

CONSTRUCTING HUMAN RIGHTS:
LANGUAGE IN THE ASEAN HUMAN RIGHTS DECLARATION

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The candidate confirms that the work submitted is his own and that appropriate credit has been given where reference has been made to the work of others.

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The great irony of this act is that it is almost always the very last piece to be written, only to then find itself in the wings as the first amongst many a hundred pages to be read. The reason this becomes the habit is that all work is turned around when you begin to remember those for whom a word of gratitude is in order: the depth and scale of the investigation, you see, is unimaginable without the magnanimity of individuals. You are somehow lost as the author; you are the last one that matters. And everyone else comes first because the privilege of writing is a lease; it rests ultimately on the charity of those who have allowed you to catch time, keep your economy, nurture old and new friendships, and respect the silence and solitude of the hours, night and day. I have had the benefit of these ephemeral goods in a variety of unexpected ways.

First, my research fielded me into 15 cities, in 13 countries, spread in three continents across the world – Europe, Asia and Australia. I, therefore, feel a tremendous debt to my friends who have opened their doors, shared their table and brought me and my family hearth of home, especially in the sometimes inauspicious face of culture shock when one comes upon a foreign land. Lourdes and I were early on in our marriage and had recently had our first-born child Matteo, so we were happy and grateful to find their warm company.

Secondly, I have battled with my ideas to no end and I presently do not know whether what I owe to the following people is an apology or a humble homage for measuring with me their intellectual courage, rigour and power in order to fine-tune and fasten my work to a level far from what I could possibly have done alone.

Thirdly, there is a class within them who have taken the time to read my drafts (indeed, even if only parts of it) and be patient with my essays; they have been a balm to my periods of doubt and certain distress when I could not quite piece the puzzle in my mind.

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Fifth, there are at least two unique and splendid communities who have generously offered me a sanctuary for the mind and the soul when the writing came close to unbearable and what I genuinely needed was to walk steadfast in silence and near complete isolation. I am profoundly grateful for their prayers.

Sixth, there are the loveliest of persons behind every gesture: the book request, the photocopy or the scan, the extra key, the school locker, the right address, the good direction, the email in transit, the otherwise lost icon in your Word or the symbol in your Mac, the smile, the countless coffee refills and gorgeous cups of chocolate and tea and milk – in the dead of winter, in the heat of summer – and the always kind word, all on a day when the world has gone, so you think, haywire, of which the best qualification that can be given them is this: people “just right there at just the right time”.

I keep their names in anonymity because they each know who they are and I hope that what matters for them as it does for me is that they know my work as it stands now is on account of their efforts to share their own.

Finally, there are the individuals closest to my heart because they not only fall into all these fast categories but also fill the interstices in between, and to whom I dedicate this first book in my life:

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and Ambassador Rosario Manalo,

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my family in Argentina, the US and the Philippines,

with love and joy;

my son, Matteo, who is our inspiration;

and to my wife, Lourdes,

who is my love, joy and devotion.

ABSTRACT

Why did ASEAN agree to a human rights regime? The 10 member countries launched the ASEAN Intergovernmental Commission on Human Rights in October 2009, a little less than a year after the ASEAN Charter was ratified, bestowing the organisation legal personality. Article 14 of the Charter provided for the establishment of a “human rights body”. These events transpired just over a decade after the Asian Values Debate reached its apogee in the mid 1990s, and over four decades after the founding of the organisation in 1967.

The existing literature points to the plurality of actors in the regional campaign for human rights and power of norms on domestic change. This study looks deeply into the validity of the following hypothesis: *ASEAN agreed to an international human rights regime because rights discourse was able to accommodate contradictory notions of human rights and the different social and political orders of the organisation, its member states, elite groups and civil society.* The use of text and discourse gave rise to the admissibility of what would otherwise have been, or constantly branded as, a “Western liberal project”. My argument goes against the common observation that rhetoric can become a substitute for real change: one cannot say what one cannot do, one cannot write that which (almost always) one cannot commit to do. Social and political change does not happen without the representational and constitutional power of language.

For this I draw up what I call the “language pendulum”. It is a model that explains the power of language and discourse in international politics. I use as a my case study the drafting process of the ASEAN Human Rights Declaration (a “bill of rights”) to illustrate how human rights norms are socialised in a variety of transactions through the use of discursive strategies.

Author's Note

In the critiques that have followed on the heels of the adoption of the ASEAN Human Rights Declaration there has been a robust debate between those who see the glass as either half-empty or half-full.¹ These attempts are ultimately based on the assumption of critics on what *ought* to have happened. In this investigation, however, my inclination is towards the practice of scholars of history who give an account of what *did* happen. The theory and account that I provide is built on interpretative rather than normative grounds. This is not to diminish the importance of either one; on the contrary, it is to distinguish the varying degrees of salience that both have in light of the question that I have posed. This work may provide the critics the room they need to make an “assessment” of the human rights project - but it is not in itself an assessment – it does not make assumptions *of how the glass ought to be filled in the first place*.

The views expressed in this work belong entirely to the author and they are exercised in his personal capacity; they do not necessarily represent the views of the Philippine Government, the ASEAN Secretariat, or the Association of Southeast Asian Nations.

¹ See review of literature and contrast critical statements by the following: BURROW, S. & SUZUKI, M. 2012. ITUC/ITUC –Asia Pacific Statement on ASEAN Human Rights Declaration. Available: <http://www.ituc-csi.org/ituc-ituc-asia-pacific-statement,12479?lang=en> [Accessed 15 May 2014], ICJ. 2012. ICJ condemns fatally flawed ASEAN Human Rights Declaration. *International Commission of Jurists* [Online]. Available: <http://www.icj.org/icj-condemns-fatally-flawed-asean-human-rights-declaration/> [Accessed 15 May 2014], SUHAKAM. 2012. Malaysia: ASEAN Human Rights Declaration falls short of expectation. *Asia Pacific Forum* [Online]. Available: <http://www.asiapacificforum.net/news/malaysia-asean-human-rights-declaration-falls-short-of-expectation> [Accessed 15 May 2014]. See also, ASHTON, C. 2012. Statement by High Representative Catherine Ashton on the adoption of the ASEAN Human Rights Declaration. Available: http://eeas.europa.eu/delegations/vietnam/documents/press_corner/2012/20121123_en.pdf [Accessed 15 May 2014], NULAND, V. 2012. ASEAN Declaration on Human Rights. Available: <http://www.state.gov/r/pa/prs/ps/2012/11/200915.htm> [Accessed 15 May 2014], 2013. Still Window-Dressing: A Performance Report on the Third Year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2011-2012. Bangkok, Thailand: Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR). I thank an anonymous reviewer for asking me about how I have reflected on my work in terms of the positive and negative criticisms on the AHRD.

- **ABBREVIATIONS**

ASEAN Member States: My preference in my writings has always been to use Myanmar-Burma instead of referring to one of the either. But in deference to ASEAN usage and over-all word count, the option here has been to employ Myanmar. In the case of the other member states, I have opted for the “familiar” shorthand in standard UK English (with reference to Oxford Dictionaries online: <http://www.oxforddictionaries.com>). The same principle applies in my choice of word spelling (e.g. labour vs labor), except when they appear in direct quotes or proper names and titles.

- *Brunei:* *Brunei Darussalam*
- *Cambodia:* *Kingdom of Cambodia*
- *Indonesia:* *Republic of Indonesia*
- *Laos:* *Lao People’s Democratic Republic*
- *Malaysia:* *Malaysia*
- *Myanmar:* *Republic of the Union of Myanmar*
- *Philippines:* *Republic of the Philippines*
- *Singapore:* *Republic of Singapore*
- *Thailand:* *Kingdom of Thailand*
- *Vietnam:* *Socialist Republic of Viet Nam*

ASEAN Human Rights Declaration: Depending on the context and the aesthetic flow of the text, there are two forms of shorthand: the AHRD or the “Declaration”.

ASEAN Intergovernmental Commission on Human Rights and the ten State Representatives: The former is referred to as the AICHR or the “Commission” and latter are termed as “Representatives”. The choice is not an easy one on account of the fact that the word “intergovernmental” is essential to the Commission as a body created for the member states and by the member states. Again the end result would have been rather cumbersome. By adhering to the title of “Representative”, a respectable degree of balance I believe is achieved.

Secretariat: The AICHR, strictly speaking, does not have a “secretariat” of its own, but a special unit designated by the ASEAN Secretariat to manage the budget and the activities of the Commission, hence the shorthand “Secretariat” has been used.

- **PRIMARY SOURCES:**

UN Official Documents and UN Human Rights Instruments: Certified true copies of the UN treaties and their current status may be verified at United Nations

Treaty Collection website.² For the actual texts cited in this paper, including the Universal Declaration of Human Rights 1948 (UDHR 1948) and the Vienna Declaration and Programme of Action 1993 (VDPA 1993), I have consulted the website created by the Office of the High Commissioner for Human Rights on “Core International Human Rights Instruments”.³ All other UN documents (e.g. Human Rights Council documents) are also retrievable from the Official Documents System Search.⁴

Regional Human Rights Instruments: The University of Minnesota Human Rights Library has a complete and updated archive.⁵ I have, however, opted to access the instruments via the official websites of the regional organisations or monitoring bodies, except in the case of the 2004 Arab Charter on Human Rights.

- 1969 American Convention on Human Rights (Organization of American States): http://www.oas.org/en/topics/human_rights.asp
- 1981 African Charter on Human and Peoples’ Rights (African Commission on Human Peoples’ Rights): <http://www.achpr.org/instruments/>
- 1950 European Convention on Human Rights (European Court of Human Rights): http://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n1359128122487_pointer.

National Constitutions: The constitutional texts cited in the comparative tables provided in the appendix have been drawn from the copies of the national constitutions (in the English version) that were examined by the Secretariat for the Zero Draft. The reader may also check online versions at Oceana Law Online.⁶ It must be noted, however, the discrepancy in translation that may arise.

ASEAN Official Documents: There are various ways to search the ASEAN website, although given the complex categorisation of ASEAN official documents, one methodical way of searching is through the ASEAN Summit page, which lists the types of documents that were produced as a result of the specific meeting.⁷ If a word or subject search is preferred, then the Centre for International Law of the National University of Singapore Database is meticulously done.⁸ Take note,

² See: http://treaties.un.org/Pages/DB.aspx?path=DB/MTDSG/page1_en.xml&menu=MTDSG.

³ See: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>; <http://www.ohchr.org/EN/UDHR/Pages/UDHRIndex.aspx> (UDHR 1948); and <http://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf> (VDPA 1993).

⁴ See: <http://www.un.org/en/documents/ods/> or <http://www.un.org/en/documents/index.shtml>.

⁵ Available at: <http://www1.umn.edu/humanrts/regional.htm>.

⁶ This was previously available at <http://www.oceanalaw.com/default.asp>. The website has changed to oxcon.ouplaw.com as of 1 April 2014. I am grateful to the Research Assistance Unit at the United Nations Office at Geneva Library (<http://librarycat.unog.ch/vwebv/holdingsInfo?bibId=39693>) for providing me the initial reference.

⁷ Available at: <http://www.asean.org/asean/asean-structure/asean-summit>.

⁸ Available at: <http://cil.nus.edu.sg/2009/cil-documents-database/>.

however, that the URL links on the actual PDF documents that are supposed to lead you to the “original documents” on the ASEAN website are out of date.

Other Official Documents: These would include the names and titles of international accord during the negotiations in the body of the text, which are cited as part of the first-hand account. The links are hence cited individually.

▪ CITATIONS AND REFERENCES

Article Citations for Official Documents: The reader, as has already been mentioned, will find the online database for articles cited in official documents in this part of the study as well as in the body of the research, but will also find many of them included in the appendix for ease of reference. They are not cited in the indented direct quotations when the text makes specific reference to them in the body to avoid redundancy.

Text Citations of First-Hand Account in Part 2: The texts which appear in the “First-Hand Account” section of Chapters 2.2, 2.3 and 2.4, including the draft version of the articles of the Declaration found in the tables provided in this study form part of my personal notes and they are cited as they appeared in the documents and drafts indicated (*i.e.* including italics, strikethroughs and highlights). They are classed as original data. Later additions to my original narrative have been footnoted (*e.g.* personal or informal conversations) as well as references to the work of other entities during the proceedings (*e.g.* CSO recommendations). I have also provided brief descriptions of ASEAN institutions to give the reader an initial orientation. What may appear, therefore, as a sparse bibliography betrays the positive fact that the whole of three chapters comprise absolutely new and original data.

References: The reference style in use is Harvard System. Journal articles to which electronic subscription was available via the University of Leeds have been referenced as “Journal Article(s)”. Other articles, including newspaper articles to which electronic access has been possible have been referenced as “Electronic Article(s)” and have been re-accessed within the week of submission for continued existence and accuracy.

ACRONYMS

ACHPR 1981	African Charter on Human and Peoples' Rights 1981
ACHR 1969	American Convention on Human Rights 1969
ACMW	ASEAN Commission on Migrant Workers
ACSC	ASEAN Civil Society Conference
ACW	ASEAN Committee on Women
ACWC	ASEAN Commission on the Promotion and Protection of the Rights of Women and Children
ADSOM	ASEAN Defense Senior Officials' Meeting
AHRD	ASEAN Human Rights Declaration or "the Declaration"
AICHR	ASEAN Intergovernmental Commission on Human Rights
AMM	ASEAN Ministerial Meeting or the ASEAN Foreign Ministers Meeting
APF	ASEAN People's Forum
ARF	ASEAN Regional Forum
ASEAN	Association of Southeast Asian Nations
ASEAN-ISIS	ASEAN Institutes for Strategic and International Studies
CEDAW 1979	Convention on the Elimination of All Forms of Discrimination against Women 1979
CMLV	Cambodia, Myanmar, Laos and Vietnam
CRC 1989	Convention on the Rights of the Child 1989
CSIS	Centre for Strategic and International Studies
CSO	Civil Society Organisation
ECHR 1950	European Convention on Human Rights 1950
EPG	Eminent Person's Group
EU	European Union
HLTF	High-Level Task Force
IAMM	Informal ASEAN Ministerial Meeting
ICCPR 1966	International Covenant on Civil and Political Rights 1966
ICERD 1966	International Convention on the Elimination of All Forms of Racial Discrimination 1966
ICESCR 1966	International Covenant on Economic, Social and Cultural Rights 1966

ICRMW 1990	International Convention on the Protection of All Migrant Workers and Members of Their Families 1990
ILO	International Labour Organization
IR	International Relations
ISDS	Institute of Strategic and Development Studies
ISIS-Malaysia	Institute of Strategic and International Studies - Malaysia
ISIS-Thailand	Institute of Security and International Studies - Thailand
Kuala Lumpur Joint Submission	Joint Submission to the ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration by Civil Society Organisations and People's Movements
LGBIQ	Lesbians, Gays, Bisexual, Transgender, Intra-sexual and Queer
LGBT	Lesbian, Gay, Bisexual and Transgender
Manila Joint Submission	Joint Submission to the ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration by Civil Society Organisations and People's Movements
MDG	Millennium Development Goals
NGO	Non-Governmental Organisation
NWS	Nuclear-Weapon States
Philwomen	Philwomen Recommendations for the Second Regional Consultation of AICHR with Civil Society Organizations on the ASEAN Human Rights Declaration (AHRD)
R2P	Responsibility to Protect
SAPA	Solidarity for Asian People's Advocacy
SEANFWZ 1995	Southeast Asian Nuclear-Weapon-Free Zone Treaty 1995
SEAWC	Southeast Asia Women's Caucus on ASEAN
Second Addendum	Second Addendum to the Women's Caucus Submission on the ASEAN Human Rights Declaration (AHRD) to the ASEAN Intergovernmental Commission on Human Rights (AICHR)
SIIA	Singapore Institute of International Affairs
SLOM	Senior Labour Officials' Meeting
SOGI	Sexual Orientation and Gender Identity
SOGI	Sexual Orientation and Gender Identity
SOM	Senior Officials' Meeting
TAC 1976	Treaty of Amity and Cooperation 1976
TOR	Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights
UDHR 1948	Universal Declaration of Human Rights 1948

UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCC 1992	United Nations Framework for Climate Change 1992
UNGA	United Nations General Assembly Resolution
UPR	Universal Periodic Review
VDPA 1993	Vienna Declaration and Programme of Action 1993
WG-AHRM	Working Group for an ASEAN Human Rights Mechanism
WHO	World Health Organization
ZOPFAN 1971	Zone of Peace, Freedom and Neutrality 1971

TABLE OF CONTENTS

ACKNOWLEDGEMENTS	II
ABSTRACT	V
AUTHOR'S NOTE	VI
ACRONYMS	X
TABLE OF CONTENTS	XIII
LIST OF TABLES	XVI
TABLE OF FIGURES	XVI
PROLOGUE	1
PART 1: THE RESEARCH QUESTION AND THEORETICAL APERTURE	3
CHAPTER 1.1	4
INVESTIGATING THE EXPANSION OF THE INTERNATIONAL HUMAN RIGHTS REGIME: THE CASE OF ASEAN	4
1.1.1 INTRODUCTION	4
1.1.2 LIMITS OF THE STUDY	9
1.1.3 ORGANISATION OF THE STUDY	10
1.1.4 THE EVOLUTION OF HUMAN RIGHTS IN SOUTHEAST ASIA: WHODUNIT – AGENT OR STRUCTURE?	12
1.1.5 FIRST ASSUMPTION	16
1.1.6 STRUCTURE AS “AGENT”: AN EXCEPTION TO THE NORM?	17
1.1.7 SECOND ASSUMPTION	19
1.1.8 THE POWER OF NORMS IN ASEAN: REVISITING THE LEVELS OF ANALYSIS PROBLEM	20
1.1.9 THIRD ASSUMPTION	25
1.1.10 SUMMARY	26
CHAPTER 1.2	28
THE LANGUAGE PENDULUM: CONSTRUCTING HUMAN RIGHTS DISCOURSE IN SOUTHEAST ASIA	28
1.2.1 INTRODUCTION	28
1.2.2 LANGUAGE IN THE CONSTRUCTION OF SOCIAL REALITY	29
1.2.3 LANGUAGE IN CONSTRUCTIVISM: WENDT, KRATOCHWIL AND ONUF	31
1.2.4 THREE CONCEPTUAL TOOLS: TEXT, CONTEXT AND TIME	39

1.2.4.1	Language as Text	39
1.2.4.2	Language as Context	43
1.2.4.3	Time	48
1.2.5	HOW SOCIAL FORCES ACT THROUGH LANGUAGE OR THE “PENDULUM EFFECT”	51
1.2.5.1	Macro-to-micro	51
1.2.5.2	Micro- to-macro	52
1.2.5.3	Micro level	53
1.2.6	APPLYING THE LANGUAGE PENDULUM	55
1.2.7	SUMMARY	59
<u>PART 2: HOW THE ASEAN HUMAN RIGHTS DECLARATION WAS DRAFTED</u>		63
CHAPTER 2.1		64
INTRODUCTORY NOTES		64
2.1.1	EVOLUTION OF THE ARTICLE	65
2.1.2	CHRONOLOGY	66
2.1.2.1	First Phase: Laying the Groundwork	67
2.1.2.2	Second Phase: The First Working Drafts	71
2.1.2.3	Third Phase: Engaging ASEAN and Civil Society	73
2.1.3	TIMEFRAME	77
CHAPTER 2.2		80
THE RIGHT TO LIFE AND “IN ACCORDANCE WITH NATIONAL LAW”		80
2.2.1	INTRODUCTION	80
2.2.2	FIRST-HAND ACCOUNT	81
2.2.2.1	Jakarta (March)	81
2.2.2.2	Yangon	85
2.2.2.3	Kuala Lumpur	86
2.2.2.4	Manila	88
2.2.3	PERSPECTIVE OF THE WORD: THE RIGHT TO LIFE	94
2.2.3.1	Summary	98
CHAPTER 2.3		99
EQUALITY OF RIGHTS WITHOUT DISCRIMINATION AND SPECIAL PROTECTIONS FOR GROUPS		99
2.3.1	INTRODUCTION	99
2.3.2	FIRST-HAND ACCOUNT	100
2.3.2.1	Jakarta (February)	100
2.3.2.2	Bangkok	103
2.3.2.3	Yangon	106
2.3.2.4	Kuala Lumpur	107
2.3.2.5	Manila	109
2.3.3	PERSPECTIVE OF THE WORD: THE PRINCIPLE ON EQUALITY WITHOUT DISCRIMINATION	113
2.3.3.1	Summary	119

CHAPTER 2.4	121
THE RIGHT TO PEACE AND THE RIGHT TO DEVELOPMENT	121
2.4.1 INTRODUCTION	121
2.4.2 FIRST-HAND ACCOUNT	121
2.4.2.1 Jakarta (April)	121
2.4.2.2 Yangon	125
2.4.2.3 Bengar Sari Begawan	129
2.4.2.4 Manila	130
2.4.3 PERSPECTIVE OF THE WORD: THE RIGHT TO PEACE	134
2.4.3.1 Summary	140
<u>PART 3: ANALYSIS AND CONCLUSION</u>	<u>143</u>
CHAPTER 3.1	144
HOW, WHEN AND WHY ASEAN IS CONSTRUCTING A HUMAN RIGHTS REGIME?	144
3.1.1 INTRODUCTION	144
3.1.2 HOW: THE PERSPECTIVE OF THE WORD	145
3.1.3 WHEN: LANGUAGE AND POWER	148
3.1.4 WHY A HUMAN RIGHTS REGIME?	150
<u>EPILOGUE: REFLECTIONS ON METHODOLOGY AND A FUTURE RESEARCH AGENDA</u>	<u>160</u>
<u>BIBLIOGRAPHY</u>	<u>170</u>
<u>APPENDIX A : THE ASEAN HUMAN RIGHTS DECLARATION AND THE PHNOM PENH STATEMENT</u>	<u>176</u>
<u>APPENDIX B : THE INTERNATIONAL BILL OF HUMAN RIGHTS</u>	<u>187</u>
<u>APPENDIX C : ANNOTATIONS OF THE RIGHT TO LIFE IN THE ZERO DRAFT</u>	<u>189</u>
C.1 NATIONAL CONSTITUTIONS CITED IN THE ANNOTATIONS OF THE RIGHT TO LIFE IN THE ZERO DRAFT	190
C.2 INTERNATIONAL HUMAN RIGHTS INSTRUMENTS CITED IN THE ANNOTATIONS OF THE RIGHT TO LIFE IN THE ZERO DRAFT	196
C.3 REGIONAL INSTRUMENTS CITED IN THE ANNOTATIONS OF THE RIGHT TO LIFE IN THE ZERO DRAFT	198
<u>APPENDIX D : COMPARATIVE TABLE ON COMMON CRIMES PUNISHABLE BY DEATH IN ASEAN MEMBER STATES BASED ON NATIONAL LEGISLATION</u>	<u>200</u>
<u>APPENDIX E : THE PRINCIPLE OF NON-DISCRIMINATION IN REGIONAL HUMAN RIGHTS CHARTERS</u>	<u>210</u>

List of Tables

TABLE 1: THE EVOLUTION OF THE ARTICLE ON THE RIGHT TO LIFE	91
TABLE 2: THE EVOLUTION OF THE ARTICLE ON THE PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION.....	111
TABLE 3: THE EVOLUTION OF THE ARTICLE ON THE RIGHT TO PEACE.....	132
TABLE 4: RETENTIONIST ASEAN STATES WITH MANDATORY DEATH PENALTY	190
TABLE 5: RETENTIONIST ASEAN STATES WITH NO MANDATORY DEATH PENALTY	192
TABLE 6: ABOLITIONIST DE FACTO ASEAN STATES.....	193
TABLE 7: ABOLITIONIST ASEAN STATES	194
TABLE 8: INTERNATIONAL HUMAN RIGHTS INSTRUMENTS CITED IN THE ANNOTATIONS OF THE RIGHT TO LIFE IN THE ZERO DRAFT.....	196
TABLE 9: REGIONAL INSTRUMENTS CITED IN THE ANNOTATIONS OF THE RIGHT TO LIFE IN THE ZERO DRAFT	198

Table of Figures

FIGURE 1: THREE DISCURSIVE STRATEGIES.....	40
FIGURE 2: THREE TRANSACTIONS (OR THE THREE FORCES OF THE PENDULUM)	42
FIGURE 3: THE CONCEPT OF TIME IN SAUSSURE.....	43
FIGURE 4: THE PENDULUM MODEL (“LANGUAGE PENDULUM”)	48
FIGURE 5: THE CONCEPT OF TIME IN THE LANGUAGE PENDULUM.....	50
FIGURE 6: PLOTTING THE DIALOGUE	58
FIGURE 7: TIMEFRAME: CONTESTING INTERNATIONAL AND REGIONAL NORMS IN THE ASEAN HUMAN RIGHTS DECLARATION	79
FIGURE 8: ASEAN TRIPOD FOR THE POLITICAL-SECURITY COMMUNITY	135

Prologue

Between January of 2012 and August of 2013, I had the privilege of being taken by Ambassador Rosario Manalo under her wing whilst on her watch as the Philippine Representative to the ASEAN Intergovernmental Commission on Human Rights. I had just come back from Europe and I was about to undertake my fieldwork for my doctoral research on the expansion of the international human rights regime in Southeast Asia. The idea was to investigate the history of the human rights movement in the region and its impact on the history of the constitution of the Association of Southeast Asian Nations – the ASEAN Charter of 2008. But I was about to be swept away by an even more ambitious project: the international negotiation and adoption of the ASEAN Human Rights Declaration. I was invited by Ambassador Manalo to become a member of the Philippine Delegation as a researcher. The opportunity was unique and once-in-a-lifetime.

All throughout the negotiations I jotted down my observations and worked them through in a journal that I then kept and brought along with me as we travelled around Southeast Asia passing through the cities of Jakarta, Bangkok, Yangon, Kuala Lumpur, Manila, Siem Reap and Phnom Penh. We would meet once a month on an average of two days. The negotiations were difficult, in fact very difficult. The end result, I believe, is nothing short of a miracle. If, however, what we have before us is a blip – and this is the question I would like to share with cynical minds - why then has it taken such a long time for “Asia” to “catch up” with the rest of the world on the Universal Declaration of Human Rights of 1948? Why was there all the fuss on the Asian Values Debate in the 90s? Why did we finally have ten countries of divergent national political systems, social conditions and cultural inclinations agree on the “Western project” of human rights? There is little telling of how history will judge the power of this symbolic act.

There are three dimensions that comprise my doctoral research. Firstly, I provide an account, from the ringside, of how the ten ASEAN Representatives drafted the first single regional charter or “bill” of human rights in Asia. An account is an attempt to reconstruct the events as close to the truth as is humanly possible. And this is what I do here. I was an observer and I had as my main objective *to understand* how a human rights declaration would be drafted – I was neither interested in its failure nor in its success. I must confess,

however, that living through the negotiations, even the most dispassionate observer was bound to commend the Representatives for seeing the Declaration through its final form. In the process my great esteem was towards the perseverance of these ten individuals. In the same measure, civil society must be praised for putting up a fight that I also think will establish a precedent in the management of the internal affairs of ASEAN. The final document embodies the many voices of Southeast Asia, as will presently be evident to the reader.

Secondly, I expose my theoretical framework for understanding and explaining the phenomenon of human rights as a norm in international relations. It is an exploration of the disciplinary boundaries of International Relations and an explicit research agenda to reinstate the value of dialogue understood as oriented verbal interaction between an addressor and an addressee. I, therefore, borrow from linguistics and establish the model that I call the "Language Pendulum" that illustrates how the community of speakers under investigation creates its own language for human rights. It demonstrates the contestation for power between elites and interest groups and the ensuing structural changes in the minute manifestation of a word.

Finally, lest my work be used for tangential reasons, it is important that I make my agenda clear: I am an advocate of free and independent thinking. If we subscribe to the project of humanity to build a moral community - and human rights is probably our most sustained attempt just yet- we have the responsibility to be critical of the institutions required towards this end. I hence believe that it is important to tell this story in order to bring into light the fact that the ASEAN Declaration is primordially a *negotiated* text. And it is only by understanding the immediate circumstances from which it sprang can one reasonably proceed to judge how much of it is an achievement and a failure.

I must give credit at this point to an acquaintance of a learned hand in International Relations, Michael Donelan, whom I had accidentally met at one of our graduate cocktails whilst I was still a student at the London School of Economics, wet behind the ears and enthusiastic about joining the diplomatic corps, who told me that should chance and opportunity bring me to such heights, I should forget about recounting the cocktails and commit to memory how negotiations come alive and are brought to an end. This, we both agreed, was how we could contribute to the study of international politics and to the future of those who choose to master it and dream of a better world.

PART 1: The Research Question and Theoretical Aperture

“Without ideas there are no interests,
without interests there are no meaningful material conditions,
without material conditions there is no reality at all.”

Alexander Wendt,
Social Theory of International Politics (1999: 139)

“... the *statement* is an institution of language...,
but the *fact stated*, ..., exists independently of any institution.”

John Searle,
The Construction of Social Reality (1996: 27)

“In order to observe the process of combustion,
a substance must be placed into the air.
In order to observe the phenomenon of language,
both the producer and the receiver of the sound
and the sound itself must be placed into the social dimension.”

V.N. Voloshinov,
Marxism and the Philosophy of Language (1973: 46)

Chapter 1.1

Investigating the Expansion of the International Human Rights Regime: The Case of ASEAN

1.1.1 INTRODUCTION

The question I put before me is this: why did ASEAN Member States agree on the international human rights regime? The 10 member countries⁹ launched the ASEAN Intergovernmental Commission on Human Rights (hereafter AICHR or “the Commission”) in October 2009, a little less than a year after the ASEAN Charter¹⁰ (hereafter “the Charter”) was ratified in December 2008 by all ten Member States, giving the organisation legal personality. Article 14 of the Charter provided for the establishment of what was then curiously called a “human rights body” that would “operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting”.¹¹ The AICHR was established along with its Terms of Reference¹² (TOR) at the 15th ASEAN Summit in Cha-am Hua Hin, Thailand. These events transpired just over a decade after the Asian Values Debate reached its apogee in the mid 1990s, and over four decades after the

⁹ The Association of Southeast Asian Nations (ASEAN) was established on 8 Aug. 1967 in Bangkok by the five original member countries: Indonesia, Malaysia, Philippines, Singapore, and Thailand. Brunei Darussalam joined on 8 Jan. 1984, Vietnam on 28 July 1995, Lao PDR and Myanmar on 23 July 1997, and Cambodia on 30 April 1999. Available at: <http://www.asean.org/about ASEAN.html>.

¹⁰ Available at: <http://www.asean.org/21861.htm>.

¹¹ For a first-hand testimonies of the drafters, see KOH, T., MANALO, R. G. & WOON, W. (eds.) 2009. *The Making of the ASEAN Charter*, Singapore: World Scientific Publishing Co. Pte. Ltd.

¹² Available at <http://www.asean.org/22769.htm>.

founding of the organisation in 1967.¹³ It took long before the political elite, long desirous of peace and regional political stability, recognized the principle of human rights on the one hand; and it was but a brief interlude between the clamor of Southeast Asian governments for deferential treatment on account of culture and identity and the formal establishment of the first Asian human rights mechanism - on the other. The ironies are telling of the vagaries of international politics in Southeast Asia. In the late 60s and the early 70s security over border disputes which arose from the process of decolonisation was the overriding concern for Indonesia and Malaysia, whilst for the Philippines, Thailand and Singapore the broader politics of regional autonomy via economic progress, social and cultural development and the geopolitics of anti-communism held sway in the discourse of regional cooperation (Turnbull, 1992). The fact that the 1948 Universal Declaration of Human Rights (UDHR 1948) had already become the “standard of civilization” (Donnelly, 1998) in the West, post-1948, was not manifest in the early deliberations amongst the five original members of ASEAN. Firstly, the organisation was in its infancy; the first summit of the heads of state would not take place until 1976. Secondly, the Cold War had delivered a wedge in Southeast Asia between communist and anti-communist governments with authoritarian proclivities for whom human rights standards and its attendant supporters would be vastly problematic. Thirdly, only three of the major international human rights instruments¹⁴, the International Covenant on Civil and Political Rights (ICCPR) in 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966, and the International Convention on the Elimination of All Forms of Racial Discrimination (CEDAW) in 1966, had been barely created by the members of the United Nations. There was but a dearth of human rights law to spur and support an effective human rights regime - *nullum crimen sine lege, nullum poena sine legge*; no crime without law, no penalty without law. The international politics of Southeast Asia was governed by invariable flux and uncertainty under the weight of big-power rivalry and the concomitant diversity of models of economic and political development and the sudden agenda of constructing a national identity (Turnbull, 1992).

¹³ The literature on the Asian Values Debate is vast but the place to start is a survey of the following: ZAKARIA, F. & YEW, L. K. 1994. Culture Is Destiny: A Conversation with Lee Kuan Yew. *Foreign Affairs* [Online], 73. Available: <http://0-search.proquest.com.wam.leeds.ac.uk/docview/214285529?accountid=14664> [Accessed 4 May 2014], MAHATHIR BIN, M. & ISHIHARA, S. 1995. *The voice of Asia: two leaders discuss the coming century*, New York; Tokyo, Kodansha International, BAUER, J. R. & BELL, D. A. (eds.) 1999. *The East Asian challenge for human rights*, Cambridge: Cambridge University Press.

¹⁴ These three conventions are available at:
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>.

The events of 1979 through the fall of the Berlin Wall in 1989 brought the “debate” between cultural identity and the triumph of liberal democracy into Southeast Asia and confronted the region with an economic and political scenario that was no less complex (Ferguson, 2009, Fukuyama, 1992, Huntington, 1993, Leifer, 1999). The Vienna World Conference on Human Rights in June 1993 and the regional preparatory meetings, in particular, the Bangkok Regional Conference on Human Rights brought to the surface the concerns of a region wary of the new face of Western imperialism. The split between states hostile towards human rights campaigns (Singapore, Malaysia, and Indonesia) and those who had more tempered reservations toward the work of civil society in this respect (the Philippines and Thailand) became evident. The predominant rhetoric emanating from ASEAN, however, was negative and this found articulate and eloquent voices in Lee Kuan Yew (Zakaria and Yew, 1994), Mahathir Mohamad (Mahathir bin and Ishihara, 1995) and Kishore Mahbubani (Mahbubani, 1999). Interestingly, even civil society, whilst advocating for human rights reforms, held reservations by highlighting the need for sensitivity towards regional socio-cultural practices.¹⁵ In spite of this, however, the ASEAN Foreign Ministers officially declared through a communiqué a month after the Vienna Declaration that the organisation should “consider the establishment of an appropriate regional mechanism on human rights” (ASEAN, 1993: Par. 18).¹⁶ In the 1990s civil society organisations began to make inroads into ASEAN because of the realisation that the regional association could muster some clout, observing the benefits that regional coordination brought in response to the 1997 economic crisis. ASEAN had also shown indications of becoming a more people-oriented organisation (Collins, 2008).¹⁷ The ASEAN Free Trade Area (1992), the ASEAN Regional Forum (1993) and the ASEAN Plus Three Meeting (1997) were formed amongst others, but in the midst of these dense regional arrangements the negative consensus on human rights was, at best, held at bay.

It is at this point that my investigation begins: between 1993 and 2008, civil society networks, ASEAN member states and the ASEAN Secretariat (hereafter “the Secretariat”), began contesting the human rights agenda. The existing literature points to the plurality of actors in the regional campaign for human rights, focusing on the power of norms on

¹⁵ See for example, BREMS, E. 2001. *Human rights: Universality and diversity*, Martinus Nijhoff Publishers, pp. 69-71.

¹⁶ Available at:
<http://cil.nus.edu.sg/rp/pdf/1993%20Joint%20Communique%20of%20the%2026th%20ASEAN%20Ministerial%20Meeting-pdf.pdf>.

¹⁷ Contrast views with MCCARTHY, S. 2009. Chartering a New Direction? Burma and the Evolution of Human Rights in ASEAN. *Asian Affairs: An American Review*, 36, 157 - 175.

domestic change (Risse et al., 1999, Jetschke, 1999), but the central research question remains open: why did ASEAN respond to normative pressures from a variety of political actors – from the Great Powers all the way down to Southeast Asian societies – from the establishment of a “human rights body” to the eventual adoption of the ASEAN Human Rights Declaration in November 2012? Was it because the inclusion of human rights principles or the commitment thereof to the creation of a regional “body” would buy them economic and development aid tied to human rights standards?¹⁸ Was it because official talk about human rights would give national governments better leverage in “locking-in” (Moravcsik, 2000) variable mandates of authoritarianism and democracy in the face of domestic and international criticism? Was human rights an auxiliary debate in the search and consolidation of a security community that would incrementally guarantee regional order (Acharya, 2009)? Or indeed, was it because human rights was, for ASEAN - an idea whose time had come – a “natural” consequence of the global trends and pressures contributing to the critical mass of states and regions who believe, in small or great part, in the discourse of human rights? An affirmative answer to the last hypothesis invariably lends credence to the first three whilst an affirmative answer to the first three hypotheses would not stand without the legitimizing force of the last. That is, if the last hypothesis were proved to be true, all others can hold water; for these first three to make plausible sense, however, someone would have to believe somehow in the idea of human rights. The plurality of motives cannot be ruled out. The notion of human rights entails assumptions about values and beliefs protecting human dignity – no state would subscribe, or indeed, ought, to human rights principles without ceding to the discourse that it embodies. The study that I propose, therefore, looks deeply into the validity of the last hypothesis. Did ASEAN agree on the international human rights regime because rights discourse was able to *resolve* or because it was able to *accommodate* contradictory notions of human rights?¹⁹ It is my contention that the use of text and discourse exposes the contestation for power between different social and political orders of the organisation, its member states, elite groups and civil society. The study goes against the common observation that rhetoric can become a substitute for real change: one cannot say what one cannot do, one cannot write that which (almost always) one cannot commit to do. Social and political change does not happen without the representational and constitutional power of language; this proceeds

¹⁸ Katsumata (2009), for example, argues that, despite human rights related sanction, the US has maintained bilateral trade relations with Singapore, Cambodia, Indonesia, Vietnam, the Philippines, Malaysia and Thailand, and the EU has continued to negotiate a free trade agreement with ASEAN.

¹⁹ I am grateful to Adam Tyson for this nuance. I do not wish to make any claim that there has been substantive structural human rights progress (see immediate succeeding section: Limits of the Study).

either before the fact when the intention is expressed or post-facto when change is verified, and indeed, during the fact, when change is manifested.

Were we to fix our investigative energies on the first three hypotheses, it becomes evident that the human rights agenda is little more than a strategy. Firstly, if ASEAN had shunned EU human rights conditionality (Smith, 2008), as it did early on in the 90s when European Commission Asia Strategy Papers dropped explicit references to human rights principles and focused instead on issues of good governance, it would not lose out anyway on intra-regional trade nor in its economic relations with say China and Japan. And indeed, if maximising trade policy were a genuine priority then why did ASEAN not subscribe to human rights earlier on in the 90s when trade was no less a concern than in the subsequent decade? Secondly, the claim that national governments would, agreeing to human rights standards, have enhanced legitimacy and be able to enforce policy preferences at a particular point in time against future domestic political alternatives would be redundant because ASEAN was already playing on the norms of consent and consensus and the principles of sovereignty and non-interference. Furthermore, any regional mechanism would not have teeth because a region-wide human rights culture was non-existent, let alone the support of a legal framework that would enforce penalties in the case of human rights violations. Thirdly, there were already security arrangements in place, not least the ASEAN Regional Forum (ARF)²⁰, why opt for another more contentious framework given the dissenting voices of the governments of Cambodia, Laos, Myanmar and Vietnam? Such divisions were understandable given the divergent normative and political traditions in these and all the other ASEAN countries, how do we hence make sense of the final nod amongst the group of ten states? These three alternative scenarios problematise the research question. Indeed, a fifth “meta-hypothesis”, already alluded to above, is to view human rights as an instrumental choice (and hence consider it as a kind of first-order preference) in pursuit of all the four (second-order) preference outcomes in the hypotheses.²¹ To negate this meta-hypothesis would be to reject reality

²⁰ The ARF was established in 1994; The inaugural meeting was attended by the 10 ASEAN members (Brunei, Myanmar, Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand, and Vietnam) and ASEAN’s 10 dialogue partners (Australia, Canada, China, the European Union, India, Japan, South Korea, Russia, New Zealand, and the United States). Papua New Guinea and Mongolia joined the group in 1999, and North Korea was admitted in 2000. The ARF is a multilateral forum for official consultations on peace and security issues; it came out of the annual ministerial-level meeting of ASEAN members.

²¹ I have adopted the conceptual categories on preferences and strategies put forward in CLARK, W. R. 1998. Agents and Structures: Two Views of Preferences, Two Views of Institutions. *International Studies Quarterly*, 42, 245-270. They will be summarised below and then employed throughout the study.

because the international human rights regime in ASEAN is a given at this point, whichever hypothesis one argues to be more valid. If we then take human rights instrumentality on all four accounts, however, two critical dilemmas arise as sub-questions to our central inquiry: why choose human rights? And in the event, what was the consequent discourse of human rights in Southeast Asia? These two lines of inquiry form the vertebrae of the central research question and will inform the investigations in the chapters that follow.

1.1.2 LIMITS OF THE STUDY

The study approaches norms from the Constructivist tradition in International Relations through the lens of linguistics. It complements the emerging literature in human rights in Southeast Asia, which have so far relied heavily on interpretivist accounts using history, sociology, and law. In a further complementary role, the investigation contributes to the general literature on IR by focusing on communicative processes embedded in the logics of social action. It is, therefore, essential that the limits of my claims are made clear at this early stage.

1. The study makes no attempt to generalize on progressive human rights structural changes either on the level of ASEAN or in any of the 10 member states let alone actual human rights situations on the ground. On the contrary, the investigation looks at the minutiae – what may often be considered negligible aspects - of social phenomena, in a specific setting, within a limited time scale and the paucity of rare pieces of valuable data.
2. *Minutiae of social phenomena*: Ideas are not static; language is the meter through which we are able to follow its evolution. Voloshinov argues, “what is important about the word... is not so much its sign purity as its *social ubiquity*. The word is the medium in which occur the *slow quantitative accretions* (emphasis mine) of those changes (,) which have not yet achieved the status of a new ideological quality, not yet produced a new and fully-fledged ideological form. The word has the capacity to register all the transitory, delicate, momentary phases of social change” (Voloshinov, 1973: 19). The degrees of change in social reality are hence dependent on the variable of time specified in the scientific study.

3. *Limited time scale*: The actual case study is bounded between January and November 2012. It is an exploration of the substantive notions of the human rights provisions as they were actually deliberated *in situ*. Further allusions to the traditional-historical meaning of certain rights go beyond this timeframe but they are anchored in the official negotiations “locked” in the period chosen for the study. What happens, therefore, is that a wider timeframe will provide a wider analytical window from which to observe changes; it does not follow, however, that the longer the timeframe the bigger the changes become.
4. *Specific setting*: The negotiation of the ASEAN Human Rights Declaration as a case study is a *genre* (i.e. a sub-set) of international negotiations. This genre of diplomatic negotiation of an international non-binding political document is, in addition, a regional geographic sample (i.e. representing 10 ASEAN Member States and their Representatives) in the international setting. The theoretical model remains to be tested in a longitudinal and cross-regional comparative study.
5. *Elite interviews*: It is a recognized fact among Southeast Asian scholars that elite interviews in the context of ASEAN are very rare pieces of data. For practical and ethical reasons informal conversations and published first-hand accounts of privileged witnesses were preferred before setting off on fieldwork. A theory sets out to accommodate the full range of variables of an aspect of the phenomena, even if in some instances all such variables will not be available.

The study looks at three social mechanisms at the level of the individual (micro), inter-individual (micro/micro-macro) and the aggregate set of social interactions (macro-micro). The first of these three has proven to be the most rare and in this respect most valuable. This fact, in my view, can only add to the great potential of developing the Pendulum Model in future investigations. A future research agenda is proffered in the last chapter.

1.1.3 ORGANISATION OF THE STUDY

Whilst this project is ideally to be read in its entirety, the chapters have been organised so that they are relatively stand-alone pieces with the caveat that a considerable degree of

engagement with theory (Chapter 1.2) is necessary to stave off ambitious expectations. There are three parts. Part I focuses primarily on the theoretical foundations of the study. The first chapter is a survey of the extant literature on the development of the human rights agenda in ASEAN, the theoretical trend on the power of norms in ASEAN, and a clarification of the conceptual posture of the study in light of these debates. The second chapter is an exposition of the analytical aperture of the investigation; the word “aperture” is non-accidental because the section attempts to expand the theoretical contours of IR, borrowing from the field of linguistics. Thereon, I design the language pendulum that illustrates the three causal mechanisms at work in the negotiation of norms within a “linguistic community” (*i.e.* producers and receivers of signs or the community of ASEAN Member States represented in the ASEAN Intergovernmental Commission for Human Rights). The core of the thesis, Part II delves into the actual negotiation - the drafting narrative of the Declaration - from January to November 2012. The section’s introduction provides a synoptic account of the ten (10) official meetings of the AICHR, and the four (4) regional consultations between the AICHR and the ASEAN Sectoral Bodies, and ASEAN and regional CSOs (2 consultations each), including the ASEAN Foreign Ministers Meeting. Chapter 2.2 (The Right to Life and “In Accordance with National Law”), Chapter 2.3 (Equality of Rights Without Discrimination and Special Protections for Groups), and Chapter 2.4 (The Right to Peace and the Right to Development), which comprise Part II, describe first hand and in detail the deliberation of each of the articles referred to in the corresponding titles. They chronicle the contestations between the AICHR Representatives, CSOs and their networks and ASEAN leaders based on the normative claims of the international human rights regime as well as competing national agendas and the divergent social, cultural and religious traditions of the member states. The last half of each of the chapters presents the evolution of the human rights provision in focus over ten months, and the application of the language pendulum, or more specifically “the perspective of the word”.

Finally, Part III (Chapter 3.1) submits the analyses and conclusions of the research. It interweaves the analytical sections of each of the core chapters and analyses the patterns and progressions of human rights discourse or the lack thereof. The conclusions are drawn, firstly, in response to the alternative hypotheses stated above; and secondly, with respect to the answers proffered by the literature on the research question and the discipline of International Relations; and finally, in light of pressing issues in ASEAN and international politics. By way of an epilogue, I offer an earnest reflection on the principles and methodology, which have guided me in the course of the study. The purpose of this research is to analyse causal mechanisms and strategies that led to the codification of

human rights norms - with the Declaration as my case study - and to understand the values and beliefs which underpin ASEAN human rights discourse. It suggests the underlying principles for a sustainable global human rights agenda based on shared notions of human dignity but pleads not to be an argument for a particular agenda of human rights. It does not consist in making normative judgments on the legal force of the ASEAN Charter, the future efficacy of the Declaration, or indeed the “ASEAN Human Rights System”²² but offers an analytical inquiry into dominant regional discourses in the construction of ASEAN institutions, which can in turn provide the framework for discussing emerging issues in global governance. The remaining sections of this chapter detail my arguments in the context of the ongoing debates in International Relations with regard to the research question: 1) the primacy of agent and/or structure in the explanations on the evolution of human rights in ASEAN, and more specifically the Declaration; 2) the power of human rights and structures as “agents”; 3) the role and meaning of norms and the level of analysis problem in the analysis of international politics in Southeast Asia. I hope that by staking my claims the study will have its corresponding contribution in these intellectual tensions. The arguments will once again come out as concerns when I make my theoretical considerations on the nature of language in international politics (Chapter 1.2).

1.1.4 THE EVOLUTION OF HUMAN RIGHTS IN SOUTHEAST ASIA: WHODUNIT – AGENT OR STRUCTURE?

A survey of the literature reveals that a complex and sustained web of interactions between transnational advocacy networks, the ASEAN and its institutions impacted on the socialisation of human rights norms. There are four sets.²³ Jörn Dosch (2008), Herman Joseph Kraft (2012) and Matthew Davies (2013) in their account of institutional and normative frameworks in ASEAN touch on the relevance and heuristic advantage of text and discourse between actors during the process of negotiation and the drafting stages of the ASEAN Charter. Dosch compares three documents - the submission of the

²² See CLARKE, G. 2012. The Evolving ASEAN Human Rights System: The ASEAN Human Rights Declaration of 2012. *Northwestern Journal of International Human Rights*, 11, 1-27.

²³ Outside the tensions between these sets of articles is a careful study of the legal epistemology of the human rights provisions as they have been formulated in the AHRD. See RENSHAW, C. S. 2013. The ASEAN Human Rights Declaration 2012. *Human Rights Law Review*, 1.

transnational network, Solidarity for Asian People's Advocacy²⁴ (SAPA) in April 2006, the report of the Eminent Persons' Group²⁵ (EPG) in December 2006 and the final version of the Charter in November 2007, and argues that there is a "striking convergence of core concepts" (2008: 533). Further on, however, one of his sources claims that similarity in "wording" and "substance" was "purely coincidental" (Dosch, 2008: 535). Kraft (2012), meanwhile, points to how "conceptual ambiguities" such as those found in the Terms of Reference of the AICHR are considered opportunities by civil society transnational networks, like the Working Group for an ASEAN Human Rights Mechanism (hereafter the WG-AHRM or "the Working Group"), to "push the envelope" on human rights, which is indicative of this network's past strategy in complementing the "piecemeal institutionalisation of international human rights law" in Southeast Asia (Eldridge, 2002: 2). With even greater detail, Davies compellingly demonstrates how the Working Group diffused "the radicalism of rights" (2013: 402) by engaging in "clear issue linkage strategies to illustrate the positive relationship between human rights and existing ASEAN agreements" (2013: 394). He substantiates such links by comparing how two points²⁶ coming from a Working Group Concept Paper - A Roadmap for an ASEAN Human Rights Mechanism - were "replicated directly" in the Vientiane Action Programme.

The articles of Hiro Katsumata (2009) and Stephen McCarthy (2009) comprise a second set of arguments. McCarthy places great emphasis on the international pressures such as that exerted on ASEAN because of the actions of the military of junta of "Burma" during the crackdown on the Buddhist monks in 2007 which forced the organisation to adopt "damage control positions" (2009: 164-167). His version of the human rights story exemplifies how states agree to human rights norms in pursuit of what I call credibility

²⁴ Also called the Solidarity for Asian Peoples' Advocacies' Working Group on the ASEAN is an aggrupation of regional and national civil society organizations that do joint strategizing and action in engaging the ASEAN. It has engaged the ASEAN on the ASEAN Charter Drafting process, particularly the Eminent Persons Group and the High Level Task Force. SAPA and its members have been a driving force in the annual convening of the ACSC/APF ASEAN Civil Society Conference/ASEAN Peoples' Forum since 2006.

²⁵ The Eminent Persons Group was created and mandated by the ASEAN Summit (*i.e.* heads of state) to examine and provide practical recommendations on the directions and nature of the ASEAN Charter. The ASEAN Summit endorsed the EPG Report via the 2007 Cebu Declaration on the Blueprint of the ASEAN Charter. The report is available at: <http://cil.nus.edu.sg/2007/2007-report-of-the-eminent-persons-group-on-the-asean-charter-adopted-on-13-january-2007-in-cebu-philippines-by-the-heads-of-stategovernment/>.

²⁶ These include the 1) "[a]doption of an ASEAN instrument for an arrangement on the promotion and protection of the rights of women and children" and 2) the "[e]laboration of an ASEAN instrument for an arrangement on the promotion and protection of the rights of migrant workers" (Muntarhorn, 2003, cited in Davies, 2013: 396).

enhancement and squarely places human rights acquiescence as a strategic move. Interestingly, however, McCarthy also mentions how the preambles of both the 1993 Bangkok Declaration of Asian States and the 1993 NGO Bangkok Declaration carry the discourse of human rights education and awareness as a “cultural substitute” for “universal” human rights principles plagued by socio-cultural debates when they are codified into positive rights (2009: 163). Katsumata, in the meanwhile, juxtaposes Western external pressure to what he calls “mimetic adoption” (2009: 625- 628). ASEAN member states do not acquiesce to Western demands – they emulate Western standards to raise the identity of ASEAN as an “advanced and legitimate institution” in the “community of modern states” (Katsumata, 2009: 625). Whilst the argument is untenable outside the influence of normative structures, Katsumata confesses that his take is on the “actor’s side of the story” (2009: 626).

The third set of inquiries – Alan Collins (2008), Duy Phan (2008), Avery Poole (2010) and Shaun Narine (2012) –, although not explicit on discursive mechanisms which might be possibly present, recurring and repeating, also look into the overall evolution of human rights, slightly indirectly in the case of Collins. They demonstrate the necessity of the frequency of interactions between human rights agents in a variety of spaces and the varying intensity of interactions over given periods. Poole was the first to set out more comprehensively than any other a clear chronology of references to human rights. She acknowledges how the ASEAN Secretariat, the EPG and the High Level Task Force (HLTF)²⁷ had different takes on the idea of a human rights body, its “role and structure”, and whether or not such a reference be included at all in the emerging regional legal framework of ASEAN. The EPG report, for example, put emphasis on “the respect for and the promotion of human rights of every individual in every Member State” (2007). This principle can neither be found in the present form of the Charter nor the Terms of Reference of the AICHR. Duy Phan also closely chronicles the developments which lead to the inclusion of the human rights body provision in the Charter, but with a focus parallel to that of Kraft (2012) on the activities of the WG-AHRM, aligning his emphasis on the network’s repetitive efforts in pushing the human rights agenda. The ASEAN reception of civil society recommendations through the WG-AHRM oscillates between acknowledgement and appreciation; there is a cautious air in the responses of member states. The actual consequences, over time, Duy Phan (2008) concedes, however, seem to

²⁷ The HLTF was set up to carry out the drafting of the ASEAN Charter based on the Kuala Lumpur Declaration on the Establishment of the ASEAN Charter and the recommendations (*i.e.* 2007 EPG Report) of the Eminent Persons Group on the ASEAN Charter.

be an acceptance of some of the very suggestions of NGOs such as the WG-AHRM, which had recommended the creation of the EPG in preparation of the Charter.

Finally, all published in the same year, 2012, Narine (Contemporary Southeast Asia), Ciorciari (Human Rights Quarterly) and Clarke (Northwestern Journal of International Human Rights) share the vantage point of close perspective and proximity to the adoption in November of the ASEAN Human Rights Declaration. Critical of the human rights project in Southeast Asia, Narine argues that it is part of a larger regional strategy to “rejuvenate and re-legitimize” ASEAN (2012: 367). Region-wide concerns he argues have more to do with state building (*i.e.* securing political and social stability); hence the institutional weaknesses of the human rights institutions in place are effectively structural problems that could push the human rights in either direction. Ciorciari (2012) and Clarke (2012) provide neat and incisive broad narratives of the political forces (again, the considerable role of regional CSOs, the ASEAN Institutes of Strategic and International Studies (ASEAN-ISIS)²⁸ and the Working Group, in particular) that shaped the human rights agenda; and in the case of Clarke, the drafting history of the Declaration.²⁹ Both authors would agree – along with Tan Hsien Li (2011)³⁰ – on the incremental process of human rights institutionalisation in Southeast Asia but they are at odds in terms of their outlook of the project - Clarke being the more optimistic of the two. Along with Katsumata, Ciorciari, Clarke and Davies (2013) might be further grouped as those who look at the “reputational impact”³¹ of human rights on political actors.

²⁸ The ASEAN-ISIS is an association of think-tanks and non-governmental organizations that was formed in 1988. Its founding membership comprises the Centre for Strategic and International Studies (CSIS) of Indonesia, the Institute of Strategic and International Studies (ISIS) of Malaysia, the Institute of Strategic and Development Studies (ISDS) of the Philippines, the Singapore Institute of International Affairs (SIIA), and the Institute of Security and International Studies (ISIS) of Thailand. The ASEAN-ISIS and WG-AHRM are the only two entities that have directly advocated for a human rights mechanism in ASEAN, which are registered in Annex 2 of the ASEAN Charter as “entities associated with ASEAN”. See for example, RÜLAND, J. 2002. The Contribution of Track Two Dialogue Towards Crisis Prevention. *Asien*, 85, 84-96, HERNANDEZ, C. G. 2006. Track Two and Regional Policy: The ASEAN ISIS in ASEAN Decision Making. *Twenty Two Years of ASEAN ISIS: Origin, Evolution and Challenges of Track Two Diplomacy*, 17-29.

²⁹ Clarke’s account of the Tier 1 stage in the Two-Tier Process is the most complete in the extant literature. See the Introduction of Part 2 of his thesis for a synoptic chronology of the stages of the drafting process.

³⁰ This is the only monograph that has come out so far on the ASEAN Intergovernmental Commission on Human Rights.

³¹ This is a term used by Ciorciari but foreshadowed and explored in KLOTZ, A. 1995. *Norms in international relations: the struggle against apartheid*, Ithaca, N.Y; London, Cornell University Press.

The authors in the reviewed literature coincide in terms of recognizing: 1) the chronological link and order in the interactions on the human rights agenda; 2) the diversity of types of human rights agents which include civil society organisations, ASEAN member states and state-appointed or statist institutions in the negotiation of the human rights provision in the Charter, the Terms of Reference of the AICHR and the Declaration; 3) the variety of loci (*e.g.* meetings, informal seminars and workshops, fora, ministerial meetings, etc.) within which actors exert human rights pressure; and finally, various authors also clearly acknowledge 4) how these actors are able to mobilize agendas because of the increased level of political liberalisation, development of national human rights practices and the consolidation of a security regime. Taken together, however, an evident bias towards the power of agency surfaces; the arguments reflect the reductionist ontologies that the authors use implicitly - the outcomes of negotiations were attributed more towards – although in varying degrees - to the agency of individuals, networks and state actors rather than the shaping effects of structure.

1.1.5 FIRST ASSUMPTION

My stand on whose preferences dominate outcomes is clear: it was *ASEAN* who agreed to a human rights body. In this respect, I make the first of three assumptions in this study: we must agree on a vocabulary on preferences and strategies to make the claims for this study on the role of agent and structure, the notion of power and the place of language in norm diffusion. Preferences mean the dispositional trait of actors, the way an actor values alternative outcomes of the decision process being modelled. “Preferences (along with beliefs) define who an actor is “ (Clark, 1998: 252). Strategies and the actions they involve, meantime, produce the valued outcomes – they consist in what an actor *can do*. In light of this distinction the explanations implied by the reviewed literature either treat actor preferences exogenously (fixed) or endogenously (shaped by institutions). This is a juxtaposition of agency-centred and structure-based institutionalist approaches but they are roughly equivalent to the perspectives of the authors examined above. What they fail to consider, however, is how preferences (including actors’ beliefs) is where games *begin*: “actors *prefer* a particular outcome because they *believe* it will best satisfy some deeper goal” (Clark, 1998: 254), so first-order preferences can be the “strategic equivalent” of a “more primitive end” (second-order preferences) and so on (Clark, 1998: 263). This is where and how preferences may obtain.

The view on human rights *simply as* an instrumental move not only negates this “recursive relationship” between agent and structure but also unduly consolidates human rights as a static notion. I have preferred for this study to avoid ontological reductionism and give primacy neither to agent nor structure but to the *necessary relationship* between them: another way of understanding the human rights regime in Southeast Asia is not to see it as it relates to material preferences (*e.g.* a strategic move to strengthen the economy) but how and why it is negotiated at all (*i.e.* human rights because agents have principled notions of human dignity). Human rights is hence constitutive of agent (actors) and structure (institutions). “Structure is not ‘external’ to individuals... It is in a certain sense more ‘internal’ than exterior to their activities” (Giddens, 1984: 25). Finally, I will concede to the vocabulary of agency-centred theorists with regard to the use of the terms, actors, institutions, and organisations because, according to Clark, they are able to better clearly “delineate” between agent and structure: “actors are agents because they make choices in their attempt to achieve their goals. Institutions are structures because they constrain the behaviour of actors” and the “collections of actors can be more profitably thought of as ‘organizations’ than institutions” (North, 1990, cited in Clark, 1998). This is particularly essential in the case of ASEAN because if we refer to the collective group of states as an institution, it will be difficult to separate member states from the set of rules that structure their behaviour.

1.1.6 STRUCTURE AS “AGENT”: AN EXCEPTION TO THE NORM?

Human rights became part of the global normative agenda with the signing of the UDHR in 1948: “Every human being is born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.³² To this day, however, its advocates continue to wrestle with the fundamental components in international relations: the individual, the community, and the goods that we seek to distribute amongst ourselves. We consider the individual because we seek to protect, preserve and enhance human dignity; we consider the community because as individuals we are natural social beings, requiring and desiring to develop our potential in the company of like creatures and *looking to achieve* such ends on the basis of common values, dreams and practical choices; and finally we consider the goods and natural resources which make up the practical requirements of our daily

³² Available at: <http://www.un.org/en/documents/udhr/index.shtml>.

existence within and between the communities that we choose to create and develop. On the one hand, “human rights” has become a norm through which we can universally debate the meaning of human dignity that is basic to all. On the other hand, the international human rights regime – the set of international laws, international conventions, treaties and declarations – which demand reciprocal duties have, however, been challenged with regard to its purported universality. These issues were echoed in the Asian Values Debate (Bauer and Bell, 1999) but it turns out that they are also contradictions that were built into the pedigree of the notion as it was handed down to us in our time and the drafters of the UDHR 1948. The liberal notion of human rights merges particularistic accounts of rights from Roman legal notions and customs of Germanic tribes that view rights arising out of a contract between protecting the ruled from their rules with universalistic accounts from Christian natural law tradition and Greek ideas of human flourishing that endow every individual by virtue of his or her humanity natural rights (Brown, 2002). The debates that went on within the UN Blue Ribbon Committee, which was commissioned to draft the UDHR 1948, tell of how the group could never agree on cultural and philosophical underpinnings of the final bill that continues to be the definitive normative document on the international human rights regime. The bill was meant to be read as an “integral document” (Glendon, 1997) but it appears that it was also meant to be read as a framework from which a regime – “norms *and* (emphasis mine) decision-making procedures accepted by international actors to regulate an issue area” – might emerge (Donnelly, 1986). The tension between the need to codify human rights principles creating reciprocal obligations (regime) and the collective reiteration and acceptance as an evaluative standard (norm) based on philosophical and cultural systems of belief is incommensurable.

Notwithstanding this dilemma, Risse and Sikkink (1999) have shown how human rights norms do make an impact on domestic structures. Civil society organisations link transnationally to create networks that create pressure “from above and below” national governments to effect human rights change. Actors are “socialised” through five-stages (called the “spiral model”): repression, denial, tactical concessions, prescriptive status and rule-consistent behaviour (Risse and Sikkink, 1999: 17-35). They point out that the more governments “talk the talk”, the more they get entangled in the web of human rights discourse. Argumentative rationality takes over rhetoric. The power of norms is transmitted by transnational networks – “those relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense

exchanges of information and services” (Risse and Sikkink, 1999: 18). Norm promoters³³ need to have an organisational platform from which norm-building activities may take place. Such organisational platforms almost always need the support of state actors, where the former provides tools for engagement. Their general finding across a range of diverse cases is that the socialization process effecting human rights change disconfirms the notion that human rights would not fit in particular cultures or regions of the world (Risse and Sikkink, 1999, Hoge et al., 1996). Interestingly, in a more recent study, Lake and Wong (2009) demonstrate how the *formation* of networks allows for the diffusion of norms. Networks create spaces for political power and this in turn is distributed amongst its various nodes. The “central node” is able to set agendas and can privilege the acceptance of one amongst many competing norms because of the *information flows* that are controlled by the central node (Lake and Wong, 2009). Networks can themselves, therefore, behave like political actors. They pay attention to the aggregate action over the component-based pressure of transnationally-linked actors in the spiral model. The creation and spread of norms are a function of the *structure* rather than the content of the network (Lake and Wong, 2009: 135); hence the important distinction they make between “principled actors” (Keck and Sikkink, 1998) and actors with a “principled purpose” (Lake and Wong, 2009: 146).

1.1.7 SECOND ASSUMPTION

Several observations merit emphasis at this stage. Firstly, the conclusions above have largely to do with the effect of socialisation processes on domestic structures. If norms affect domestic institutional change in a differential manner (Risse et al., 1999), how does it affect *regional* institutional change? This takes a number of assumptions that would be challenged by the nature of ASEAN as regional organisation; there are issues of institutional capacity and democratic accountability available to states that ASEAN given its nature and stage of development has so far not fulfilled. Secondly, splicing agency between agent and structure is essential in order to understand the source and forms of causation. But one tends to privilege one over the other, depending on the research question. There is risk in the existing literature for potential confusion between the impact of network power (inclined towards material structure) and norm power (inclined

³³ They are also called “norm entrepreneurs”; see FINNEMORE, M. & SIKKINK, K. 1999. International Norm Dynamics and Political Change. *In*: KATZENSTEIN, P. J., KEOHANE, R. O. & KRASNER, S. D. (eds.) *Exploration and contestation in the study of world politics*. Cambridge, Mass.: MIT Press.

towards ideational structure). What happens empirically lies on both tendencies in varying measures across space and time, not least because one of the many interactions that we are looking at – transnational networks and civil society vs. states and state agents – occur on multiple levels. It is a question of where power lies *and* how power emanates from networks that effect human rights change.

I now make the second crucial assumption: I consider power in international relations in all its dimensions and various forms. I make my claim along the tradition of Barnett and Duvall who see power as “the production, in and through social relations, of effects that shape the capacities of actors to determine the condition of their existence” (Barnett and Duvall, 2005: 42). The nuance I proffer, however, is that whilst this definition leaves out “persuasion” and “processes of collective choice that produce joint action” (Barnett and Duvall, 2005: 42) it does not leave out (to my mind and for the express purpose of this investigation) strategic bargaining in a collective group by various actors where the consecutive pursuit of interests by various actors yield “compromises” as outcomes. Barnett and Duvall acknowledge that this conceptualisation places power in the continuum of agency and structure, looking not simply at its source but also at its effects both intentional and unintentional. I believe in the cumulative effects of power over time; indeed, “power inheres in structures and discourses that are not possessed or controlled by any single actor” (Barnett and Duvall, 2005: 44). What now of the power of norms? To this final debate we now turn.

1.1.8 THE POWER OF NORMS IN ASEAN: REVISITING THE LEVELS OF ANALYSIS PROBLEM

It is essential to understand how norms count in ASEAN as constitutive rules in the game of international relations. Martha Finnemore and Kathryn Sikkink mapped out in 1999 the controversies surrounding what has become, especially since the “ideational turn” in the 1980s, the self-conscious debate amongst IR scholars on the extent to which a clear explanation and understanding of norms can consequently help us grasp the theoretical tug of war between materialism and idealism, behavioural logics between “appropriateness” and maximum utility, between the role of choice and determinism in norm-based behaviour, and the treatment of persuasion in processes of agency (Finnemore and Sikkink, 1999: 269-275). Norms, they define, are “standards” of “*appropriate* (emphasis mine) behaviour for actors with a given identity” (Finnemore and

Sikkink, 1999: 251). The emergence, agreement and consolidation of norms can be explained through what they call its “life cycle”, where each stage is an outcome of a distinct convergence of various types of actors, motives, and mechanisms of influence (Finnemore and Sikkink, 1999: 255). Hence, norm entrepreneurs need to have an organisation platform from which norm-building activities may take place. Such organisational platforms almost always need the support of state actors, where the former provides “tools” for engagement. A relevant point they make in the study of norms, in general, is the need to take great care in (1) defining the relationship *between* norms, (2) approaching them either as agents of stability or change and in (3) understanding them either as “single standards of behaviour (sic)” or a collection of practices and rules that are structured together. In this study we shall navigate connections between international norms on human rights and ASEAN regional norms, look at change, and relate norms to institutions in the sociological sense (see Chapter 1.2). The idea of *appropriateness* above sets up standards for approximating whether actions are “good” or “bad”; norms hence are not simply prescriptive, but also have constitutive and evaluative power; they create actors, actions and perceptions of the former. Indeed, the reason why they transform is because of their moral or ethical qualities that appeal to the collective mind.

The general consensus amongst constructivist ASEAN scholars is to “naturally” give ontological primacy to the existence and force of normative behaviour, but most especially to the principle of non-interference in the management of international affairs (Acharya, 2009). Realists, on the other hand, such as Michael Leifer (1999) have also attributed explanatory power to this “cherished norm” but only in so far as it complements the regional association’s more primitive concern to arrange a security community (Leifer, 1999: 35-38). He argues that the contrast between the cases of Myanmar, on one hand (ASEAN admitted Myanmar as a member despite Western pressures - including internal ASEAN dissension - on the country’s human rights records) and Cambodia, on the other (ASEAN postponed its entry until “restoration of some form of the political status quo” following the 1997 coup), was “striking in terms of the norms invoked” (Leifer, 1999: 36). In the former, norms were a function of Great Power politics, hence of an instrumental nature; but he also seems to imply, in the latter, that it is not because norms do not matter but because their force varies in the face of decisions concerning states. Application depends on whether a state is either inside or outside of the organisation; hence the value of a norm is of a strategic-preferential nature.

This literature has been effectively challenged by Lee Jones (2010), setting up a debate, in a way, between two camps. There are those for whom norms are *defended* on the basis of other competing norms (Acharya, 2009), and those for whom norms are *(un)broken* on the basis of actor interest: in the case of Leifer it is the national and regional interest, but in the case of Jones it is because of “the interests of dominant social groups against their domestic and foreign opponents” (Jones, 2010: 484). Jones makes an equally powerful case to that of Leifer: the longstanding pattern of ASEAN retaining the principle of non-interference despite “glaring exceptions” to the rule lies not with norms but with the conflicts within those member states opposed to change. He sits uncomfortably in this camp in so far as he remains statist and argues on a different set of assumptions, breaking down ASEAN corporate agency and looking toward “state managers” furthering their “interests and strategies” either as “military-bureaucratic allies” or “capitalist oligarchs” (Jones, 2010: 484; 488), and secondly, as much as he is amenable to the normative force of “social and political orders” (2010: 480). To my mind, therefore, Jones cannot but somehow cede part of his argument to ideas and language, which lend material to social force. Even communism had doctrinaire party ideologues – and indeed, Marx. The argument the sympathisers of Jones would make, however, is that, along the lines of Leifer, “norms” here are instruments. Two counter-points can be made to settle the issue: both camps confuse the game of international relations for “organised hypocrisy” (Krasner, 1999), and secondly, they are simply talking past each other because the levels of analysis do not match.

Much confusion above can be clarified first by looking at the “system-component” or level of analysis problem in international relations. William Moul (1973) revisited a classic paper by W.S. Robinson (1950) on the misuse of aggregate information in studying the behaviour of individuals, and posited: “Can ecological correlations (correlations among groups) be substituted for individual correlations? Can accurate inferences be made from ecological relationships to individual relationships and vice versa? His conclusion was that they cannot” (Robinson, 1950, cited in Moul, 1973: 496). Pursuing this argument, Moul re-analysed a study by Singer and Small (1969) as a further example of how inferences made from aggregate to individual relationships can result in possible inaccuracies (1973: 499-507). The relevant point for this study is that the existence of a “relationship at the international system level of analysis does not, *in and of itself*, provide evidence that the relationship exists at the national level” (Moul, 1973: 498). And vice-versa: state behaviour cannot, logically, be taken to confirm or discount regional behaviour. It is one thing to say that *ASEAN* breached the principle of non-interference in its relations with Cambodia, postponing its entry into the organisation (Leifer, 1999: 35-38), and another to

say that *Thailand* violated the sovereignty of Cambodia, “sponsoring right-wing guerrilla forces to block communist forces from coming to power” (Jones, 2010: 486). We are comparing component-to-component relationships to aggregate-to-component relationships to validate aggregate responses (non-interference); but each level relies on material and ideational resources that are qualitatively and quantitatively distinct. Furthermore, *Thailand* acting on Cambodia *during the Cold War* and *ASEAN* acting on Cambodia *post-Cold War* bring to the fore the complexities of temporal aggregation to the spatial dimensions of aggregation. The force of the principle of non-interference as it is with the norms of human rights will have been reiterated by a different configuration of actors, practices and rules, *in a different time*. Aggregate states in whose relations we take interest are studied in aggregate; and so it is with the ideas and the language they take *in aggregate*. The crucial point to make is that space *and* time are critical foundations both for ideationally inclined approaches (constructivists on norms) and materially inclined approaches (realists and political economists on actors) and unless we want to make their premises irrelevant (what they take to be the world out there) their dimensions require separate verification. Norms explain phenomena differently for both camps – not that they lack the power to explain – but because they measure differently in the dimensions of the “worlds” that are portrayed.³⁴

If both camps can agree on the existence and variable explanatory power of norms, where do the twain part ways? Pace Stephen Krasner - who takes norms as prescriptive rules, hence his critique that Westphalian sovereignty and international legal sovereignty have always been violated, and as such have always been characterized by “*organised hypocrisy*” (Krasner, 1999: 220) - Friedrich Kratochwil (2001), takes norms as *constitutive rules* in the game of international relations. There are two axial points that place our study in favour of Kratochwil: firstly, *why need we justify interventions at all?* To say that it counts as part of the practice of hypocrisy evades the question. The interrogation implies rather that a norm has been breached, in this case, state sovereignty, and that the balance of power or say the human rights regime, perhaps *ought* to prevail. Deviations from such norms always consist in difficult compromises which may be through invitations (conventions and contracts) or interventions (coercion and imposition) (Krasner, 1999: 25-26). There are, however, “*settled norms*” in international relations - those which cannot be disputed by pointing out instances where people (or states) have not in actual fact acted according to them (Frost, 1996: 105). Frost inveighs that even in cases where states

³⁴ For an excellent exposition of the ontological and epistemological differences in international theories, especially on structural theorizing see Chapter 1 in WENDT, A. 1999. *Social theory of international politics*, Cambridge, Cambridge University Press.

interfere in domestic affairs, it should be noted that they justify their actions according to these norms and he, therefore, argues that “this gives an indication whether a given item is settled within a specified domain of discourse” (1996: 105). It is the concept of that norm which is regarded as settled within the modern-state domain of discourse, “and not any particular conception of the concept” (Frost, 1996: 106). We may thus find ourselves, perhaps not only re-thinking the “bundle of characteristics” which comprises sovereignty but also looking at “a qualitative shift in the authority relationship between states and the international community” (Lyons and Mastanduno, 1995: 15). It is in this sense that the rules which establish norms (or institutions in the sociological sense) are *constitutive* – they do not merely *regulate* antecedently existing activities but they are also, in a way, the bundle which “*create(s)* the very possibility of certain activities” (Searle, 1996: 28).

Krasner relies on the analogy of the game of chess to illustrate what it means for a rule to be constitutive. But Kratochwil argues that the international system does not have constitutive rules, “if such rules are conceived of as making some kinds of action possible, and precluding others”. Kratochwil dissents, saying, that “the constitutive rules of international politics are not those of a well-defined game like chess, or one that is supervised by an authorized referee...” (2001: 5). The chess analogy or the analogy of a game, more generally, is slippery in the sense that games always have parameters. But then again games are invented, rules are constructed, and are then followed *officially*, but they are also “*meant to be broken*”. The point I wish to make is that norms in the Kratochwillian sense comprise the “rules” before the rules: it is to see the game played rather than the game lost *or* won; it is the game arbitrated rather than the game decided. Following norms in the international system consists in setting up a game and in characterizing certain practices as *legitimate, permissible or forbidden* (Kratochwil, 2001: 4).

Secondly, the phrase “organized hypocrisy” transcends the stark almost hopeless canvass of realist revisionism that is depicted by Krasner. He would patently contend that international politics is organised not in the least as “an environment in which the logics of consequences dominate the logics of appropriateness” (1999: 6). By this he means that the frequency at which interventions have taken place clearly indicate that the force of rational calculations have outweighed political action which spring from rules, roles and identities appropriated by specific circumstances. It is in this light, however, that I find Kratochwil’s argument most convincing:

When we examine the political practices falling under the heading of sovereignty we are not simply observing things but assess actions. Actually, the choice of the word “hypocrisy” (rather than a simple statement that something is “not true”) shows that we have left the descriptive vocabulary and are appraising. Such appraisals contain observations but cannot be reduced to them (Kratochwil, 2001: 4).

The two points we have thus raised address not only the intricacy of a norm’s function but also its contested embeddedness in the international structure. To count the significance of norms in the strategic-instrumental sense is to miss the point: norms don’t count for what actors *can do* but form part of who they *can be*. The “ASEAN way” – consultation and consensus, non-confrontation or abstaining from the use of force and non-interference in the affairs of other states – have got to be played out in the game of international relations.³⁵ In normative *behaviour* what becomes *central* is the *process* of assessing strategies and preferences and not the centrality any single norm or any single actor. Norms are bundles of rules that give rise to what the white line of a ball court *means*. These are the real “boundaries” of normative behaviour where human rights must be properly assessed.

1.1.9 THIRD ASSUMPTION

I now make the third and final assumption. The literature in this chapter confirms that where there are norms there must be drivers and takers.³⁶ The drivers have been conceptualised as *agents* - norm entrepreneurs, as well as groups, and individuals who belong to the state. The takers, in the meantime, have been the state and state actors. Without the tools for engagement, however, there can be no realistic notions neither of takers nor drivers. This study chooses to look at not only at interaction (how specific agents are socialised) but also at the tools of sociality that carries the effects of power mentioned earlier on. We have so far seen human rights pressure “from above and below” following Risse and Sikkink (1999); I would like to analyse the pressure *from within and*

³⁵ For discussions on the “ASEAN Way” see ACHARYA, A. 2009. *Constructing a security community in southeast Asia : ASEAN and the problem of regional order*, London, Routledge, HAACKE, J. 2003. ASEAN’s Diplomatic and Security Culture: A Constructivist Assessment. *International Relations of the Asia-Pacific*, 3, 57-87, NISCHALKE, T. I. 2000. Insights from ASEAN’s Foreign Policy Co-operation: The “ASEAN Way”, a Real Spirit or a Phantom? *CONTEMPORARY SOUTHEAST ASIA*, 22, 89-112.

³⁶ See CHECKEL, J. T. 1999. Norms, Institutions, and National Identity in Contemporary Europe. *International Studies Quarterly*, 43, 84-114.

without. I mean the power of language and discourse that can explain why, how and when norms matter. My proposition is to introduce the notion of a “norm carrier”, which are otherwise benign conduits were it not for the drivers and takers who act on them. Acharya (2004) points out the two waves of scholarship on normative change: the first exposes norms as part of a universal moral script - “international prescriptions” to which states eventually subscribe; and the second puts emphasis on the “role of domestic political, organizational and cultural variables in conditioning the reception of new global norms” (Risse-Kappen, 1994, cited in Acharya, 2004). This study contributes to what we might say as the “third wave”, which I believe Acharya initiated, riding on the notion of “dynamic congruence-building”³⁷. He argues that whilst “framing” and “grafting” “reinterpret or represent” norms, his theory of “localization” “reconstructs” them (2004: 244).³⁸ The initial two waves describe “the fit” whilst this third perspective describes “the *degree* of fit between two, competing international norms” (Acharya, 2004: 243). Where lies the difference between Acharya’s proposition and the one we presently make? Previous scholars look at norm dynamics; a theory of language in international politics focuses on the *communicative dynamics* of norms.³⁹

1.1.10 SUMMARY

It is in the nature of discourse that over time layers of meaning accumulate between actors of diverse preferences (including beliefs) and strategies. Human rights was introduced in the ASEAN Charter, given further normative force with the launching of the ASEAN Intergovernmental Commission on Human Rights and enshrined in the ASEAN Human Rights Declaration. To explain this institutional phenomenon, assumptions on the role of agent and structure have been clarified, the meaning of norms and the problems of levels of analysis revisited in the context of international politics since the foundation of ASEAN,

³⁷ See ACHARYA, A. 2004. How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism. *International Organization*, 58, 239-275.

³⁸ Sparked by studies which use “framing” and “grafting”, and Southeast Asian historiography on the political and civilizational advancement of Southeast Asian societies from the infusion of foreign ideas, Acharya’s advances the theory of localization: “Instead of just assessing the existential fit between domestic and outside identity norms and institutions, and explaining strictly dichotomous outcomes of acceptance or rejection, localization describes a complex process and outcome by which norm-takers build congruence between transnational norms (including norms previously institutionalized in a region) and local beliefs and practices” (2004, p. 241).

³⁹ The point I make here is that strategies such as framing are embedded in the “wider” processes of verbal and extra-verbal interaction; this will be discussed further in Chapter 1.2.

and our assumptions on preferences, power and language unbundled. Firstly, accounts of the evolution of the human rights regime in ASEAN have tended to establish a chronology of contestations between civil society organisations and international organisations and ASEAN member states and the Secretariat. The literature has left out much of the influence of ideas, hence more importantly the necessary and recursive role between agent (individual actors) and structure (norms and institutions which constrain). Secondly, structures can be agents in the form of *knowledge* flowing through the controlled nodes of networks; but this would not necessarily shift the bias in extant literature on the dichotomy between agents and structures. This would only bring us back to the power norms – and herein the third section of the chapter, which arouses a third debate. The more general literature on the international politics in Southeast Asia does acknowledge the power of norms – privileging the principle of non-interference – in varying degrees (between material and ideational approaches) and along different levels of analysis (national – regional/international). Norms, however, do not count as strategic choices (what actors can do) but as the beliefs and values underlying preferences over outcomes (who actors are and can be). They are bundles of constitutive rules in the game of international relations – reiterated collectively to make certain actions possible (evaluative) rather than prohibited or not (solely prescriptive) in the absolute sense.

Chapter 1.2

The Language Pendulum: Constructing Human Rights Discourse in Southeast Asia

1.2.1 INTRODUCTION

I propose a theoretical framework for the power of language in international politics in three analytical moves. First, words are foundational in the construction of social reality. I borrow from the ideas of John Searle (1995) to make this point. Second, I undertake a discussion of the most critical treatment of language in the discipline of International Relations (IR) within the strand of Constructivism and here I limit myself to the work of Friedrich Kratochwil and Nicholas Onuf.⁴⁰ My task is to explain why I take this “linguistic turn” based on the foundations of social constructivism, conversing consequently with the ideas of Alexander Wendt (1999) and responding to the critique raised by post-structuralist scholars like Majah Zehfuss (2002). I identify why both of them are right about language. In the case of the former, I lean on his insistence on the *social structure* of international politics; in the case of the latter, I rest on her defence of how discourse must answer *why* structures *change*. I then briefly engage in a meta-reflection of how language has been obscured in IR and I make my case of how to uncover its sense of centrality. My third move is to assemble my conceptual kit for analysing language (*text and context*) from the vantage point of linguistics. I foray into the investigations of Ferdinand de Saussure - in order to decipher the unchanging codes of social practice, and V.N. Voloshinov - in order to

⁴⁰ The seminal works that I examine are: KRATOCHWIL, F. V. 1991. *Rules, norms, and decisions: on the conditions of practical and legal reasoning in international relations and domestic affairs*, Cambridge University Press, ONUF, N. G. 2013. *World of our making: rules and rule in social theory and international relations*, London, Routledge.

explain how these codes are oriented in space and time.⁴¹ Contemporaneously, another move unfolds: I display what I have designed and called the *language pendulum* that I establish based on my close observations of the actual negotiations of the AHRD between February and November 2012.

1.2.2 LANGUAGE IN THE CONSTRUCTION OF SOCIAL REALITY

Words are the “first” institutions in the construction of social reality. John Searle (1996) makes this argument perspicuously, so borrowing his formula is essential at this point: “X counts as Y” or “X counts as Y in context C”, where X characteristically assigns an entity some new status, Y. This new status can only be possible by virtue of “human agreement, acceptance, and other forms of collective intentionality”, which are “necessary and sufficient to create it” (Searle, 1996: 51). Let us take the case of the construction of “money”. Coins or bills (*pieces of metal and paper*) issued by the European Central Bank (x) count as *money (y) in the Euro Zone (c)*.⁴² Searle contends that:

The move from brute to the institutional status is *eo ipso* a *linguistic move* (emphasis mine), because the X term now symbolizes something beyond itself. But the symbolic move requires thoughts. In order to think the thought that constitutes the move from X term to the Y status, there must be a vehicle of the thought. *You have to have something to think with* (emphasis mine) (Searle, 1996: 73).

This formula operates reiteratively in a way that one institutional fact builds upon another: first, to call a piece of paper a bill requires that we agree with what a “bill” looks and means; subsequently, we agree on how and why a bill looks and means a “Euro”; and we then agree on one higher move in order to see how the Euro becomes “official currency” for “trade” in the “international economy”, and so on. This is how social reality is constructed - all the way. Language is - both in the material (brute) and ideational (social and institutional) sense - *a fact* - indispensable in the application of the process signalled above. Were we now to apply language and discourse as a resource in the construction of

⁴¹ The seminal works that I examine in this respect are: SAUSSURE, F. D., CHARLES, B., ALBERT, S. & ALBERT, R. 1968. *Cours de linguistique générale*, Paris, Payot, VOLOSHINOV, V. N. 1973. *Marxism and the Philosophy of Language*, New York, Seminar Press.

⁴² Searle in his case uses the example of the US dollar (1996: 28; 45-46).

the international structure it would be in Alexander Wendt's ontological frame both the *last natural kind* and the *pre-eminent social kind* (1999: 69-72). The distinction he makes between these two concepts is strikingly parallel to Searle: *natural* kinds are approximately *brute facts* and *social* kinds are *institutional facts* (1996: 1-29).

Searle develops the notion of "institutional facts" working upwards from "simpler" forms of "social facts"; this process is based ultimately on the "logical priority" of what he calls "brute facts". In such a sequential construction he argues for the indispensability of the linguistic component in many institutional facts (1996: 32-37):

Brute facts exist independently of any human institutions; institutional facts can exist only within human institutions. Brute facts require the institution of language in order that we can *state* the facts, but the brute facts *themselves* exist quite independently of language or any other institution. Thus the *statement* that the sun is ninety-three million miles from the earth requires an institution of language and an institution of measuring distances in miles, but the *fact stated*, the fact that there is a certain distance between the earth and the sun, exists independently of any institution (Searle, 1996: 27).

Searle's philosophical tract exhibits an anodyne sense of language *as fact* but it has, I believe, profound implications for how we explain and understand structures and power in international politics.⁴³ The social world that we create as individuals embedded in communities are amorphous and it is language – the daily utterances silent and spoken, written and oral – that we employ which help us to pin this world down. The structure of language and the words that comprise are capsules of the layers of social reality shifting and transforming over time. They form the discourse that stand as reference points for actors in international relations who are in the constant business of negotiation and diplomacy. I believe that to be "at a loss for words" is to be, at once, unable to capture the social dimension of reality *and* to be able to acknowledge a moment of "crisis". To call, to name, or to signify any particular act or event or notion is to participate in its very construction. Social reality is fulfilled in and through "expression". One must be careful not to overestimate this potential, however. Language is always at the service of those who wield it as much as those who dwell in it. If we are to have such a fruitful discussion, however, we must proceed to ask how disciples of International Relations have

⁴³ I thank Colin Wight for his insights into my work and the conversations we held on my interest in making a claim for language in IR. He has argued that IR has valued language, not least in the works of Onuf and Kratochwil, but the proposition has never been made explicit.

themselves looked upon language. I approach this challenge from the project of the constructivist school, for reasons that will become apparent in three sub-moves: first, by revisiting the discussion of the nature of structure by Wendt; secondly, by responding to the critique of the latter's work by Majah Zehfuss, I argue for the value of language as sign; and finally, by conversing with the work of Onuf and Kratochwil, I appraise the inroads of language in our discipline. To this we now turn.

1.2.3 LANGUAGE IN CONSTRUCTIVISM: WENDT, KRATOCHWIL AND ONUF

Alexander Wendt dissects under his lens the social reality of the international state system and what he does is fundamentally to set up his theory in conversation with structural realists in the tradition established by the classic work of Kenneth Waltz, "The Theory of International Politics" (1979). In stark contrast to Waltz, however, he recovers the critical part that systemic thinking plays in understanding international politics, and re-affirms the concept of sociality in challenging the dominant ontology in the international structure. The systemic nature of Wendt's strand of social constructivism (as opposed to reductionist theories) looks at patterns of state behaviour at the international system (aggregate level) as well as the individual behaviour of states (unit level). He argues that it is systemic in that structures have "causal powers" in the international system (Wendt, 1999: 11) and qualifies further that it is impossible for such structures to have effects "apart from the attributes and interactions of agents" (1999: 12). For Wendt, the international structure not only *constrains* state behaviour *but also constructs* state identity. The distinction is subtle and is oftentimes confounded in the din of scholarly debate; but these are the qualities of structure that allow for change. Wendt resuscitates the concept of "sociality". He points out in the first instance that the "character of international life... is largely constituted by social rather than material structures" (Wendt, 1999: 20). It is a profound challenge to orthodox views of the world where guns, goons and gold carry the order of the day. The basis of this sociality is "shared knowledge", and structure is hence the *distribution* of that knowledge (Wendt, 1999: 20). This proffers a protagonist role to the world of ideas "'all the way down' or (almost anyway...)" (Wendt, 1999: 20; 90). The meaning of power and its various effects on interest is largely dependent on the social structure of the system in contrast to the determinant role of the material in neorealist thinking; how states see themselves and other actors to be, their values, beliefs and perceptions of identity, constitute – make possible - international relations.

Wendt's treatise became the object of a robust debate in a volume edited by Guzzini and Leander (Guzzini and Leander, 2006). The most sustained critique was launched by Majah Zehfuss⁴⁴ who contended that sociality without understanding the discursive process that evolves with systemic change is damaging to the constructivist project; Zehfuss claims that in Wendt, "we are forced to infer actors' self-understandings from nothing but their behaviour" (2006: 98-104). I believe the debate forks into two directions. First, there are arguments about the place of identity and its transformative capacities within the framework of constructivist thought. Zehfuss contends quite correctly that narratives of identity from *within* and not simply between states ought to be central in establishing intersubjective meanings in the international system. She questions how a "constructivist" approach can plausibly bracket the (re)articulation of identity; identity is constructed not only in relation to the other (Wendt) but also in relation to self (Derrida).⁴⁵ It must be made clear at this point, however, that Wendt does not problematise identity *less*, ergo his now quintessential phrase in International Relations practice - "anarchy is what states make of it". The other direction in which the argument goes is that we cannot understand "states" all by themselves. Now the illusion that Wendt has created, in part because of his neat characterisations of the logics of anarchy - Grotian, Hobbesian, Kantian - is that states appear to be the only units which count.

Two sub points are noteworthy: First, nowhere does he actually rule out the existence of other political actors. Wendt, I believe, has exercised an empirical prerogative; he has provided a particular theory particular to *a* question (*i.e.* states are *the* actors in the international system). And second, the *logics* of anarchy lie in how states see themselves against each other (*i.e.* norms and institutions in the sphere of international activity influence the perception of actors).⁴⁶ What sustains the tension between the Zehfuss and Wendt is the divide drawn elegantly by Ted Hopf (1998) between conventional and the critical constructivism, recalling its origins from critical theory. While those on the conventional strand begin from a cognitive account of identity and analyse its effects on

⁴⁴ Zehfuss' initial piece found in the Guzzini and Leander volume originally appeared in the European Journal of International Relations, issue no. 3 (2001). This was followed a year after by a monograph, ZEHFUSS, M. 2002. *Constructivism in international relations: the politics of reality*, Cambridge, Cambridge University Press.

⁴⁵ See the arguments of Zehfuss (2002) against "constructivisms", inspired by the work of Jacques Derrida.

⁴⁶ I am grateful to Colin Wight for our conversations on Wendt and for helping me clarify the points that I raise in this section.

the social positions of actors, those on the critical side concern themselves further by interrogating the manner in which such identities make people believe in “a single of version of naturalized truth” (Hopf, 1998: 184). Critical theorists are interested in “exploding the myths associated with identity formation” where conventional constructivists primarily treat identities as “possible causes of action” (Hopf, 1998: 184). The former are fixed on the power of change while the latter stop at understanding the dynamics of change. While conventional constructivists are happy to consign the origins of identity to alienation - the need to define oneself in terms of the Other - critical constructivists take individuals to either assimilate the other, if deemed equal, or oppress the same, if inferior.

The problem that we find in the discussion between Wendt and Zehfuss is that both believe in the possibilities of a moral community but they fundamentally disagree on *where* to begin theorising; the identity of the state is likened to the identity of the self and the collective but it is not the identity of the individuals and the communities that make up the state. Hence the critique of Sujata Pasic that Constructivism does not engage “the actual social levels of states’ sociality” (Pasic, 1996: 57). I do not think however that, *pace* Zehfuss, Wendt’s “anthropomorphic concept of the state” is unable to cope with “identities which are unstable in themselves”. They are both trying to look at the (in)stability of identities – but they establish distinct spatio-temporal boundaries. Zehfuss breaks the boundaries more widely because invoking discourse - and not just gestures - opens the contestation of multiple identities to *all* actors at *all* levels from *all* directions. In this regard, I agree with the caveat raised by Zehfuss because it is only through language and discourse that we can understand behaviour, indeed both in its “rational” and “irrational” manifestations. Social practices are articulated on the basis of and through the repetition of narratives of identity. Zehfuss brings to the surface the power of discourse, which Wendt (1999) sustains nonetheless although in a manner less explicit than in his postmodern critic. The ultimate divide between the two, I believe, derives from their incommensurable views of the world. For critical theorists, observers form part of the reality they purport to see – they are subjects of the “reproduction, constitution, and fixing” of the social entities under their eye (Hopf, 1998: 184). Constructivists a la Wendt would posit meanwhile that there is “a reality that exists independent of the human mind”⁴⁷ – it is not, *pace* post-structuralists, discourse all the way down. In light of this, I contend that language *as sign* allows us to negotiate tensions between critical

⁴⁷ I am indebted to the neat discussion of scientific realism to John Searle in “The Construction of Social Reality” (1996).

constructivists and conventional constructivists who are “agnostic about change in world politics” (Hopf, 1998: 180). The resources and effects (*i.e.* structure) of language are located on multiple levels from the atomistic rational actor to the association of sovereign states. How has this been done so far?

Nicholas Onuf and Friedrich Kratochwil converge in their propensity for investigating how rules “work”: who uses them, when and how? Both authors have not only worked together (Onuf, 2013: ix-xi) but they have also shared intellectual affinities with the work of J.L. Austin (1975) on speech act theory in developing the normative use of language. For Kratochwil, instances of “speech acts” – actions that exist only by virtue of performing the verb: “I promise”, “we declare”, “we agree”, etc. are essential in *making* promises and *entering into* a contract, or, in more special cases, *claiming* rights. The act of saying constitutes the action. Kratochwil rightly points out, however, that these constitutive practices “crucially depend(s) on the knowledge of the *rule-structure* (emphasis mine)” (1991: 26). The reason a contract “binds” rests not solely on the precept, “promises cannot be broken”, but on the institution of the contract itself (Kratochwil, 1991: 28). There are instances when speech acts are not easily discernable, however, because the meaning of performative verbs can only be captured in context. Take for example the “indirect speech act” - “you look pale”, which can mean several things - “I worry about you” or “can I do something for you”. The implication here is that the meaning of language “in such instances” is “controlled” by the “structure of the discursive interaction” (Kratochwil, 1991: 29). The inverse is also true: meaning in human interaction is to be found in language: who says what to whom, when, and in what circumstances the *utterance* takes shape – *this*, I take it, is where rules begin.

The thesis of Kratochwil on the indispensability of rules and norms in international politics is based on the assertion that “all human action is rule governed” and the importance of everyday language is in its capacity to generate such rules (Kratochwil, 1991: 43; Chapter 1). Norms, he argues, all share the function of coordinating social intercourse. They are “problem-solving” devices (Kratochwil, 1991: 70) in that they: first, define the limits for social action in order to avoid conflict; secondly, define “schemes or schedules” for pursuing shared objectives or “stable cooperative outcomes” (Kratochwil, 1991: 75); and finally, sustain a discourse for negotiating a solution. The merits of Kratochwil’s claims are to be found in the way that he brings into relief the shortcomings of “calculations”, as they are construed in rational model theories, which “presuppose the independent and fixed valuations” (Kratochwil, 1991: 12) of political actors. Kratochwil

demonstrates thus how norms and rules influence choices through the “*reasoning process*”, *i.e.*, deliberation and interpretation (1991: 9).

Onuf in turn exemplifies the categories of reasoning before the categories of its *effects* have ossified into how we think of international politics. He deconstructs the discipline of International Relations by re-examining the rules of pre-modern society and uncovering the “false duality” between authority (the state) and anarchy (“the state of nature”) as features of the international system (Onuf, 2013: 196). Onuf argues that the incidence of anarchy ought not to be mistaken as the condition of anarchy (2013: 167). There are, in fact, various ways in which the world is made: “to identify *categories* (emphasis mine) of rules is to find their content, not in any specific sense, rule by rule, but in the characteristic ways in which human beings, in constituting themselves as such, relate material conditions to the conditions of rule that mark all societies” (Onuf, 2013: 65). For Onuf, the three types of speech acts comprise the most inclusive category for all types of rules. Language enables people to “perform social acts” and “achieve ends” by saying *something*, acting *in* saying something, and bringing about something *through* acting in saying something (Habermas, 1984, cited in Onuf, 2013: 83). It is, as Onuf’s opus title conveys, *a world of our making*.

If constructivists have indeed shown concern for language, although it be in varying degrees of depth, why hasn’t there been any corresponding intramural discussion in IR or an open claim about its transformative capacity if not explanatory power? The self-evident answer is that constructivists tend to look at different sets of structures: Wendt looks at the social structure of the international system, Kratochwil looks at rules, norms and practical reasoning, and Onuf examines rules and categories in order to explain international politics. Language has been dealt with as a strand in a theoretical bundle. The more elusive but fundamental reason I believe, however, is revealed if we bring out the assumptions on the notion of language *implicit* in constructivist thought, for which I shall make my case in three *meta*-moves.

First, the work of Anthony Giddens (1984) on the theory of structuration or the duality of structure has greatly influenced not only approaches to sociology but also the thinking of social structure in constructivist thought (Wendt and Onuf, not to say the least). The “rules and resources” of “structures” are *organised* as the properties of social systems but they are “out of time and place” while social systems depend on “the situated activities of human agents” (Giddens, 1984: 25). A problem with this conceptual model of social

structure, Onuf believed, was connecting the “transformations of relations effectuated through rules and resources” with “the reproduction of relations as regular social practices” (Onuf, 2013: 61). The solution for Giddens, in the meantime, was “recursion” or “the propensity of knowledgeable agents to refer to their own or other’s past and anticipated actions in deciding how to act” (Onuf, 2013: 62).

But a further critique of this model is that it makes all but a “slight nod” to the material circumstances of agents. It is not the patterns of human relationships but the rules and resources, which “generate and reproduce” the systemic relationships that we observe, that constitute social structure. And the “rules and resources” (*i.e.* rules, norms, ideology, and symbolic orders) “all depend for their existence on their at least tacit acknowledgement by the participating agents” (Porpora, 1989: 202). Social structures are an intersubjective not objective or material reality. Structure according to Giddens, therefore, is not the “actual organization of society” but the “organizing principle” behind the actual organization” (Porpora, 1989: 201). Wendt somehow replicates this model by setting up the logics of anarchy as “structuring properties” of the “social” international system. At this point, one can safely argue that these sociological insights have led Wendt to emphasise the “social” over “corporate identity of states” (Checkel, 1998: 341).

The second point to be made is that these problems reflect the same tensions found in the heart of sociological inquiry. Douglas Porpora (1989) navigates the dilemmas in the four conceptions of social structure, the “rules and resources” of social systems has already been mentioned above given its proximity to the present discussion. But there are also structures which refer to “systems of human relations among social positions” distinctively associated with the Marxist tradition. They mean a “nexus of connections” among human actors, “causally affecting their actions and in turn causally affecting them” (Porpora, 1989: 200). Porpora goes on to argue:

The causal effects of the structure on individuals are manifested in certain structured interests, resources, powers, constraints and predicaments that are built into each position by the web of relationships. These comprise the material circumstances in which people must act and which motivate them to act in certain ways. As they do so, they alter the relationships that bind them in both intended and unintended ways (1989: 200).

The strongest argument to be made in favour of this conceptual framework is that “actors frequently respond to their structured interests in creative ways that in principle cannot

be predicted in advance” (Porpora, 1989: 200). Porpora leans toward this account. I tend to agree with him because there *are* certain relationships which can exist “across differences in norms or rules” - such as those between people and job opportunities - “regardless of whether or not any of the participating actors realises that they are embedded in them” (Benton, 1981 cited in Porpora, 1989: 202). Hence, poor people who have no access to jobs may go through a regime change - a socialist-communist state to a democracy in transition - and will think differently about the structure of national politics but the fact that they have no access to jobs can remain, and, at the same time, be “external constraints on action” (Porpora, 1989: 207).

It seems to me, and I believe Porpora is right, that there are fundamentally three structures out there that signify 1) material reality, 2) intersubjective (ideal) reality, and 3) the system of human relations. Individuals collectively make sense of the first two in a recursive fashion reminiscent of Giddens. My reservation, *pace* Porpora, is when he says that “the trick is to develop a nonreductive materialism *giving primacy to the material* (emphasis mine) without embracing determinism”. If this asserts, as he says, “the underlying connection between material circumstances and behaviour”, then it works. If it assigns determinism to material before subjective reality, then it fails. On this call, a constructivist will want to avoid the charge that we are “reducing one unit of analysis - agents (states, decision makers) - to the other - structures (norms) (Checkel, 1998: 340).

My third move consists in making a series of observations on the implications of this discussion on language in Constructivism, in particular, and International Relations, in general, in order to pick up the question once again, why not language?

- Notwithstanding the constructivist proposition that structures and agents are mutually constitutive, our disciplinary incursions from IR into sociology (*e.g.* structuration theory and symbolic interactionist theory) have come out with a tendency towards structures, and more specifically towards *intersubjective* structures. It is important to note that many other constructivists have relied on the insights of sociological institutionalism and these have been based upon a particular branch of organization theory, which have also “systematically excluded questions of agency, interest and power” (Checkel, 1998: 341). This “neglect” is said to have been legitimate because of the “extreme agent orientation of most mainstream IR” (Finnemore, 1996: Chapter 1, Checkel, 1998: 340).

- It turns out that even the most sustained external critique of Constructivism - in terms of how it brackets the articulation of identity - comes from post-structuralism (recall Zehfuss); and here, once again, Constructivism along with language (in the tradition of Critical Theory and Foucauldian archetypal notions of humans as power's "intended targets" as well as its "effects" (Barnett and Duvall, 2005: 56) - fall *within* the subjective realm of structure. If my reading is right, therefore, constructivist thought has tended to privilege, and not least empirically, social structures.⁴⁸ This has somehow tilted the treatment of language in the same direction. Language has itself been obscured if not eclipsed by the ontological divide between agent and structure in IR.
- I believe that a corrective, a more-nuanced treatment of language within Constructivism compels us to look more deeply into parallel insights within sociology itself on alternative notions of social structure. This is, of course, if we agree that process ought to answer not only *how* change happens but also *why* it happens. Rightly enough, Porpora revitalizes "Marxian" sociological formulations of structure as the system of "class and intraclass relations such as domination, competition and exploitation" (1989: 198) along with the caveat to reject "positivist understandings of causality as involving deterministic laws" (1989: 202). This potentially brings back the force of material circumstances in the power of social structures and agency in the process of structural change.
- Constructivism is known to bridge the perennial dichotomy between structure and agent in IR. To advance this project, I have explored notions of language away from these present prejudices of Constructivism within sociology and forayed into the foundations of linguistics. My conviction is that our propositions on the centrality of understanding and explaining change through process and the delicate balance between agent and structure can be sustained in and through the study of language. If Onuf (speech acts in political society) and Kratochwil (persuasion in discourse and legal reasoning) reveal how language is used in the practice of international relations, I would like to explore the ways in which language is itself produced and the power of political actors contested.

What I fundamentally examine in this work is the structure of language on the one hand and the agency of state actors on the other. The present task is hence to bring into relief the mutual constitution of these two elements in the process of drafting the ASEAN Human Rights Declaration. I have discovered that the properties of the two types of social

⁴⁸ Jeffrey Checkel (1998) also makes this argument.

structures are reconcilable through verbal interactions in the process of “dialogue”. I set up a linguistic model in which language as text (“collective rules and resources that structure behaviour”) and language as context (“system of human relations” or between addressor and addressee) are ultimately inseparable in the “perspective of the word”. I would like to look at how a community of speakers generates via social mechanisms⁴⁹ indigenous linguistic forms and strategies and how these social practices influence the identity and interests of agents. To this we now turn.

1.2.4 THREE CONCEPTUAL TOOLS: TEXT, CONTEXT AND TIME

1.2.4.1 Language as Text

It is my contention that discourse, understood as *text* (a “system of signs”) and *context* (power and meaning) advances the constructivist project in that they influence the behaviour and properties (identity and interests) of agents. I take them up as separate analytical propositions and bring them back together at the end. I understand language as text in the Saussurian tradition: it is a system of signs held up by the principle of “arbitrariness” and “linearity”. A sign is the convergence of a concept and an acoustic image. If we, for example, take natural language to be such a system, then the words, phrases, paragraphs, etc. are instances or units of such a convergence. Signs have no meaning in themselves; there is no interior or natural link between the two. Rather, each sign “means” in relation to the other signs within the system – it is a meaning based on difference. In the case of human rights norms, I have chosen *discursive strategies* as one among many signs; it is the analytical unit of departure (made up of smaller units such as words) that make up the system in which political actors contest human rights notions in international negotiation. In the case of the negotiation of the ASEAN Human Rights Declaration, I discovered at least three instantiations of discursive strategies:⁵⁰

⁴⁹ For an excellent discussion see, HEDSTRÖM, P. & SWEDBERG, R. 1996. Social Mechanisms. *Acta Sociologica*, 39, 281-308.

⁵⁰ The definition of community is potentially problematic and must be handled with care. It is *sui generis*. At best, I use “community” in its broadest sense as some form of social and political unit; in this study, it is ASEAN. The notion of framing is backed up by a vast literature. A useful and critical starting point will be found in PAYNE, R. A. 2001. Persuasion, Frames and Norm Construction. *European Journal of International Relations*, 7, 37-61. I use the word “framing” in the sense that they are “employed by willful agents to situate issues within a broader social and historical setting”: Actor A communicates to actors B.C and D that new normative concern

Extra-framing: this is a move by actors to uncover meaning(s) of ideas/words using textual precedents as they are framed in international documents; *the strategic tendency is to "move outwards" the realm of community language sources and discourse.*

Intra-framing: this is a move that questions meaning, employing words and phrases based on differences engendered by the variety of socio-political and cultural settings. Actors frame meaning using almost always local and national language sources or discourse; *the strategic tendency is to "move inwards" the shared national and regional norms.*

Consensus or ground rule: this is a move toward the last resort. There is a meeting of the minds or an impasse. The latter is resolved either through trade-off, which means giving in mid-way; or through the ground rule, so that where one or more actors are in disagreement, the negotiations are either postponed or the issue is discontinued indefinitely. *It is chiefly context that defines where either "consensus" or "ground rule" becomes the strategy.*

Figure 1: Three Discursive Strategies

Signs according to Saussure have contrasting properties, which is what gives them “timeless” qualities. They are arbitrary and concrete, mutable and immutable. Arbitrary means that each of the three discursive strategies above in and of itself will not mean anything were it not for adjacent discursive strategies; each sentence or phrase in each strategy will neither mean anything were it not for adjacent sentences or phrases within each strategy and so on. John Joseph argues insightfully that readers of the Saussure’s *Cours de Linguistique Générale* (1968) are led to believe that all signs are related to thought not to the rationalizing effects of reason until they come to the chapter, “Mechanisme de la Langue”, where it states that “everything having to do with language as a system demands... to be treated from the point of view... of limiting the arbitrary” (Joseph, 2004: 69). Meaning is relational not illogical – this is arbitrariness. Signs “stop”

Z should be embraced, partly because z is” similar to already agreed norms x and y” (Payne, 2001: 43).

each other. A sign becomes “real” - a word becomes word, a sentence becomes a sentence and so on, when concept and acoustic image pair up in the linearity of time – this in turn, is concreteness. The point to be made here is that signs emerge ultimately within a system only within which they make sense. I have discovered that the relations between signs are structured across fundamentally three transactions. They are discursive pathways or processes through which norms are transacted in political negotiation. The conditions under which the text of the Declaration and human rights norms were negotiated can be classified under three types. I look at these types as genres of verbal interaction. A transaction is, at its most elemental form, understood as the (re)production of the text.⁵¹ The three transactions form the push and tow of forces through which a system sustains itself, and they are equivalent to the three “forces” that act on a pendulum when the latter is set in motion.

⁵¹ Voloshinov defines speech performance to include: “unofficial discussions, exchanges of opinion at the theater or a concert or at various types of social gatherings, purely chance exchanges of words, one’s manner of verbal reaction to happenings in one’s life and daily existence, one’s inner-word manner of identifying oneself and identifying one’s position in society, and so on... they are of course joined with other types of semiotic manifestation and interchange - with miming, gesturing, acting out and the like” (1973: 20).

Definition is the first type of transaction. It is the elemental transaction in human affairs when actors *describe* the text of a notion, a concept, a phenomenon, an event or simply a fact. It is a representation of reality. *Definition* (equivalent to “inertia”) is the force that makes the pendulum swing outwards in a given direction.

Contestation is the second type of transaction. It is a consequence of a conflict or a contradiction in representation; it is a struggle to win between at least two definitions. *Contestation* (equivalent to “gravity”) is the force that draws the pendulum back from the direction that definition takes it in.

Compromise is the third type of transaction. This consists in accommodating irreconcilable differences in representing logic, opinion, and belief systems. Actors agree on a new definition – a text is either reproduced or replaced. *Compromise* (equivalent to “wind resistance”) is the force that causes the pendulum to swing back and forth in shorter and shorter arcs. It is essentially the force that will eventually stop a pendulum from swinging and for language to “snap into place”.

Figure 2: Three Transactions (or the Three Forces of the Pendulum)

What happens is that compromises may lead back to definitions, further contestations and further compromises or an impasse. There is no assumption of linear progression. Now the problem that arises in this system is that either the signs relate to themselves in some eternal cycle with little or no recourse to novelty or change – be it “good” or “bad”, or that we simply do not have an idea of who or what provokes change. Humans have “no access” to the system. This problem is not particular to this model; it is symptomatic, it would seem, in the way structure is conceived to only limit. John Joseph argues that, according Saussure, “it is that languages inevitably change, yet no one can change them... were there some rational connection between signified (concept) and signifier (acoustic image), it would allow speakers of the language to intervene either to prevent inevitable change, or to initiate changes on their own” (Saussure et al., 1968: 106, Joseph, 2004: 72). This is the second property of systems as immutable and mutable. How does change, therefore, actually happen? Saussure has provided only cues, conceding to the possibility of change on account of “social forces” and “time”, after which he remains silent:

If a language were considered in a chronological perspective, but ignoring the social dimension (as in the case of a hypothetical individual living in isolation for hundreds of years) there might be perhaps no change to observe. Time would leave no mark upon the language. On the other hand, if one looked at the community of speakers without taking the passage of time into account, one would not see the effect of social forces acting upon language” (Saussure et al., 1968: 113).

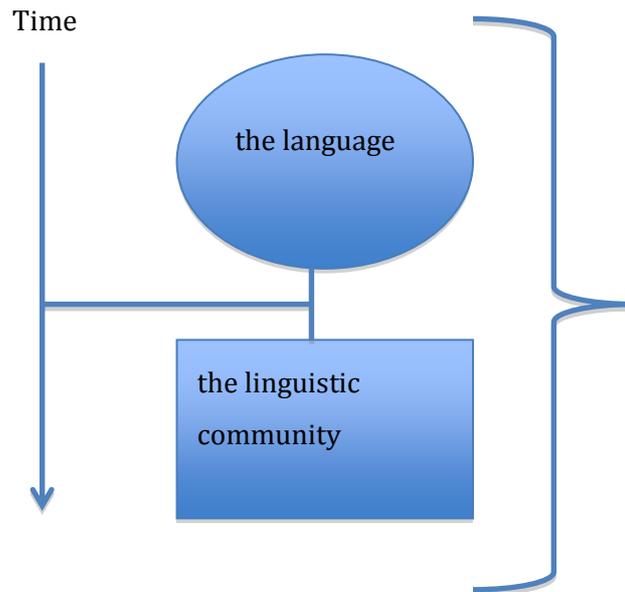


Figure 3: The Concept of Time in Saussure

It is important to note that Saussure modified his first diagram (1968: 112) on the necessary relation between linguistic structure (language and speech) and the “community of speakers” by adding the “indication of the passage of time” in a succeeding diagram above (1968: 113). Change happens when the social and the historical combine. Saussure fails to explain, however, *what* these social forces are and *how* they actually combine in time. This brings me to my next move in order to understand how text, social forces and time interact to change normative structures in international politics.

1.2.4.2 Language as Context

Language is *context*. My reflections stand on the shoulder of V.N. Voloshinov (1973) in this regard because the philosophy behind the patterns I have discovered through which social

structures are “mutually constituted and co-determined” is in consonance with the Voloshinov’s Marxist philosophy of language – his “spirit of the sign” - which takes text into the “sphere of organized social intercourse” (1973: 46). Against the rather cold, closed and rigid mechanism of a self-perpetuating system of signs, Voloshinov gazes on language as a “continuous *generative process* (emphasis mine) implemented in the social-verbal interaction of speakers” (1973: 2). Voloshinov decries the inner logic of Cartesianism and rationalism because the linguistic sign is *meaningful*:

In order to observe the process of combustion, a substance must be placed into the air. In order to observe the phenomenon of language, both the producer and the receiver of the sound and the sound itself must be placed into the social dimension (1973: 46).

If Saussure looks at the structure of language as a system of signs, Voloshinov looks at how signs are a conjunction or a “clash” of systems – or indeed “a system of systems”. They fundamentally disagree on the source of meaning; for Saussure it is to be found in the way signs are positioned in relations of difference against each other within a system; for Voloshinov a sign is always situated in the manner in which it is generated by a given social collective. Both thinkers converge in systemic thought because structures *are* there – it is in how they *become* that they see differently. Recall that for a good constructivist, Wendt would argue, structures constrain in as much as they construct and they cannot be understood apart from the self-understandings of political actors and the social world that they inhabit. Voloshinov, meanwhile, argues that the underlying movement in the creation of signs is understood in a relationship given that a “generative process can only be grasped with the aid of another generative process” (1973: 4). “Understanding is a response to a sign with signs” (Voloshinov, 1973: 4). The challenge as I see it is to take the system of linguistic forms, such as the discursive strategies we have classified above, back to its speakers because “what is important for the speaker about a linguistic form is not that it is a stable and always self-equivalent signal, but that it is an always changeable and adaptable sign” (Voloshinov, 1973: 68). Voloshinov hence maintains:

Thus the constituent factor for the linguistic form, as for the sign, is not at all its self-identity as signal but its specific variability; and the constituent factor for understanding the linguistic form is not recognition of “the same thing,” but understanding in the proper sense of the word, *i.e.* orientation in the particular given context and in the particular, given situation – orientation in the dynamic process of becoming and not “orientation” in some inert state (1973: 69).

This converts Saussure's language and the linguistic community into what they are in reality: living things!

I shall now draw the analogies and reformulate the terms that we have so far defined under Saussurian notions of language as text into what they mean for the pendulum model that I wish to set up under Voloshinov's line of thought. There are three crucial "corrections" to be made, *pace* Saussure: (1) signs (in this case, discursive strategies); (2) the system of signs (which has as its structure the three dialogic performances); (3) and finally, the linguistic community (the rather hapless community of speakers with no recourse to change either of these two elements). Firstly, the three discursive strategies that I have uncovered are what Voloshinov conceives as "behavioral utterances", which are in turn determined by the "particular situation" and the "audience" (Voloshinov, 1973: 96). These specific speech genres form to an appreciable degree under the influence of stabilizing social customs and circumstances:

Each situation, fixed and sustained by social custom, commands a particular kind of organization of audience and, hence, a particular repertoire of little behavioral genres. The behavioral genres fits everywhere into the channel of social intercourse assigned to it and functions as an ideological reflection of its type, structure, goal, and social composition (Voloshinov, 1973: 97).

Secondly, the three performances would be what Voloshinov calls instances of "verbal interaction" – the basic reality of language (1973: 94) – or what I have denoted as the discursive processes that reproduce text. They are "performances" engaged in "ideological colloquy of large scale" so that they "respond to something, object to something, affirm something, anticipate possible responses and objections, seek support, and so on" (Voloshinov, 1973: 95). The problem that arises, he points out, is the study of the "connection" between these concrete verbal interactions and the "extraverbal situation" – both "immediate situation" and, through it, the "broader situation" (Voloshinov, 1973: 95). Finally, both the strategies (the "instantiations" or the actual use of behavioural genres) and the dialogue performances (forms of verbal interaction) remain inert elements if they fail to align within the community of speakers - the womb of language. Beyond the immediate and the particular, it is the broader context in which both elements are naturally situated. Impregnated with ideas, the fellowship of speakers make the ground fertile for the complex composite of the physics of sound, the physiological capacity for its production and reception and the psychology of the "experience" of the speaker and

listener, and allow for language to grow and acquire soul (Voloshinov, 1973: 46). Communities gather towards a certain end.⁵² This is *not* to say that the overall telos is motivated by a harmony of interests; what is at stake rather, is an interest in harmony – of whatever sort that may be.

⁵² I am grateful to Jim Martin and our conversations, which have helped me refine this dimension in the notion of community.

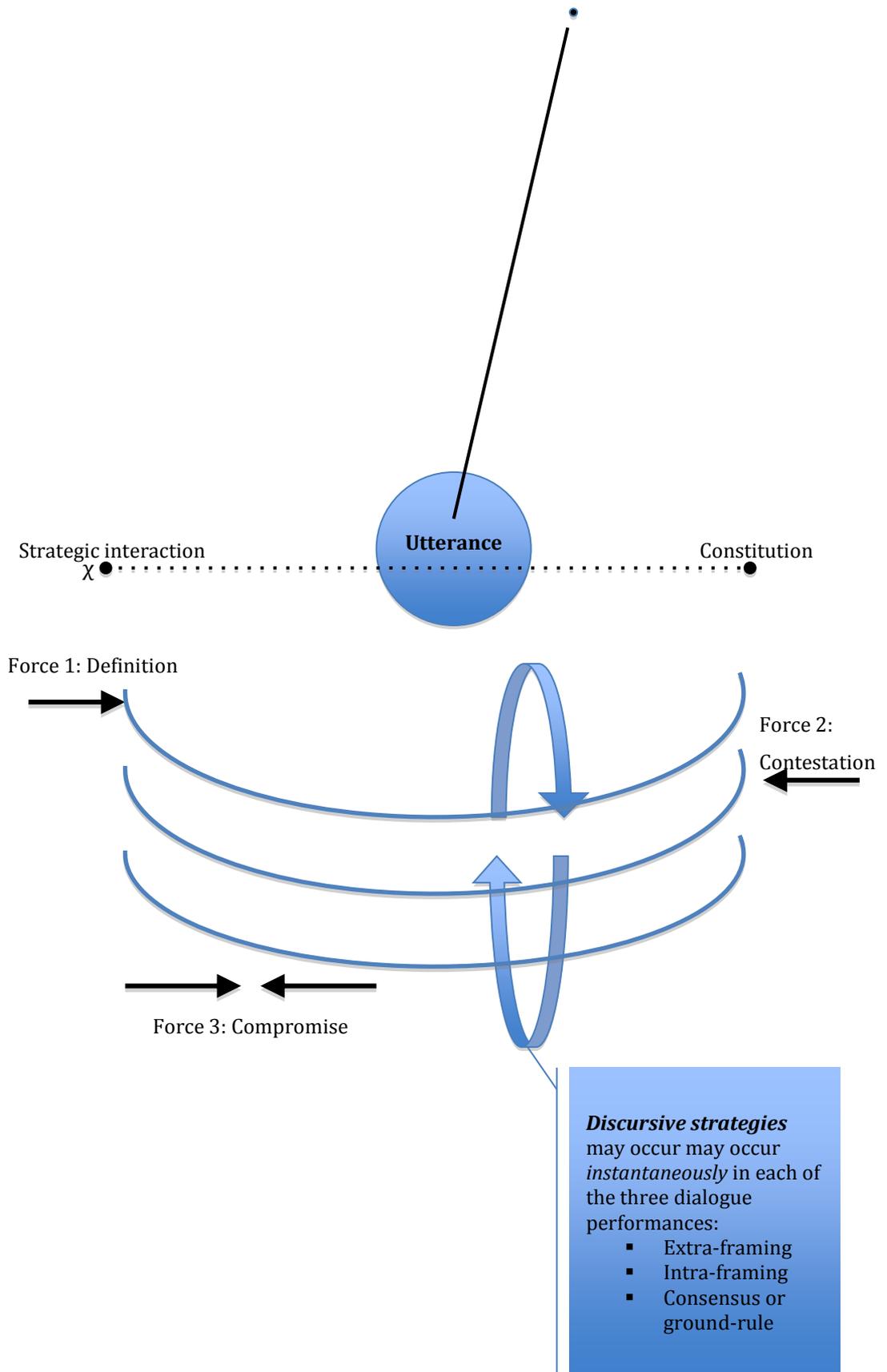


Figure 4: The Pendulum Model (“Language Pendulum”)

1.2.4.3 Time

There is the outstanding part of the pendulum heretofore unnoticed which determines the speed of one full swing. It is the string from which the bob hangs. The longer the pendulum, the slower the pendulum swings; conversely, the shorter the pendulum, the faster the swing. It is said that this represents an absolute principle that will always work no matter the type of design. The length of the pendulum relates to the distribution of time in norm negotiation. And it is the third and final conceptual key. It is a difficult concept to grasp but the model cannot do without it – the best Saussure could do – after naming it – was remain silent. Our elemental notions of time are based on the rhythms of the human body and the movement and the properties of the Earth. Time is the interplay between sleep and nourishment, between night and day, and the seasons that intervene in cycles which are themselves changing. Given these most basic human needs and functions it is already evident that we agree on the activities but “disagree” on the exact time for their exercise. Locating time, therefore, is a physical, mental and ecological set of intuitions inherent in humanity. Such intuitions are perceived from the perspective of the individual on one end and the community on the other. In the pendulum model, therefore, instead of defining what it is, the view is to define what it does. Just as the physical forces behind motion parallel dialogic performances, I find that the function of time in real dialogue works on the same mechanics behind the pendulum: all forces being equal, the longer the bob, the longer the oscillation periods are between the poles of social creativity. Hence, presumably “longer” dialogue performances, “deeper” introspections and so on. This somehow obscures, however, the fact that some norms are negotiated over a relatively short time. Put another way, time does not cause agreement. What time does, I believe, is that it constitutes the conditions under which the movements of a dialogue can actually take place. Without time, there can be no dialogue, no strategy and no utterance. The linguistic sign as much as the social forces which construe it are predicated on interaction – that is, the *dialectical movement* between performances, between strategies, and within utterance. Recall the point made above: understanding a sign is an “act of reference between a sign apprehended and other already known sign(s)” (Voloshinov, 1973: 4).

Time in the Pendulum Model frames text and context. Time comprises the *terms* of dialogue, not its effects. Time, therefore, crucially provides the conceptual and material framework from which to make ultimately comparisons of structural change in social systems. The phrase “let’s talk” is perhaps the most apt metaphor in relating time to the production of discourse. “Let’s talk” is the proposition. It is to meet, to encounter and to

get to know but it does not come with the imperative to agree. To talk is to engage discursively where language can either be the means or the end, or indeed both, where a “meeting of the minds” is desired, at least, to some degree. The notion is for parties to explore at the initiation of the encounter and to create parameters for interaction. In this sense, time contextualizes not only actors in space (the existence of interlocutors, norm drivers and takers, located and bounded geographically) but also social structures. The creation of discourse in time is both active and passive and it is this quality that allows for the consequent effective distribution of ideas to take place.

Out of time and
place: sign as text

Timeframe:
sign as text *and* context

Out of time and
place: sign as text

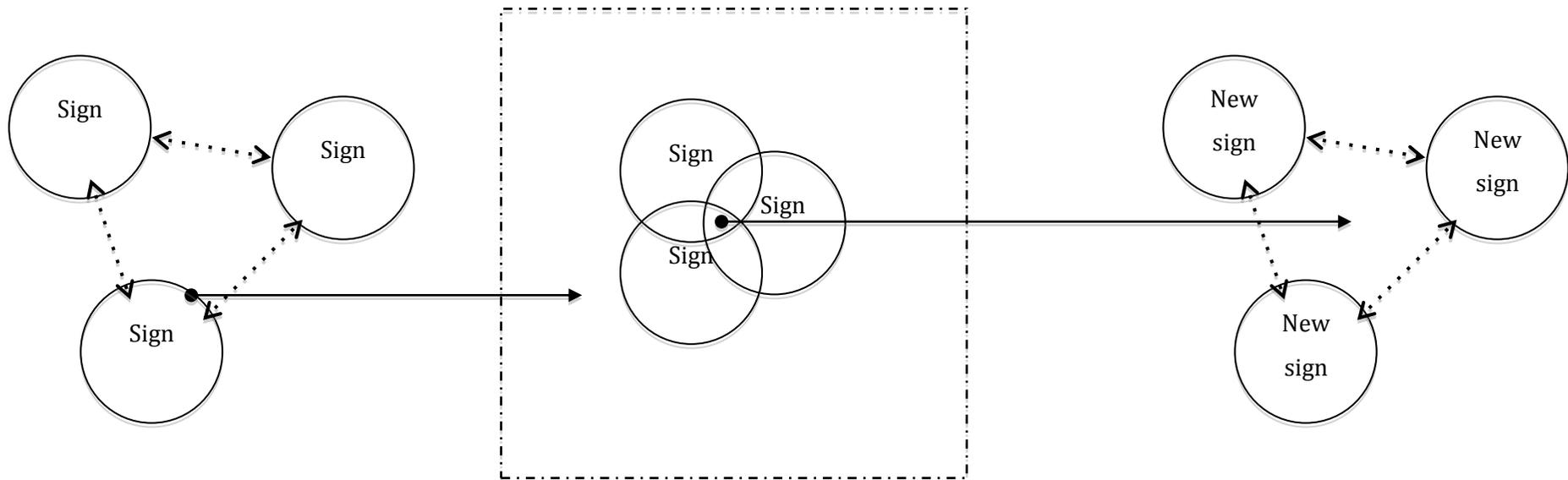


Figure 5: The Concept of Time in the Language Pendulum

1.2.5 HOW SOCIAL FORCES ACT THROUGH LANGUAGE OR THE “PENDULUM EFFECT”

I have thus assembled the components of the language pendulum, which essentially runs on three generative mechanisms. Metaphorically, the next move is taking the pendulum out of the vacuum and into the world, the natural environment where a combination of forces (*e.g.* definition-inertia, contestation-gravity, compromise-resistance) can act on the motion of the utterance. By using the term *generative mechanism*, I situate the language pendulum amongst what Hedstrom and Swedberg call “theoretical constructs that provide hypothetical links between observable events” (1996: 290). This is a variation on the view by Elster (1989) that a mechanism should provide “an account of what happened as it actually happened and not as it might have happened” (Hedström and Swedberg, 1996: 290). I tend to think with my colleagues in the former who believe that such a project will “take centuries” – if it were technically possible – because a full narrative of the events “immediate and distant”, “macro and micro”, will always be selective. Hence a mechanism, *pace* Elster, can refer only to “a subset of the potentially important events, and they can therefore only give plausible accounts of what happened as it could have happened” (Hedström and Swedberg, 1996: 290). The principle that informs this view is that a “really good” social mechanism is not a detailed descriptive narrative but *like a really good biological theory* – one that “sees through the clutter of evolution to the basic mechanisms lying beneath them” (Crick, 1989, cited in Hedström and Swedberg, 1996: 291). The language pendulum is a composite of three such mechanisms.

1.2.5.1 Macro-to-micro

The **first mechanism** (*macro-to-micro*)⁵³ corresponds to the system level of analysis or how the aggregate of relations structures the units of the system represented by the community of speakers. Recall a point made earlier: “utterance as such is wholly a product of social interaction, both of the immediate sort as determined by the circumstances of discourse, and of the more general kind, as determined by the whole aggregate conditions under which any given community of speakers operate” (Voloshinov, 1973: 93). What,

⁵³ Macro-to-micro mechanisms (or “situational mechanisms”) “link systematically and reasonably precise way a social structure or other macro-sociological state to the beliefs, desires, and opportunities of individual actors” (Hedstrom and Swedberg, 1996: 297).

therefore, happens in actuality is that actors have recourse to the three discursive strategies above, which are instantiated in each of the three performances. The discursive pathways of beliefs and ideas, therefore, feed into each other, so that there are at least three cycles going on; first, is the movement of the three performances following the physics of a pendulum; second, is the movement of the three discursive strategies within each performance; and, not any less significant, is the movement of the three discursive strategies across the three performances (see figure above). What happens is that *in context* compromises may inevitably lead back to definitions, further contestations and compromises – dialogic performances *cum* discursive strategies represent probabilities in dynamic cycles - until language “snaps into place”, agreements are “set in stone” and norms begin to “settle”.⁵⁴ The language pendulum assumes some form of community “telos” (going towards a certain goal); it does not, however, predict some unassailable progress towards it. The pendulum of time lends itself metaphorically because movements proceed in eternal cycles. The *snap* is a human “obstruction” to make temporal sense of meaning, but the word will move on in perpetuity.

1.2.5.2 Micro- to-macro

This leads me to the **second mechanism (*micro-to-macro*)**⁵⁵ that corresponds to the unit level of analysis that comes from the viewpoint of the system’s parts – its individual units. How do agents via the utterance influence social relations? Inside the individual, there is the psyche, which is inner speech or experience. Outside the individual is ideological sign, which is a shadow but also a segment of *material* reality, always having some kind of “material embodiment, whether in sound, physical mass, color, movements of the body” (Voloshinov, 1973: 11). There is a sense, however, in which these two implicate each other inevitably and tacitly in the word: “utterance is constructed between two socially organized persons and, in the absence of a real addressee, an addressee is presupposed in

⁵⁴ The argument of Elster is noteworthy in this respect: “... causal explanations must be distinguished from predictions. Sometimes we can explain without being able to predict, sometimes predict without being able to explain” (Elster, 1989, cited in Hedstrom and Swedberg, 1996: 283).

⁵⁵ Micro-to-macro level mechanisms (or “transformational mechanisms”) at which a “number of individuals interact with one another and the specific mechanism (which depends upon the *type of interaction*) describes how these individual actions are transformed into a collective outcome (Hedstrom and Swedberg, 1996: 297-298). The “type of interaction” which I have chosen to emphasize highlights my agreement with Barnett and Duvall (2005) on the types of social relations delineated above.

the representative of the social group to which the speaker belongs” (Voloshinov, 1973: 3). Signs can only arise on “interindividual territory”; it is essential that “two individuals be organized socially, that they compose a group, a social unit; only then can the medium of signs take shape between them” (Voloshinov, 1973: 12). From the vantage point of content of the utterance, however, never the twain shall part. The distinction within, argues Voloshinov, is only a matter of degree.

I see, therefore, language and discourse “swinging” like a pendulum somewhere along the range of social relations in international politics. The swing represents the manner in which the agent (psychic experience and ideology) moves between the two poles of social creativity. On the left end are relations of interaction between social beings who have fixed preferences, values and ideas. They are, according to Barnett and Duvall “preconstituted social actors” for whom “power nearly becomes an attribute” and is used “knowingly as a resource to shape the actions or conditions of action of others” (Barnett and Duvall, 2005: 45). On the right end of the axis lie relations of constitution. Actors are “analytically preceded” by the social relations which constitute them as social beings along with their capacities, values and identities (Barnett and Duvall, 2005: 46). It would appear that on the left-end language is mainly functional and instrumental; it serves as a means to a further end; while on the right end, language resembles Habermasian notions of communicative action where language is essential - it partakes in the process of constructing the properties of agents.⁵⁶ In reality, via the utterance, language is creative end to end. Language is causal and constitutive *ab initio*.

1.2.5.3 Micro level

If the pendulum is the key operationally, then dialogue is the key metaphorically. The final, **third mechanism** is what I call the “dialogue within the dialogue”, which is the physiology and psychology of the utterance itself – *how it comes to life*. This is the **micro level mechanism**.⁵⁷ Voloshinov calls the utterance the “dialectical synthesis” that “is constantly taking place again and again between the psyche and ideology, between the inner and the

⁵⁶ For the seminal exposition of this idea in IR literature see, RISSE, T. 2000. "Let's Argue!": Communicative Action in World Politics. *International Organization*, 54, 1-39.

⁵⁷ Micro level mechanisms (or “individual action mechanisms”) reveal “how a specific combination of individual desires, beliefs, and action opportunities generates a specific action” (Hedstrom and Swedberg, 1996: 297).

outer” (Voloshinov, 1973: 40-41). *Dialogue* is the metaphor for verbal communication where strategies collide and re-assemble. In the alternating lines of dialogue performances, one and the same discursive strategy can figure in two mutually clashing performances. And the reason for which these connections are complex and in sui generis is that verbal interactions cannot be divorced from “social acts of a nonverbal character” (Voloshinov, 1973: 95). Once the *context* of a sign - the discursive combination of performances, strategies, producer and receiver, in this case - is “read”, language ceases to be mere a linguistic form and becomes a fact of social milieu (Voloshinov, 1973: 97).

In the meantime, the *dialogue within* cannot be better captured than by the phenomenon of *introspection*. It is a movement that is inward and outward. I believe this is where the analysis of the level of interaction genuinely belongs because it can be understood from the point of view of the individual as well as the systemic structure. Put another way, it is where the three sets of cycles in the consciousness of the individual meet. Introspection is the *understanding* of the inner sign and it is “perfectly consistent and continuous” (Voloshinov, 1973: 11):

Thus, there is no leap involved between inner experience and its expression, no crossing over from one qualitative realm of reality to another. The transit from experience to its outward expression occurs within the scope of the same qualitative realm and is *quantitative* in nature. True, it often happens that in the process of outward expression a transit from one type of semiotic material (*e.g.* mimetic) to another (*e.g.* verbal) occurs, but nowhere in its entire course does the process go outside the material of signs” (Voloshinov, 1973: 28).

It is introspection that exploits the full semiotic potential of the linguistic sign; and the key to knowing whether it has reached this point is what I call specificity – or the *perspective of the word*, which refers to the capacity of language to accommodate contradictory notions:

In actual fact, each living ideological sign has two faces, like Janus. Any current curse word can become a word of praise, any current truth must inevitably sound to many other people as the greatest lie. This *inner dialectic* quality of the sign comes out fully in the open in times of social crises or revolutionary changes. In the ordinary conditions of life, the contradiction embedded in every ideological sign cannot emerge fully because the ideological sign in an established, dominant ideology is always somewhat reactionary and tries, as it were, to stabilize the preceding factor in the dialectical flux of the social generative process, so

accentuating yesterday's truth as to make it appear today's
(Voloshinov, 1973: 23-24).

The above two statements are as compelling as it can get on the structural capacities of language in social relations. Language represents a continuum through the interminability of the creative process; it is indistinguishably physical and ideational. What happens, in fact, is that all three mechanisms are generated from various points - *macro, micro-to-micro, micro* - but all converge in the cycle of a dialogue.⁵⁸ *This is how the pendulum – the utterance – snaps into place.* Social reality is one in language.

1.2.6 APPLYING THE LANGUAGE PENDULUM

Language takes on the constructivist project by demonstrating the effects of its capacities on the structure of political and social institutions. The case that I will examine is the structure of the international human rights regime. The Language Pendulum is the mechanism through which ASEAN has created its own human rights regime structure. I therefore take language as the set of dialogue performances and the strategies marshalled by the Representatives of the ASEAN Intergovernmental Commission on Human Rights to be the variables of the this study. They vary as instances of the international human rights regime based on the international bill of rights that has evolved from the UDHR 1948 (see Appendix B). I use the UDHR as the baseline of analysis for three main reasons: firstly, 1948 is the year when human rights was effectively enshrined as text by the international community through the United Nations System; secondly, the comparison is between two similar “speech acts” – two declarations – that are essentially non-binding instruments but normative in nature; and finally, the UDHR 1948 is the “canon” on which ASEAN in fact agreed to base its work; the constant refrain in the discussions was “we want a document that is UDHR-plus”.⁵⁹ In order to understand the human rights provisions of the ASEAN Human Rights Declaration, they must each be placed in context by reconstructing their evolution via the language pendulum. By focusing on the effects of dialogue on the negotiation of the AHRD, the reasons why member states agreed to a human rights regime

⁵⁸ Hedstrom and Swedberg (1996) build the typology that I have just used from macro-micro-macro model on social action by James Coleman (VWV). In this case, my serendipitous discoveries have been the cyclical movements of the performance and strategies.

⁵⁹ Personal notes of the author.

despite their diverse political ideologies will hopefully come to light. The presentation of data will proceed in three steps:

Drawing the historical account. The human rights provisions in the AHRD were formally negotiated over ten months and a number of them were debated either at length or in separate stages spread between two to three meetings. In order to provide the texture and substance of a given human rights article, I give an account of the negotiations as they happened in the course of the meetings.

- Were there “blueprints”, documents or sections (phrases and paragraphs) used as examples, cited or quoted, modified or adopted verbatim in the initial formulation?
- Who were the parties (the addressors and the addressees) to the negotiations of the text, including the “privileged witnesses”?⁶⁰
- Who were the most influential parties? Did they lobby for specific provisions?
- When was the text drafted and in what circumstances? How long did the negotiation take?

Plotting the dialogue. Dialogue performances embed what I call “pressure points” which emerge in varying intensities or gradations according to the extra-verbal situation, which will have been delineated in the preceding historical account. A dialogue performance construes the relations created by rights entitlement: who does what to whom and *for whose benefit?* The last component is of particular importance to the pendulum and is inspired by the work of Voloshinov because the various levels of dialogue (macro-to-micro, micro-macro, and micro level) are the sites of class struggle.⁶¹ The fundamental key is to understand an utterance as someone (the actor or the individual who instigates the process), doing something (medium) on someone (the object of the process), and for someone (the “beneficiary” of the process). This is what Voloshinov means when he argues that:

⁶⁰ I owe this point to Luc Reychler who helped me look at the variables of a research experiment.

⁶¹ “(Social) existence reflected in sign is not merely reflected but *refracted* (I think both processes comprise the recursive nature between agents and structures). How is this refraction of existence in the ideological sign determined? By an intersecting of differently oriented social interests within one and the same sign community, *i.e. by the class struggle*” (Voloshinov, 1973: 23).

The immediate social situation and the broader social milieu wholly determine – and determine from within, so to speak – the structure of an utterance...

The immediate social situation and its immediate social participants determine the ‘occasional’ form and style of an utterance. The deeper layers of its structure are determined by more sustained and more basic social connections with which the speaker is in contact (1973: 86-87).

Voloshinov exemplifies by arguing that even a mere “cry” for hunger is meaningful (*i.e.* “socially oriented in its entirety”): it will hence “sound in one way or another – like a demand or request, insistence on one’s rights or a plea for mercy, in a style flowery or plain, in a confident or hesitant manner, and so on” (1973: 87). What, therefore, counts as experience and ideology, is the “individualization” of an utterance (*i.e.* defines, contests, and makes compromises). The second analytical step will be, therefore, to look at how addressor and addressee negotiate – through the performance of dialogue - the points of resistance which include: the agents, the beneficiaries, and the medium (in this case, human rights). The model that I draw illustrates the effect of language on normative structures over time. The pendulum is the process that tells us not only *where* (in the text) resistance and appropriation happen (structure) but also *who* make them happen (agency).

- How was a given text transacted - defined, contested, or brought to a compromise?
- What were the strategies used (extra-framing, intra-framing, compromise or consensus) by whom?
- Did individuals or parties shift positions during and after the negotiation?

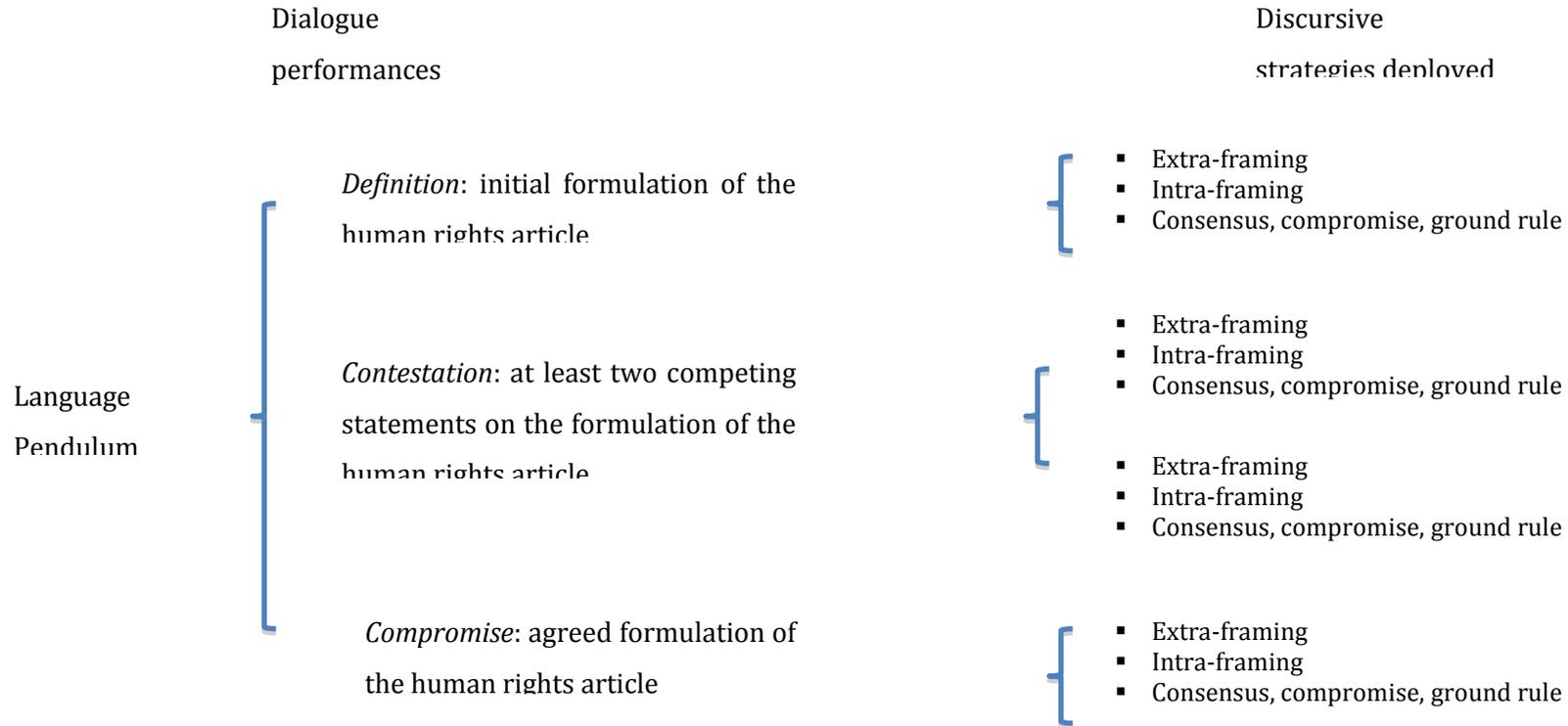


Figure 6: Plotting the Dialogue

Exposing the “perspective of the word” - a new text. The final step is an analysis of how addressors and addressees (the parties in the negotiation) may have brought new actors and beneficiaries in the AHRD - or retained the old, or brought new claims, thereby “reproducing” or subverting provisions in the UDHR 1948. What appears to be an old standard formulation is reproduced for a different set of motives and by a different set of political actors (*i.e.* a different set of identities and interests).

- Who or what has been resisted or appropriated from the “original” notion of the human rights provision?
- Does the new formulation expand (*i.e.* give more entitlements) the human right in question or not?
- Does it extend the right to more groups or stakeholders or not?
- Furthermore, while the most obvious discourses of rights have arguably been those generated by UN, international and regional documents, the question of whether there is indigenous rights talk in various national traditions is equally crucial (Wright-Carozza, 2003). Where else from does human rights get its ideological force?

I am interested in the conditions under which and through which normative structures are constituted through text. By asking these questions, we are then able to determine the relative force of the dialogue performances and discursive strategies and introspection and provide possible explanations why a particular meaning has settled over or in place of another. A text is always “new” because of *context*.

1.2.7 SUMMARY

Ideas, values and beliefs, which make identities possible, matter in the realm of international politics and it is language and discourse that distribute them amongst political actors. I made the following moves in this chapter in order to delineate a critical analytical framework that I have called the Language Pendulum:

1. I initially rescue language and its preeminence in the construction of the social reality via John Searle. It is language (comprising social facts) and its “intuitive

features” which allow us the *possibility* to construct this *social world* over material reality (or brute facts) (Searle, 1996: 31) that we are interested in. The power of language to structure international politics has been present in the thinking established by the constructivist school in IR. This led me to lean heavily on the arguments by Nicholas Onuf, Friedrich Kratochwil, and Alexander Wendt. Wendt was attacked, however, for being inattentive to the assumptions essential to the place of language and discourse within Constructivism itself. By pointing out where he was possibly misrepresented by the critique, I recovered the key elements of constructivist thought (structure, process or interaction, and sociality) that provide the basis from which language can be a powerful analytical framework in explaining the negotiation of norms.

2. The mutual constitution of structures and agents has tended to privilege structures, and in particular intersubjective structures. A fruitful discussion of language, in IR more generally, will not yield on such grounds. The examination of a multidimensional and complex phenomenon as is the case of the expansion of the international human rights regime in Southeast Asia requires widening the conceptual aperture of the discipline along the lines of what has been called “integrative pluralism” (Dunne et al., 2013). I borrow from linguistics to clarify my position on the ideology of language (text and context). The capacity of language to invent and reproduce meaning is by virtue of its structure (causal and constitutive) as well as the agency of political actors. I borrow from Ferdinand de Saussure in his contention that meaning in language is not to be found inherently in words; they are set in negative and positive relations against each other so that “a system of signs” emerges. A sign is the point at which an idea and an acoustic image converge. A word or a sentence, a three-page declaration or treaty or an utterance of a sort recorded in oral or written form are instances of the linguistic sign.

I am ultimately indebted to V.N. Voloshinov for helping me bring language back into the fold of social relations and time. Language as sign must be understood in its “natural” environment; it is only by gathering the elements within its social purview that we can analyse how structures undergo change and explain the trajectory of international politics and the norms which make it meaningful.

3. Language as text and context tells us more than language as rule and norm. Consequently, I assemble the components of the Language Pendulum and the mechanics behind its “movements”. I establish the model that illustrates

indigenous discursive structures – based on my own observations of how an actual living document – the ASEAN Human Rights Declaration – was drafted over a period of ten months (February 2012 – November 2012).

If dialogue is the key metaphorically, then the pendulum is the key operationally. The latter's three mechanisms (macro-micro, micro-macro, micro) constitute the model for understanding the system of signs embedded in the system of human relationships (*i.e.* the process of dialogue): discursive strategies are behavioural utterances; dialogue performances are verbal interactions; and the political actors (addressors and addressees) comprise the linguistic community. The language pendulum is my attempt to establish a middle-range theory on the negotiation and expansion of human rights norms drawing from IR, sociology and linguistics.

Political actors are “budded” by language: from fixed preferences to genuine dialogue, or vice-versa, from credible negotiations to disbelief and distrust. There is no necessary and linear progression either in terms of the three transactions or the range of social relations; new actors and new textual and discursive samples emerge. The result is that compromises inevitably lead back to definitions, further contestations and fresh compromises until the pendulum snaps into place. Recorded (oral or written) agreements are hence pivotal. They fix the struggle and contest for norms and institutions and they become the reference points for transformational politics. The sum total of texts and discourses is what gives the political community its identity and the power to negotiate on its own terms in order to distinguish themselves from other units and levels of interaction in the international system. A new “indigenous” discourse takes over. It is towards this task that we shall now direct our energies.

PART 2: How the ASEAN Human Rights Declaration Was Drafted

“Our policy is to avoid ‘*guarantee* of human rights’ though we might not object to a declaration.”

Charles Webster, historian who acted as UK Foreign Officer at the time of the preparation of the Charter of the United Nations, *The Strange Triumph Human Rights* (2004: 392)

“There was substantial agreement even between the spokesmen for different ideologies on the definition of the traditional rights such as the right to a fair trial, even though agreement on a text sometimes concealed an unexpressed disagreement over the meaning of particular words. Thus the word “democratic” in Article 29 would probably be interpreted differently in London and Moscow.”

John Humphrey, one of the 9 members of the Drafting Committee of the 1948 Universal Declaration of Human Rights, *Memoirs* (1983: 426)

“Why are you trying to fit the braces of an old man on a 2-year-old child...? ASEAN is on the road to human rights but the West cannot be dictating.”

Ambassador Rosario G. Manalo, Philippine Representative to the Drafting of the ASEAN Human Rights Declaration, *How West Was Won* (Villanueva, 2012)

Chapter 2.1

Introductory Notes

To understand and explain the influence of ideas and language in the formation of the international human rights regime, it is necessary to give an account of how norms are negotiated. I have chosen as my case study the drafting history of the ASEAN Human Rights Declaration (AHRD) by the ASEAN Intergovernmental Commission on Human Rights (AICHR). ASEAN has constructed the international human rights regime according to the interests of regional and national political elites, the campaign of regional, national and international civil society organisations, and based on the claims of rights entitlements from the national governments (*i.e.* the duties and responsibility of states). Human rights was contested not only on the basis of what human rights is *per se* but on the terms upon which rights claims exist; these terms include the power of regional and international norms in the exercise of practical and legal reasoning (Kratochwil, 1991, Klotz, 1995). The three succeeding chapters, therefore, trace the arguments, portray the individuals who made them, and describe the immediate events that surrounded them.

Each chapter consists of three components. Firstly, I provide a close historical account of how a human rights provision took shape - a first-hand narrative of the negotiations of the Declaration from February until November 2012. I provide the official and actual dates of the meetings which were devoted specifically for the drafting of the AHRD. The dates for the regional consultations, special meetings with the ASEAN foreign ministers and the regular meetings of the AICHR, however, are specified where and when necessary. I do not provide an account of the AICHR regular meetings in the course of the negotiations. There were a total of four regional consultations and they have been labeled from the 1st to the 4th not in terms of types (of which there are two: consultations with ASEAN Sectoral Bodies and CSOs). I was present in all the meetings except January. I have relied on my conversations with colleagues as well as the Representatives for this section of the

synopsis. Unless otherwise indicated all material in the section under “First-Hand Account” is original and forms part of my personal notes on the drafting history of the AHRD. I provide citations exceptionally as when personal conversations were held with regard to information that had to be verified after the negotiations had already taken place. Second, I provide a table on the evolution of the article, which is provided in each of the chapter. Finally, a discussion of the “perspective of the word” rounds off the chapter; I draw an abstraction of the dialogue performances (definition, contestation and compromise) and discursive strategies (extra-framing, intra-framing and compromise) based on the mechanics outlined by the language pendulum. The sections taken together expose the atmosphere and background of the elements and dynamics of the negotiations. And by identifying the points of resistance and appropriation, I hope to focus on the major norm impediments and facilitators in accepting rights language and account for the discursive remedies that political actors deployed in the formulation of a new article - *a new sign*.

2.1.1 EVOLUTION OF THE ARTICLE

Three essential cues and three signposts require elucidation. The first cue is that the AICHR official meetings between January and November 2012 comprise the second stage of what is called the “**two-tier approach**”; the first stage refers to the work of the Drafting Group from July 2011 to January 2012 (2013: 26), which consisted of technical assistants and state officials and bureaucrats sent by the Representatives and their national governments. In practical terms, however, their draft was considered largely insignificant by several of the AICHR Representatives. This notwithstanding, the work of the Secretariat and the Working Group was not without consequence. Their drafts had not only worked out the conceptual and legal assumptions of the succeeding discussions but were also indicative of the contours and boundaries of national positions. Some of the members of the Drafting Group were, in fact, indirect parties to the negotiation as the assistants; and in the case of Laos and Cambodia, became eventually, themselves, the steady alternates of the Representatives. Even a simple cursory look at their drafts confirms that formulations did not stray from the international bill of human rights (see Appendix B) and national constitutions of member states, which became the shared concerns of the Representatives. The first signpost is, therefore, a comparative table for the human rights article under analysis to give the reader a detailed look into the genealogy of the text, from the earliest version (*i.e.* the Zero Draft of the ASEAN Secretariat) to the succeeding official version,

which in practice is the last draft of every AICHR meeting on the Declaration. They form the chain of AICHR working drafts. This is provided in every chapter.

2.1.2 CHRONOLOGY

The second cue is that as one meeting gave way to the next, what emerged was the need and desire of the ten Representatives to think and act as the community of ASEAN states; both the principles and roster of rights were to be contemplated in the context of national and regional socio-political realities. This meant that, for most of the Representatives, human rights recognised on the regional level were not to contradict the national laws and the politics of the member states. As a consequence, the Representatives felt compelled to claim ownership of the Declaration by drafting it themselves. This attenuated the influence of not only the preceding two drafts compiled by the ASEAN Secretariat and the Drafting Group, respectively, and the suggestions of civil society, but also the individual contributions of each of the AICHR Representatives during the official negotiations. The Representatives walked on a tightrope in carrying out their mandate to balance the exigencies of the member states and the needs and desires of national constituencies and various interest groups in ASEAN. Language played out at least two functions. In the event of contradictions, a word, a phrase or a formulation was chosen to *fix or freeze* the normative ideal or aspiration - and at the same time - leave the interpretation *open and wide*. It is in this respect that a “biography” of the Declaration especially in terms of how, when, and for and on whom these linguistic strategies operated is necessary. The second signpost I provide for the reader is a synopsis of the meetings in chronological order to give an account of the most salient features of the meetings devoted officially to the drafting of the Declaration from beginning to end. I believe there were three phases:

2.1.2.1 First Phase: Laying the Groundwork

*Meeting 1. Siem Reap, 8-9 January 2012.*⁶²

The first “official” meeting for the ASEAN Human Rights Declaration kicks off. But for all intents and purposes, the agenda focused on the administration of the drafting process. The Representatives first sat down to propose a calendar of meetings for the specific design of negotiating the list of human rights provisions that would comprise the Declaration. The draft would have to be ready by the 21st ASEAN Summit in November 2012. Precise dates and venues were tabled, but they had yet to be confirmed. Second, it was agreed that Representatives unable to be present in any of the meetings should appoint alternates to whom the Representatives must themselves give full mandate. Finally, the **Drafting Group** presented their report and the “**Basic Draft**”. Between July 2011 and January 2012, the ten Representatives sent their delegates, some of whom were also their special assistants and advisers, coming from the various national ministries and national organisations, to meet monthly, to investigate the legal framework for an ASEAN human rights regime and to come up with a working text. This was called the Drafting Group, and the Basic Draft, which was the end product of their deliberations, was meant to be a platform for the official negotiations. This marked the transition between the first and the second stage of the “two-tier approach” in the drafting process.

*Meeting 2. Jakarta, 17-19 February 2012.*⁶³

Chet Chealy, member of the Cambodian Human Rights Committee, presides over the meeting and stands in as the alternate of Om Yentieng, the Official Representative of Cambodia to the AICHR, almost permanently until November 2012. The Representatives had now before them the Basic Draft: a 19-page document that was marked heavily by brackets and footnotes, manifesting the approbations and discontents of the country delegations. Side by side was the “**Zero Draft**”, which was prepared by the ASEAN Secretariat to provide the Drafting Group with a basis to jumpstart its own negotiations. It was fourteen pages long. The Representatives had also given the ASEAN Secretariat the mandate to assemble a draft with provisions culled from the various national

⁶² See official press release at: <http://aichr.org/press-release/press-release-of-the-first-meeting-of-asean-intergovernmental-commission-on-human-rights-on-the-asean-human-rights-declaration-siem-reap-cambodia/#more-435>.

⁶³ See official press release at: <http://aichr.org/press-release/press-release-of-the-second-meeting-of-the-asean-intergovernmental-commission-on-human-rights-on-the-asean-human-rights-declaration/#more-440>.

constitutions, international human rights agreements, international protocols and regional declarations. Beginning the negotiations – where from, what and how - like in all things was to prove difficult especially because neither of the two drafts eventually found favour amongst all the Representatives.

In the Jakarta meetings, the substantive negotiations began and the groundwork was laid. The structure of the Declaration was adopted. The discussions of the ASEAN foreign ministers in their Siem Reap ASEAN Foreign Ministers Meeting (AMM)⁶⁴ Retreat (11 January 2012) became the backbone of the negotiations: they reminded the Representatives that the Declaration was to be a “political document” and should be “comprehensive but succinct”. Exploratory discussions on the universality of human rights, gender, non-discrimination and a limitation clause were brought to bear. The Representatives agreed that the AHRD must not dilute the UDHR 1948, it must “add value” and must be “commensurate with the idea that human rights is progressive and not retrogressive”.

*Meeting 3. Jakarta, 12-13 March 2012:*⁶⁵

This was going to be the first time the AICHR Representatives were going to sit down around the table – *in complete attendance* – and in this sense, serious preparatory work began. The modality of meeting in small caucus groups, first, and then in plenary, was upheld. The Commission was a gathering of individuals who had, at least at one stage of their careers, either been engaged in the international affairs of the 10 ASEAN member states or committed to the cause of human rights. They were seasoned diplomats, international lawyers, state ministers, academics and human rights advocates:⁶⁶

⁶⁴ This is also called the ASEAN Foreign Ministers’ Meeting held annually with “retreats” and “informal meetings” that take place in between. See the official press release of the January 2012 AMM Retreat at: <http://www.asean.org/images/archive/120111-AMM-Retreat.pdf>.

⁶⁵ See official press release at: <http://aichr.org/press-release/press-release-of-the-eighth-meeting-of-the-asean-intergovernmental-commission-on-human-rights-aichr-and-the-third-meeting-of-aichr-on-the-asean-human-rights-declaration-ahrd/#more-442>.

⁶⁶ See the CVs on the official AICHR website: <http://aichr.org/about/aichr-representatives/>. This may be compared with the Human Rights in ASEAN Online Platform (<http://humanrightsinasean.info/asean-intergovernmental-commission-human-rights/representatives.html>) for more information. I have only include the preceding or concurrent posts of the Representatives whilst they were tasked with the negotiation of the Declaration.

- Brunei Darussalam: *Pehin Dato Dr. Awang Hj. Ahmad bin Hj. Jumat* (“Dato Pehin”). His previous post was Minister of Culture, Youth and Sports; and before that, he was the Minister of Industry and Primary Resource.
- Cambodia: *Om Yentieng* (“Senior Minister Om Yentieng”), He was also Senior Minister and President of the Cambodian Human Rights Committee.
- Chet Chealy* (“Mr. Chealy”), Alternate Representative. He chaired six out of the ten official meetings. He was also Member of the Cambodian Human Rights Committee.
- Indonesia: *Rafendi Djamin* (“Pak Rafendi”). He was also Coordinator for the Coalition of Indonesian NGOs for International Human Rights Advocacy.
- Lao PDR: *Bounkeut Sangsomsak*. His last post was Vice Chairman of the Commission on Foreign Relations of the National Assembly.
- Phoukong Sisoulath* (“Phoukong”), Alternate Representative. He was the Project Manager for the Department of Treaties and Law in the Ministry of Foreign Affairs. He sat in the place of Bounkeut Sangsomak for the entire duration of the negotiations.
- Malaysia: *Dato’ Sri Dr. Muhammad Shafee Abdullah* (“Dato Shafee”). He was also Ad Hoc Legal Adviser to the Malaysian Government and to the Ruling Party (UMNO) and Advocate and Solicitor of Malaya, Messrs Shafee and Co.
- Myanmar: *Amb. Kyaw Tint Swe* (“Ambassador Swe”). He was also Vice Chair of the Myanmar National Human Rights Commission. Prior to the post of Representative, he served as the Permanent Representative of the Permanent Mission of the Union of Myanmar to the United Nations.
- Philippines: *Amb. Rosario Gonzales Manalo* (“Ambassador Manalo”). She was the Senior Foreign Service Adviser to the Secretary of Foreign Affairs of the Philippines. She was also Philippine Representative to the Asia-Europe Foundation Board of Governors and former Chairperson of the High Level Task Force for the drafting of the ASEAN Charter.
- Singapore: *Richard Magnus* (“Mr. Magnus”). He was a retired Senior District Judge and was also sitting on numerous national advisory committees and chairing the board of various national institutions in Singapore (*e.g.* Casino Regulatory and Public Guardian).
- Thailand: *Dr. Sriprapha Petcharamesree* (“Dr. Sriprapha”). She was also full-time faculty at the Human Rights Study Program and former Director of the Office of Human Rights Studies and Social Development, both at Mahidol University, Thailand.
- Viet Nam: *Amb. Nguyen Duy Hung* (“Ambassador Hung”). He was also Director General of the Institute for Foreign Policies and Strategic Studies at the Diplomatic Academy of Vietnam.

The next ten months were going to see the ten state representatives complete a unique moment: the first human rights declaration by national governments ever to come out of Asia. In this regard, they agreed to hold two separate regional consultations, first, between the Commission and the ASEAN Sectoral Bodies,⁶⁷ and second, between the Commission and regional and national civil society organisations (CSOs).

The Second Progress Report of the AICHR on the drafting of the AHRD was prepared for the “interface meeting” with the ASEAN Foreign Ministers Meeting to take place on the 2nd of April 2012, at the 20th ASEAN Summit in Phnom Penh. Seventeen (17) substantive articles were identified under the category of civil and political rights.

*Meeting 4. Jakarta, 9-11 April 2012:*⁶⁸

The AICHR Representatives had emerged with renewed energy from their interface meeting with the ASEAN foreign ministers. On top of the enthusiasm, their report was also accepted with a sense of urgency because it was now clearer than ever that a clean draft would have to be presented in the next Foreign Ministers Meeting (the AMM on July 8, 2012) and adopted by the heads-of-state in November 2012. The discussions in Phnom Penh were to have a considerable influence on the present proceedings. The mandate that the Declaration was meant to be a “political document” was constantly reiterated. The views were divided between those who favoured revisiting the UDHR 1948, reaffirming its principles and subsequently elaborating an additional list of “new” rights or “added value” rights, and those who believed that the structure of the AHRD – as it stood in working texts of the last two previous meetings - was already good and workable. Modifications would have to be made but they would mostly have to be on the length and style of declaratory phrases and sentences. The Commission eventually deliberated on this potentially divisive issue in a morning “retreat” on the second day. But as the meeting advanced, the strength of the majority and the practices in the negotiations since January gave weight to the latter proposition. Various Representatives consequently pressed their case on provisions for special protections for groups, the right to development and the need for international cooperation in the promotion and protection of human rights.

⁶⁷ They are also called the ASEAN Sectoral Ministerial Bodies, which represent the various national organs of the member states administering the public services of the state (*e.g.* education, health, security, etc.); see list in Annex 1 of the ASEAN Charter.

⁶⁸ See official press release at: <http://aichr.org/press-release/press-release-of-the-fourth-meeting-of-the-asean-intergovernmental-commission-on-human-rights-aichr-on-the-asean-human-rights-declaration-ahrd/#more-446>.

Economic rights were grouped together with social and cultural rights because they were “interrelated”. This generation of rights went through collective scrutiny with relatively few dissents.

2.1.2.2 Second Phase: The First Working Drafts

*Meeting 5. Bangkok, 6-8 May 2012:*⁶⁹

Senior Minister Om Yentieng from Cambodia returns to preside over the meetings. Three full days are dedicated entirely to the draft (6-8 May); a day is then spent for the regular meeting (9 May) and the last day for the First Regional Consultation (10 May). Bangkok will probably come down in the history of the draft of the AHRD as one of its most decisive moments for three reasons. Firstly, the Representatives had to agree on how to undertake the consultation with ASEAN Sectoral Bodies, including specialized bodies.⁷⁰ The actual draft could not be made available, so another document that would most accurately present the advances in the drafting process had to be drawn up. In the meantime, the Representatives were also under the pressure of the next deadline set by the ministers – the AMM July meeting in Phnom Penh. Secondly, the AICHR had to wrestle with what had now become an unmanageable 16-page “working text”, carried over from the Jakarta meetings. Achieving a balance between brevity and conciseness was a priority. And thirdly, the Representatives would have to negotiate, possibly for the last time, on the substantive content of the Declaration, especially on the list of civil and political rights, under all these extenuating conditions, because it was always nearly impossible to amend an article that had already secured consensus. A retreat (their second one to date) was convened: it was agreed that drafting must only be done in plenary and that the “ground rule” (established previously in Jakarta) to respect unanimity in the discussion of each provision must be respected and observed. What I have called a “Night Draft” under the lead of Singapore and in consultation with Cambodia, Myanmar, the Philippines and Thailand took shape on the evening of the 6th. Negotiations resumed, in plenary, the following morning. By the meeting’s end, it was the eponymously called the “**Bangkok Draft**” (8 May), which became the first of a **series of working drafts** of the Commission.

⁶⁹ See official press release at: <http://aichr.org/press-release/press-release-fifth-meeting-of-aichr-on-the-asean-human-rights-declaration-ahrd/#more-449>.

⁷⁰ These included, for example, the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW) and the ASEAN Committee on Women (ACW).

*Meeting 6. Yangon, 3-6 June 2012:*⁷¹

The Representatives had agreed that in Yangon they would primarily focus on a “cosmetic revision” of the draft. But the meeting brought to bear some of the thorniest issues. With the Bangkok ASEAN Sectoral Bodies’ Consultation just past and the Kuala Lumpur Civil Society Organisations’ (CSO) Consultation imminent, Yangon became arguably the most thorough “in-house” inquiry into the list human rights as well as the substantive content of its provisions. The Philippines submitted suggestions in order to refine the language whilst Malaysia argued formidably for what was yet the most comprehensive attempt to come up with just one provision for the entire Declaration establishing limits on the bill of rights – “a general limitations article”. The Philippine proposal became the negotiation template; the deliberations were paced, paragraph-by-paragraph. The Malaysian proposal, meanwhile, was turned down in favour of built-in limitations in the individual articles (as it had been done in the Bangkok Draft). This would have been an opportunity to make the draft much tighter and more coherent in form and in substance. But the move came too late. The hard won agreements on how and in which article to apply the limiting clause, “in accordance with national laws” and its many variations, were at risk and the Representatives were no longer disposed to re-negotiate in this regard. The negotiation of the “**Yangon Draft**” (6 June) formed part of the first crescendo of the AICHR deliberations. What was put on the negotiating table – some of them for the last time - were the provisions on regional particularities, gender, the right to development and sustainable environment, the right to education, and a closing paragraph for the Declaration. The right to peace was born.

*Meeting 7. Kuala Lumpur, 23 June 2012:*⁷²

The “**Kuala Lumpur Draft**” (23 June) was to be the first in which the rights of specific groups in ASEAN were to be either gradually incorporated or reinforced in the Declaration not only by the AICHR Representatives but also, more significantly, by national, regional, and international civil society organisations. Kuala Lumpur was set to be the venue of the Second Regional Consultation (22 June); it was the first official encounter between civil society advocates and the ten AICHR Representatives. The 36 attending CSOs were represented by a total of 53 delegates. Nearly all delegates had lobbied forcefully for the

⁷¹ See official press release at: <http://aichr.org/press-release/press-release-of-the-sixth-meeting-of-the-asean/#more-444>.

⁷² See official press release at: <http://aichr.org/press-release/the-seventh-meeting-of-the-asean-intergovernmental-commission-on-human-rights-aichr/#more-439>

equality of rights and non-discrimination by focusing on the groups that were somehow left outside the purview of human rights protections: minorities and indigenous peoples, HIV victims, women and children and migrant and undocumented workers (see Section 2.2.2.3). The notions of public morality, national security and just requirement and the right of self-determination were also closely examined. Some member states had carried out national consultations running up to the regional consultations so the charge that civil society was not consulted *at all* by the Commission was only partly accurate – the real issue that civil society had, I believe, with the Representatives was that it was not consulted in the way it believed it ought to have been consulted.⁷³ This would have been the highpoint of the dialogues with civil society. Later on, however, during the 45th ASEAN Foreign Ministers Meeting (AMM) on 8 July 2012 in Phnom Penh, the foreign ministers were to give the instructions for pushing the same initiatives: to increase consultations with all stakeholders in order to refine and improve the text of the Declaration.

2.1.2.3 Third Phase: Engaging ASEAN and Civil Society

45th ASEAN Ministerial Meeting, Phnom Penh, 8 July 2012:⁷⁴

The “**First AHRD Draft**”⁷⁵ had been submitted to the ASEAN foreign ministers but deeper tensions in the drafting of the Declaration were about to come to a head in the face-to-face meeting between the Representatives and the ASEAN Foreign Ministers at the 45th AMM. The AICHR had also wanted to win its mandate anew and this meant delivering results, which made the further demand of sparing the foreign ministers from the painstaking task of negotiating human rights. The foreign ministers, several of the Representatives argued, were not to duplicate the very work that had been purposely delegated to the AICHR. On the other hand, some member states wanted to turn over a significant

⁷³ Even NGOs as critical as SAPA acknowledge the significance of this aperture in the history of the AICHR; see for example, 2013. *Still Window-Dressing: A Performance Report on the Third Year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2011-2012*. Bangkok, Thailand: Solidarity for Asian People’s Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR).

⁷⁴ See official press release at:
http://www.asean.org/images/PRESS%20ADVISORY_AMM_AICHR%20Meeting.pdf

⁷⁵ This was the “Kuala Lumpur Draft”, and in this sense, therefore, a composite of the Jakarta working texts, Bangkok, Yangon and Kuala Lumpur working drafts. It was called the “AHRD” draft so that it would not only be not privileging any one country but also because this would be the first draft presented collectively by the AICHR.

if not a considerable part of the drafting process to the Senior Officials Meeting (SOM),⁷⁶ which would push the Declaration towards the exigencies of the state rather than the people. This fact was symptomatic of more profound divisions in the work ethic and ideologies of the member states: some were working bottom-up whilst others were following orders from top-down. We conveyed to the Phnom Penh Peace Palace. The meeting with the ten ASEAN foreign ministers started at 14:30 and ended at 15:30 p.m., exactly one hour had passed. Upon the assurance of the Indonesian Foreign Minister, Marty Natalegawa, the drafting of the Declaration would continue under the stewardship of the AICHR - the “kitchen”, it was said, “remains with AICHR”.

*Meeting 8. Bengar Sari Begawan, 26 August 2012:*⁷⁷

The Third Regional Consultation (25 August) in Brunei was meant to placate the tensions between the AICHR and the ASEAN Sectoral Bodies since the First Regional Consultation in Bangkok. This was not simply going to be a face-saving measure. The mandate to hold more consultations with the sectoral of bodies of ASEAN and the civil society organisations of the region had come from the foreign ministers in the last AMM in Phnom Penh. Notwithstanding the low number of delegates who showed up in Bengar Sari Begawan, noteworthy contributions were brought to the floor. The lobby to give special protections for women and children, the disabled and the elderly and the campaigns for the Responsibility to Protect (R2P) persisted. There was a proposal to modify the preamble but the Kuala Lumpur Draft virtually remained untouched. The eventuality of specific human rights conventions in the foreseeable future became clear. The meeting was thus going to be a “freer” attempt to forge what I began to think of also as a “civil society” or “people’s version” of the draft, evolving in two stages. The first stage was going to be a consultation with practitioners within ASEAN who were dealing with specific sectors and industries that had either an impact on or were contingent to human rights issues. Meanwhile, the second stage was to take place in Manila when the AICHR would meet with national and regional CSOs for the second time after Kuala Lumpur.

⁷⁶ The Senior Officials’ Meeting is usually composed of high-ranking officials from the ministries of foreign affairs of the member states (*e.g.* representatives and permanent ambassadors to ASEAN; they coordinate with ASEAN National Secretariats and other ASEAN Sectoral Bodies.

⁷⁷ See official press release at: <http://aichr.org/press-release/special-meeting-of-the-asean-intergovernmental-commission-on-human-rights-aichr/#more-433>.

*Meeting 9. Manila, 13-14 September 2012:*⁷⁸

The circumstances in which the Manila meeting unfolded were not dissimilar to those in Brunei: how far, if possible, was the AICHR willing to sacrifice the hard-won formulations to accommodate the reasonable suggestions of civil society organisations – especially in light of the fact that each of the Representatives wanted nothing less than a good Declaration? On account of this dilemma the deliberations in Brunei and Manila will probably comprise the second crescendo in the drafting history of the Declaration. The Representatives were going to hold the Fourth Regional Consultation on the 12th of September. 8 joint submissions in hardcopy and a matrix prepared by the Secretariat, collating all CSO recommendations were distributed so that the articles may once again be examined against other possible formulations. An attempt to curb the repetition of the phrase “in accordance with national law” was made to no avail. The rights to peace and development were hailed as they were cautiously disputed along with special protections for women and children. Nearly all the articles were put under scrutiny, including the now well-beaten phrase “regional particularities” and “public morality”. A meeting with three regional experts on the last day (14 September) provided the platform from which to measure how far above or below international human rights the standard the Declaration stood. This was going to be the last genuine shot both by the Representatives and civil society advocates who were present to make substantial changes to the draft before the Informal ASEAN Foreign Ministers Meeting (IAMM) on the 27th of September. It was expected, that the foreign ministers, who met on the sidelines of the 67th Session of the UN General Assembly, would make the decision to either return or accept the draft and pass it on to the ASEAN heads-of-state for final deliberation. The “**Manila Draft**” bore “twins”: first, the “highlighted version” kept two issues hanging in the balance: the inclusion of two ASEAN declarations on women and the adoption of the Vienna Declaration and Programme of Action paragraph on “regional particularities”; and second, the “clean version” (15 September) was sent to the ministers on the 18th of September.

Informal ASEAN Ministerial Meeting, New York, 27 September 2012:⁷⁹

⁷⁸ See official press release at: <http://aichr.org/press-release/the-second-regional-consultation-of-the-asean-intergovernmental-commission-on-human-rights-aichr/#more-425>.

⁷⁹ See official press release at: <http://www.asean.org/news/asean-secretariat-news/item/chairman-s-statement-of-the-informal-asean-ministerial-meeting-iamm>; <http://www.mfa.go.th/main/en/media-center/14/28065-Informal-ASEAN-Ministerial-Meeting-in-New-York.html>.

The “Second AHRD Draft”⁸⁰ was now in the hands of the ASEAN foreign ministers.

*Meeting 10. Siem Reap, 23-24 September 2012:*⁸¹

Everyone had fought obstinately for every word and every turn of phrase. The foreign ministers were gathering in New York on Thursday the 27th. There was still that tiny possibility that the odds may turn against the ASEAN Human Rights Declaration. But I could not see how anyone would sustain another round of negotiations. In many ways, Siem Reap was the quiet after the storm. The Siem Reap meeting, however, is key in understanding “woman power”, what it meant to dialogue with stakeholders and ultimately the dynamics of negotiation in ASEAN: the two regional declarations on women, which would have been left in limbo, were fiercely contested.

21st ASEAN Summit, Phnom Penh, 18 November 2012:⁸²

All ten ASEAN Heads-of-State gathered for the summit. On the 17th, the night before the signing, the fate of the Declaration suddenly hung in the balance. The following morning, at the foreign ministers’ meeting, the Philippine Secretary of Foreign Affairs, Alberto del Rosario, was anguishing to endorse a human rights declaration that might be found to fall below the standards set by the UDHR 1948. But then all those gathered eventually concurred to a key paragraph in an document, which was meant to be read always alongside the Declaration, the Phnom Penh Statement:

We... do hereby... reaffirm our commitment to ensure that the implementation of the AHRD be in accordance with our commitment to the Charter of the United Nations, the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and other international human rights instruments to which ASEAN Member States are parties, as well as to relevant ASEAN declarations and instruments pertaining to human rights (Phnom Penh Statement, Par. 3)

⁸⁰ This was now the “Manila Draft” but effectively the composite of the First AHRD Draft and the revisions in the Brunei and Manila meeting.

⁸¹ <http://aichr.org/press-release/the-tenth-meeting-of-the-asean-intergovernmental-commission/#more-416>.

⁸² See official press release at: <http://aichr.org/press-release/the-adoption-of-the-asean-human-rights-declaration-ahrd-at-the-21st-asean-summit-and-the-special-meeting-of-the-asean-intergovernmental-commission-on-human-rights-aichr/#more-694>; <http://aichr.org/news/asean-human-rights-declaration-adopted-and-the-signing-ceremony-of-the-phnom-penh-statement/#more-686>.

The final draft and the Phnom Penh Statement of 2012 (see Appendix A) were endorsed and the ASEAN Human Rights Declaration was adopted and signed by the ASEAN Heads of State.

2.1.3 TIMEFRAME

The third important fact to note is that there was a clear appreciation by *all* the Representatives for the Declaration to positively add to the value of the minimum standards already set by and in the Universal Declaration of Human Rights 1948. The Representative of Laos remarked aptly that it was “time to change”. The other crucial human rights text between 1948 and 2012, was the Vienna Declaration and Programme of Action of 1993 which was adopted by 171 states at the Vienna World Conference on Human Rights in 1993. The latter stands at par in terms of relevance and importance with the UDHR 1948 and ASEAN regional documents in the drafting of the AHRD. With this in mind, the third signpost is a timeline that plots the deliberations on a given article along the sequence of the AICHR meetings and the resulting drafts – it is a bird’s eye view of the “milestones” of the human rights provision. As such it illustrates the time and frequency at which ASEAN and human rights norms were contested in fundamentally three sample articles: the right to life, the equality of rights without discrimination, and the rights to peace and development.

The timeline demonstrates the temporal scale of the language pendulum – when it starts and when it ends. The reason, I surmise, that Saussure kept relatively silent on measuring the effect of time was his academic agnosticism with *context*, which creates and establishes meaning in the social system. Depending on the research question, the point of departure of the pendulum swing varies. In this case, we are effectively looking at the international human rights regime as it has been appropriated by ASEAN. The foundational text is the UDHR 1948 from which the international bill of human rights emerges, but the base definition starts when the community negotiations for each article begins. The AHRD is in itself a contestation of the UDHR 1948, and I am interested in how the dynamics of dialogue institutionalized human rights norms in the drafting of the regional declaration. Note how particular provisions were formulated over a relatively short period of time (life) or over more prolonged stages (equality of rights). Meaning is bounded and captured by the *temporal* spectrum of pendulum model (see Figure 1 below) because the extra-

verbal situation (*i.e.* data-set) changes as the scale in which contestations are taken into account also vary.

The histories of the chosen sample of articles represent the most “contested” norms (*i.e.* durable, not to be confused with level of importance) during the negotiations. I shall limit myself to three sets, however, as already signaled from the timeline above: the first is national sovereignty and law; second, gender and equality; and the third, is the renunciation of the use of threat or force.⁸³ The last raises the ante in human rights contestation because the rights to peace and development do not have an ostensibly direct UDHR 1948 or VDPA precedent or foundational text – they are “new rights”. These three rights provisions represent not only the broadest range of normative issues but also the “fullest” negotiations, that is, the widest data-set (verbal interactions *and* extra-verbal situation) that I have been able to compile realistically. Taken together with the rest of the 37 articles, these represent the most distinguishing features of the Declaration as a human rights instrument.

⁸³ I have written on the fourth normative concern elsewhere, the principle on the universality of human rights, which was without a doubt one of the most contested provisions. Discussing this provision will inevitably touch the vast literature on the Asian Values Debate and its salience on the wider debate of human rights and cultural relativism cannot be overstated. Its treatment, however, will be far too lengthy. This is why I shall take it up as part of my future research agenda. I have written briefly about the very thorny phrase “regional particularities” in this respect; see VILLANUEVA, K. H. R. 2012. How West was won: Asean Magna Carta. *Philippine Daily Inquirer* [Online]. Available: <http://opinion.inquirer.net/43189/how-west-was-won-asean-magna-carta> [Accessed 3 May 2014].

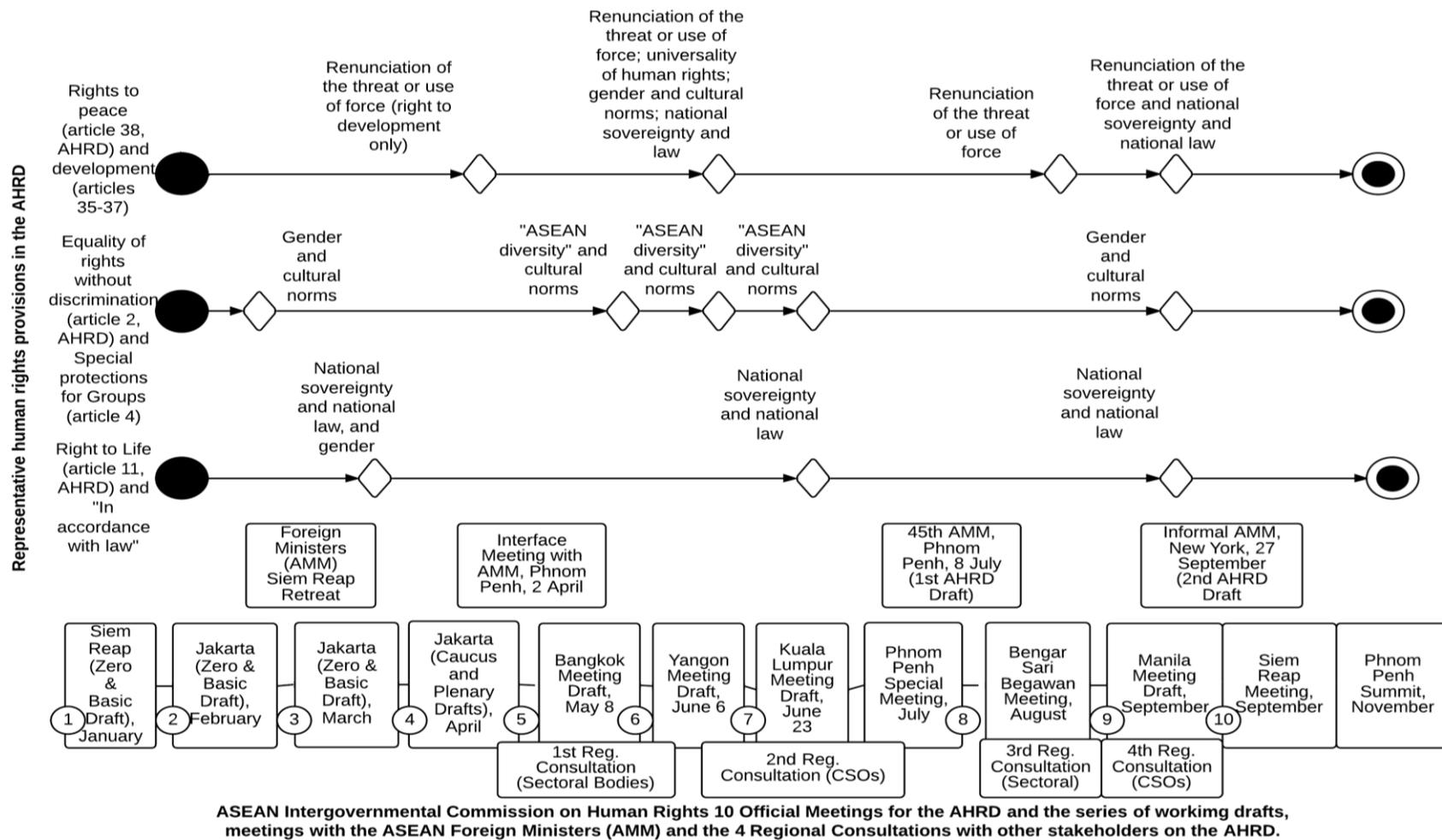


Figure 7: Timeframe: Contesting International and Regional Norms in the ASEAN Human Rights Declaration

Chapter 2.2

The Right to Life and “In Accordance with National Law”

2.2.1 INTRODUCTION

One of the first human rights provisions which incited extended deliberations was the right to life. It was contested in the course of the negotiations not least because initial formulations, especially in the Basic Draft, held explicit provisions on the death penalty. The succeeding discussions on this provision, however, were also emblematic of the normative tensions that were generated between national and regional discourses – in particular, the principle of national sovereignty. The phrase “in accordance with national law”, which figures for the first time in the provision on the right to life, is hence nearly omnipresent in the Declaration. When and wherefore this phrase had to be worked into a particular article was a prickly and intractable issue in the history of the AHRD. In the final document it appears unequivocally in at least seven rights provisions.⁸⁴ The set of contestations around the “right to life” as well as those around the insertion of “in accordance with national law” as a limiting or qualifying clause manifest the possibilities of various interpretations on the expansion of these norms. For this we turn to three meetings: Jakarta (in March), Kuala Lumpur and Manila.

⁸⁴ See Articles 11 (life), 16 (seek asylum from persecution), 18 (nationality), 19 (marry and found a family), 20.2 and 20.3 (protection against *ex post facto* law), 25.1 and 25.2 (political participation), and 27.2 (free trade unions) of the AHRD provided in Appendix A. The law is invoked in several other instances, appearing a total of 23 times, but not entirely in the interest of “limiting” a right.

2.2.2 FIRST-HAND ACCOUNT

2.2.2.1 Jakarta (March)

The highpoint of the negotiations of the right to life came in Jakarta on the 12th and 13th of March 2012. Prior to that, on the 11th of March, the negotiations were aligned in two ways. Firstly, the Representatives kept on returning to discussions on procedural issues. The urgency in negotiating an early draft compelled the group to maximize time. They hence implemented the proposal from the previous meetings to form smaller groups and discuss *in caucus* the different sets of rights under the stewardship of the Representatives who held the related expertise. The groups were meant to be “open-ended” so that any member state wishing to make any sort of contribution would be free to join any of the groups at any time without encumbrances. The other strand of the debates spun around substantive issues (*i.e.* the content, meaning as well as the order or sequence of rights) that would underpin a “bill of rights”. The Representatives echoed repeatedly the “guidelines” from the last foreign ministers’ AMM Retreat in Siem Reap to be “comprehensive and succinct”. Ambassador Manalo from the Philippines insisted that this was a “declaration” and anything more specific and elaborate in the way of the law was the reserve of a convention under the norms of international law. The eventuality of ASEAN human rights covenants emerging soon after the release of the Declaration began to be implicit in the exchanges of the Representatives. They had to constantly remind themselves, however, that these two projects were to be undertaken separately.

A vast majority of the day was dedicated to clarifying, defining, qualifying and selecting words that were most appropriate to the historical and geopolitical context of ASEAN. The Philippines consistently pointed out that the AHRD was an ASEAN project and as such, the principles set out were not only inter-governmental but also “people-oriented”. Thailand and Indonesia were clearly sympathetic to civil society even if in varying degrees, with the latter perhaps being more radical in its vision and thus overly idealistic in proposing the terms of engagement with civil society organisations; Myanmar, Vietnam and Laos, in close agreement with the Philippines and Thailand, tried to navigate towards a compromise in the discussions of each individual right; Singapore and Malaysia, whose representatives were seasoned and knowledgeable practitioners of international law, in turn brought caution and care to the words and phrases that may be turned towards tangential legal interpretations; and finally, Brunei, whose delegation was most conscious

of its national mandate to abide dogmatically by the rules, was determined to meet and deliver results in the most efficient and timely manner. These were the general tendencies in the positions of the Representatives *at this stage* of the negotiations. But their views actually carried more nuances, which made the outcome of each of the deliberations less predictable than could otherwise be imagined. Everyone was extremely aware that controversy or divergent views would naturally arise when discussing certain rights and their substantive content.

On the morning of the 12th before the caucus discussions could even begin Malaysia, which joined the group on civil and political rights, came up with its own draft that it claimed to be a “realignment” of the list of rights based on the Basic Draft and the subsequent discussions of its national delegation. Malaysia had neatly put the amended versions in boxes and retained the original text of the Basic Draft. Interestingly, at this stage of the negotiations, the Zero Draft prepared by the Secretariat was the closest and most straightforward version to Article 3 of the UDHR 1948: “Everyone had the right to life, liberty and security of person”. The Secretariat had annotated its formulation on the right to life by citing eight of the ten national constitutions, five international documents and four regional instruments (see Appendix C.1, C.2, and C.3, respectively). It was in the Basic Draft, however, that death penalty was stated explicitly, previous reservations from member states notwithstanding (see Table 1 below). Now in Jakarta, the general feeling within the group was that death penalty would intuitively go against the notion of the right to life. But member states cautioned each other on the fact that the Declaration could not contravene existing national and international laws. Cambodia and the Philippines had abolished death penalty for all crimes (abolitionist states); Brunei, Lao PDR and Myanmar had abolished in practice (abolitionist *de facto*)⁸⁵ and the rest of the member states had so far retained it (retentionist states) (see Appendix D).

As the negotiations proceeded in caucus, the first caveats came from Malaysia and Singapore who favoured employing both words - “serious” and “heinous” - to denote crimes because each of these had contested meanings in international law and are, in certain cases, exclusive of each other. Richard Magnus of Singapore then came up and broached the idea of perusing the European Convention on Human Rights 1950 (hereafter

⁸⁵ I use *de facto* in the manner that human rights observers (such as Amnesty International and Death Penalty Worldwide) denote the term to refer to countries who have not held executions in the last ten years. See 2012a. Death Penalty Worldwide. Center for International Human Rights at Northwestern University School of Law and World Coalition Against the Death Penalty.

ECHR 1950) as an alternative formulation. Thailand, meanwhile, also suggested reviewing the ECHR 1950 and argued that the language in Article 2 contemplates death penalty but evades its direct expression (see Appendix C.3). Ambassador Manalo from the Philippines then motioned to change “death penalty” to “capital punishment”, possibly to soften the nakedness of the word “death”. Dato Shafee of Malaysia, reasoned that in actual fact in Malaysia there is a movement to abolish death penalty, but there are 60% of the population who are actually against its abolition. The caucus subsequently agreed to delete the following two of the existing three sub-articles:

~~Death penalty~~ Capital punishment may be imposed ~~only shall be limited~~ for the most serious or heinous crimes. ~~Capital Punishment~~ Death penalty shall not be imposed prescribed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

Member States shall endeavour to review from time to time the need for capital punishment as a penal measure with a view of its abolishment (sic) in the future (see Table 1).⁸⁶

Dr. Sriprapha of Thailand pressed for a fresh proposal by recommending that a single sentence capture the essence of the entire provision: “Everyone has a right to life” - full stop. After all, she reasoned, Article 3 of the UDHR 1948 does not suggest the death penalty in any way; it would only be contemplated in the International Covenant on Civil and Political Rights 1966 (hereafter ICCPR 1966; see Appendix C.3). Ambassador Manalo positioning the Philippines on the side of Thailand, argued out: “if you get into the details then we are confusing what is a declaration - a political aspiration - with the specificities that ought to go into a convention”. This was in order to make the Declaration comprehensive and succinct.

A debate on the meaning of “life” arose. The word and notion of “life” was defined by Thailand as contra to death or the failure of the biological capacity to live. Singapore and Malaysia motioned to define life in “broader” terms, however, so that imprisonment, Mr. Magnus and Dato Shafee agreed, constituted the deprivation of life; the years spent in prison comprised an equivalent number of years of effective living outside penitentiary confinement. Dato Shafee argued that the understanding and interpretation of rights allow for a “margin of appreciation”. These contestations led to a pithier final version by the end

⁸⁶ The strikethroughs refer to deletions.

of the caucus session that included the inherent right to life as it is “protected by law” in the “broadest sense”.

Every person has an inherent right to life which shall be protected by law. No person shall be deprived of his life save in accordance with law.

On the following day, the 13th, Ambassador Manalo made a final appeal to pare the phrase down to the single sentence - once again - for the sake of making it “comprehensive and succinct”. Dato Shafee intervened, however, encapsulating the meaning of the existing phraseology: “the present article embodies three concepts: first, life is inherent; secondly, because it is inherent then the law must protect it as part of the duty of the state; and finally, one may be deprived of life only in ways and means permitted by the law”. This instance of elocution somewhat reflected, amongst others, the vestiges of the British proclivity of the interlocutors to draw precision on the legal consequences of the article in contrast to the “declaratory” formulation of the article – *everyone has an inherent right to life*. Towards the end, Ambassador Hung of Vietnam introduced a gender-sensitive modification, so that the final text includes both possessive pronouns – “his or her life”. The final formulation contemplates accordingly national laws for which death penalty still holds but avoids its explicit reference, possibly in the “hope” of keeping or abetting death penalty in a future time.

Now it also became apparent in the March meeting that debating the phrase “in accordance with national law” would never stray far and wide from the centre stage of the negotiations – with some rights being more vulnerable than others to the political vagaries of the national governments. The two member states that were conceivably most reticent to qualifying or limiting most if not all the provisions based on national law were Indonesia and Thailand and perhaps slightly less so the Philippines. But indeed, depending on the right provision under deliberation, individual Representatives, at one time or another, had each manifested that putting in the phrase “in accordance with national law” would pull the Declaration below the standard of the UDHR 1948.

The first clear show of resistance also occurred in Jakarta (the 13th of March) on the negotiation of the freedom of movement and residence as it was then formulated:

Every person has the right to freedom of movement and residence within the borders of each member state. Everyone has the right to leave any country including his or her own, and to return to his or her country (in accordance with law).

Thailand, Myanmar and the Philippines argued that adding “in accordance with law” would immediately place undue limitations on the right. Malaysia in consonance with these member states further contested that Article 13 of the UDHR 1948 from which this provision originates does not put any limitation; Dato Shafee was also quick to suggest that a general limitations article similar to Article 29 in the UDHR 1948 should therefore be drafted at some stage for the AHRD, so that member states may be allowed a margin of appreciation to interpret and justify national limitations on the list of rights. It was a task that he was to take up in earnest further down the road. In the meantime, the final text on the freedom of movement and residence (Article 15 of the AHRD), except for the sole addition of the word “her” to address the bias of gender, was to be, almost in its entirety, one of the four UDHR 1948 replicas of the articles in the AHRD:⁸⁷

Every person has the right to freedom of movement and residence within the borders of each State. Everyone has the right to leave any country including his or her own, and to return to his or her country.

2.2.2.2 Yangon

These tensions were to surface once again when deliberations started on how rights were to be given remedy based either on national sovereignty or the international human rights regime, on the 3rd of June in Yangon. Article 5 of the AHRD stipulates:

Every person has the right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law.

⁸⁷ The other three count the provisions against torture and cruel and inhuman punishment (UDHR Article 5, AHRD Article 14) recognition as a person before the law (UDHR Article 6, AHRD Article 3), and nationality (UDHR Article 15, AHRD Article 18). It must be noted, however, the substantive content of the last is altered significantly by the phrase “as prescribed by law”. The addition is “significant” with regard to the drawn out deliberations on the limitations clause. No addition per se is insignificant.

There was a fundamental disagreement between Laos, who understood the phrase “court or other competent authorities” to belong to the remit of national institutions, and Indonesia, who argued that the basic principle behind this provision was the notion of “remedy”; courts and competent authorities, according to Pak Rafendi, ought not to be limited to national courts but also to a possible ASEAN human rights court to which individuals might eventually seek redress. Ambassador Manalo of the Philippines requested the floor and assured Laos that no party could anyhow appeal to a regional court unless primary recourses to national courts are exhausted. Now Thailand had also a little while earlier proposed the deletion of the phrase “granted to that person by the constitution or by law” - to which Mr. Magnus retorted that it is, in fact, the law that grants rights. Dr. Sriprapha ultimately argued that not all rights, however, are granted either by the constitution or by the law – “there are rights that are not in the law”. A consensus could not be reached, so no single word in this article was hence changed.

2.2.2.3 Kuala Lumpur

Civil Society Organisations put up a clear stand against the use of the phrase “in accordance with law” during the 2nd Regional Consultation (or the first regional consultation on the AHRD *with CSOs*) in Kuala Lumpur on 22nd of June.⁸⁸ Two days earlier, between the 20th and the 21st, the 5th Regional Consultation on ASEAN and Human Rights, which was a separate gathering of concerned CSOs in the region, had taken place. As a result of this meeting, the delegates drew up a “Joint Submission” (hereafter the “Kuala Lumpur Joint Submission”) (2012e) that was presented to the AICHR. The Kuala Lumpur Joint Submission was a list of their “general” as well as “specific” recommendations on civil and political and social, economic and cultural rights; they had, interestingly, devoted a whole section of their proposal to the rights of specific groups.⁸⁹ The Representatives now in turn reviewed carefully the Kuala Lumpur Joint Submission during and after the 2nd Regional Consultation.

⁸⁸ See official press release at: <http://aichr.org/press-release/the-seventh-meeting-of-the-asean-intergovernmental-commission-on-human-rights-aichr/>.

⁸⁹ The Kuala Lumpur Joint Submission was prepared specifically for the regional consultation (see <http://www.forum-asia.org/?p=14184>).

Both national and regional CSOs attended the consultation; the ten countries were represented by 39 CSOs “national” organisations while a total of 14 CSOs were supposed to be operating across the region (see Section 2.1.2.2, Kuala Lumpur Meeting). During the consultation, the national CSOs were requested to group according to their member states and present their recommendations ensemble. The handful of regional CSOs, in the meantime, conveyed their recommendations individually. All of the inputs were eventually collated by the Secretariat into one matrix document called, “Paragraphs Inputs from the National and Regional CSOs”. The Kuala Lumpur Joint Submission was distinct, however, in that it had not only sparked everyone’s attention first, but was also a negotiated text of what was in itself already a large and periodic assembly of CSOs within the region. A hardcopy was distributed during the meeting; the Joint Submission was a clear and systematic document and had somehow provided a template for the matrix that was soon after prepared by the Secretariat for the rest of the CSO inputs.

A couple of the points in the Kuala Lumpur Joint Submission that were then raised are now worthy of note, especially with regard to specifying the state and its national laws. Firstly, the CSOs objected to any “overarching limitations on the totality of rights” and suggested the inclusion of a general principle in order to protect non-derogable rights, appealing to Article 4 of the ICCPR 1966:

In respecting, protecting and fulfilling human rights, Member States shall at all times observe the relevant rules of international law, in particular the principle of non-derogability of fundamental human rights (2012e: 3-4).

Secondly, in the case of the provision on the right to form and join a union, the Kuala Lumpur Joint Submission stated that, “the AHRD should not include any language that implies this right could be subject to national laws and regulations without making explicit that national laws should protect this right and should be consistent with international human rights and labor rights standards on the basis of International Labour Organization (ILO) Conventions 87 and 98” (2012e: 9).⁹⁰

⁹⁰ Convention 087 refers to the Freedom of Association and Protection of the Right to Organise Convention of 1948 and Convention 098 refers to Right to Organise and Collective Bargaining Convention of 1949. Available at: <http://www.ilo.org/dyn/normlex/en/f?p=1000:12000:0::NO>.

Further down the list, on the provision on the right to asylum, the language the Kuala Lumpur Joint Submission suggested was derived from Article 14 of the UDHR 1948: “Everyone has the right to seek and to obtain in other countries asylum from persecution.” The AHRD, the CSOs inveighed, is an “aspirational document” and the phrase “as required by law” is “unnecessary” (2012e: 11). The final text on seeking asylum, which became Article 16 of the AHRD, however, built in a degree of ambiguity for national interpretation:

Everyone has the right to seek and receive asylum in another State in accordance with the laws of such State and applicable international instruments.

Fourthly, in their defence of the right to health, civil society advocates could not have been clearer in what could ostensibly be read as their overarching argument and overall appeal for a progressive reading of human rights:

National laws cannot be invoked as a justification to derogate from rights protected under international law. If national laws and regulations must be mentioned, it should be phrased as: ‘States should take all necessary measures to protect and fulfil this right, including through legislations, consistent with international human rights standards and law’ (2012e: 9).

Finally and most relevant to this account is the fact that the first provision on the list of the “suggested language” under civil and political rights was on the right to life. It was phrased in two basic sentences: “Everyone has an inherent right to life. No one shall be deprived of this right” (2012e: 6). This, the CSOs in the Kuala Lumpur Joint Submission claimed, “represents a progressive reading of the current state of international human rights law” (2012e: 6). The article, however, as it was then worded in the AICHR’s Yangon Draft, remained unchanged.

2.2.2.4 Manila

The final set of deliberations on the right to life took place in Manila on the 13th of September, a day after the culmination of the 4th Regional Consultation (or the second and final regional consultation with CSOs). Three of the eight sets of submissions - Civil Society Forum, Women’s Caucus and Philwomen - targeted each of the individual formulations in

what was by then already the Kuala Lumpur Draft with specific proposals for a change in language – including the right to life. Philippine Women on ASEAN (Philwomen) lobbied to replace the phrase “in accordance with law” with the following formulation:

Every person has an inherent right to life which shall be protected by law. No person shall be deprived of life save in accordance with generally accepted international human rights standards (2012f: 3).⁹¹

Women’s Caucus, on the other hand, lobbied for the adoption of a single sentence, “Everyone has the right to life”, because, they reasoned, “the right to life is inherent”; and “not all ASEAN states subscribe to the death penalty” (2012g: 4-5).

Finally, following through on their proposal, the Kuala Lumpur Joint Submission, the drafters of the Joint Submission of the Civil Society Forum on the ASEAN Human Rights Declaration (hereafter the “Manila Joint Submission”) (2012d), pressed for a more radical overhaul:

Every person has an inherent right to life which shall be protected by law, including through the abolition of the death penalty
~~No person shall be deprived of life save in accordance with law~~
 (2012d: 10).⁹²

The Manila Joint Submission was the result of the Civil Society Forum on ASEAN Human Rights amongst 54 civil society organisations, which was held just before the regional consultation from the 10th to the 11th of September. The practice of the CSOs was to usually pair suggested amendments with a rationale or an underlying principle, which came in the form of an international declaration or convention. This time the Manila Joint Submission had now expanded its argument for this clarion call to abolish death penalty by including citations of specific international human rights instruments:

⁹¹ The amendment was underlined and the phrases for deletion were rendered with strikethroughs.

⁹² The amendment was underlined and the phrases for deletion were rendered with strikethroughs.

This represents a progressive reading of the current state of international human rights law and standards as reflected for instance by the UN General Assembly resolutions calling for the abolition of the death penalty. See *e.g.* 65th session of the UN General Assembly, UNGA Res. 65/206 (2010); 2nd Optional Protocol to the ICCPR (2012d: 10).

The Secretariat had not only provided all the Representatives a hardcopy of all the eight submissions but had also collated once again all the inputs in a single matrix document. *All* of the articles with the corresponding inputs went through the scrutiny of the Commission. The right to life, by virtue of its place in the sequence of the draft was among the first to be examined. All the countries made their last principled stand. Dr. Sriprapha of Thailand reiterated for the group and for the record that she was not comfortable with the paragraph because it fell below the standard of the UDHR 1948. Ambassador Manalo, in the same vein, argued that invoking national law would kill the spirit of human rights. Ambassador Swe tried to push for the single sentence - everyone has an inherent right to life. But for some of the Representatives the existing article already represented a consensus - a good compromise at the very least - and there was no room for maneuver at this stage.

Dato Shafee, hoping to strike perhaps an even better compromise proposed the reconsideration of a general limitations clause. Singapore reasoned toward its preference to treat each right on a case-to-case basis. In the meantime, Thailand argued that Article 7 of the AHRD on the universality of rights will have already called the attention of the reader to the “different political, economic, legal, social, cultural, historical and religious background” that must be borne in mind in the interpretation of the provisions. Pak Rafendi of Indonesia, shared the concerns of his colleagues, and called for the significant reduction of the number and frequency in which limitations appear. Ambassador Swe, therefore, finally appealed that the matter be deferred to the human rights experts with whom they were to have a final consultation on the following morning. However, the question to include or delete various references to national law, during and after the experts’ consultation, fell in the shadow of the more general negotiations on the Declaration. Article 11 had taken its final form way back in Jakarta.

The Caucus and Plenary Versions are “end versions”; the articles actually went through several versions before the end version in caucus (12 March 2012) and in plenary (13 March 2012).

The “Basic Draft” is a formulation of the article resulting from the discussions of the Drafting Group. Discussion results on the Basic Draft are marked with strikethrough lines (for deletion) and brackets (for further consultation with the AICHR). Malaysian suggestions are shaded in yellow. This version was the basis of the negotiations of the AICHR in caucus. The resulting “caucus version” was the basis of the negotiations of the AICHR. The “plenary version” was carried over as the “Jakarta working text” in the succeeding meetings in March and April until the Bangkok Draft was adopted as the first in the series of 4 working drafts (Bangkok-Yangon-Kuala Lumpur-Manila).

Table 1: The Evolution of the Article on the Right to Life

Universal Declaration of "Human Rights 1948	Zero Draft	Basic Draft	Caucus Version	AICHR Plenary Version, Jakarta	Night Draft- Bangkok Draft- Yangon Draft- Kuala Lumpur Draft- Manila Draft
<p><i>“Everyone has the right to life, liberty and security of person.” (Article 3)</i></p>	<p>Every person has an inherent right to life. This right shall be protected by law. No one may be arbitrarily deprived of this right.</p> <p><i>No limitations or derogations are permitted in regard to those rights guaranteed absolutely in international law, in particular the right to life, freedom from slavery, prohibition of torture, prohibition of</i></p>	<ol style="list-style-type: none"> 1. Everyone has an inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of this right. 2. [Death penalty shall be reserved for the most serious crimes, which are determined by national law of each ASEAN Member State but shall not be 	<p>Title: “Right to Life”</p> <ol style="list-style-type: none"> 1. Every person has an inherent right to life which shall be protected by law. and deprivation of such right must be in accordance with established law and must not be arbitrary. No one shall be arbitrarily deprived of this right. No one shall be deprived of his life 	<p><i>“Every person has an inherent right to life which shall be protected by law. No person shall be deprived of his or her life save in accordance with law.”</i></p>	<p><i>“Every person has an inherent right to life which shall be protected by law. No person shall be deprived of life save in accordance with law.”</i></p>

	<p><i>imprisonment for non-fulfilment of contractual obligation, no retroactive criminal law, recognition as a person before the law, freedom of thought, conscience and religion or beliefs.</i></p>	<p>imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.]</p>	<p>intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. Such penalty shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.</p> <p>2. Death penalty Capital punishment may be imposed only shall be limited for the most serious or heinous crimes. Capital Punishment Death penalty shall not be imposed prescribed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.</p> <p>3. Member States shall endeavour to review from time to time the need for capital punishment as a penal</p>		
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			measure with a view of its abolishment (sic) in the future.		
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2.2.3 PERSPECTIVE OF THE WORD: THE RIGHT TO LIFE

The question that runs in this analysis is this: if it is a clear and open fact that death penalty is still sustained by national laws within the region, and if the mandate of the AICHR to act as an intergovernmental institution is no less unequivocal, then why does the language of the provision avoid the direct and explicit expression of death penalty?

Micro-macro mechanism: How do agents (the individual units) via the utterance influence social relations? A close examination of the discursive strategies that were deployed in the contestation of the parties in the dialogue reveal interesting patterns of coalition that form as the pendulum swings multiply over time. Three camps begin to emerge: one comprised by Singapore and Malaysia, another led by Thailand, and, to a much lesser extent Indonesia, while somewhere along the middle-ground, the Philippines and Myanmar oscillate by framing discourses that move simultaneously outwards and inwards the community identity of ASEAN. Relations *within* coalitions are chiefly defined by fixed preferences, values and ideas, on the basis of which the countries are able to readily identify common national interests; they are hence *inclined* towards relations of interaction. Relations *between* coalitions are defined by an underlying predisposition to change; they are hence inclined towards relations of constitution – language is *ab initio*. Based on the volleys of contestations, these member states articulate the three approaches in defining the common ASEAN provision on the right to life.

The first approach displays the strategy of *intra-framing*, taken evidently by Malaysia and Singapore, who, whilst making appeals to standard definitions in international law - note, for example, the precisions they draw between “serious” and “heinous” crimes - do not stray away from the ambit of their national constitutions. The positions adopted by Singapore and Malaysia may be attributed to the almost inevitable weight of their common history. These two countries share the colonial legacies of being under British rule. Their national struggles for independence and the creation of a national identity are deeply intertwined. They have had to deal with the complexities of brokering political power in a multi-ethnic society, even to this day. Interestingly, their Commonwealth tradition is acknowledged expressly by the later remarks of their Representatives nowhere less than in the established gendered practices found in their constitutional texts (see Section 2.4.2.2).

In the same regard, what is most striking is the invocation of the law in identical language, in national constitutions of both countries: “*No person shall be deprived of his life or personal liberty save in accordance with law*” (see Appendix C.1). When Dato Shafee, thus explains, the necessity of the law in the protection of the quality of life there is express approval from Singapore. The constitutional provisions of the two countries digress only on account of the day from which the constitutional provision takes effect (*e.g.* Malaysia specifically refers to Merdeka Day) and the possible arbitrage of a Syariah court. These same articles on the right to life were footnoted by the Secretariat on the Zero Draft⁹³, prior to the official negotiations, to denote the compatibility of national normative frameworks.

The second approach demonstrates the strategy in *extra-framing*. Thailand manifestly reasoned on the normative standards set by Article 3 of the UDHR 1948 and led the proposal for a single and “succinct” sentence following the guidelines set by the Siem Reap AMM Retreat (January 2012). What is apparently surprising, however, is that Thailand is a “retentionist” state; in fact, its last execution in 2009 along with Singapore, has been relatively recent (see Appendix D). It is even rather more intriguing if one sees that, on the surface, Thailand has the most number of types of crimes punishable by death - at least thirteen - in contrast to Singapore and Malaysia, where the death penalty is endorsed and upheld in at least eight classes of criminal transgressions (see Appendix D). Note that we have not included in this summation the broad range of crimes classified under “other offenses resulting (and not resulting) in death”. One reason why Thailand has opted for this stand is because its official representative, Dr. Sriprapha Petcharamesree, has always made it clear that she represents her country but operates with autonomy and independence from the national government. It is a condition that is similar to that of Rafendi Djamin of Indonesia. In both of these countries, the Representatives are actually elected and nominated and not appointed by their governments. Equally important, however, is that Thailand in contrast to Singapore and Malaysia is a party to the ICCPR 1966 for which it must hence maintain its international obligations.

The final approach takes on the metaphor of the “bridgework” that Myanmar and the Philippines took on in reaching a *compromise* on this provision. The mandate from the Siem Reap AMM Retreat could not be overestimated in setting the ideological margins of the Declaration. Ambassador Manalo reiterated what could possibly be the broadest

⁹³ Personal notes of the author.

mandate of the foreign ministers - the text must be “comprehensive and succinct”. This instruction was oftentimes played off by the Representatives, including herself, against the parallel objective of drafting a “political document”. This discursive pair counted amongst the more “neutral” rhetorical strategies: the tendency was for addressors to extra-frame against addressees who wanted to include great detail and to intra-frame against those who lobbied for parsimonious declaratory sentences. In both directions, the right to life, expanded entitlements: compare the evolution of the provision especially from the Basic Draft to the Plenary Version. Ambassador Swe, in the meantime, had occasionally tended to suggest external arbitration in case of an impasse. The two countries formed a solid alliance between an abolitionist state - the Philippines - and an abolitionist de facto member - Myanmar, and represented the middle-way between the coalitions. Their official representatives were seasoned and respected diplomats whose track records included ASEAN and UN-level negotiation. These two were actually tipping the balance in favour of a liberal formulation on the right to life. The diplomatic repartee between the two, consisting of discourses built on human rights on the one hand and the state on the other, kept the negotiations on an even keel.

Macro-micro mechanism: What are the immediate and more general circumstances of discourse, as determined by the whole aggregate conditions under which the community of speakers operate? One of the reasons I believe that language could not be any more “transparent” was because ASEAN member states were themselves aware that no international consensus on death penalty was forthcoming;⁹⁴ the Representatives could not expect themselves to provide greater clarity, plausibly on account of this very fact, therefore. What was certain, however, was that a regional consensus was not anywhere near realisation. The argument runs between the chicken and the egg, so that states can either typically “mask” complex national political realities or reaffirm the status of their national legislation against the backdrop of specific social norms and political systems. This will now be made even clearer from the exposition below.

Firstly, the status of mandatory death penalty in the region is indicative how the death penalty pervades in an uneven manner. Four states - Malaysia, Singapore, Brunei and Myanmar - have retained it for crimes such as murder, terrorism-related offenses resulting in death, kidnapping not resulting in death, and drug possession, whilst another four - Thailand, Vietnam, Laos, and Myanmar - have not imposed it (see Appendix D). I include

⁹⁴ See for example, JOHNSON, D. T. Z. F. E. 2009. *The next frontier : national development, political change, and the death penalty in Asia*, Oxford; New York, Oxford University Press.

Myanmar in both groups because the government has put a moratorium on capital punishment, so it is somewhat of a joker in the pack. But in the same light, Brunei and Laos have unmistakably shown unusual restraint because the last recorded or known executions have not occurred within the past ten years: the last execution was in 1957 in the case of Brunei, 1989 in the case of Laos, and 1988 in the case of Myanmar (see Appendix D).

Second, a survey of the responses of these eight member states – either as parties to the ICCPR 1966 or in their interactive dialogue during the Universal Periodic Review - to the recommendations of the U.N. Human Rights Council, including other international human rights bodies such as the Human Rights Committee, to abolish death penalty show no clear and definitive signs that any of them - including their constituencies in the case of Malaysia and Vietnam - are ready to relent (2012a). Finally, on the average there are four species of national laws among member states which uphold the death sentence, the most common being the penal code in each of these countries (see Appendix D). Singapore, for example, counts on at least eight legal sources in contrast to Thailand where the death penalty appears to be largely regulated by the Thailand Criminal Code (see Appendix D). This presents a clear legal, political and institutional challenge.

Micro level mechanism (or “introspection”): How does the utterance come to life? Introspection is the most difficult mechanism to investigate because of the rarity of data: free, unsolicited, untrammelled expression of individual desires, beliefs and action opportunities on what might seem politically sensitive views will not usually be available. Such views on the right to life have been an exception because Dato Shafee, the Malaysian Representative to the AICHR, incidentally published his reflections in the New Straits Times on the AHRD. He advocates:

Malaysia should rethink holistically and practically the whole debate on the abolition of the capital punishment and not merely on abolishment of the mandatory death penalty and take the lead and be the proponent in ASEAN countries to implement this actively... I have mooted this idea on several occasions among my colleagues in AICHR for all the 10-member ASEAN countries to consider...

While I support the idea of immediately removing the mandatory capital punishment in drug cases, I am proposing that this should be merely a beginning of the migration of our laws towards the incremental and eventual total abolition of the death penalty... It is cruel and inhuman punishment; it is irreversible if a wrong

conviction occurs; it is contrary to human rights by world standards; the retribution theory or “an eye for an eye” is no longer an acceptable theory in sentencing principles; and the death penalty does not reduce specific crimes such as drug offences, murder etc.. All the above reasons are sound and reasonable (Abdullah, 2012).

There is an apparent contradiction between the views expressed here and the stand taken by Malaysia during the negotiations. In my conversations with Dato Shafee, he has assured me that he has always believed that death penalty should be abolished. Why, therefore, did he not simply stand on the side of Thailand, Indonesia, Myanmar and the Philippines? On the one hand, he was fulfilling his duty to the state. On the other hand, however, Dato Shafee was struggling out of what we have called a dialectical synthesis - the dialogue within the dialogue. He was trying to make sense out of a variety of clashing discourses - again and again - between the psyche and ideology, between the inner and the outer. Dato Shafee had finally struck an inner compromise. A new sign materialised when he said in Jakarta (March), balancing the tradition Malaysia shared with Singapore against the more liberal proclivities of Indonesia and Thailand:

... the present article embodies three concepts: first, life is inherent; secondly, because it is inherent then the law must protect it as part of the duty of the state; and finally, one may be deprived of life only in ways and means permitted by the law.

2.2.3.1 Summary

In summary, three points must be made. First, the overview of national laws demonstrate that death penalty is still firmly in place, despite calls for international human rights bodies to increase the power of judicial review. Second, international treaty obligations especially with regard to the 1966 ICCPR across the region are incomplete. In conjunction with the fact that national constitutions also unevenly subscribe to national law, the regional consensus is a reflection of the international consensus, which is at best patchy. Finally, these ambiguities taken together have resulted in a language that has, therefore, “hidden” death penalty from view. Article 11 signifies that the “regional consensus” is inching away from death penalty.

Chapter 2.3

Equality of Rights Without Discrimination and Special Protections for Groups

2.3.1 INTRODUCTION

A total of nine general principles were finally hallowed into the Declaration, two of which deserve an account for our present purposes, on two grounds: the first is the fact that they were continually the focus of negotiations over an extended period of time, and secondly, because they reflect the tensions in negotiating the gender⁹⁵ and cultural norms within ASEAN no less than the struggle for specific interest groups to be identified and empowered in a socially and geographically diverse region. These principles are the equality of rights without discrimination and the special protections for groups. It is difficult to ascertain whether a highpoint in the negotiations could be argued to have taken place, but in the case of the provision on the equality of human rights, there are several meetings in which the views of nearly all stakeholders were brought into sharp focus: Jakarta (February), Bangkok, Yangon, Kuala Lumpur, and Manila. Our account will

⁹⁵ The ASEAN Member States had taken up the definition of “sex” and “other status” in the first-tier deliberations. Three points must be made *a propos*: 1) Before the official negotiations began in January 2012, the Basic Draft, which was envisioned to be the textual basis or working text for the AICHR Representatives, had already registered qualifications and definitions (see immediately succeeding section); Malaysia’s position, for example was to be made publicly clear in the two Regional CSO Consultations (Kuala Lumpur and Manila); 2) Note that all ASEAN Member States have signed up to CEDAW but have made reservations which reveal how they have had to accommodate national interests; these debates can be carefully studied in LINTON, S. 2008. ASEAN States, Their Reservations to Human Rights Treaties and the Proposed ASEAN Commission on Women and Children. *Human Rights Quarterly*, 30, 436-493.; 3) I have deliberately excluded annotations on international documents cited by the AICHR Representatives during the negotiations to keep close to the first-hand narrative and the word limit. I make this exception here for the express purpose that the word “other” and “sex” as they have been defined in CEDAW were challenged as not being sufficiently representative of present social and political realities in the region. I thank Michael O’Flaherty for pointing out this necessary exception.

primarily trace the evolution of Article 2 of the AHRD (see Table 2 below), but not without offering a parallel account of Article 4 of the AHRD on the special protection of the rights of “specific” groups and the deliberations on the catchall phrase “marginalised and vulnerable groups”.

2.3.2 FIRST-HAND ACCOUNT

2.3.2.1 Jakarta (February)

On the 19th of February, in Jakarta, a plenary discussion on the meaning and significance of “General Principles” in the AHRD transpired. The Representative of Singapore, Richard Magnus, a man of the law and erudite in speech, was chosen to lead the discussion. Mr. Magnus argued calmly that the section on general principles must first of all refer to the underlying set of values and principles that we “assume” in the “enunciation and application” of human rights. The Philippines, Singapore and Thailand each came up with its own proposal for such a set of principles but the AICHR eventually opted on the Singapore proposal. Initial disagreements revolved around the first attempts at phrasing what was to become Article 2 of the AHRD:

Everyone is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, colour, ethnicity, [descent,] sex, [gender identity], [sexual orientation], age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status. [No one shall be discriminated against by any public authority or any third parties on any grounds].⁹⁶

Now Thailand suggested strongly that if the AICHR were to “modernise” the Declaration then the concepts of “disability” and of “sexual orientation”, following the language of the “CEDAW Committee (General Recommendation. No 28, Par. 18)”,⁹⁷ must seriously be

⁹⁶ This was “proposed principle 2” or “PP2” as it was written in the document; the words in brackets in the Singapore proposal here below were recommendations of the Representatives that had been raised for subsequent discussion.

⁹⁷ “...The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity.” Available at:

given thought. But the positions of Brunei and Malaysia on the use of the phrase “sexual orientation” were, in point of fact, non-negotiable; and indeed not all the Representatives were comfortable with the words “gender identity” and “sexual orientation”. For Brunei, these terms conflicted with national laws.⁹⁸ In the meantime, Malaysia further explained that people who would fall under the category of another sexual orientation were duly protected under national law but they were classed as “persons”.

Ambassador Hung of Vietnam asked himself and the group whether the principle of non-discrimination articulated in the Singapore proposal had already responded to this concern (see immediately below “proposed general principle” 4 or “PP4”). Equality and non-discrimination are two concepts, Dr. Sriprapha retorted: non-discrimination was a right in itself: “no one shall be discriminated against” (PP2) is not equivalent to “everyone is equal before the law” (PP4). Dato Shafee agreed. Dr. Sriprapha further contended that non-discrimination somehow covers rights that are not yet enshrined in law, and that it has a much wider application. Elucidating in consistent fashion, Mr. Magnus observed that different notions of equality are invoked in each of the paragraphs. Magnus argued that PP1 is based on natural law, PP2 refers to the legal regime, and PP4 relates to entitlement rights:

PP1 All persons are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of humanity.

PP2 Everyone is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, colour, ethnicity, [descent,] sex, [gender identity], [sexual orientation], age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status. [No one shall be discriminated against by any public authority or any third parties on any grounds].

PP3 Everyone has a right of recognition everywhere as a person before the law.

PP4 Everyone is equal before the law. Everyone is entitled without discrimination to equal protection of the law.⁹⁹

<http://www2.ohchr.org/english/bodies/cedaw/comments.htm>. Thailand had consistently adopted this position in preparing the Basic Draft by the Drafting Group.

⁹⁸ Dato Pehin confirmed this in my subsequent conversations with him.

⁹⁹ There were a total 9 Proposed Principles.

Both principles were retained under the “General Principles” section, although the AICHR had come to a deadlock on the article on the non-discrimination. They were going to need more time to work it out. After the morning break, Ambassador Swe of Myanmar mediated to somehow bridge differences between national positions by suggesting that the more controversial terms be bracketed and deferred to a more senior level. Rafendi Djamin of Indonesia insisted that what was at stake was the principle of non-discrimination, and hence also supported the motion by Myanmar to use momentarily brackets. Indonesia broached developments on the ongoing discussions at the UN level via the Lesbian, Gay, Bisexual, and Transgender (LGBT) Commission and noted that its findings could shed light on their own deliberations, especially because these groups had been, according to Pak Rafendi, one of the most vulnerable sectors of society even in times of peace. He further argued that these concerns were growing in salience and relevance in human rights discourse and that the principle and language of non-discrimination could also be found in the 2007 Yogyakarta Principles.¹⁰⁰ Thailand, following on the arguments of Indonesia, pointed out that the principle of non-discrimination is “non-derogatory” and “non-negotiable” and agreed to the strategy of bracketing so that a more systematic or methodical discussion can take place in due course. Vietnam suggested that the AICHR consult with legal experts. In the meantime, Laos called the attention of his colleagues to the fact that including the phrase “other status” towards the end of the sentence contemplated all possibilities.

Mr. Magnus and Ambassador Swe concurred that member states have already identified the incompatibility of the recommendations with existing national laws and traditions but that it was indeed also important to note that discussions on the UN level were in progress. They believed that the group could also, therefore, wait out the developments in these discussions and eventually come to agree on another language. The AICHR Representatives agreed to put “gender identity” and “sexual orientation” and a couple of other terms in brackets, in the hope that what they could not resolve amongst themselves would be decided either at a later stage or on the ministerial level. The Representatives were aware that ASEAN needed to “modernize” the language and meaning of human rights taken from the UDHR 1948. Definitive choices were hence made in favour of “economic status” instead of “property”, “all persons” instead of “all human beings”, and “the spirit of humanity” in place of “the spirit of brotherhood”. The last two were accepted on account of the need to counter amongst others biases based on gender, while the first term,

¹⁰⁰ Available at: <http://www.yogyakartaprinciples.org>.

economic status, was accepted because of its currency in face of the outmoded word “property” (see Table 2 below).

During this time, the AICHR had also simultaneously deliberated on the notion of “descent” and “ethnicity”. Pak Rafendi had motioned, on the basis of his reading of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD 1966), that descent contributed to the meaning of the clause on non-discrimination. However, the general problem with “descent” as such was that it risked unfastened interpretation, including versions that might refer to illegal immigrants in contrast to the specificity of the Malaysian and Singaporean national constitutions for which the term refers to country nationals.¹⁰¹ In the meantime, the issue of “ethnicity” along with its various expressions was about to trigger more extended deliberations from February onwards. It was to the discussions on race, rural communities and indigenous groups and migrant workers that this notion was intricately bound.

2.3.2.2 Bangkok

In Bangkok, the drafters raised for themselves a crucial question: how were they going to reign in what could potentially be a more unwieldy collage of rights provisions based on national interests and country constitutions? The human rights provisions in the Jakarta working texts were still redundant if not incoherent at this stage and, on the whole, substantively bare. It did not yet measure up to a decent and presentable draft. Ambassador Manalo from the Philippines stepped in and spoke in no uncertain terms that she wanted to see a draft of not more than five pages; these were her clear instructions from the Philippine foreign minister. Dr. Sriprapha, whose foreign minister also wanted a document of only five pages, supported her plea. Manalo reminded everyone at several junctures that she would veto anything that went beyond this quota.

The Representatives were burdened considerably with the preparations for the First Regional Consultation with the ASEAN Sectoral Bodies – this was to be the very first encounter of any kind with stakeholders outside of the AICHR on the draft of the Declaration. After the letter and information document for the sectoral bodies was

¹⁰¹ Informal conversations with Representatives as well as colleagues from the various national delegations during the drafting of the AHRD.

finished off, a retreat was convened (also on that same morning of the first day, 6th of May). The Representatives repair to this ASEAN peculiarity – the so-called “retreat” – when they agree that protocol must give way to straight and intimate talk between colleagues. The retreat environment is presumably informal and more relaxed; it is similar to a caucus session except that it is exclusive to the Representatives in attendance. Now it must be said the draft really only began to shape up soon after the retreat; a consensus had been achieved to work on the outstanding sections of the Jakarta working draft and to incorporate all the other sets of rights which had so far been settled in plenary. On that very evening, five country Representatives, including the chair – Cambodia, Myanmar, the Philippines, Singapore, and Thailand – met over dinner to work out the terms upon which the Jakarta working draft would be fitted into five pages.

On the morning of the 7th of May, what I have called the “night draft”, six pages in length, was presented to the AICHR. It was tight, purged of brackets, strikethroughs and footnotes, and included all the sections previously agreed upon by the Representatives, thanks in part to the drafting skills of Richard Magnus and his team. As it was laid open to further revisions, however, jousts ensued as to the extent in which some rights ought to be enunciated. All the Representatives had positively received the night draft; but it was once again at risk of being mangled by either the addition or deletion of words and phrases, such as the ubiquitous tail-phrase - “in accordance with national law”. The air was tight with frustration. Frictions had come to a head between those who were inclined to a detailed declaration and those who wanted to simply re-affirm the existing provisions of the UDHR 1948 and elaborate new rights.

Ambassador Swe of Myanmar jolted the negotiations forward as he pronounced in a wise sleight of diplomacy – part gambit, part ultimatum - that his delegation would no longer take part in the drafting process if the Representatives would not focus swiftly on the substance of the night draft. His delegation would reserve its comments to the amendments until the long drawn – many of them superfluous - debates were over. In Swe’s own words, a “golden medium” between detail and parsimony was a goal for the Representatives so that the negotiations would not drag on needlessly. The length and structure of the draft was on the table in a standoff. The Chair called for a break. The AICHR came back after coffee ripe with a consensus and immediately accepted the night draft presented by Singapore on behalf of the four other Representatives. The first in a series of AICHR working drafts - the “Bangkok Draft” - was completed after deliberating on the formulations that were carried over from the Jakarta working texts and the Night

Draft. The five-page limit ultimately carried the day but the substance of the declaration – it was agreed - was in no way to be compromised.

Now the negotiations on special protections of groups (*e.g.* women and children, minorities and indigenous peoples, etc.) are noteworthy for our present purpose. In Bangkok, there was an understanding that the words and phrases that would cover crucial human rights concerns, such as statelessness and the plight of specific groups such as women and children and migrant workers, and the right to vote had to be as inclusive as possible. In this respect, the phrase “marginalised groups” of Article 8 (in the Night Draft) was kept open to meaning and interpretation:

The rights of women, children, the elderly, persons with disabilities, migrant workers and marginalised groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms.

It was initially argued that the word “marginalised” was not the most appropriate word because it connoted “stigmatization”. Ambassador Manalo suggested, for example, using the word “vulnerable” instead of “marginalised” and “ethnicity”. But it was Dr. Sriprapha, backed up successively by Pak Rafendi, who argued that “marginalised” and “vulnerable” have different meanings. Thailand had, in fact, made a stand to reinstate a unique section found earlier in the Basic Draft – “The Rights of Women and Children and Other Vulnerable Groups” - that would respond to the rights of specific and marginalised groups, which would have included “the rights of disabled persons, migrant workers, minorities and other vulnerable groups”. This, however, did not prosper, so the deliberations continued. Singapore came back by saying that “marginalised” prevailed as the standard in use in UN conventions. But the Philippines had then quickly argued that “vulnerable” would actually be “more comprehensive in scope”. The word “vulnerable” was thus introduced - and in the meantime - the word “ethnicity” had already been taken out from the provision on non-discrimination. These modifications concerned distinct rights provisions in the Declaration but the issues were interrelated. The discussions oriented the sense and meaning of the phrase “marginalised and vulnerable groups” that was to ultimately complete the special protections provision, moving up in the end as Article 4 of the final version of the AHRD:

The rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised

groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms.

2.3.2.3 Yangon

The Representatives would fine-tune the phrase once again when they got to Yangon. On the 3rd of June, Ambassador Manalo, after having led national consultations with CSOs in the Philippines,¹⁰² suggested that the phrase “rural communities” be introduced before “marginalised groups”. Singapore framed the Philippine recommendation with an additional phrase, so that the article would include “*people from* rural communities, vulnerable and other marginalised groups”. Dr. Sriprapha observed that identifying the “people from...” such communities is different from recognising the group itself, “rural communities”. Ambassador Manalo clarified that she was interested in signaling the poor people, not least the “poor peasants” and “rural women” within these communities, whose rights were under constant threat. Pak Rafendi from Indonesia raised his doubts a propos about the meaning of the word they had chosen, “vulnerable”, and instead inquired about the promotion of the “rights of specific groups” as a whole, which he believed was important and necessary.¹⁰³ But “specific groups are not specific enough”, according to Myanmar; and they would “not necessarily (be) vulnerable groups”, according to the Philippines, however.

The AICHR was now somehow split between those who thought “specific” was vague, and those who thought “vulnerable” was not sufficiently specific either. Indonesia wanted the formulation to contemplate the rights of indigenous peoples and human rights defenders. In the meantime, the notion that Thailand had wished to be reflected upon by the AICHR was the “rights of collectivities”. Ambassador Hung indicated his approval for rural communities because it was an appropriate term for the realities of Southeast Asia; the term “poor people”, however, he thought, could easily mislead one to think about only one group of poor people - those living in rural areas. Pak Rafendi eventually retorted that an alternative would hence be the phrase, “disadvantaged groups in urban and rural communities”. A consensus grew on the “value-added” meaning between these two terms

¹⁰² See list of CSO consultations (pp. 29-31) in 2013. *Still Window-Dressing: A Performance Report on the Third Year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2011-2012*. Bangkok, Thailand: Solidarity for Asian People’s Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR).

¹⁰³ Informal conversations with Rafendi Djamin.

- rural communities and disadvantaged groups - but a decision to choose between these two was hard-pressed. The best compromise the AICHR could get at in Yangon was instead to open the provision slightly a bit more with the addition of the word “other” to “vulnerable and marginalised groups”.

2.3.2.4 Kuala Lumpur

In Kuala Lumpur, the Representatives came face to face with a motley but select group of human rights defenders representing CSOs all over Southeast Asia (see Section 2.2.2.3). The CSO delegates spoke in no uncertain terms on more than three dozens of issues relating to the rights and freedoms of persons and groups. But several rights acquired a more pressing nature because they were repeated invariably by a host of different stakeholders. It was a fine and prolific moment for everyone; introductions were made, business cards exchanged, and there was frank and open talk especially during the breaks. The whole day was dedicated to listening and talking with advocates and representatives of civil society and collecting their recommendations in written form. This was the 22nd of June.

The following day, the Representatives sat together to carefully consider the views and new insights into the special protection of specific groups, as they were lobbied chiefly by the CSOs during the consultation dialogue. These groups included migrant workers and their families, persons with disabilities, indigenous peoples and traditional communities, stateless persons, refugees, displaced persons, minorities, and women and children. The Representatives had before them two documents: 1) the “Joint submission to the ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration” (what has been referred to here as the “Kuala Lumpur Joint Submission”) by Civil Society Organisations and people’s movements participating in the Fifth Regional Consultation on ASEAN and Human Rights (20-21 June 2012) and 2) “Paragraphs Inputs from the National and Regional CSOs” compiled by the Secretariat to compare what was by this time called the Yangon Draft against the inputs made by all the organisations that attended the consultation.

Malaysia suggested that, in light of the sustained appeals for a more explicit treatment of the rights of indigenous peoples during the consultation, the AICHR was compelled somehow to heed the call and take action. It was argued, however, that all the

constituencies of a country might also be considered “indigenous”, so not all Representatives were entirely comfortable with the provision. Pak Rafendi asked that they consider the word “minority” instead. A suggestion to use the word “ethnic” was also broached. But neither of these ideas was accepted. Myanmar preferred the word “indigenous” to “ethnic” while Thailand opined that the term “ethnic” glosses over the fact that some such groups are vulnerable and others are not. Ambassador Manalo, bridging the divide, then called everyone’s attention to an earlier consensus that the notion of “indigenous” was to be included in the phrase “other vulnerable and marginalised groups” - to which the group nodded afresh in general agreement. Finally, Dato Shafee in promoting the special protection of groups such as women, called for the deletion the word “other” that was recently added in Yangon, in the end putting all the groups under special protection at par with each other.

The final observation to be made was that at this stage of the Declaration’s history, the CSOs did not yet have a copy of the AICHR’s evolving draft. The Kuala Lumpur Joint Submission hence contained specific if partial formulations on the manner in which they thought the provisions were taking shape. It is noteworthy that their proposed formulation for the general principle of equality without discrimination stripped the phrase anew to a single sentence:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind whatsoever” (2012e: 12).

The Kuala Lumpur Regional Consultation had once again given this basic principle an extended lease on life – that is, in terms of its place and meaning in the history of the draft. Finally, on account of its interactions with the CSOs, the AICHR had not only touched on the principle of non-discrimination but also on the notion of public morality in the context of women’s rights, children’s rights, the right to sustainable development and the formulation of a closing paragraph that would guarantee the non-derogatory nature of certain rights.

2.3.2.5 Manila

The AICHR and the CSOs were going to have an encounter for the second and final time. Straddling between the 3rd Regional Consultation in Brunei that had just concluded and the Informal ASEAN Foreign Ministers Meeting (IAMM) in New York that was imminent, the Representatives found themselves calibrating the progress of the draft. The Declaration was to be presented to the international community at 21st ASEAN Summit on the 18th of November in Phnom Penh. This Manila meeting was, in effect, almost everyone's last shot at making changes. Time was sparse and any present negotiation fraught with difficulty. The expectations were high on both sides of the negotiating table; the AICHR needed and wanted to hear indeed from human rights stakeholders within and outside of ASEAN. The attendance and the contributions from civil society organisations were remarkable; they came in full force as they presented 8 "submissions" (recommendations in hard copy),¹⁰⁴ expounding simultaneously on the articles, which CSO advocates believed were either "vague" or falling below international human rights standards.

Three major concerns emerged from the dialogue. There was the clamor of CSOs to limit "claw-back clauses" (see 2.2). Secondly, women's groups (*i.e.* Philwomen's and Women's Caucus submissions) reiterated their arguments for striking out the word "morality", observing that the current wording in the draft had retained it despite their earlier caution that this notion was being slanted by sectors in society with adverse effects on women's rights. Finally, LGBT advocates articulated their membership in humanity and made a reasoned appeal to the inclusion of the explicit phrase, "gays, lesbians, and transsexuals" in the non-discrimination clause so that these groups may not be discriminated against. Now in principle, these CSOs were in consonance on claiming equality of rights but in practical terms their recommendations were somehow at odds. Observe the comparison of the recommendations coming from three submissions, examined by the Representatives before the article took its final form:

¹⁰⁴ 1) What has been called here the "Manila Joint Submission" to the AICHR on the AHRD; 2) Second Addendum to the Women's Caucus Submission; 3) Philwomen Recommendations; 4) CRC Asia Submission on the AHRD; 5) Submission of the Indigenous Peoples Task Force on ASEAN and the ASIA Indigenous Peoples Pact on the AHRD; 6) Indonesian Civil Society Organizations Inputs for AHRD; 7) ASEAN Disability Forum Statement; 8) Working Group for an ASEAN Human Rights Mechanism: Talking Points for the Third Regional Consultation of the ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration (sic).

Yangon Draft-Kuala Lumpur Draft-Manila Draft	Manila Joint Submission	Second Addendum to the Women's Caucus Submission	Philwomen Recommendations
Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status.	Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind such as race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status (2012d: 4-5).	<i>Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, ethnicity, gender, sex, age, language, religion, political or other opinion, national or social origin, economic status, health status, birth, disability, sexual orientation and gender identity, or other status</i> (2012g: 1).	Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as sex , race, gender, sexual orientation and gender identity , age, language, religion, political or other opinion, national, social or ethnic origin, citizenship , economic status, birth, disability or other status. (2012f: 1-2).

The differences in the phraseology – amongst the CSO recommendations - reflected the same tensions within the AICHR when this article was under deliberation. The formulations that were lobbied are a function of the inadequacy of any one version when political agendas compete. This is where institutional memory weighs in; negotiations build meaning and relations. Thailand and Myanmar were quite happy with the single sentence proposed by the Manila Joint Submission, which stopped at the phrase, “without distinction of any kind”. But Indonesia and Vietnam were also content in keeping the “original” (*i.e.* Kuala Lumpur Draft version). The Representatives eventually settled on the current wording (Yangon-Kuala Lumpur-Manila Draft) because they had agreed that “gender” in place of “sex” and the phrase “other status” are inclusive of all persons.

Table 2: The Evolution of the Article on the Principle of Equality and Non-Discrimination¹⁰⁵

Universal Declaration of Human Rights 1948	Zero Draft	Basic Draft	AICHR Plenary Version, Jakarta	Night Draft	Bangkok Draft	Yangon Draft-Kuala Lumpur Draft-Manila Draft	ASEAN Human Rights Declaration 2012
<p><i>“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent,</i></p>	<p>No one shall be discriminated on grounds of race, colour, sex, gender identity, language, religion, age, political or other opinions, national or social origin, sexual identity, property, place of birth, or other status. No one shall be discriminated against by any public authority on any ground.</p>	<p>Everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinions, national or social origin, [sexual identity], property, birth, disability or [other status]. No one shall be discriminated against by any public authority or any third parties on any grounds.</p>	<p>Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, colour, ethnicity, [descent,] sex, [gender identity], [sexual orientation], age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status. [No one shall be discriminated against by any public authority or any third parties</p>	<p>Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, ethnicity, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status.</p>	<p>Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, ethnicity, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status.</p>	<p>Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status.</p>	<p><i>“Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status.”</i> (Article 2)</p>

¹⁰⁵ See explanatory note on the series of drafts above Table 1.

<i>trust, non-self-governing or under any other limitation of sovereignty.” (Article 2)</i>			on any grounds]				
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2.3.3 PERSPECTIVE OF THE WORD: THE PRINCIPLE ON EQUALITY WITHOUT DISCRIMINATION

Once the trail of the dialogue on the provision for the equality of rights without discrimination is examined under the movement of the language pendulum, the contestations reveal two fundamental ways of phrasing the article: on one end of the extreme is the tendency toward an “itemisation” of the list of identity categories, and on the other, is the preference for the “abbreviated version”, which merges, in principle, no fewer categories than those contemplated in the former. Several of these categories were intently deliberated throughout the drafting process but we shall, for the present need, focus on the inclusion of the words “gender identity” and “sexual orientation”. What the non-discrimination clause effectively does is that it names the basis upon which discrimination happens - or perhaps better said - it distinguishes the categories upon which discrimination ought never to take place. It is wont to behave, therefore, like an accordion – *expanding* to accommodate all, *contracting* to *potentially* accommodate all. The question that comes to light, and which consequently knits this section together is, what deeper tensions underwrite this clash in phraseology?

Micro-macro mechanism: The framing strategies in this provision were evident even before the formal negotiations in the heart of the AICHR began. If one looks at the fine print of the Basic Draft,¹⁰⁶ two views prevailed. Brunei and Malaysia systematically engaged in a series of *intra-framing* strategies derived from the social and legal institutions of their countries and ASEAN. In the meantime, Indonesia and Thailand were held by their common beliefs to challenge the traditional categories of non-discrimination (*i.e.* race, sex, colour, etc.) by deploying the *extra-framing* strategies on the basis of UN processes and international human rights instruments. In both instances, the fixed values, preferences and ideas of member states bind them largely, therefore, in relations of interaction.

For Malaysia, sex and "other status" were "to be determined in the context of ASEAN Common Values (sic)".¹⁰⁷ The argument found in the annotation of the Basic Draft goes on

¹⁰⁶ Personal notes of the author.

¹⁰⁷ Personal notes of the author.

to elaborate that the views of both committees – the Human Rights Committee under the ICCPR 1966 and the Committee on Economic Social and Cultural Rights under the ICESCR 1966 – “are persuasive in nature and only with reference to the State Parties to the same Covenants”.¹⁰⁸ “Any definition of other status and sex”, it further claims, “is to be determined by ASEAN common values in the spirit of unity in diversity. Furthermore, in relation to the principle of equality, ASEAN Member States may take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Declaration (AHRD)”.¹⁰⁹ Malaysia somehow puts itself in a bind. It agrees with the principle but it is selective on the institution that establishes its terms.

Brunei was no less reticent. Dato Pehin, with whom I had informal and personal conversations on this matter consistently argued that the “way of life” in Brunei dictates acceptable codes of behaviour from those that are not - and he called this “chara hidup”, which is also inspired by the teaching of Islam as the country’s official religion.¹¹⁰ The “Report of the Working Group on the Universal Periodic Review” of Brunei expands on this conviction further:

With regard to sexual-related matters, Brunei Darussalam reiterated that the core value of Brunei Darussalam society was the family institution as the basic unit of society. Family values were an important factor in development as well as in securing a safe and loving environment. Tradition and cultural factors also played an important role (2010b: 13).

The initial accounts demonstrate that Malaysia and Brunei were consistently open and strong in their positions. This was further brought into relief during the Manila Regional Consultation with civil society. The SAPA Annual Report 2013 on the AICHR documents:

On 12 September... In addition to individual submissions, the CSOs presented their second joint submission by 62 CSOs... The Malaysian AICHR representative defended the retention of the term “public morality” and further stressed that specific reference to rights of LGBT persons was one of those things” that Malaysia,

¹⁰⁸ Personal notes of the author.

¹⁰⁹ Personal notes of the author.

¹¹⁰ Personal notes of the author.

Brunei and Singapore “cannot accept in the declaration”. The Indonesian representative told participants that the term (public morality) remained in the text because the AICHR “could not reach a consensus” to remove it (2013: 33).

Now, during the negotiations, Dato Shafee, the representative of Malaysia, to make his point clearer argued – it is not that LGBT rights are not contemplated, but that they are in fact protected as a class under “persons”. Dato Pehin, the representative of Brunei, for his part, clearly pointed out that Sharia law and the penal code are upheld in equal measure, so the idea of approving same-sex marriages, for example, is a proposal that his country could not accept.

We have so far discussed only one position with regard to the inclusion of “gender identity” and “sexual orientation” – the other two now deserve attention. During the Drafting Group meetings in 2011, it was Thailand that motioned for the word “gender identity” to be included, and that “sexual identity” be changed to “sexual orientation”. It was a recommendation that was in line with CEDAW standards and was hence reiterated by Dr. Sriprapha during the negotiations. Indonesia, this time in the course of the official negotiations, followed through by extra-framing its arguments first on the basis of the (2007) Yogyakarta Principles and the campaign of the International Gay & Lesbian Human Rights Commission via discussions at the level of the UN. Pak Rafendi, the representative of Indonesia argued that the LGBTs are “one of the most vulnerable groups” in times of war *and* peace. The stand of the Representative of Indonesia will come as no surprise to close CSO-observers in the region who will have witnessed the solid professional ties of Pak Rafendi with local and regional NGOs, not to mention the equal attention he has paid to the agenda of groups more specific to LGBT rights, especially Arus Pelangi and Gaya Nusantara.¹¹¹ It now turned out that these last two formed part of the ASEAN LGBTIQ (Lesbians, Gays, Bisexual, Transgender, Intra-sexual and Queer) Caucus who had been lobbying against the status quo of “religious and sectarian prejudice” for the recognition, promotion, and protection of LGBTIQ (2011a).

Macro-micro mechanism: The three mechanisms are analytically distinct but the movements in each of them, however, are linked in eternal cycles, so that in practical

¹¹¹ I have had informal conversations with Pak Rafendi and he has confirmed that he worked and listened closely to the concerns of the LGBTs though these formal institutional venues before, during and even after the negotiations. See also: <http://www.thejakartapost.com/news/2012/09/20/ahrd-won-t-be-perfect-says-marty.html>

terms the three mechanisms and the three cycles operate contemporaneously. The point to be made here is that in the discussion of each movement, the other two come to the fore. In the case of the principle of equality and non-discrimination two structures have had an influence on the macro-sociological state of the negotiations to the beliefs, desires and opportunities of individual actors. Let us first take the case of relations between Indonesia and Thailand and those between them and the other 8 members of the AICHR: the Kuala Lumpur and Manila Regional Consultations with civil society, including the strong advocacy links of LGBT groups with Indonesia have in no small measure made an impact on the negotiations.

It is important to note at this point that the ASEAN LGBTIQ Caucus convened for the first time in 2011 during the annual ASEAN Civil Society Conference (ACSC) and ASEAN People's Forum (APF), which was held from 3-5 May in Jakarta, and for the second time, on the same occasion, from 29-31 March 2012 in Phnom Penh (2011b, 2012c). The ACSC/APF fora have been held on the sidelines of the ASEAN Summit and important ministerial meetings to lobby and pressure the regional block to take in the perspective of civil society in discussing their agendas. Observe, therefore, how the ASEAN LGBTIQ Caucus agenda evolved in the period that coincides with the official drafting of the AHRD. Their first set of "recommendations" comes from the 2011 caucus, while the second set is taken from the 2012 caucus. It is patently clear that the group had in fact carried over their lobby agendas from one year to the next. In 2012, however, a significant recommendation is added – the inclusion of SOGI (sexual orientation and gender identity) *in the ASEAN Human Rights Declaration* (point 1 of the second set):

SET 1 (2011 Recommendations) :

1. Immediately repeal laws that directly and indirectly criminalize SOGI (sexual orientation, gender identity), recognize LGBTIQ rights as human rights, and harmonize national laws, policies and practices with the Yogyakarta Principles;
2. Establish national level mechanisms and review existing regional human rights instruments (*e.g.* AICHR, ACWC) to include the promotion and protection of the equal rights of all people regardless of SOGI with the active engagement of the LGBTIQ community;
3. Depathologize SOGI and promote psychosocial well-being of people of diverse SOGI in accordance with the World Health Organization (WHO) standards, and ensure equal access to health and social services (2011a, 2011b).

SET 2 (2012 Recommendations):

1. *Include SOGI provision into the ASEAN Declaration on Human Rights, specifically inclusion of reference to 'gender identity' and 'sexual orientation' within Article 2 (emphasis mine);*
2. Immediately repeal laws that directly and indirectly criminalize SOGI, recognize LGBTIQ rights as human rights, and harmonize national laws, policies and practices with the Yogyakarta Principles;
3. Establish national level mechanisms and review existing regional human rights instruments (*e.g.* AICHR, ACWC) to include the promotion and protection of the equal rights of all people regardless of SOGI with the active engagement of the LGBTIQ community;
4. Depathologize SOGI and promote psychological well being (sic) of people of Diverse SOGI in accordance with the World Health Organization (WHO) standards, and ensure equal access to health and social services (2012b, 2012c).

This observation cannot be made without pointing out that the wider venue in which the ASEAN LGBTIQ agenda was elaborated – the ASEAN Civil Society Conference (ACSC) and ASEAN People's Forum (APF) - had likewise evolved in pursuing the wider agenda requirements of Southeast Asian civil society organisations. At the ACSC/APF in Hanoi (24-26, September 2010), the final statement of the conference lumped together specific groups in ASEAN – “especially children, women, migrants, youth, indigenous peoples and ethnic minorities, religious communities, workers, peasants, fisher folk, refugees, stateless persons and internally displaced peoples, the elderly, persons with disabilities, LGBTIQ, people living HIV/AIDS and other impoverished, disadvantaged and marginalised communities” – all in one paragraph under the heading of “social protection and culture” (2010a). Now in the two succeeding final statements (May 3-5, 2011, and March 31, 2012), the whole document would reflect in its basic template the three ASEAN community pillars (economic, social and cultural, and political and security) and elaborate a set of agendas for each of the special groups, such as those mentioned above (2011b, 2012c).

It is no mere coincidence that it was in the LGBTIQ section of the 2011 ACSC/APF Final Statement (2011b) that very same references to SOGI were also to appear first, citing amongst others the 2007 Yogyakarta Principles and the World Health Organization. This was in clockwork consonance with the 2011 and 2012 sets of recommendations of the ASEAN LGBTIQ Caucuses (2011a). Eventually, in the 2012 ACSC/APF Final Statement,

there would not only be a reference to SOGI but - this time - an explicit lobby to include it in the AHRD. This is to dispel pure conjecture in the alignment of campaign strategies along various levels of civil society transnational networks in the region. The LGBTIQ group, therefore, begins to claim a rank and status, hitherto unpossessed by them, in the order of the categories listed in the non-discrimination clause especially by 2011.

The second structure relates to the systemic norms propagated by the UN and the UN system itself. This brings us to the *compromise* strategies brokered by Myanmar, Singapore and Vietnam to firstly, bracket the terms, second, await UN-level discussions, and third, consult legal experts, respectively. The proposal to await the developments and the outcome of UN discussions was generally accepted by everyone. It appeared to be a gradual solution to the impasse. The contestations at this point of the dialogue, however, may have opened up more points of convergence between the member states in introducing the notion of gender. This was a clear case of powerful and strategic extra-framing using the discourse of emerging rights in the UN. It held the contestations on both sides of the spectrum in equal balance. The striking temporal alignment between developments in the UN and those of the region are undeniable. The UN discourse on sexual orientation and gender identity was, as if to dispel any doubt again of an accident, also formalized in 2011, via a Human Rights Council resolution on the 17th of June:

The Human Rights Council...

Expressing grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity,

Requests the United Nations High Commissioner for Human Rights to commission a study, to be finalized by December 2011, documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity; (2011)

The result is, therefore, unsurprising but significant: none of the forerunning regional instruments – the 1950 ECHR, 1969 American Convention on Human Rights (ACHR), 1981 African Charter on Human and Peoples' Rights (ACHPR), and 2004 Arab Charter – had converged on the notion of gender, let alone gender identity and sexual orientation. That is, *the first regional human rights instrument to actually employ the word "gender" is the AHRD* (see Appendix C.3). All the regional instruments above have mirrored the 1948

UDHR's standard chain of categories – *race, sex, colour, language, religion, political or other opinion, property, birth, or other status*. They had added four new categories to the provision on non-discrimination, which include variations on extant categories as well as new phrases: “national minority” (1950 ECHR) or “ethnic group” (1981 ACHPR), “disability” (2004 Arab Charter and AHRD). But “age” and “gender” are uniquely ASEAN.

Similarly, none of the international instruments that were referenced in the Zero Draft – UDHR 1948, ICCPR 1966, CRC 1989, ICRMW 1990 - agree on gender (see Appendix C.2). Indeed, as a footnote, it will be interesting to see what non-discrimination clauses will look like after the 2011 UN Human Rights Council Resolution *and* the AHRD. The AHRD as an intergovernmental human rights instrument may actually be the first to recognise non-discrimination along the plane of socially-constructed identities. It is in this sense that the move from sex to gender is significant: gender broke open the notion of sex, while gender breaks itself open to the notions of gender identity and sexual orientation. It operates like a numerical key in what could be an equation of greater proportions. Words open minds.

2.3.3.1 Summary

The final article in the AHRD that registers the change from “sex” to “gender” appears to be a shallow shift but its significance has a far wider reach when one considers the “historical circumstances” in which it has taken place. This is the crux of the matter. The notion of non-discrimination traditionally defined, amongst others, through sex – and the converse, the notion of sex as it has traditionally defined non-discrimination - could simply no longer be sustained as viable discourses. The usual beneficiaries of rights entitlements under sex were the biological male and female, the beneficiaries under “gender” are social beings who share and negotiate their identities. The contestations demonstrate that the interlocutors may have propped up notions that defined the former (sex) with terms in stasis and the latter (gender) with terms that are in flux.

What becomes evident from the dialogue is that, more than a mere preference of phrase, is a “class struggle” between traditional societies and the more progressive communities who have espoused what may appear to the former as “radical” if liberal notions of human rights. For Malaysia and Brunei “persons” are classed as male and female and those who

count themselves as belonging to the group LGBTIQ will have to be classed as such. For Thailand and Indonesia, the very conception of what these classes are or are taken to mean *within* the category of “persons” has to be challenged. The point here is not to be critical of whether it is sufficient enough a change or not – this is not what the investigation has set out to do - it is for whom and by whom meaning has shifted.

Chapter 2.4

The Right to Peace and the Right to Development

2.4.1 INTRODUCTION

The “right to peace” is a new right, first, in the sense that it was at best only implicit in the UDHR 1948 - “Everyone is entitled to a *social and international order* (emphasis mine) in which the rights and freedoms set forth in this Declaration can be fully realized” (Article 28); and secondly, because up to this day there has been arguably no other regional human rights declaration that has revealed its elements quite explicitly like the AHRD. Richard Magnus, the Representative from Singapore, called it in fact an “emerging right”. Part of the reason it was minted is on account of the unique regional history of ASEAN and the vision of its founders to see an end to intra and inter-state conflict arising from the periods of struggle for national independence. In this light, it is also, therefore, imperative to follow the parallel negotiations on the right to development – comprised by a set of three articles elucidated equally to great detail by its drafters, which has been at the core of ASEAN regionalism since its inception. Both provisions also share the distinct feature as “individual *and* collective rights”. The negotiations during the meetings in Jakarta (April), Bangkok, Yangon, Bandar Sari Begawan and Manila are instructive in this regard.

2.4.2 FIRST-HAND ACCOUNT

2.4.2.1 Jakarta (April)

Indonesia was at the helm on the discussions of the right to development. Rafendi Djamin perhaps the most profusely enthusiastic if not the most open advocate and ally of civil

society organisations in the drafting of the Declaration innately brought with him his extensive NGO experience and the insights of his long and close relations with international benefactors and funding institutions. On the 9th of April, he presented a text enumerating ten points, which was eventually pared down to three main articles, and two extra paragraphs, which would have been an addition to the section on general principles. Pak Rafendi had invoked President Suharto of Indonesia, as the “father of development” despite the fact, he further claimed, that in the Suharto years other development rights were denied. The Representatives generally agreed with the ten points raised by Indonesia but some of them were found to be too lengthy. Each of the Representatives therefore maintained their arguments for individual preferences and chose accordingly from among the ten points.¹¹²

Dr. Sriprapha first emphasised the “inalienability” of the right to development, citing the UN Declaration on the Right to Development of 1986 as well as the Joint Communiqué of the 26th ASEAN Ministerial Meeting in 1993. The fundamental problem of poverty and the access to natural resources were issues to which, she then contended, the right to development also ought to respond. Mr. Magnus, taking up his turn, summoned the notion of this right in the common literature inspired and proclaimed by the Organisation of African Unity (replaced in 2002, by the African Union), and the work of Ramon Magsaysay, the 7th president of the Republic of the Philippines. He cited a string of documents in support of the relatively long history of the right, which included the African Charter on Human and Peoples’ Rights of 1981 (not least the economic conditions for the enjoyment of right), once again the UN Declaration on the Right to Development of 1986, the Millennium Development Goals (MDG) of 2000 (in terms of specifying *ASEAN* MDG targets and narrowing the development gap), and the Vienna Declaration and Programme of Action of 1993.

In the meantime, Ambassador Manalo made the more subtle but no less significant modification that development initiatives and accompanying conditions ought to be labeled “*people-oriented*”, and not, as it was phrased initially, “*people-centred*”, because the idea of “development” essentially signifies the promotion and protection of the well-being of the people through policies which are guaranteed by the state. The latter expression, she inveighed, drops the notion of the state and its responsibility to be an

¹¹² see annex; The first of the final three articles of the provision took in elements from points 1, 3 and 4, the second, from point 9 and the third, from points 2 and 10.

agent of change.¹¹³ Mr. Magnus asked for the floor once again and zeroed in on giving emphasis to the peculiarity of this right in the ASEAN context, citing the preamble of the ASEAN Charter as one its sources:

We the Peoples... resolved to ensure sustainable development for the benefit of present and future generations and to place the well-being, livelihood and welfare of the peoples at the centre of the ASEAN community building process (ASEAN, 2012: Par. 9);

Phoukong Sisoulath of Lao PDR, echoing the same concern, specified in his intervention that development is - instead of the more general phrase “(of) all peoples” - the inalienable right “of every human person” and “the peoples of ASEAN”. On the other hand, the right to development as an integral part of ASEAN community building was worked out by Indonesia by turning to the UN Declaration on the Right to Development of 1986. Pak Rafendi had the support of all his colleagues, the most vocal of whom included Laos, Vietnam, Singapore, Thailand and the Philippines. Now whilst Singapore and Thailand contended that there were sources on the right to development other than the 1986 UN Declaration, Ambassador Manalo felt that such a reference was politically significant because it pointed to the fact that this right historically put the developed and developing world at odds. She advocated among her colleagues for an awareness and sensitivity to development policies by international institutions that would be mutually beneficial for *both* ASEAN countries and the West.

The burden of responsibility on states per se was also potentially divisive because some member states believed that the correlative duties of the right to development were to fall equally on the international community. Ambassador Manalo understood acutely the concern of her peers, but she disagreed on the motion to draft a declarative statement, the aim of which was to impose certain duties or obligations on the non-member states. She felt that such an action would not be appropriate to the spirit of the provision. Thailand and Myanmar appreciated her point of view, so Ambassador Swe suggested a language of international cooperation: “ASEAN member states will seek to work with the international community...”. At the outset, Ambassador Swe’s recommendation won over the proposal of Singapore to adapt the language in the VDPA of 1993 instead:

¹¹³ Informal conversations with Ambassador Manalo.

...States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development... (1993: Art. 10).

Finally, Dato Shafee, provided insights for what would have been a unique paragraph meant to round off the principles of the right to development - a move that somehow fired his colleagues with enthusiasm:

Paragraph 1: ASEAN Member States has (sic) a moral and legal duty to seek and develop measures and means for the unification of her peoples, irrespective of and without prejudice to their differences and diversities in ethnicity, race, religion, status and other denominations.

Paragraph 2: Towards this dominant purpose the ASEAN Member States shall endeavour to harness the advantages, harmonise and celebrate these differences and diversities towards national and regional developments in socio-economic and political matters.

After a series of exchanges, the rough text was turned into a polished provision, guaranteeing that the invocation of ASEAN diversities will no longer be used for divisive purposes and that, above all, the burden of unifying – and not erasing – differences in the region rests on the state:

ASEAN and its Member States shall uphold and respect for the (sic) different cultures, languages and religions of the peoples of ASEAN, while emphasizing their common values in the spirit of unity in diversity. Towards this goal ASEAN and ASEAN Member States shall harness the advantages and celebrate these differences and diversities towards effective, equitable and sustained development and its benefits for the people of ASEAN in socio-economic and political matters.

After a closer look, the Representatives saw that the paragraph had metamorphosed into a human rights principle whose proper place was in the “General Principles” section of the Declaration.¹ But this never took off. The three articles on the right to development, however, were indeed almost nearing their final form.

2.4.2.2 Yangon

Phoukong Sisoulath, the formidable defender of the draft's most contentious phrase "regional particularities" was likewise the frontline advocate of the right to peace; he pondered patiently on this provision from the time he was a member of the Drafting Group until his tenure as the alternate representative of Bounkeut Sangsomsak, the official representative of Lao PDR to the AICHR. But the only time the right to peace was methodically negotiated, at length, and by all the Representatives, was on the 5th of June in Yangon. It was on account of the historical conditions of ASEAN, both national and regional, which compelled the Representatives to make any specific right for that matter explicit, that this provision eventually stood out. The right to peace was not only a "new concept", according to Phoukong, for which it has value added quality, but it was also drafted without a dissenting voice.

The emerging right to peace begged for conceptual clarifications both from its sympathizers and supporters, counting everyone in the AICHR. The Representatives from Thailand, the Philippines, and Laos were to invoke an exhaustive list of previous documents that had made reference to peace in international relations. Peace, Phoukong believed, was an individual and communal right, despite the fact a clear consensus on its notion as a right had yet to be achieved. The historical sources of meaning, he argued, are numerous and these included the UN General Assembly Resolution 1984¹¹⁴ (UNGA 1984) on the Right of Peoples to Peace, the ASEAN Charter, the Santiago Declaration on the Human Right to Peace, the Luarca Declaration, the International Covenant on Civil and Political Rights, the African Charter and the Asian Charter on Human Rights by NGOs.

Ambassador Manalo nodded in agreement with Laos and contended that this was an area in which the duty of the state would have to be keenly rallied. She believed that there were three key documents in understanding the meaning of this right - the ASEAN Charter, the 1976 Treaty of Amity and Cooperation (TAC 1976), and the 1971 Zone of Peace, Freedom and Neutrality Declaration (ZOPFAN 1971) - but the crucial idea and phrase which ought to be included in this provision, reiterated in political documents, was the right to enjoy peace "in an ASEAN space of security, neutrality, freedom, friendship and cooperation". In fact, the Chair, Chet Chealy, who then spoke in his capacity as the Cambodian representative, saw it as both the right of the individual in as much as the "right of the

¹¹⁴ Available at: <http://www.un.org/documents/ga/res/39/a39r011.htm>.

state". The "right to live in peace", Phoukong added, is necessary for the full development of all human capabilities – physical, intellectual and spiritual.

Dr. Sriprapha in the same way thanked Laos for the initiative, manifesting clearly that "peace is a precondition for the fulfillment of human rights". She invoked UNGA 1984 and argued that the assurance of the right of peoples to peace demands that the policies of states be directed towards the elimination of the threat of war, particularly nuclear war, the renunciation of the use of force in international relations and the settlement of international disputes by peaceful means. Dr. Sriprapha had also referenced a United Nations Educational, Scientific and Cultural Organization (UNESCO) document which defined peace in terms of five elements: (1) respect for life, dignity and the human rights of individuals, (2) rejection of violence, (3) recognition of equal rights for men and women, (4) upholding the principles of democracy, freedom, justice, solidarity, tolerance and acceptance of differences, and (5) understanding between nations and countries, and between ethnic, cultural and social groups. The right to peace, she pressed, cannot be a pretext to violate the human rights of the people – a view that would be endorsed by Pak Rafendi a little while later in his interventions.

Ambassador Hung of Vietnam calmly reminded everyone that their objective was to protect the peaceful relations between member states not least because of the "potential risks and threats" within the region. He too, like Ambassador Manalo, held the belief that it was the duty of the ASEAN Member States and ASEAN as a whole, to establish and ensure peace as well as promote a culture of peace in the ASEAN region. And still there were other Representatives who maintained that wars suffered in the past within the region were no less painful reminders of the scourge of conflict.¹¹⁵

Ambassador Manalo followed through the earlier intervention of Thailand and clarified for her counterparts what she saw as the distinction between what may have been understood as the social anthropological meaning of peace lobbied by UNESCO, under the stewardship of Frederico Mayor Zaragoza, to its member countries in the late 90s and early 2000s against the dominant concept of peace in the UN which refers to the interruption of stable interstate relations through war. Which of these two did ASEAN wish for the Declaration, she asked. Dr. Sriprapha, at this point, had a go at the provision

¹¹⁵ Informal conversations with colleagues in various national delegations during the drafting of the AHRD.

by proposing the following definition, borrowing some elements from UNGA 1984 on the Right of Peoples to Peace and from her conversations with the Lao PDR Representative, Bounkeut Sangsomak:

Every person, individually and collectively, has the right to live in peace. The policy of states should be directed towards the elimination of the threats of war, the renunciation of the use of force in interstate relations, and the settlement of international disputes by peaceful means based on the ASEAN Charter.

Pak Rafendi of Indonesia perhaps even more audacious in his intervention subsequently brought a suggestion to the floor – a phrase that was later acknowledged by Richard Magnus as encapsulating the “correlative rights” to peace:

In the realisation of the right to live in peace. Member States should not deny the rights of victims and survivors of gross violations of human rights to truth, justice and reparation.

Mr. Magnus had added that there are three elements that must be considered in thinking about this right: (1) acknowledgement that a right to peace exists; (2) there must be a purpose for exercising this right, which in this case is to promote the exercise of fundamental freedoms and human rights, and (3) this right must be exercised within a particular context. The formulation continued to shift briskly whilst another attempt, this time by Ambassador Hung of Vietnam, came closer to emphasising the duty of the state:

Every person and the peoples of ASEAN have the right to enjoy peace and security such that the rights and freedoms set forth in this Declaration can be fully realised. To this end, ASEAN Member States should promote further peace, security, stability and cooperation in the region.

But there were now also calls from Indonesia and Singapore that it was perhaps best to go back to the “original formulation” - as it was recently drafted in Bangkok, “Every person has the right to enjoy peace and security such that the rights and freedoms set forth in this Declaration can be fully realised”, full stop. It became eventually apparent to everyone that some of the suggestions had gone a detail too far. Ambassador Manalo then argued, hoping somehow to bridge potential divisions between member states, that the correlative rights broached by Indonesia for example, are welcome, but they would be best pursued in a convention.

It was not after they had broken off for lunch, however, that the article on the right to peace, with Singapore taking in cues from Vietnam, Laos and the Philippines, was cast in its final form as Article 38 of the AHRD:

Every person and the peoples of ASEAN have the right to enjoy peace within an ASEAN framework of security and stability, neutrality and freedom, such that the rights set forth in this Declaration can be fully realised. To this end, ASEAN Member States should continue to enhance friendship and cooperation in the furtherance of peace, harmony and stability in the region.

Phoukong motioned with usual steadiness to change “framework” to “community” but Ambassador Swe moved to withdraw his approval if those who draft the article also amend their very own versions; he also emphasised the fact that “stability” should never be a pretext for subjugating the people of the country. Pak Rafendi concurred, while Ambassador Manalo could never more agree that “framework” was the appropriate word in order to subscribe to the ASEAN documents that promote and uphold peace. The right to peace was approved and, upon the recommendation and the watchful eyes of Ambassador Hung, it was to immediately follow the section on the right to development. The salience of the words they chose to include in the second and final sentence were hence inescapable: “ASEAN framework”, “ASEAN Member States”, “continue”, “to enhance”, “friendship” and “cooperation”.

Now the provision on the right to development was supposed to have been settled by this time; but when the word “sustainable” was proposed for insertion between the words “right to” and “development”, its latent challenges began to surface. The instant reaction was positive. The term “sustainable development” eventually came under the scrutiny of the Philippines and Myanmar, however. Ambassador Manalo contested that the notion of sustainable development referred to the environment and was related to the politics of climate change. Pak Rafendi had cited the United Nations Framework on Climate Change 1992 (UNFCCC 1992) in marshaling his arguments for a strong provision on the right to development. Ambassador Swe, in the meantime, pointed out that the component on the environment was already contemplated in the line “to meet equitably the developmental and environmental needs of present and future generations” found in the same article; he agreed on the necessity of protecting the environment but felt that the introduction of the whole concept of sustainable development was somehow askew. It would change the spirit of the provision or narrow its intended remit. The Philippine Delegation, hoping

once again to bridge differences, finally came up with the phrase, “including the protection and sustainability of the environment”, which captured the meaning neatly. Everyone agreed.

Pak Rafendi raised the stakes higher, however, by problematising the concept of gender in the same article, to which Ambassador Manalo could only approve with gratefulness and cheer. She gave an accurate background for “gender and development”, which had turned into the dominant discourse in the 80s, following “women and development” in the 70s. It was her lady peer in the group, however, Dr. Sriprapha, who came to her aid by coining and adding the phrase, “gender-sensitive development programmes”, to the provision. The last two final changes in the phraseology of the article were to come in the context of the two regional consultations with CSOs: “gender sensitive” was modified to “gender responsive” (Kuala Lumpur Meeting) and “poverty reduction” into “poverty alleviation” (Manila Meeting), while the notion of equitable “and sustainable” benefit from economic, social, cultural and political development was introduced (likewise Manila). This was in no small measure to the robust lobbies of the region’s CSOs .

The women Representatives won even more praise when the AICHR decided to use variations of the neutral possessive pronoun “one’s” in place of the rather unprepossessing use of the phrase “his or her”. The gentlemen of the Commonwealth nations were on guard (Mr. Magnus and Dato Shafee, most especially), who pointed out that the employment of “his” was a time-tested standard in Commonwealth documents but Ambassador Manalo got back by pronouncing – gentlemen, the Feminist Movement began long before the Commonwealth of Nations! I reckoned that there was no pun intended.

2.4.2.3 Bengar Sari Begawan

Bengar Sari Begawan was the venue of the 3rd Regional Consultation (or the second regional meeting with the ASEAN Sectoral Bodies). While the attendance unfortunately went down to 8 delegates representing 4 ASEAN sectoral bodies from the initial 28 delegates representing 11 ASEAN sectoral bodies in Bangkok, the meeting was not inconsequential in understanding the substantive content of the right to peace. In fact, it was the first time the right to peace was to be contested by “outsiders” even if the voices that spoke out loud were also from within ASEAN ranks. Not surprisingly, it was the

ASEAN Defence Senior Officials Meeting (ADSOM) who had saluted the inclusion of a section on the right to peace and reminded the AICHR that such a provision was for all the peoples of ASEAN and that it ought to be on the basis of “friendship” and “cooperation” that this right must be ensured. The ADSOM delegate had also called the attention of the group on the earlier recommendation they made to the AICHR to include a clause on the Responsibility to Protect (R2P).

This moment was seized upon a little while later by Laos who invited the group to think over not only on the right to peace but also on its related aspects to R2P; peace, Phoukong had contented, was after all meant to guarantee stability in the region. In fact, a workshop and the start of a thematic study on the right to peace under the stewardship of Laos had already been negotiated with the Commission. But Ambassador Manalo immediately cautioned the group that R2P, contrary to what appeared to be the widely held belief, is not in a strict sense a human rights concept but a political instrument centered on the state, and that it has not yet, in fact, even been adopted by the UN. She then reiterated her earlier reference to the Declaration of the Zone of Peace, Freedom and Neutrality of 1971 (ZOPFAN 1971) that was adopted by ASEAN member states, committing them “to ensuring peace and all aspects related to the maintenance of peace and stability in the region”. There were regional instruments already at hand.

2.4.2.4 Manila

On the 13th of September, against the backdrop of the last regional consultation with civil society, the Representatives reviewed the matrix of CSO inputs on the Kuala Lumpur Draft, which the Secretariat had put together from the various submissions of the CSOs. This was the last time the right to peace was to stand scrutiny. When they came to paragraph 38, on the submissions, the Manila Joint Submission (see Section 2.2.2.4) coming out of the recent Civil Society Forum on the AHRD had suggested an alternative formulation:

~~(1) Every person and the peoples of ASEAN have the right to enjoy peace within an ASEAN framework of security and stability, neutrality and freedom, such that the rights set forth in this Declaration can be fully realized. To this end, ASEAN Member States should continue to enhance friendship and cooperation in the furtherance of peace, harmony and stability in the region.~~

(1) ASEAN Member States undertake to formulate and implement policies towards the elimination of the threat of war among and between peoples, including nuclear war, the renunciation of the use of force and peaceful settlement of disputes.

(2) Members States may not invoke the right to peace to deny victims and survivors of human rights violations the right to truth, justice and reparations, or evade their duty to bring to justice perpetrators of such violations, irrespective of rank and status”
(2012d: 24-25).

Two reasons were provided: “(1) the first paragraph reflects more clearly the obligation of states to uphold people’s right to peace as stated in UNGA resolution 39/11 (1984); the text was taken directly from the resolution with minor abbreviations; (2) meanwhile, the second paragraph aims “to guarantee that the right to peace is not used as a justification for member states to deny victims their rights, including the right to truth, justice, etc.” (2012d: 24-25). A consensus simply could not be reached because while some elements were acceptable to the Representatives they felt that the focus and the approach that was suggested in the phraseology of the Manila Joint Submission had altered the spirit of the provision.

On the following day, the 14th of September, the human rights experts whom they had invited congratulated the AICHR, ensemble. Prof. Vitit Muntharbhorn, who was a member of the Advisory Group of Eminent Persons on International Protection of the United Nations Office of the High Commissioner for Refugees and who was also co-chairperson of the Working Group for an ASEAN Human Rights Mechanism, commended their efforts in putting out a section on the right to peace, especially because, he reported, the UN Security Council was at work on an International Covenant on the Right to Peace. He then only wished to further recommend that the phrase “bearing in mind an ASEAN framework” be added in the provision. In the meantime, Ms. Yuniyanti Chuzaifah, who was chairperson of the Indonesia National Commission on Violence Against Women, believed that the concept of peace had to be joined to the concept of justice - they were, she believed, two sides of the same coin. By this time, however, the Representatives were confident in the article they had drafted. It was finished. The right to peace was born.

Table 3: The Evolution of the Article on the Right to Peace¹¹⁶

Universal Declaration of Human Rights 1948	Zero Draft	Basic Draft	Caucus Version-AICHR Plenary Version, Jakarta ¹¹⁷	Night Draft-Bangkok Draft	Yangon Draft-Kuala Lumpur Draft-Manila Draft	ASEAN Human Rights Declaration 2012
<p><i>“Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” (Article 28)</i></p>	<p>“UNITED by a common desire and collective will to live in a region of lasting peace, security and stability, towards the full realization of human dignity and the attainment of a higher quality of life with sustained economic growth, shared prosperity and social progress, developing a community of caring societies;”</p> <p>“AFFIRMING that respect for the dignity and equal rights of all human beings as enshrined in the Universal Declaration</p>	<p>The peoples of ASEAN as members of a global community have collective as well as individual duties and responsibilities to promote a culture of peace by taking appropriate actions to prevent war and foster international and regional peace, collective security and cooperation.</p> <p>1) Everyone has the right to peace in order to develop fully his or her physical, intellectual, moral and spiritual capacities without being a target of any kind of violence.</p>	<p>Right to Peace</p> <p>58. 1) Every person has the right to peace in order to develop fully his or her physical, intellectual, moral and spiritual capacities without being a target of any kind of violence and so that the rights and freedoms set forth in this declaration can be fully realised.</p> <p>2) [No Member State shall allow any groups of individuals or external powers to use its territory as a base to violate, use of force against or threaten the national independence,</p>	<p>Every person has the right to enjoy peace and security such that the rights and freedoms set forth in this Declaration can be fully realised.</p>	<p>Every person and the peoples of ASEAN have the right to enjoy peace within an ASEAN framework of security and stability, neutrality and freedom, such that the rights set forth in this Declaration can be fully realised. To this end, ASEAN Member States should continue to enhance friendship and cooperation in the furtherance of peace, harmony and stability in the region.</p>	<p><i>“Every person and the peoples of ASEAN have the right to enjoy peace within an ASEAN framework of security and stability, neutrality and freedom, such that the rights set forth in this Declaration can be fully realised. To this end, ASEAN Member States should continue to enhance friendship and cooperation in the furtherance of peace, harmony and stability in the region.” (Article 38)</i></p>

¹¹⁶ See explanatory note on the series of drafts above Table 1.

¹¹⁷ The AICHR Plenary Version Draft reverted back to the enumerating “Right to Peace” under “Political Rights” without any formulation.

	<p>of Human Rights is the inalienable foundation for peace, democracy, human security, freedom, justice and development in the world;”</p> <p>“ASEAN Member States share a common concern in the promotion of peace, security and the rule of law, as well as the protection of human rights and fundamental freedoms.”</p> <p>“The peoples of ASEAN as members of a global community have collective as well as individual duties and responsibilities to promote a culture of peace by taking appropriate action to prevent war and foster international and regional peace, collective security and cooperation.”</p>	<p>2) [No ASEAN Member State shall allow any groups of individuals or external powers to use its territory as a base to violate, use of force against or threaten the national independence, sovereignty, political unity, territorial integrity of another ASEAN Member State.]</p> <p>3) [Acts of genocide or terrorism shall not be tolerated. Mass destruction or nuclear weapons shall never be developed and used in the ASEAN region.]</p> <p>[Everyone is entitled to peace and security so that the rights and freedoms set forth in this Declaration can be fully realised.]</p>	<p>sovereignty, political unity, territorial integrity of another Member State.]</p> <p>3) [Acts of genocide or terrorism shall not be tolerated. Weapons of mass destruction or nuclear weapons shall never be developed and used in the ASEAN region.]</p>			
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2.4.3 PERSPECTIVE OF THE WORD: THE RIGHT TO PEACE

The question that motivates this analysis is, why was the right to peace never as “controversial” as, say, the provisions on non-discrimination and the special protection for groups? The ostensible answer is that the whole region has experienced the ravages of conflict and poverty, not least wrought by centuries of colonisation, the struggle for independence and the fight against communist expansion, the quest for national identity and its attempt to unshackle itself from proxy wars born out Great Power rivalry. Would not the political and security infrastructure of bilateral treaties specific to the security orientations of each country, or indeed the multilateral security forum, the ASEAN Regional Forum¹¹⁸ (ARF), then have sufficed? The cynical answer is that institutions specifically designed for security cooperation, like the ARF, have not really had enough teeth. A more blatant not less cynical observation is that the “culture of peace” can be sown rather on the cheap. But the Representatives defined the right to peace carefully, even if beyond controversy. There is more than meets the eye.

The ASEAN is a veritable maze. A real and practical way of imagining the emerging international human rights regime is to situate its place in the longer and wider historical sequence of constitutional texts, normative and community implementation instruments since the foundation of ASEAN in 1967. It is not an easy task because the manner in which these instruments have been developed are organic, largely subject to their status as small and medium-sized states in international politics and without the benefit of social and cultural threads that can be easily knit to provide the fabric of regional integration. Regional arrangements have, thus, been drafted from the bottom and up, that is, based largely on the compatibility of *inter-national* institutions.¹¹⁹ I have hence drawn up what I take to be the design of ASEAN political-security cooperation in order to understand how the “*human right to peace*” operates in tension alongside ASEAN traditional security approaches. Let us first turn to what I have set up as the “tripod” of the ASEAN political-security architecture (see Figure 8 below)

¹¹⁸ See footnote 9 for a brief description.

¹¹⁹ See for example, DESIERTO, D. A. 2009. Universalizing Core Human Rights in the New ASEAN a Reassessment of Culture and Development Justifications Against the Global Rejection of Impunity. *Goettingen journal of international law Goettingen Journal of International Law*, 1, 77-114.

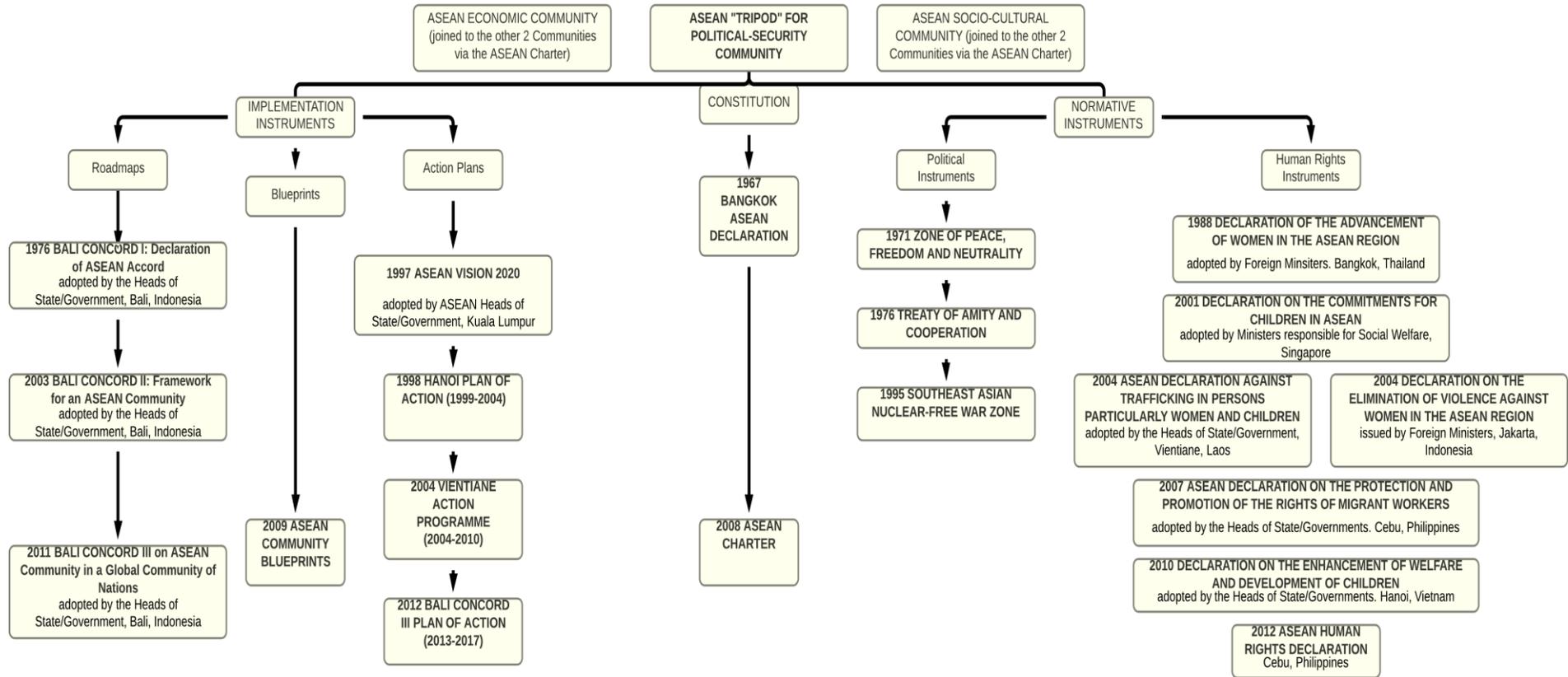


Figure 8: ASEAN Tripod for the Political-Security Community

The **implementation instruments** are generally “roadmaps”, but there are three varieties. The first strand is made up of the Bali Concord of 1976, 2003, and 2011¹²⁰ (also called Bali I, II, III, respectively), which are *policy roadmaps* implementing ASEAN norms and values through specific regional activities, in the wider context of international politics. The second strand consists of the ASEAN Action Plans - 1998 Hanoi, 2003 Vientiane and 2012 Bali, which draw up *coordinated activities* across the three community pillars for ASEAN regional integration *within a given timeframe*. The third strand includes the three Blueprints, which are coordinated activities *specific to each of the three communities* - Economic, Political-Security, and Socio-Cultural. These three strands or categories comprise what I call the “*community implementation instruments*”.

Normative instruments may be classified as either political-security instruments or human rights arrangements. The former play “a pivotal role in the area of confidence building measures, preventive diplomacy, and pacific approaches to conflict resolution” (ASEAN, 2003: Part A, Par. 6). There are fundamentally three of these:¹²¹ the 1971 Zone of Peace, Freedom and Neutrality (ZOPFAN 1971), the 1976 Treaty of Amity and Cooperation (TAC 1976), which includes three protocols - 1987, 1998, and 2012, and the 1995 Southeast Asia Nuclear Weapon-Free Zone (SEANWFZ 1995) to which is attached one protocol (1995). A crucial distinction between community implementation instruments and normative political instruments is that the former is limited by politics and geography, while the latter is open to accession to states outside of Southeast Asia; the former essentially, though not exclusively, defines internal (*i.e.* regional) foreign policy and the latter external political foreign policy. Human rights instruments straddle, in principle, both spheres.

Macro-micro mechanism: It is important to note at this stage the intervention made by Ambassador Manalo, the Philippine Representative, when she reminded everyone of the three documents that were “key” in understanding the right to peace, reiterating ZOPFAN 1971, the TAC 1976 and the ASEAN Charter 2008. Note, therefore, that *definitions* of the right to peace for the Philippines would have to be devised on the basis of community texts. Laos, Singapore and Vietnam echoed these *intra-framing* strategies most vocally by

¹²⁰ Reference and URL links are available under the section on “ASEAN Official Documents” in the Author’s Note.

¹²¹ Reference and URL links are available under the section on “ASEAN Official Documents” in the Author’s Note.

referring invariably to the ASEAN Charter and the need to “exercise” peace in context. The fact that it has been considered an “individual and *communal* right” signals its essential social orientation. What does this mean?

The first salient point to be made here is the assumption that the notion of peace is not without its own history in the evolution of ASEAN. The circumstances in which these documents were adopted, therefore, come to the fore: ZOPFAN 1971 came at the height of the Cold War; TAC 1976 during the Vietnam War; and the ASEAN Charter 2008 was drafted in the post 9/11 environment and in an era of increasing globalisation coupled with the rise of China. The 1995 Southeast Asian Nuclear-Weapon-Free Zone Treaty (SEANFWZ 1995), whose political basis was ZOPFAN 1971, must also be included in this list because it marked the first time all of the *future* ten ASEAN member states got together on a platform. Three sub-points are in order. The first is that peace is about “neutrality”; ASEAN member states do not wish to be parties to a conflict to which they do not belong. The original term was actually “neutralization”; it was only after a series of consultations among ASEAN states, succeeding the speech of Malaysian foreign minister Tun Ismail Abdul Rahman about his “apprehensions of a power vacuum” in the region especially with the departure of the British, that “neutrality” – which meant that peace as “self-imposed” and “not to be guaranteed by external powers” - came to be the final word for the 1971 treaty (Abad, 2011: 84-85).

This brings us to the second sub-point, which is that peace is also related to the idea of “freedom from external interference”. Non-interference was a precursor to the principles of the “ASEAN way” eventually formalised in the TAC 1976;¹²² this was inspired by the “aims and objectives” of the United Nations and the ideological division in which the original five nations of ASEAN (Indonesia, Malaysia, the Philippines, Singapore and Thailand) found themselves in with the socialist-communist bloc (Cambodia, Myanmar, Laos and Vietnam). The third final point is that peace also means the promotion of “nuclear weapon-free zones”, which was a “trend” already established by Latin America

¹²² Article 2 of the treaty stipulates: “In their relations with one another, the High Contracting Parties shall be guided by the following fundamental principles: a. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations; b. The right of every State to lead its national existence free from external interference, subversion or coercion; c. Non-interference in the internal affairs of one another; d. Settlement of differences or disputes by peaceful means; e. Renunciation of the threat or use of force; f. Effective cooperation among themselves.” Available at: <http://www.asean.org/news/item/treaty-of-amity-and-cooperation-in-southeast-asia-indonesia-24-february-1976-3>.

(1967 Treaty of Tlateloco)¹²³ and the South Pacific (Treaty of Rarotonga), and carried over to SEANFWZ 1995, which was in turned open for accession to Nuclear-Weapon States (NWS) also in 1995.¹²⁴

Given the aforementioned arrangements, what the ASEAN community, therefore, seeks is security. And peace and stability are the conditions it bears; peace is an intangible and abstract good. Peace *as a human right* emerges from security and defence arrangements by member states through its political instruments. ASEAN has evidently evolved from a form of “cooperative security” (Leifer, 1999) based on the individual interests and capabilities of the members states to one that has begun to look at “comprehensive” notions of security, which is signaled clearly by the progress of the regional platform from Bali Concord I to III.

From Bali I where ASEAN the heads of state and government agreed on security as a - “continuation of cooperation on a *non-ASEAN basis* between the member states in security matters in accordance with their mutual needs and interests” (ASEAN, 1976: Section E) - to Bali II which envisaged an ASEAN Security Community bringing - “ASEAN’s *political and security cooperation to a higher plane* to ensure that countries in the region live at peace with one another and with the world at large in a just, democratic and harmonious environment...” (ASEAN, 2003: Section A) - to the Bali III Action Plan that encourages - “ASEAN to play *a constructive role* in and promote a *rules-based approach* towards the peaceful settlement of disputes, in accordance with the ASEAN Charter, the TAC (1976) and other relevant ASEAN instruments as well as international law with a view to maintaining and promoting regional and international peace and security” (ASEAN, 2011: Part A, Section 1), the language has shifted dramatically - and ASEAN is not known to say what it does not want to say.

Micro-macro mechanism: The second salient point is that if “peace” had to be examined within ASEAN institutions it was because outside of the community there was also an emerging rights principle on peace with its own history. The *contestations* between Thailand, Laos and the Philippines revealed an equal tendency, especially in the case of the

¹²³ Reference and URL links are available under the section on “UN Official Documents” in the Author’s Note or alternatively at:
<http://www.iaea.org/Publications/Documents/Treaties/tlatelolco.html>.

¹²⁴ See LAURSEN, H. W. 2013. An Introduction to the Issue of Nuclear Weapons in Southeast Asia. Available: <http://nwp.ilpi.org/?p=2024> [Accessed 2 May 2012].

last two, to deploy *extra-framing* devices. If we are to observe the pattern of dialogue performances, the rights language in the UN and the UNESCO, which belong to the same system, are the two discursive sites in which the notion of peace has developed. “The policies of States towards the elimination of the threat of war...” first summoned by Thailand during the negotiations, and then the Philippines and the Manila Joint Submission (2012d: 20), echoes nothing less the text of the UNGA resolution 39/11 of 1984, which declares the following principles:

1. The “fundamental obligation of each State” in preservation and promotion the right to peace.
2. The “sacred right to peace” of the “peoples of our planet”.
3. The eradication of the “threat of war”, particularly nuclear a nuclear catastrophe, and the peaceful settlement of disputes. (UN, 1984)

The other predominant text was the UNESCO discourse on a “culture of peace” with the support of UN resolution 52/13 (1998) and 53/243 (1999), which formalised the Declaration and Programme of Action on a Culture of Peace. This movement was fundamentally the brainchild of Frederico Mayor Zaragoza, ex-secretary general of UNESCO (1987-1999) and David Adams who was the director of the UNESCO Unit for the International Year for the Culture of Peace (2000), which was followed by the International Decade for a Culture of Peace and Non-Violence for the Children of the World (2011-2010)¹²⁵. In contrast to the movement engendered by UNGA 1984, the “culture of peace” underscores the debates on the biological predisposition of human beings to a “culture of violence” spawned by knowledge and information in the media. Now it turns out that in 1986, twenty scientists from all over the world, including Zaragoza and Adams, gathered in the southern Spanish city of Seville to draft the Seville Statement on Violence.¹²⁶ The international consensus that was drawn to form this document was based on this question:

Does modern biology and social science know of any biological factors, including those concerned with the biology of violent behavior of individuals, that constitute an insurmountable or

¹²⁵ It is a fortunate coincidence I knew David Adams personally and worked under his supervision when I was accepted as a trainee in the very same Culture of Peace Programme in the UNESCO in 2000.

¹²⁶ Available at: <http://www.culture-of-peace.info/ssov/title-page.html>.

serious obstacle to the goal of world peace based upon the principle of equal rights and self-determination of peoples and including an ultimate goal of general and complete disarmament through the United Nations? (Adams, 1989: 2)

The Seville Statement and the campaign of Zaragoza and Adams that “the same *species* who invented war is capable of inventing peace” (Adams, 1989: 2) eventually found its way as one of the foundational documents in the UNESCO project “Toward a Culture of Peace”. UNESCO had taken the *right of peoples to peace* (of the 1984 UNGA 39/11 Resolution) and incorporated it into “a set of values, attitudes, traditions and modes of behaviour and ways of life” not only based on human rights and fundamental freedoms but also non-violence through education, dialogue and cooperation, the right to development, equal rights and opportunities for women and men, and the principles of pluralism, cultural diversity and understanding at “all levels of society and among nations” (Adams, 1989). These were the very same principles that Dr. Sriprapha was to raise during the negotiations. The *culture* of peace was meant to “prepare the grounds for the constructing” of peace away from the traditional notions of security patrolled by the state and its military (“a culture of war”) to the more non-traditional security measures, which are also guaranteed by the states, such as education, respect for human rights, equality and tolerance, the developmental and environmental needs of the people, the free flow of information and disarmament.

2.4.3.1 Summary

In order to comprehend what “peace” means, therefore, it is necessary to understand the concept of security in ASEAN according to the “key documents” signaled in the course of the negotiations, no less than the trajectory of peace predominantly promulgated by the UN. Hence the point of clarification raised by Ambassador Manalo on whether what was on the table was the “socio-anthropological meaning” of peace or “something else”. If the right to peace was uncontroversial, it was because on either end of these discursive traditions - regional and international - it was the *negative* to war. The ASEAN “*framework*” for peace - a deliberate choice over the word “community”, if the very negotiations are once again to be recalled - couches the term between neutrality, freedom, non-interference, equality, tolerance and the right to development in order to avoid interstate war. ASEAN peace continues firmly to be anchored in the state as its primary guarantor but the fact that it is an “individual and collective right” *in a human rights*

declaration - placing equally within its purview the dignity and well-being of peoples and persons - is without precedent in history.

PART 3: Analysis and Conclusion

“I think it is a good beginning and I think it’s what’s possible at this time...
It’s probably not up to universal standards,
it’s probably subjecting to rights of ... the government
rather than absolute rights of the individual...
but politics is the art of the possible...”

Surin Pitsuwan, Secretary General (2008-2013), in an interview
after the adoption of the ASEAN Human Rights Declaration,
ASEAN adopts “flawed” human rights declaration (Hindstrom, 2012)

“Political *outcomes* do not necessarily reflect
the preferences of any one actor, or group of actors,
rather they are a product of many actors pursuing their interests.
It is important to take this insight one step further:
political *actions* do not necessarily reveal preferences over outcomes either;
at best they reveal subjective beliefs about what actors consider
the best response to the expected behavior of other relevant actors.”

William Roberts Clark,
Agents and Structures: Two Views of Preferences, Two Views of Institutions (1998: 247)

“Concepts, like individuals, have their histories, and are just as incapable of withstanding the
ravages of time as are individuals.”

Soren Kierkegaard
The Concept of Irony, (Kierkegaard and Capel, 1966: 46)

Chapter 3.1

How, When and Why ASEAN is Constructing a Human Rights Regime?

3.1.1 INTRODUCTION

The central question of this investigation was: how and why did ASEAN member states agree to a human rights regime? My proposition was to hence explain and understand the evolution of human rights principles as an outcome of the mutual constitution between agents and normative structures through the theoretical aperture of language. I have developed a theory based on insights from linguistics and designed the language pendulum to explain how, when and why norms are constructed. This chapter recapitulates the investigation in three sections based such scope conditions. The first (on the question of *how*) brings the analyses in the preceding three chapters together by revisiting the notion of the perspective of the word; the aim is to uncover the meaning of the human rights provisions via the social mechanisms at work in verbal interactions. The second section (on the question of *when*) argues the existence that controversial “words” are moments of contestation that manifest conflicts of interest and the unequal distribution of power between state actors and between them and interest groups. And the final section (on the question of *why*) responds to the query of why such a social phenomena occurs by wrestling with the changes in identity and interest of the political agents in the use of language. The negotiation of the ASEAN Human Rights Declaration is a case of how the international human rights regime transforms in the context of a specific political discursive space through the power of institutions, human rights agents and international and regional norms.

3.1.2 HOW: THE PERSPECTIVE OF THE WORD

The language pendulum illustrates how structures and agents mutually constitute - one and the other, in the communicative dynamics of dialogue. It is how, why and when structural change happens: the pendulum swings create feedback loops between agents and structures; the perspective of the word is a temporal discursive frame of the series of loops moving infinitely in cycles. The **“first movement”** (macro-micro mechanism) corresponds to the system level of analysis or how the aggregate of relations constrains the units of the system represented by the community of speakers (in this case, primarily, the Representatives of the ASEAN member states). What happens in actuality is that actors have recourse to the three discursive strategies, which are instantiated in each of the three dialogue performances. This first movement is the *sum* of all *three cycles*: the three dialogue performances, the three discursive strategies within each performance, and the three discursive strategies across the three performances. These are the three cycles *in aggregate*. *It is via the 1st movement that the boundaries of the international position (e.g. the ASEAN regional consensus) are established. We can read this by observing the pattern of dialogue performances.*

If we are to take the case of AHRD Article 38 on the right to peace as a case in point, then note the tenor and pattern of dialogue performances. Contestations brought into relief a general acquiescence amongst member states (led by Laos and Thailand) on the force of the definition in UN documents (*i.e.* UNGA 1984) and a clear consensus on the use of ASEAN foundational security arrangements. The emerging architecture of the ASEAN Community builds on the normative traditions of peace and security of the association from its inception. The right to peace contests regional textual antecedents from 1971 ZOPFAN, 1976 TAC, and 1995 SEANFWZ, encompassing respectively, regional discourses on neutrality, national independence in matters of defence and security, and the a common platform for a non-proliferation regime traditionally centred on the state.

Framing the notion of peace as human right, however, re-balances the distribution of power in the design of the ASEAN Political-Security Community between the state and the community of individuals, between the member states and peoples. Human rights, such as those to peace and development, that are individual and collective effectively represent a new ordering principle. Indonesia had wanted to expand the claim to include what Singapore argued as correlative rights to peace (*i.e.* truth, justice, and reparation) but it was stopped on its heel. An ASEAN regional consensus had been reached, which had not

only constrained individual member states' wider interests but had also altered the fundamental normative security structure of regional bloc. The AHRD grafted the vision of the region that would in the future enjoy "peace and stability" onto the holistic approach to peace and development that is apportioned by the human rights regime.

The "**second movement**" (micro-macro mechanism) corresponds to the unit level analysis that comes from the viewpoint of the system's parts - or the relations of its individual units. This is the bob of the pendulum swinging somewhere along the range of social relations in international politics. The "swing of the bob" represents the manner in which the agent moves between the two poles of social creativity: on the left are social beings who have fixed preferences, values and ideas, whilst on the right lie relations of constitution. *It is via the 2nd movement that the boundaries of the national position (e.g. conservative-traditional vs liberal;) are established.* We can read this by observing the *instantiations (i.e. textual antecedents) of discursive strategies* that repeat and recur (*i.e. intra-framing, extra- framing, consensus or ground-rule*).

The emblematic case here is the negotiation of AHRD Article 2, which claims the equality of rights for all without discrimination. The AICHR was evidently split between the divide led by Malaysia and Brunei on one end, and Indonesia and Thailand, on the other. Such a provision typically identifies a list of categories or identity labels upon which individuals should never be discriminated or upon which discrimination actually happens. The deliberations were set between two extremes, however: an exhaustive list on one end, and on the other, one sentence that had as its finality - "no discrimination of any kind". The underlying tension of the article that was laid bare was that class or category does not really make sense under the principle of non-discrimination; but if and when they are mentioned it is because by default *all* the categories upon which rights as goods must be distributed ought to be spelled out.

One of the keys to the successful lobby was the strategy of Indonesia to note the timely coincidence of developments in UN level discourses on the rights of the LGBT community. It is also noteworthy that there was a prevailing concurrence on awaiting the results of these discussions in order to be able to arbitrate its relevance for Article 2. The negotiations dwelt upon the political dissent of "vulnerable groups" and a manifestation of their protest against the status quo, and not just the mere the definition of the categories that should apply. These two concerns could not be separated. It is for this reason that "gender" - as the word of least resistance, vis-à-vis, for example, "sexual identity or

orientation” - came to replace the word “sex”. The fact that “gender” replaced “sex” represents a clear change in the regional human rights normative structure and an achievement for Indonesia and Thailand, including the campaign of women’s groups and the advocates of the LGBT community - a case of how the individual actions of the member states and their Representatives transformed the collective outcome of ASEAN.

The “**third movement**” (micro-micro mechanism) is introspection or the “dialogue within the dialogue”, which is the physiology and psychology of the utterance itself - how it comes to life. It is, I believe, a movement that is inward and outward. It is where the analysis of the level of interaction essentially belongs because it can be understood from the point of view of the individual as well as the systemic structure (*i.e.* the three cycles in aggregate). But this is chiefly and best re-counted on the licence and the freedom of the individual. It is a rare piece of data - especially in sensitive negotiations.¹²⁷ It is where the three sets of cycles meet *in the consciousness* of the individual (as opposed to the *al aperto* movement of the first). Introspection is an understanding of the inner sign and it is perfectly consistent and continuous. The clear example for this movement is the deliberation of Article 11 of the AHRD on the right to life.

In the definition of the right to life, the notion of human rights intends to protect the dignity of the every individual human being while holding the power of the state in perpetual motion. Probing the history of the deliberations brings to light two basic sets of texts which recur: national legal documents and the sources of international human rights law. Recall that when the parties intra-frame, they invoke the penal code or the national constitution or both, and when they extra-frame, they cite the array of international human rights instruments, including other regional human rights instruments as possible textual antecedents, which contemplate the death penalty “indirectly”. Both sets of texts define human rights but they define the regime within distinct political spheres. On the one hand, the UDHR 1948 and the ICCPR 1966 are notionally *inter-national*, while national constitutions represent the contract between the state and the individual, within the *national territory*. The latter set of texts are institutions which, therefore, maintain the principle of sovereignty and hence the institution of the state, whilst the former set pushes principles of internationalism.

¹²⁷ Recall ABDULLAH, D. S. D. M. S. 2012. It's time to end the death penalty. *New Straits Times* [Online]. Available: <http://www.nst.com.my/opinion/columnist/it-s-time-to-end-the-death-penalty-1.164768> [Accessed 30 April 2014].

In so far as there is no international consensus on death penalty so is there no regional consensus on death penalty. I have argued, however, that the indirect reference to capital punishment and the use of the latter term itself are minute indications toward abolition. What has been most telling, however, is how the Representative of Malaysia began to publish his advocacy for the gradual abolition of the death penalty in public, after the negotiation of the article. Dato Shafee recounts lucidly that he had been trying to persuade his colleagues against the death penalty all along. This leads to the explanation why his defence of Article 2 was found to be sympathetic to states like Singapore, not least because he tried in a less direct manner to accommodate both the interests of retentionist as well as abolitionist and abolitionist de facto states. It was eventually his formulation of the three-layered definition of the right to life that set the standard for AHRD. This is a patent case of how “a specific combination of individual beliefs, desires, and action opportunities generate a specific action” (Hedström and Swedberg, 1996: 297).

3.1.3 WHEN: LANGUAGE AND POWER

By expressing the role of actors and the phenomena of social mechanisms which bring about change, as we have done so above, we bring agency back in - and vice versa. But when does structural change then happen? There would have to be instances in the course of social phenomena - that is, in the course of the negotiations - when no dispute arose, when there was simply no demand for change. The case of economic and social rights exhibits the contrast. Dissent on economic and social provisions was relatively scant. Why was there no cry for change, so to speak? The evident answer is because there was no conflict of interest. Economic and social rights have always figured as “Asian preferences” in the Asian Values Debate. Absent these second generation rights, however, what gives as the trigger for change? It is the opportunity for political contestation inherent in emancipatory politics that the human rights regime proffers. Human rights language is critical; it is the language of power. Discourse ossifies social positions, which also turn out as the first site for contestation. Now as conscripts to the school of Constructivism we study process and identity; more fundamentally, however, as scholars of international politics we must constantly fix our gaze on the exercise of power.

So what does language uncover about how agents and structures operate power? Three observations emerge from the examples given above: 1) language can mediate, accommodate, or erase competing normative orders; 2) it betrays the “class struggle”

between political elites, decision makers, and interest groups; and finally 3) it manifests how institutions vie for dominance and survival - state against state, state against regional community (*i.e.* ASEAN), regional community against global-international community (*e.g.* UN). Language registers imbalances, unevenness, and inequalities; it shows the contours of power in international politics. These are the conditions that push for change. This will be evident when we observe how the cycles of the language pendulum approximate the taxonomy of power in international relations neatly laid bare by Barnett and Duvall, which we now recall from Chapter 1.2.

Barnett and Duvall make two basic moves. The first is to draw a plane that represents the “how power is expressed” in the kinds of social relations: behavioural relations or “interaction” and “social constitution”. The second is to draw a plane that represents the “specificity of social relations”: “direct or immediate” and “indirect or socially diffused”. From these two dimensions emerge four types of power that form a matrix: compulsory (direct or immediate relations of interaction), structural (direct social relations of constitution), institutional (indirect interaction), and productive (indirect constitution). Recall from Chapter 1.2 (Section 1.2.5.2) that relations of interaction are between pre-constituted social beings (*i.e.* with fixed values and preferences) and relations of constitution are those between actors analytically preceded by the social relations which constitute them as social beings along with their capacities, values and identities. Barnett and Duvall “carve” the directions of power “at its joints” but equally stress that:

... if power works through the actions of specific actors in shaping ways and the extent to which other actors exercise control over their fate, it can have a variety of effects, ranging from directly affecting behaviour of others to setting the terms of their very self-understandings... Similarly if power is in social relations of constitution, it works in fixing what actors are as social beings, which, in turn, defines the meaningful practices in which they are disposed to engage as subjects (Barnett and Duvall, 2005: 46).

From the vantage point of the language pendulum, the dialogue performances *primarily* appeal to processes of interaction whilst discursive (framing) strategies appeal to processes of constitution. This means that the action of defining, contesting and compromising (dialogue performances) can demonstrate effects on the psyche or identity of the person inasmuch as the rules of institutions and “historically and contingently produced discourses” (*i.e.* the choice and the content of norms deployed in framing strategies) can have an impact on the behaviour of agents. Introspection, in turn,

negotiates the varying degrees of proximity between agents or between agents and structures. The point to be made here is that the overall mechanism of the language pendulum appeals to all kinds of social beings because they comprise a feedback loop. In this sense, language welds back power at its joints.

So if we take same examples above what do we get? The agents check on the distribution of power. First, while member states have agreed on the “inherent right to life” they do not necessarily agree on the institutions which ought to guarantee this claim. Is it the state, is it the law, or is it the individual and the community which protects and upholds its sanctity? Secondly, there is agreement on the principle of non-discrimination but there is disaccord as to whom this ought to apply - in stark contradiction to the very philosophy upon which this principle is based. Competing visions of the world dictate diverging hierarchies of institutions and therefore the value and order of societies that consequently - from a human rights perspective - “privilege” one class over another. Finally, there was a clear consensus on the desire for peace and stability but the deliberations manifest that claiming it as a right is *an ASEAN initiative*, which means that it is ultimately based of the value and meaning of peace for the region. To be clear it is not that such struggles are individually contained in each of these provisions. The struggle between institutions, the struggle between classes, and the struggle between regional and international norms are interwoven in the negotiation of each provision and, needless to say, the AHRD.

3.1.4 WHY A HUMAN RIGHTS REGIME?

We noted at the outset of this investigation the central question - to which my initial hypothesis was this: *ASEAN agreed to a human rights regime in response to the tactical campaigns of transnational advocacy networks because rights discourse was able to accommodate contradictory notions of human rights and the different social and political orders of the organisation, its member states, elite groups and civil society.* There are three parts to this: who, how and why. We have so far addressed *how* the regime was set up by looking at a case in point - the communicative dynamics of drafting a human rights text - the ASEAN Human Rights Declaration. On account of the theory and model that I have designed, the question of *when* such processes kick into motion has not been left unturned. By observing the dialogue and rhetorical strategies that were called upon, however, the hypothesis may be disputed by asking two questions: who then were the

actors, and why did they do it? We shall now proceed to verify the other two parts of the hypothesis which I have tendered above.

The evidence which has been gathered for this investigation demonstrates the multiplicity of agents in the construction of human rights norms. On the level of the individual, it has been pointed out that a range of professionals and technocrats (*i.e.* international lawyers, diplomats, academics, etc.) participated in both in the stages of negotiating the text and, more importantly, in codifying the substantive content of the human rights provisions. On the level of society, members on NGOs and human rights advocates took part in the national consultations as well as the regional consultations, giving impetus to the inclusion of marginalised and vulnerable groups. On the level of the state, the ASEAN foreign ministers were consulted formally (at least twice, in Phnom Penh and New York) and informally, which resulted on their recommendation to engage with civil society as much as remind the AICHR that the Declaration be kept a political document. On the level of the international system, the ASEAN via the Secretariat provided unit support, which provided the first of various work templates for the drafting of the Declaration. More importantly, however, there were consultations with Senior Officials Meetings as well as the ASEAN Sectoral Bodies on the inclusion of key human rights issues. What does this phenomena indicate?

First, contrary to my hypothesis, civil society in the form of transnational advocacy networks have been effectual but not central in the acceptance of human rights norms and the eventual formation of a regional arrangement on human rights. Secondly, the diffusion of human rights norms do not only belong to the province of moral entrepreneurs but also to state agents (*i.e.* the regional political elite and decision makers) who appropriate human rights principles within the framework of state institutions. Finally, related to this is observation that the power of the state itself is arguably the most powerful force to contend with in the socialisation of human rights. Why did they do it? I believe the study throws light on at least three views that we now take up in turn. The first the argument is that ASEAN has given in to international pressure, not only from the West but from the international community in general. It is the push “from above”, so to speak. The clearest evidence found in the study would have to be impact of UN discussions and the trend of “regionalising” human rights that started with the Vienna Declaration and Programme of Action in 1993 when Asian countries formally “recognised” the need to set up their own regional mechanisms. Personal conversations with at least two AICHR Representatives confirm that the Vienna Conference and the end of the Cold War were watershed events

for the expansion of human rights in Southeast Asia. The 1993 VDPA was a “compromise document” that gave power not only to non-Western states but also “non-Western” NGOs to approach human rights “in context” (*i.e.* not as an apology to cultural arguments).

To subscribe to this argument, the 1993 VDPA – in addition to the undeniable normative influence of UDHR 1948 - must itself be seen as having enough impact to regulate the international order - a point that is difficult, even qualitatively, to ascertain. A fact beyond question, however, is that the 1993 VDPA *is* part of the core of UN international human rights instruments without which regional instruments around the world would have had little sense.¹²⁸ For ASEAN, this has meant confidently pursuing the “evolutionary approach” in signing up to the human rights regime.¹²⁹ Indeed, the old “ASEAN position” on human rights cannot properly be understood in the absence of the 1993 VDPA, which was often quoted as an argument for cultural relativism. The entire controversy raised by the proponents of the “Asian Values Debate” in the personas of Lee Kuan Yew of Singapore and Mahathir Mohammad of Malaysia was, for a time, a powerful antithesis to the liberal order of rights. These arguments notwithstanding, note that human rights campaigns in ASEAN have not been able to do without “reaffirming” the commitment of the association to the 1993 VDPA¹³⁰ - and the AHRD is the last and arguably the most historic of this nascent line. The 26th Communiqué, which came on the heels of the Vienna World Conference, is possibly one of the most cited official ASEAN texts in the campaign of civil society to create an Asian regional human rights mechanism.

Finally, paragraph 5 and the phrase “regional particularities” of the 1993 VDPA was the point of departure in defining the principle of the universality of human rights during the negotiation of the draft:

All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the

¹²⁸ See for example, Donnelly (1999); <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>.

¹²⁹ See for example, VILLANUEVA, K. H. R. 2012. How West was won: Asean Magna Carta. *Philippine Daily Inquirer* [Online]. Available: <http://opinion.inquirer.net/43189/how-west-was-won-asean-magna-carta> [Accessed 3 May 2014].

¹³⁰ See for example, the work of the Working Group on the ASEAN in Human Rights Online Platform <http://humanrightsinasean.info/asean-background/asean-and-human-rights.html>, and

realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds (AHRD, Article 7).

This now final product marks a clear move away from cultural relativism to affirming the universality of human rights in no uncertain terms (Villanueva, 2012). One conclusion of this study is that ASEAN has seen itself more clearly as member of the international community but certainly on its own terms. This has meant deconstructing the human rights regime and building it up again on the basis of an ASEAN regional “consensus” - the sum of national positions in which each of the AICHR Representatives was demonstrably comfortable. Some have always called it the least common denominator. The other remarkable evidence of the “shaming” pressure of the international community will be found not only in the constant disquiet of the drafters to raise the standard of the AHRD to be at par or above the 1948 UDHR, but also the final official statement on the adoption of the Declaration, the Phnom Penh Statement (see Appendix A):

Reiterating ASEAN and its Member States’ commitment to the Charter of the United Nations, the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and other international human rights instruments to which ASEAN Member States are parties as well as to relevant ASEAN declarations pertaining to human rights;..

Do hereby:...

Reaffirm further our commitment to ensure that the implementation of the AHRD be in accordance with our commitment to the Charter of the United Nations, the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and other international human rights instruments to which ASEAN Member States are parties as well as to relevant ASEAN declarations pertaining to human rights (Paragraph 3-7).

The second reason is that national governments have given in to domestic pressure. The push “from below” arises from the need and desire to claim legitimacy for the mandate of the ruling party in their respective constituencies. This is most certainly the case with the so-called socialist-communist bloc of states if not the “CMLV” states who were not only late in joining the ASEAN but who have also been gradually opening up to a world that moves on capitalism and the charge of democratic institutions - always with the careful exception of China and the Arab states who pose real challenges with their evolving political systems. To be sure governments like the Philippines, Indonesia and Malaysia

have not been spared from the rebuke of organisations like Amnesty International, Human Rights Watch,¹³¹ and of course the monitoring exercises of the UN Human Rights Council via the Universal Periodic Review.¹³²

Conversations with CMLV government officials in the course of traveling through the cities of these countries have revealed that there is a general acceptance of the fact that the implementation of state ideology has transformed and that there are clamours from the people on the urgency to promote and respect human rights principles. How has this been achieved by the states concerned? The formulation of the right to peace and development, the right to education, and the right to food and adequate healthcare, exemplify the concern of the majority of states in varying degrees. Note, however, that national institutions have not really been altered to accommodate or accompany rhetoric - at least not yet. It will have been observed that drafting the Declaration became possible because the interlocutors have - save in the case of Thailand - invariably worked within or on the basis of domestic legislation, cultural and religious traditions and the political situation of the country at the time (the human rights provisions on the right to life and the principle of equality and non-discrimination are clear examples). The point to be made here is that it appears to be possible to talk about rights without changing national institutions. Indeed most cynics are wired to think this way. But we shall challenge this in a while.

The flip side to winning political legitimacy from the national constituency and the country's regional neighbours is gaining the baseline for membership and credibility in the international community. This is true - but quite frankly, it is an assertion that in this particular case does not hold. It will be recalled that one rather unprecedented move was the organisation of four regional consultations (two of which took place with the ASEAN Sectoral Bodies and the other two with regional and national CSOs). These were initiatives that were not fully appreciated by the delegates and the participants, for reasons that were understandable whichever side one takes (recall Sections 2.2.2.3, 2.2.2.4, 2.3.2.4, 2.3.2.5, and 2.4.2.4). It must be noted, however, that on all four consultations, the AICHR was honest about which proposals it could and could not admit, and threw in a dose of realism by cautioning their counterparts in the dialogue that this exercise was no blank check. The issues that were raised on all the contentious provisions were not new to

¹³¹ See for example: <http://newsinfo.inquirer.net/597962/aquino-defends-human-rights-record>; <http://globalnation.inquirer.net/97259/human-rights-watch-ph-fails-in-ending-impunity>.

¹³² A good introductory survey is on the website of Death Penalty Worldwide Online Database, searching into the country profiles: <http://www.deathpenaltyworldwide.org/search.cfm>.

AICHR. The Representatives and the AICHR as a whole hence made the public pledge to CSOs that their recommendations were to be taken up in earnest, but with the same grave proviso that even the “best” of ideas may *not* be carried through the final document.

The third argument is that ASEAN on account of its evolving institutional arrangements is responding to pressures “from within” its own walls to come to grips with the international human rights regime. There are at least two processes in this regard: the first is the mandate of the AICHR itself, and the second, is the construction of the ASEAN Community by 2015. In the former, call to mind the constant warnings of the Representatives to abide by their directives faithfully (*e.g.* complete a *clean* draft, adhere to the guidelines of the ASEAN foreign ministers, draft the Declaration themselves, etc.); meanwhile, in the latter, there were clear signals of the desire to provide continuity in their work by pointing to the future of human rights conventions and the necessity to be coherent as the “overarching human rights body” by coordinating with ASEAN Commission for Women and Children. This is not to mention the invocation of the AICHR’s Terms of Reference (TOR), which incidentally places the body up for review by 2015. All these indicate the thickening of institutional arrangements as well as the desire of the AICHR, including the Representatives, to be visible and relevant.

A fourth, this time, plausible, reason is that ASEAN member states were persuaded by the moral purpose of human rights and, through the Declaration, they aspire toward such ends. Who would honestly believe, however, that ASEAN member states signed up to the human rights regime out of pure conviction? Indeed, a question essential to the truth that observers will be inclined to ask is, what did the ten countries *really* agree on in the first place? The responses raised by CSOs and international human rights watchdogs during the negotiations and immediately after the signing of the Phnom Penh Statement of 2012 on the adoption of the AHRD had gone only so far as to demonstrate that the final text “falls below universal standards”. So the question that volleys back is, what does the claim that the AHRD falls below the UDHR 1948 *really* mean therefore? Is this the real McCoy - evidently diminished in stature - or is ASEAN window dressing indeed?

I go back to the point that I made at the beginning of this investigation: I am guided by the historical question - in the drafting of the AHRD, what is it that *did* happen - and not - what is it that *ought to have* happened? The margin of appraisal for these two legitimate inquiries requires different analytical paradigms: if the first line of question leads to the assertion that - *sex and gender do not mean the same* - the second generates other claims -

sex ought to have been sexual identity or gender identity, or why the word gender and not gender identity, etc?. What ought to be a change, what ought to have been the change, and so on and so forth, I believe crosses over from an interpretative study to a normative study of the politics of negotiating the human rights regime in ASEAN. The point that I am getting at is this: the fourth reason as much the first three depend on a “wild card”: a word, and the phrase to which it belongs, and above it, the article and the AHRD to which they accrue, can all become in themselves either signs of persuasion, ploys, or distractions.

Words are jokers in the pack. And the key to establishing their “identity” is to begin with the question - how can we, at least linguistically, deny that life and death, sex and gender, peace and security, are distinct words in each of these pairs? The change *in language* is clear to the naked eye. I have provided the outlay of the equation in which the word is a “variable” by examining the way language operates in the dynamics of an international negotiation. Identity is established on the terms by which the word changes. It is forged in the interaction of the community. This is where it acquires *integrity of meaning* – the perspective of the word. Consequently, however, the word has the capacity to be used for different ends: once the equation is transposed the meaning of the word acquires *value*. Any word will be void of value - *impotent, wandering and worthless* - unless it is understood for what it means in the first place. To put it another way, whatever one is inclined to assume – either the instrumental use of human rights or a change of the ASEAN mind regarding human rights- it cannot be done without exposing first the outlay of language - that is, the equation of words.

What the study has attempted to explain is how the discourse of human rights has been re-negotiated in the heart of the ASEAN community for it to make sense first and foremost to its members. Now what escapes the retina is the event of the idea beneath the evolution of every word. And my reader might on this matter disagree, but only if she or he does not subscribe to the common-sense fact that there is something “obvious” about an idea *changing* when the word *has changed* - in the same way that there is something absolute about the fact that a word *changes* if, and only if, an idea *has changed*. A word changes because *some-thing* happens.

The “perspective of the word” is now clear for us to challenge the veracity of the fourth reason, which is related to how ideas shift in international relations. How does the human rights project fair in the Hegelian notion of history as the struggle between ideas? If we are to take the findings of this investigation, then I think the “liberal project” of human rights

is doing fairly well. The freshly minted AHRD appears to go down the road of the future that G. John Ikenberry has called the “liberal world order”, where emerging states try expand their political authority and control over the institutions primarily initiated by the US and the UK, guaranteeing an “open world economy reconciled with social welfare and economic stability” from which all countries can benefit more buoyantly instead of lose. These institutions are de facto no longer Western – they simply guarantee greater emancipation and pluralism. On the other hand, it is tempting to go with the contrast he sets up himself with Stefan Halper’s thesis of a world where emerging states mix market economics with “traditional autocratic or semiautocratic politics in a process that signals an intellectual rejection of the Western economic model” (Villanueva, 2012).

The problem with these two scenarios is that they continue to locate the human rights story within Western scholarly discourse about where the world is headed. For all its would-be merits, the universality of the human rights project will be condemned by those of us who only place it there - on the road of the “history of ideas project”. This glosses over the fact that we may be coming upon the minutiae of ideological shifts that tells us more than the advance of the West. For this reason, the study kicks off by exposing how human rights has become a late complementary dimension in the creation of the ASEAN community - the fathers of ASEAN simply did not think of the international regime to be as essential as it was, say, in the case of the European Community. What seems to emerge rather is that, for *ASEANS*, human rights is there because there are genuine points of convergence with their own institutions that do not value human dignity any less. The point I wish to put across is that something must be said of how and why the region has finally been able to talk about what was two decades back was an anathema – in spite of the fact that it continues to be a discourse “controlled” by the state.

ASEAN has, through its own Human Rights Declaration, skilfully played out the values and ideals of social and political solidarity, and peace and harmony on the basis of respect for sovereign equality. This modus operandi, certainly not exclusive to either Asia or Asians, will keep for a long time. What can explain the staying power of “ASEAN values”, such as consensus and freedom from intervention or the principle of non-interference in the internal affairs of the state? I believe that deep in the bedrock of ASEAN cooperation is the sediment of their almost common history of colonisation. Milton Osborne, captures this finely in his introductory work on Southeast Asia:

For those who have never known what it was like to live under colonial rule the importance of achieving independence can only ever be partially understood. Attaining independence... involved more than a simple change of political control and leadership. These things were fundamentally important, but if we, as outsiders, concentrate exclusively on the political changes... we shall fail to appreciate, however imperfectly, the sense of there being an almost magical and certainly spiritual quality associated with gaining independence for many Southeast Asians, leaders and followers alike, when either willingly or otherwise the colonial rulers departed (Osborne, 2013: 213).

The romantic edge may have been frayed but the pride of independence has lingered .¹³³. This has become the sieve from which time and again any initiative must somehow pass through, and it is an experience which shapes and transforms not only relations with the international community but also between those within. This is why that given their shared sentimental voyage over the years, the fact that all ten ASEAN Member States have banded together in the human rights project has merited a measured look.

¹³³ Even as recent as retired ASEAN public servant as M.C. Abad could still observe that: “The Philippines is at the forefront of initiatives to strengthen ASEAN security cooperation, together with Indonesia, Malaysia, and Thailand. These are countries that have become confident of themselves and in their relations with their allies or close friends... The ‘hesitations’ of some members were not without basis though. If I understood the other countries correctly, some of them seemed to genuinely believe that ASEAN should not do anything that could lead to a military alliance because ASEAN was not a viable bloc by itself, while others were concerned that ASEAN defense cooperation might be misconstrued as a strategic realignment by their respective allies from other parts of the world” (2011: 68).

Epilogue: Reflections on Methodology and a Future Research Agenda

METHODOLOGY

EXPLORING SCOPE CONDITIONS

The meta-theoretical question that has attended this research is, how do we as members of humanity construct “*our world*” in the “*world out there*”? Given my interest in diplomacy and in light of my training in International Relations, Literature and Philosophy, I found natural solace and intellectual affinity with Constructivism and its core propositions: the “*fact*” that the environment in which we conduct our daily affairs is social as much as it is material; the “*fact*” that the social world is a composite of shared self-understandings (*i.e.* inter-subjectivity); and that hence, interests and identity are not two mutually exclusive spheres - but that they each form one another. It is on the basis of these assumptions that I went about thinking through my research on the construction of human rights in Southeast Asia. The essay written by Jeffrey Checkel, “The Constructivist Turn in International Relations” (1998) holds the three issues which have kindled the methodology of this study: when do we use constructivism, how is such an analysis conducted, and how deep within policy does one need to go with a constructivist analysis? Let us proceed to take up each of them in turn. The first issue revolves around the dilemma of when it is that norms transform and when do they “*simply constrain*”. Checkel counsels that one should develop “*scope conditions*” (1998: 345-347) as a response, three of which come to fore.

The first - based on the “*division-of-labour argument*” - is temporal. It recommends using Constructivism when identities are in flux, and rationalism when they are fixed. The strategy adopted in this study was to elect a case (*i.e.* the ASEAN Human Rights Declaration) and to provide a timeline (*i.e.* January 2012 to November 2012). The aim was to observe whether the evolution of the human rights provisions represented the identity of the state in a period of formation or in conditions of fluctuation. It must be noted, however, that the conclusions of this study confirm - as intuited by Checkel - the complexity of making such temporal divisions, especially when the approach that is

chosen emerges from communicative dynamics. The language pendulum that I have proffered highlights the fluidity of internal and external verbal interactions that can only be “separated” analytically, but which loses a firm grasp of the forces of social reality that it attempts to interpret if they were separated in practice. The way language and power slips and glides through the three movements of the pendulum shows how identity is formed *along various levels on interaction* - the individual, the member states, and the regional institution of ASEAN - *at various intervals in time*.

The second scope condition, which is intimately related to the first, is based on the “density-of-transaction argument”. Checkel writes, “at some stage of this process *actors* (emphasis mine) may switch from the rationalists’ consequential, means-ends logic to a situation in which their preferences are in genuine flux and open to change through persuasion and communication” (1998: 346). The strategy adopted in this regard has been similar to the first - establish temporal boundaries for the case in question - but pay attention to the role of “privileged actors and witnesses” (*i.e.* individuals directly involved in the negotiation). In practical terms, this has meant establishing a second temporal frame: the official negotiations may have transpired between January and November of 2012 but the trajectory of the ideas that have been pushed by interest groups belong to another time and spatial scale altogether. Note for example the case of the Malaysian Representative and his advocacy for the abolition of the death penalty or the Indonesian Representative on LGBT rights. My basic assumption is that (some) values and preferences do change over time - but even more so in certain discursive spaces and at certain periods within a span of time (*i.e.* moments of crisis or over extended periods of personal reflection). The correlative strategy under this scope condition, therefore, has been to abstract and design causal mechanisms in social phenomena. To this end, for example, I have reflected even more profoundly on conceptual tools to describe the internal mechanisms of change in behaviour which, in this investigation, I have called introspection.

The third scope condition examines “the role of domestic institutions” - where “institutions” refer to “the bureaucracies, organizations, and groups that channel and define policy-making within states”. In this study, they include regional bureaucracies (*i.e.* the ASEAN Intergovernmental Commission on Human Rights - AICHR - and the ASEAN Secretariat), national agencies represented by the ASEAN Sectoral Bodies (*i.e.* education, defence, health, etc.) and national and regional CSOs. For reasons of scale, time and limited funding, the fieldwork for this dimension of the process in the drafting history has been

relatively limited. I would have wanted to attend the various national consultations on the AHRD and the side meetings of the CSOs before the two Regional Consultations to understand and explain how the agenda of civil society was consolidated. Similarly, there is a wealth of evidence that may be mined in studying the variations of decision-making policies in the various national ministries represented in the AICHR. I also realised, however, that this would have been the subject of an entire investigation altogether. Nonetheless, the reader will note that the strategy with regard to this scope condition has been to focus the analysis on the institutions in direct contact with the “privileged actors” mentioned above. This is in consonance with the object to tracing “process-level evidence” crucial in middle range theory (Checkel, 1998).

EMBARKING ON AN ETHNOGRAPHIC STUDY

One of the valuable points that Checkel makes I believe, and which I have appreciated farthest, is that sifting through the process of how agents and structures mutually constitute can become an unwieldy exercise unless the boundaries of the study are clear. Theory in this sense is indispensable; but so is proximity to the empirical data. The sense that one gets out of doing constructivist analysis is that it yields clear results the closer the investigator is to the process under examination. After laying the theoretical framework and the scope conditions, I began to embark on my ethnographic study of Southeast Asia. It is arguably the most fascinating and challenging component of the study; not least, because it requires a different set of skills that takes the researcher out of the pages of a book and into the field of inter-personal and situational inquisition. My predilection was language; my assumption was that norms were embedded in it; and my mission was hence to observe text in context, in order “to explore how social structures interact with and fundamentally affect the identities of these agents, how certain logics of appropriateness come to govern their behavior” (Checkel, 1998: 343-344).

So how does one go about such an analysis? I took three essential steps (though not necessarily in the order in which I now suggest).

Step 1: Context¹³⁴

I zeroed in on the system of social relations or what I have called in this study as the “linguistic community”. There are several methods to be employed. The most common is a review of the literature, of which Chapter 1.1 is the most obvious result. I recommend at least two stages, one at the beginning and a second review either of the same set or an additional set of literature before going on fieldwork. International organisations are formidable institutions in scale and complexity. The review of literature will allow the researcher to gather and select sites of contestation - that is, the politics between agents and the institutions to which they belong. As a result, the review of literature gradually sharpens its focus. The distinct element in this study, however, is the use of participant observation. A constructivist must aim for such an ideal method for reasons that I hope are already apparent at this stage, should not they be more so as we proceed further.

Step 2: Text¹³⁵

I observed the full range of verbal interactions and chose a unit of language. The use of a linguistic model to carry out constructivist work will demand that you focus on a “level of analysis” from the point of view of language. The notion of “levels” between our two disciplines (the other being IR) ought not to be confused.¹³⁶ Once the linguistic unit is elected, it will then be possible to trace how it moves across the level of the individual, society, the state and so on. A crucial sub-step results from text (Step 2) and context (Step 1), and that is the selection of the site of power brokering, *i.e.* in this case, the drafting of the ASEAN Human Rights Declaration. The researcher will have to choose what method of data gathering will be appropriate. I made cryptic notes of the process of interaction (*i.e.* negotiations), and accomplished the transcriptions at the earliest possible time; cryptic notes lose their reliability the longer the delay. Note that digital recordings may be argued to be superior to human recollection - but it is human beings who *observe*, whilst machines record.

¹³⁴ See Chapter 1.2, Section 1.2.4.2.

¹³⁵ See Chapter 1.2, Section 1.2.4.1.

¹³⁶ See BUZAN, B. & LITTLE, R. 2000. *International systems in world history: remaking the study of international relations*, Oxford, Oxford University Press.

Step 3 Evolutionary Account¹³⁷

The final step merges the first two. Simply put it is about telling the story, so that a beginning and an end must take their place. This literally consists in the transcription of the notes that a researcher takes, and for this reason, one ought to proceed in two stages. The first stage is to tell the story immediately after the fact (*i.e.* after every meeting, in this case); and the second stage would be after the negotiations are concluded (*i.e.* at the end of the ten official meetings). It is effectively a drafting history. I provided a first-hand account. "Account," in this case, refers to the *immediate* social and historical circumstances (*i.e.* the "extra-verbal situation) in which the communicative processes took place. The two stages represent two temporal frames from the point of view the narrator. It is effectively the basis for a longitudinal analysis because, as we have pointed out earlier, meaning is negotiated over time. This is where the sense of the word takes shape.

ANALYSIS¹³⁸

Finally, how deep within policy does one need to go? For practical reasons, there is a lot of wisdom in embarking on the ethnographic study, at the start, and then deciding on the breadth of the investigation. First, one will possibly have to face the paucity and sensitivity of the empirical data; secondly, the relevance of the level of interaction may vary according to the political system and normative tradition of the country concerned; and finally, in this particular case, language is a most sensitive barometer of change, so that it can be very difficult to ascertain *a priori* how far down in archival mining one will have to go. Whilst the "messiness" that comes with research may not always afford its inquirer the privilege of the neat sequence that I suggest, neither is improvisation the total answer. I believe the key is to focus *on the processes* of the areas of transaction that one has decided to theorise on - and not the other way around - theory and then the process in question. Ethnographic study is about *being* in the environment. It is like a hunter gathering data on

¹³⁷ See Chapters 2.1 -2.4.

¹³⁸ Observe that Chapters 2.2, 2.3 and 2.4 each contain a similar section - the "Perspective of the Word".

its prey - the tools you will need have to be adapted to the circumstances of the hunt: the movement of your prey and the conditions of its habitat.

In this case, I fixed my gaze on language - the text in creation - between the addressor and the addressee and the normative structure of human rights. I was consequently able to verify how deep language delves into the various levels of interaction: Article 11 on the right to life went as far down as the professional circle of Malaysian lawyers and society in general, Article 2 on equality and non-discrimination went as wide as the national and transnational LGBT groups, and Article 38 as deep into the regional political elite of ASEAN. It was at this point, after gathering the data *in situ* that I got to moving through the three steps of my ethnographic study, *once again*. In the analysis, the trick is to focus on one or two or all three movements of the pendulum and identify the patterns which emerge in every movement - that is, follow the *perspective of the word*. Under the light of one's research question, an understanding of the movements will reveal and dictate how deep into policy one must then go.

A host of methods will then have to be mustered up: informal conversations, primary and secondary sources, and interpretative approaches. One might call it the third stage of data gathering (the first two being the review of literature and then participant observation).¹³⁹ This stage comprises the verification of initial data and research findings. It is also the phase of sharing one's findings with stakeholders themselves. The researcher will, therefore, want to meet the stakeholders again and publish results in a partial manner. The insight and feedback one gains from the stakeholders may actually deepen his or her judgement of how further down into policy the study ought to reach. Another way of explaining this exercise is this: the meaning of the unit of language is not a function of depth of policy but the trajectory of the verbal interaction and the deployment of discursive strategies. From here, an appreciation of the boundaries of the national position, the international "consensus", and the individual inclination and the discursive resources of ASEAN comes forth. In this specific case moreover, the international human rights regime as a sight of resistance and domination becomes manifest.

A valedictory point of reflection is to be patient in all aspects of the research, which means respecting the rhythm of your work. The temptation is to keep a routine - because at the

¹³⁹ For a good survey of research methodologies and fieldwork strategies see BERG, B. L. 2009. *Qualitative research methods for the social sciences*, Boston, MA; London, Allyn & Bacon.

end of the day, research is a profession like all others. But this study has taken me over seas between which work cultures are distinct and the individuals and social institutions within them or those which sustain them vary greatly. I have found it helpful, as those before me I reckon also have, therefore, that a balance between the enthusiasm of personal and social work ethic be constantly struck:

Mountains should be climbed with as little effort as possible and without desire. The reality of your own nature should determine the speed. If you become restless, speed up. If you become winded, slow down. You climb the mountain in equilibrium between restlessness and exhaustion. Then, when you're no longer thinking ahead, each footstep isn't just a means to an end but a unique event unto itself. This leaf has jagged edges. This rock looks loose. From this place the snow is less visible, even though closer. These are things you should notice anyway. To live only for some future goal is shallow. It's the sides of the mountains which sustain life, not the top. Here's where things grow.

Robert M. Pirsig, *Zen and the Art of Motorcycle Maintenance*
(Pirsig, 1976: Chapter 17)

LOOKING TOWARDS A FUTURE RESEARCH AGENDA

The future of this research forks in two directions:

Normative strand. The most recent Special Issue of the European Journal of International Relations (2013) featured under this eponymous title, has argued for “integrative pluralism” in IR in light of the multiple understandings we have about theory in/on IR and IR itself. Tim Dunne, Lene Hansen and Colin Wight (2013) reflect on this approach to theoretical constructions on account of, first, the ‘emergent properties’ and degrees of ‘organized complexity’ of the international political system; second, IR as a discipline that (potentially) encompasses all of human activity where, therefore, politics, economics, culture, history, art, language and identity all intersect and form a complex whole; and third, the structure of IR as an academic discipline, so that the “discipline is what we make of it”. If students, they argue, are socialized into a fragmented discipline then the incentives are strong for IR to reproduce itself *that way*. But change is possible. This

compels the IR scholar to embark on intellectual endeavors which, therefore, move away from “fragmentation” and the “compartmentalization” of knowledge or the boxing in of disciplines. Vis-à-vis “unity through pluralism” and “disengaged pluralism” the editors suggest a pluralism that accepts and preserves the validity of a wide range of theoretical perspectives and embraces theoretical diversity as a means of providing more comprehensive and multi dimensional accounts of complex phenomena.

A theoretical/normative strand proposes to develop conversations between the English School in IR (predominantly on an history and philosophy axis) and the Constructivist approach (borrowing from linguistics) exemplified by the method applied established in this investigation. The pursuit of an innovative programme on the strategic value of communicative processes in international politics will contribute to the development of the field on International Relations on both sides of the Atlantic but most especially in Europe where Constructivist research and scholarship using language has been fundamentally driven by interdisciplinary borrowings from philosophy (e.g. Fierke on Wittgenstein) and critical theory/post-structuralist thought (e.g. Zehfuss on Derrida). Our practices – in their creation, reproduction and re-invention – require linguistic elements. Ideas become words; words become deeds.¹⁴⁰ This is the link I wish to continue exploring. Finally, to take language “seriously” in this way, I believe, recalibrates diplomacy, as the art of negotiation, back into the sphere of peaceful dialogue (and vice-versa) from the exaggerated emphasis on material power. The project I wish to suggest builds upon previous literature showing other variables, including the causal effects of strategic interactions between political actors.

Empirical strand. An empirical strand, on the other hand, would explore the application of the theoretical model and the methodology on other systemic norms in a variety of diffusion pathways in various geographical contexts. One systemic norm under consideration is the Responsibility to Protect (R2P). The literature covering R2P in ASEAN is sparse. The most tenable reason is that ASEAN regional norms on sovereignty, non-interference and consensus are deeply entrenched and will naturally hold off commitments of international society to uphold humanitarianism. The most cautious amongst them has scrutinized the ASEAN Charter in terms of its authenticity to produce a “people-centered/people-oriented” regional organisation, citing amongst others the statist

¹⁴⁰ Jack Donnelly (1999) makes the argument, also exposed in this study, that “*general formulations*” written into international human rights instruments set “authoritative limits on the range of permissible variation” in the interpretation of a particular right.

nature of the human rights body that was envisioned, the biased criteria for accrediting national and regional NGOs, and the absence of sanctions (Morada, 2009). The basis for these arguments still hold but are challenged by the recent advances of human rights scholarship in Southeast Asia deployed in this study.

One major implication of this study is on our understanding of the discursive space that opens in talking about rights in various socio-cultural and regional contexts. The universality of rights is challenged on two grounds, that is, in terms of its normative claims as a moral language, and the subsequently the instruments available for its enforcement (Brown, 2002, Dunne and Wheeler, 1999, Donnelly, 1999).

The AHRD effectively puts an end to the former because the negotiations explicitly qualified that either the use of the word “regional particularities” should not in any way diminish the commitment of ASEAN to international human rights standards (Villanueva, 2012). Whilst enforcement remains an issue, cultural relativism in the context of rights no longer maintains its original force. More importantly, however, the contentious nature of the origin of human rights – that fact that it has Western roots - has not prevented regional groupings – ASEAN above all - from talking about rights. By virtue of performing the right to talk about rights, there does not appear to be any impediment on thinking that they can be negotiated within societies with arguably distinct values.

Two points are being made here. One, the AHRD is conventional, protecting national sovereignty in terms of the substantive formulations of the human rights provisions, but it is radical in terms of the discourse on human rights. It evidences ownership of the human rights agenda in Southeast Asia by Southeast Asians. Two, the problem with talking about rights is not located in the notion of human rights but in the value-laden institutions (including the international human rights regime itself) against which it must be fitted if states and their political agents are to agree (Acharya, 2004). There is no neutral discursive space; the study shows that political communities have a specific language through which new norms must be negotiated. A further research initiative, therefore, is to take the Pendulum Model and test its application, initially, across the drafting history of the other regional human rights declaration (Inter-American, European, African and Arab).

In postulating this future research agenda, my motives are three-fold. The first is to help in providing a “neutral” vocabulary for incommensurable theoretic traditions in IR by understanding and explaining the value of language in international politics. Secondly, the human rights regime in and of itself is a composite of abstract values in as much as a social project, negotiated somewhere between “a broad tradition of political thought and as a specific international development” post-WW II (Hoover, 2013: 33). It aims to contribute ultimately to a more holistic explanation and understanding of the evolution of the international human rights regime in Southeast Asia and in other regional organisations – to look not only at the consequences of the agency of individual actors but also at the social construction of human rights emerging from the hegemonic struggle of “world” views in and through discourse. *Language can tell us why, when and how ideas matter*: language can tell us how intersubjective norms are *collectively* held. Language serves as a conduit for thinking and there are patterns and strategies under the control of political actors that allow them to create, communicate and change the meaning of norms and identity in international relations. I find that the sphere of international politics is an arena for testing and validating perceptions of and on individual and collective actors on how the world ought to be in a state of order and harmony.

BIBLIOGRAPHY

- Vienna Declaration and Programme of Action. World Conference on Human Rights, 1993 Vienna, Austria.
2007. 2007 Report of the Eminent Persons Group on the ASEAN Charter Cebu, Philippines, 12th ASEAN Summit.
- Final Statement of the ASEAN People's Forum VI. Civil Society Conference 6 / Asean Peoples Forum 3, 24-26 September 2010a Hanoi, Vietnam.
- 2010b. Report of the Working Group on the Universal Periodic Review of Brunei Darussalam. UN Human Rights Council. Available: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/101/19/PDF/G1010119.pdf?OpenElement>.
- 2011a. Recognition and protection of LGBTIQ rights long overdue: ASEAN LGBT groups. *Fridae* [Online]. Available: <http://www.fridae.asia/gay-news/2011/05/05/10857.recognition-and-protection-of-lgbtq-rights-> [Accessed 3 May 2014].
- Statement of the 2011 ASEAN Civil Society Conferenc / ASEAN Peoples' Forum. 2011 ASEAN Civil Society Conference/ ASEAN Peoples' Forum, 3-5 May 2011b Jakarta, Indonesia.
- 2012a. Death Penalty Worldwide. Center for International Human Rights at Northwestern University School of Law and World Coalition Against the Death Penalty.
- 2012b. Inclusion of SOGI issues and Rights in the ACSC/APF and in the ASEAN Human Rights Declaration. 29 March 2012 ed.: International Gay and Lesbian Human Rights Commission.
- Joint Statement of the 2012 ASEAN Civil Society Conference / ASEAN Peoples' Forum. 2012 ASEAN Civil Society Conference / Peoples' Forum (ACSC/APF), 29-31 March 2012c Phnom Penh, Cambodia.
- Joint Submission to the ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration by Civil Society Organisations and People's Movements. Civil Society Forum on ASEAN Human Rights Declaration, 10-11 September 2012d Manila, Philippines.
- Joint Submission to the ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration by Civil Society Organisations and People's Movements. Fifth Regional Consultation on ASEAN and Human Rights, 22 June 2012e Kuala Lumpur, Malaysia.
- 2012f. Philwomen Recommendations for the Second Regional Consultation of AICHR with Civil Society Organizations on the ASEAN Human Rights Declaration (AHRD). Manila, Philippines: Philippine Women on ASEAN.
- 2012g. Second Addendum to the Women's Caucus Submission on the ASEAN Human Rights Declaration (AHRD) to the ASEAN Intergovernmental Commission on Human Rights (AICHR). Philwomen on ASEAN & Human Rights Working Group – Indonesia.
2013. Still Window-Dressing: A Performance Report on the Third Year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2011-2012. Bangkok, Thailand: Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR).
- ABAD, M. C., JR. 2011. *The Philippines in ASEAN : Reflections from the listening room*, Manila, Anvil Publishing.
- ABDULLAH, D. S. D. M. S. 2012. It's time to end the death penalty. *New Straits Times* [Online]. Available: <http://www.nst.com.my/opinion/columnist/it-s-time-to-end-the-death-penalty-1.164768> [Accessed 30 April 2014].
- ACHARYA, A. 2004. How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism. *International Organization*, 58, 239-275.

- ACHARYA, A. 2009. *Constructing a security community in southeast Asia : ASEAN and the problem of regional order*, London, Routledge.
- ADAMS, D. 1989. The Seville Statement on Violence: A Progress Report. *Journal of Peace Research* [Online], 26. Available: <http://www.culture-of-peace.info/ssov/title-page.html> [Accessed 3 May 2014].
- ASEAN 1976. Declaration of ASEAN Concord (Bali I). Bali, Indonesia.
- ASEAN 1993. 1993 Joint Communique of the 26th ASEAN Ministerial Meeting. Singapore.
- ASEAN 2003. Declaration of ASEAN Concord II (Bali II). Bali, Indonesia.
- ASEAN 2011. ASEAN Community in a Global Community of Nations (Bali III). Bali, Indonesia.
- ASEAN 2012. THE ASEAN Charter.
- ASHTON, C. 2012. Statement by High Representative Catherine Ashton on the adoption of the ASEAN Human Rights Declaration. Available: http://eeas.europa.eu/delegations/vietnam/documents/press_corner/2012/20121123_en.pdf [Accessed 15 May 2014].
- AUSTIN, J. L., URMSON, J. O. & SBISA, M. 1975. *How to do things with words: The William James lectures delivered at Harvard University in 1955*, Oxford, Clarendon Press.
- BARNETT, M. & DUVALL, R. 2005. Power in International Politics. *International Organization*, 59, 39-75.
- BAUER, J. R. & BELL, D. A. (eds.) 1999. *The East Asian challenge for human rights*, Cambridge: Cambridge University Press.
- BERG, B. L. 2009. *Qualitative research methods for the social sciences*, Boston, MA; London, Allyn & Bacon.
- BROWN, C. 2002. *Sovereignty, rights, and justice : international political theory today*, Oxford, Polity.
- BURROW, S. & SUZUKI, M. 2012. ITUC/ITUC –Asia Pacific Statement on ASEAN Human Rights Declaration. Available: <http://www.ituc-csi.org/ituc-ituc-asia-pacific-statement.12479?lang=en> [Accessed 15 May 2014].
- BUZAN, B. & LITTLE, R. 2000. *International systems in world history: remaking the study of international relations*, Oxford, Oxford University Press.
- CHECKEL, J. 1998. The Constructive Turn in International Relations Theory. *World Politics*, 50, 324-348.
- CHECKEL, J. T. 1999. Norms, Institutions, and National Identity in Contemporary Europe. *International Studies Quarterly*, 43, 84-114.
- CIORCIARI, J. D. 2012. Institutionalizing Human Rights in Southeast Asia. *Human Rights Quarterly*, 34, 695-725.
- CLARK, W. R. 1998. Agents and Structures: Two Views of Preferences, Two Views of Institutions. *International Studies Quarterly*, 42, 245-270.
- CLARKE, G. 2012. The Evolving ASEAN Human Rights System: The ASEAN Human Rights Declaration of 2012. *Northwestern Journal of International Human Rights*, 11, 1-27.
- COLLINS, A. 2008. A People-oriented ASEAN: A Door Ajar or Closed for Civil Society Organizations. *Contemporary Southeast Asia*, 30, 313-331.
- DAVIES, M. 2013. Explaining the Vientiane Action Programme: ASEAN and the institutionalisation of human rights. *The Pacific Review*, 26, 385-406.
- DESIERTO, D. A. 2009. Universalizing Core Human Rights in the New ASEAN a Reassessment of Culture and Development Justifications Against the Global Rejection of Impunity. *Goettingen journal of international law Goettingen Journal of International Law*, 1, 77-114.
- DONNELLY, J. 1986. International Human Rights: A Regime Analysis. *International Organization*, 40, 599-642.
- DONNELLY, J. 1998. Human Rights: A New Standard of Civilization? *International Affairs*, 74, 1-23.
- DONNELLY, J. 1999. The Social Construction of International Human Rights. In: DUNNE, T. & WHEELER, N. J. (eds.) *Human rights in global politics*. Cambridge: Cambridge University Press.

- DOSCH, J. 2008. ASEAN's Reluctant Liberal Turn and the Thorny Road to Democracy Promotion. *The Pacific Review*, 21, 527-545.
- DUNNE, T., HANSEN, L. & WIGHT, C. 2013. The end of International Relations theory? *European Journal of International Relations*, 19, 405-425.
- DUNNE, T. & WHEELER, N. J. (eds.) 1999. *Human rights in global politics*, Cambridge: Cambridge University Press.
- ELDRIDGE, P. J. 2002. *The politics of human rights in southeast Asia*, London, Routledge.
- ELSTER, J. 1989. *Nuts and bolts for the social sciences*, Cambridge; New York, Cambridge University Press.
- FERGUSON, N. 2009. The Revelation of 1989. *Newsweek*.
- FINNEMORE, M. 1996. *National interests in international society*, Ithaca, N.Y, Cornell University Press.
- FINNEMORE, M. & SIKKINK, K. 1999. International Norm Dynamics and Political Change. In: KATZENSTEIN, P. J., KEOHANE, R. O. & KRASNER, S. D. (eds.) *Exploration and contestation in the study of world politics*. Cambridge, Mass.: MIT Press.
- FROST, M. 1996. *Ethics in international relations : a constitutive theory*, Cambridge, Cambridge University Press.
- FUKUYAMA, F. 1992. *The end of history and the last man*, London, Penguin.
- GIDDENS, A. 1984. *The constitution of society: outline of the theory of structuration*, Berkeley; Los Angeles, University of California Press.
- GLENDON, M. A. 1997. Knowing the Universal Declaration of Human Rights. *Notre Dame Law Review*, 73, 1153.
- GUZZINI, S. & LEANDER, A. (eds.) 2006. *Constructivism and international relations: Alexander Wendt and his critics*, London: Routledge.
- HAACKE, J. 2003. ASEAN's Diplomatic and Security Culture: A Constructivist Assessment. *International Relations of the Asia-Pacific*, 3, 57-87.
- HEDSTRÖM, P. & SWEDBERG, R. 1996. Social Mechanisms. *Acta Sociologica*, 39, 281-308.
- HERNANDEZ, C. G. 2006. Track Two and Regional Policy: The ASEAN ISIS in ASEAN Decision Making. *Twenty Two Years of ASEAN ISIS: Origin, Evolution and Challenges of Track Two Diplomacy*, 17-29.
- HINDSTROM, H. 2012. ASEAN adopts 'flawed' human rights declaration. *Democratic Voice of Burma Multimedia Group* [Online]. Available: [Unlinked Thesis Master Document 2014 October 18.docx](#) [Accessed 3 May 2014].
- HOGUE, J. F., CHAIR, P. G. P. & ROSE, G. (eds.) 1996. *Samuel P. Huntington's The clash of civilizations? : the debate*, New York ; London: Foreign Affairs.
- HOOVER, J. 2013. Rereading the Universal Declaration of Human Rights: Plurality and Contestation, Not Consensus. *Journal of Human Rights*, 12, 217-241.
- HOPF, T. 1998. The Promise of Constructivism in International Relations Theory. *International Security*, 23, 171-200.
- HSIEN-LI, T. 2011. *The ASEAN Intergovernmental Commission on Human Rights*, Cambridge, Cambridge University Press.
- HUMPHREY, J. P. 1983. The Memoirs of John P. Humphrey, the First Director of the United Nations Division of Human Rights. *Human Rights Quarterly*, 5, 387-439.
- HUNTINGTON, S. P. 1993. The Clash of Civilizations? *Foreign Affairs*, 72, 22-49.
- ICJ. 2012. ICJ condemns fatally flawed ASEAN Human Rights Declaration. *International Commission of Jurists* [Online]. Available: <http://www.icj.org/icj-condemns-fatally-flawed-asean-human-rights-declaration/> [Accessed 15 May 2014].
- JETSCHKE, A. 1999. Linking the Unlinkable? International Norms and Nationalism in Indonesia and the Philippines. In: RISSE, T., ROPP, S. C. & SIKKINK, K. (eds.) *The power of human rights: international norms and domestic change*. Cambridge: Cambridge University Press.
- JOHNSON, D. T. Z. F. E. 2009. *The next frontier : national development, political change, and the death penalty in Asia*, Oxford; New York, Oxford University Press.
- JONES, L. 2010. ASEAN's Unchanged Melody? The Theory and Practice of 'Non-Interference' in Southeast Asia. *The Pacific Review*, 23, 479 - 502.

- JOSEPH, J. E. 2004. The Linguistic Sign. In: SANDERS, C. (ed.) *The Cambridge Companion to Saussure*. Cambridge: Cambridge University Press.
- KATSUMATA, H. 2009. ASEAN and Human Rights: Resisting Western Pressure or Emulating The West? *The Pacific Review*, 22, 619-637.
- KECK, M. E. & SIKKINK, K. 1998. *Activists beyond borders : advocacy networks in international politics*, Ithaca, N.Y. ; London, Cornell University Press.
- KIERKEGAARD, S. & CAPEL, L. M. 1966. *The concept of irony, with constant reference to Socrates*, London, Collins.
- KLOTZ, A. 1995. *Norms in international relations: the struggle against apartheid*, Ithaca, N.Y.; London, Cornell University Press.
- KOH, T., MANALO, R. G. & WOON, W. (eds.) 2009. *The Making of the ASEAN Charter*, Singapore: World Scientific Publishing Co. Pte. Ltd.
- KRAFT, H. 2012. RtoP by Increments: the AICHR and Localizing the Responsibility to Protect in Southeast Asia. *The Pacific Review*, 25, 27-49.
- KRASNER, S. D. 1999. *Sovereignty : organized hypocrisy*, Princeton, N.J.; Chichester, Princeton University Press.
- KRATOCHWIL, F. 2001. Sovereignty: Myth, Organized Hypocrisy, or Generative Grammar? The Case for a Conceptual Approach. Munich: Ludwig-Maximilians-Universität.
- KRATOCHWIL, F. V. 1991. *Rules, norms, and decisions: on the conditions of practical and legal reasoning in international relations and domestic affairs*, Cambridge University Press.
- LAKE, D. & WONG, W. 2009. The Politics of Networks: Interests, Power, and Human Rights Norms. In: KAHLER, M. (ed.) *Networked Politics*. Ithaca: Cornell University Press.
- LAURSEN, H. W. 2013. An Introduction to the Issue of Nuclear Weapons in Southeast Asia. Available: <http://nwp.ilpi.org/?p=2024> [Accessed 2 May 2012].
- LEIFER, M. 1999. The ASEAN Peace Process: A Category Mistake. *The Pacific Review*, 12, 25 - 38.
- LINTON, S. 2008. ASEAN States, Their Reservations to Human Rights Treaties and the Proposed ASEAN Commission on Women and Children. *Human Rights Quarterly*, 30, 436-493.
- LYONS, G. M. & MASTANDUNO, M. (eds.) 1995. *Beyond Westphalia? : state sovereignty and international intervention*, Baltimore: Johns Hopkins University Press.
- MAHATHIR BIN, M. & ISHIHARA, S. 1995. *The voice of Asia: two leaders discuss the coming century*, New York; Tokyo, Kodansha International.
- MAHBUBANI, K. 1999. An Asian Perspective on Human Rights and Freedom of the Press. In: NESS, P. V. (ed.) *Debating human rights : critical essays from the United States and Asia*. London; New York: Routledge.
- MAZOWER, M. 2004. The Strange Triumph of Human Rights, 1933-1950. *The Historical Journal*, 47, 379-398.
- MCCARTHY, S. 2009. Chartering a New Direction? Burma and the Evolution of Human Rights in ASEAN. *Asian Affairs: An American Review*, 36, 157 - 175.
- MORADA, N. 2009. The ASEAN Charter and the Promotion of R2P in Southeast Asia: Challenges and Constraints. *Global Responsibility to Protect*. Martinus Nijhoff Publishers.
- MORAVCSIK, A. 2000. The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe. *International Organization*, 54, 217-252.
- MOUL, W. B. 1973. The Level of Analysis Problem Revisited. *Canadian Journal of Political Science / Revue canadienne de science politique*, 6, 494-513.
- NARINE, S. 2012. Human Rights Norms and the Evolution of ASEAN: Moving without Moving in a Changing Regional Environment. *Contemporary Southeast Asia: A Journal of International and Strategic Affairs*, 34, 365-388.
- NISCHALKE, T. I. 2000. Insights from ASEAN's Foreign Policy Co-operation: The "ASEAN Way", a Real Spirit or a Phantom? *CONTEMPORARY SOUTHEAST ASIA*, 22, 89-112.

- NULAND, V. 2012. ASEAN Declaration on Human Rights. Available: <http://www.state.gov/r/pa/prs/ps/2012/11/200915.htm> [Accessed 15 May 2014].
- ONUF, N. G. 2013. *World of our making: rules and rule in social theory and international relations*, London, Routledge.
- OSBORNE, M. E. 2013. *Southeast Asia: An Introductory History*, Crows Nest, N.S.W, Allen & Unwin.
- PASIC, S. C. 1996. Culturing international relations theory: a call for extension. In: LAPID, Y. & KRATOCHWIL, F. V. (eds.) *The Return of Culture and Identity in IR Theory*. Boulder: Lynne Rienner.
- PAYNE, R. A. 2001. Persuasion, Frames and Norm Construction. *European Journal of International Relations*, 7, 37-61.
- PHAN, H. D. 2008. The Evolution Towards an Asean Human Rights Body. *Asia Pacific Journal on Human Rights and the Law*, 9, 1-12.
- PIRSIG, R. M. 1976. *Zen and the art of motorcycle maintenance: an inquiry into values*, London, Corgi.
- POOLE, A. 2010. Rights or rhetoric: does ASEAN's new human rights body 'matter'? *Connected Globe: Conflicting Worlds*. Melbourne: Australian Political Science Association Conference 2010
- PORPORA, D. V. 1989. Four Concepts of Social Structure. *Journal for the Theory of Social Behaviour*, 19, 195-211.
- RENSHAW, C. S. 2013. The ASEAN Human Rights Declaration 2012. *Human Rights Law Review*, 1.
- RISSE, T. 2000. "Let's Argue!": Communicative Action in World Politics. *International Organization*, 54, 1-39.
- RISSE, T., ROPP, S. C. & SIKKINK, K. (eds.) 1999. *The power of human rights : international norms and domestic change*, Cambridge: Cambridge University Press.
- RISSE, T. & SIKKINK, K. 1999. The Socialization of international Human Rights Norms into Domestic Practices: Introduction. In: RISSE, T., ROPP, S. C. & SIKKINK, K. (eds.) *The power of human rights: international norms and domestic change*. Cambridge: Cambridge University Press.
- ROBINSON, W. S. 1950. Ecological Correlations and the Behavior of Individuals. *American Sociological Review*, 15, 351-357.
- RÜLAND, J. 2002. The Contribution of Track Two Dialogue Towards Crisis Prevention. *Asien*, 85, 84-96.
- SAUSSURE, F. D., CHARLES, B., ALBERT, S. & ALBERT, R. 1968. *Cours de linguistique générale*, Paris, Payot.
- SEARLE, J. R. 1996. *The construction of social reality*, London, Penguin.
- SMITH, K. E. 2008. *European Union foreign policy in a changing world*, Cambridge, Polity.
- SUHAKAM. 2012. Malaysia: ASEAN Human Rights Declaration falls short of expectation. *Asia Pacific Forum* [Online]. Available: <http://www.asiapacificforum.net/news/malaysia-asean-human-rights-declaration-falls-short-of-expectation> [Accessed 15 May 2014].
- TURNBULL, C. M. (ed.) 1992. *Chapter 10: Regionalism and Nationalism*, Cambridge Histories Online: Cambridge University Press.
- UN 1984. General Assembly Resolution 39/11, Right of peoples to peace.
- UN 1998. General Assembly Resolution 52/13, Culture of peace.
- UN 1999. General Assembly Resolution 53/243, Declaration and Programme of Action on a Culture of Peace.
- UN 2011. Human Rights Council Resolution 17/19, Human rights, sexual orientation and gender identity.
- VILLANUEVA, K. H. R. 2012. How West was won: Asean Magna Carta. *Philippine Daily Inquirer* [Online]. Available: <http://opinion.inquirer.net/43189/how-west-was-won-asean-magna-carta> [Accessed 3 May 2014].
- VOLOSHINOV, V. N. 1973. *Marxism and the Philosophy of Language*, New York, Seminar Press.

- WALTZ, K. N. 1979. *Theory of international politics*, Reading, Mass., Addison-Wesley Pub. Co.
- WENDT, A. 1999. *Social theory of international politics*, Cambridge, Cambridge University Press.
- WRIGHT-CAROZZA, P. 2003. From Conquest to Constitutions : Retrieving A Latin American Tradition of the Idea of Human Rights. *Human rights quarterly : a comparative and international journal of the social sciences, philosophy, and law* *Human rights quarterly*, 25, 281-313.
- YEN, Y. 2010. *The evolution of human rights: Institutions, changes, and values in Southeast Asia*. Ph.D. 3423552, State University of New York at Buffalo.
- ZAKARIA, F. & YEW, L. K. 1994. Culture Is Destiny: A Conversation with Lee Kuan Yew. *Foreign Affairs* [Online], 73. Available: <http://0-search.proquest.com.wam.leeds.ac.uk/docview/214285529?accountid=14664> [Accessed 4 May 2014].
- ZEHFUSS, M. 2002. *Constructivism in international relations: the politics of reality*, Cambridge, Cambridge University Press.
- ZEHFUSS, M. 2006. Constructivism and Identity. In: GUZZINI, S. & LEANDER, A. (eds.) *Constructivism and international relations: Alexander Wendt and his critics*. London: Routledge.

Appendix A : The ASEAN Human Rights Declaration and the Phnom Penh Statement

THE ASEAN HUMAN RIGHTS DECLARATION

WE, the Heads of State/Government of the Member States of the Association of Southeast Asian Nations (hereinafter referred to as "ASEAN"), namely Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Republic of the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam, on the occasion of the 21st ASEAN Summit in Phnom Penh, Cambodia.

REAFFIRMING our adherence to the purposes and principles of ASEAN as enshrined in the ASEAN Charter, in particular the respect for and promotion and protection of human rights and fundamental freedoms, as well as the principles of democracy, the rule of law and good governance;

REAFFIRMING FURTHER our commitment to the Universal Declaration of Human Rights, the Charter of the United Nations, the Vienna Declaration and Programme of Action, and other international human rights instruments to which ASEAN Member States are parties;

REAFFIRMING ALSO the importance of ASEAN's efforts in promoting human rights, including the Declaration of the Advancement of Women in the ASEAN Region and the Declaration on the Elimination of Violence against Women in the ASEAN Region;

CONVINCED that this Declaration will help establish a framework for human rights cooperation in the region and contribute to the ASEAN community building process;

HEREBY DECLARE AS FOLLOWS:

GENERAL PRINCIPLES

1. All persons are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of humanity.
2. Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status.

3. Every person has the right of recognition everywhere as a person before the law. Every person is equal before the law. Every person is entitled without discrimination to equal protection of the law.
4. The rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms.
5. Every person has the right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law.
6. The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives. It is ultimately the primary responsibility of all ASEAN Member States to promote and protect all human rights and fundamental freedoms.
7. All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.
8. The human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society.
9. In the realisation of the human rights and freedoms contained in this Declaration, the principles of impartiality, objectivity, non-selectivity, non-discrimination, non-confrontation and avoidance of double standards and politicisation, should always be upheld. The process of such realisation shall take into account peoples' participation, inclusivity and the need for accountability.

10. ASEAN Member States affirm all the civil and political rights in the Universal Declaration of Human Rights. Specifically, ASEAN Member States affirm the following rights and fundamental freedoms:
11. Every person has an inherent right to life which shall be protected by law. No person shall be deprived of life save in accordance with law.
12. Every person has the right to personal liberty and security. No person shall be subject to arbitrary arrest, search, detention, abduction or any other form of deprivation of liberty.
13. No person shall be held in servitude or slavery in any of its forms, or be subject to human smuggling or trafficking in persons, including for the purpose of trafficking in human organs.
14. No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.
15. Every person has the right to freedom of movement and residence within the borders of each State. Every person has the right to leave any country including his or her own, and to return to his or her country.
16. Every person has the right to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements.
17. Every person has the right to own, use, dispose of and give that person's lawfully acquired possessions alone or in association with others. No person shall be arbitrarily deprived of such property.
18. Every person has the right to a nationality as prescribed by law. No person shall be arbitrarily deprived of such nationality nor denied the right to change that nationality.
19. The family as the natural and fundamental unit of society is entitled to protection by society and each ASEAN Member State. Men and women of full age have the right to marry on the basis of their free and full consent, to found a family and to dissolve a marriage, as prescribed by law.
20. (1) Every person charged with a criminal offence shall be presumed innocent until proved guilty according to law in a fair and public trial, by a competent, independent and impartial tribunal, at which the accused is guaranteed the right to defence.

(2) No person shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

(3) No person shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of each ASEAN Member State.

21. Every person has the right to be free from arbitrary interference with his or her privacy, family, home or correspondence including personal data, or to attacks upon that person's honour and reputation. Every person has the right to the protection of the law against such interference or attacks.
22. Every person has the right to freedom of thought, conscience and religion. All forms of intolerance, discrimination and incitement of hatred based on religion and beliefs shall be eliminated.
23. Every person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person's choice.
24. Every person has the right to freedom of peaceful assembly.
25. (1) Every person who is a citizen of his or her country has the right to participate in the government of his or her country, either directly or indirectly through democratically elected representatives, in accordance with national law.

(2) Every citizen has the right to vote in periodic and genuine elections, which should be by universal and equal suffrage and by secret ballot, guaranteeing the free expression of the will of the electors, in accordance with national law.

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

26. ASEAN Member States affirm all the economic, social and cultural rights in the Universal Declaration of Human Rights. Specifically, ASEAN Member States affirm the following:

27. (1) Every person has the right to work, to the free choice of employment, to enjoy just, decent and favourable conditions of work and to have access to assistance schemes for the unemployed.
- (2) Every person has the right to form trade unions and join the trade union of his or her choice for the protection of his or her interests, in accordance with national laws and regulations.
- (3) No child or any young person shall be subjected to economic and social exploitation. Those who employ children and young people in work harmful to their morals or health, dangerous to life, or likely to hamper their normal development, including their education should be punished by law. ASEAN Member States should also set age limits below which the paid employment of child labour should be prohibited and punished by law.
28. Every person has the right to an adequate standard of living for himself or herself and his or her family including: a. The right to adequate and affordable food, freedom from hunger and access to safe and nutritious food; b. The right to clothing; c. The right to adequate and affordable housing; d. The right to medical care and necessary social services; e. The right to safe drinking water and sanitation; f. The right to a safe, clean and sustainable environment.
29. (1) Every person has the right to the enjoyment of the highest attainable standard of physical, mental and reproductive health, to basic and affordable health-care services, and to have access to medical facilities.
- (2) The ASEAN Member States shall create a positive environment in overcoming stigma, silence, denial and discrimination in the prevention, treatment, care and support of people suffering from communicable diseases, including HIV/AIDS.
30. (1) Every person shall have the right to social security, including social insurance where available, which assists him or her to secure the means for a dignified and decent existence.
- (2) Special protection should be accorded to mothers during a reasonable period as determined by national laws and regulations before and after childbirth. During such period, working mothers should be accorded paid leave or leave with adequate social security benefits.
- (3) Motherhood and childhood are entitled to special care and assistance. Every child, whether born in or out of wedlock, shall enjoy the same social protection.

31. (1) Every person has the right to education.
- (2) Primary education shall be compulsory and made available free to all. Secondary education in its different forms shall be available and accessible to all through every appropriate means. Technical and vocational education shall be made generally available. Higher education shall be equally accessible to all on the basis of merit.
- (3) Education shall be directed to the full development of the human personality and the sense of his or her dignity. Education shall strengthen the respect for human rights and fundamental freedoms in ASEAN Member States. Furthermore, education shall enable all persons to participate effectively in their respective societies, promote understanding, tolerance and friendship among all nations, racial and religious groups, and enhance the activities of ASEAN for the maintenance of peace.
32. Every person has the right, individually or in association with others, to freely take part in cultural life, to enjoy the arts and the benefits of scientific progress and its applications and to benefit from the protection of the moral and material interests resulting from any scientific, literary or appropriate artistic production of which one is the author.
33. ASEAN Member States should take steps, individually and through regional and international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of economic, social and cultural rights recognised in this Declaration.
34. ASEAN Member States may determine the extent to which they would guarantee the economic and social rights found in this Declaration to non-nationals, with due regard to human rights and the organisation and resources of their respective national economies.

RIGHT TO DEVELOPMENT

35. The right to development is an inalienable human right by virtue of which every human person and the peoples of ASEAN are entitled to participate in, contribute to, enjoy and benefit equitably and sustainably from economic, social, cultural and political development. The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations. While development facilitates and is necessary for the enjoyment of

all human rights, the lack of development may not be invoked to justify the violations of internationally recognised human rights.

36. ASEAN Member States should adopt meaningful people-oriented and gender responsive development programmes aimed at poverty alleviation, the creation of conditions including the protection and sustainability of the environment for the peoples of ASEAN to enjoy all human rights recognised in this Declaration on an equitable basis, and the progressive narrowing of the development gap within ASEAN.
37. ASEAN Member States recognise that the implementation of the right to development requires effective development policies at the national level as well as equitable economic relations, international cooperation and a favourable international economic environment. ASEAN Member States should mainstream the multidimensional aspects of the right to development into the relevant areas of ASEAN community building and beyond, and shall work with the international community to promote equitable and sustainable development, fair trade practices and effective international cooperation.

RIGHT TO PEACE

38. Every person and the peoples of ASEAN have the right to enjoy peace within an ASEAN framework of security and stability, neutrality and freedom, such that the rights set forth in this Declaration can be fully realised. To this end, ASEAN Member States should continue to enhance friendship and cooperation in the furtherance of peace, harmony and stability in the region.

COOPERATION IN THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

39. ASEAN Member States share a common interest in and commitment to the promotion and protection of human rights and fundamental freedoms which shall be achieved through, inter alia, cooperation with one another as well as with relevant national, regional and international institutions/organisations, in accordance with the ASEAN Charter.
40. Nothing in this Declaration may be interpreted as implying for any State, group or person any right to perform any act aimed at undermining the purposes and principles of ASEAN, or at the destruction of any of the rights and fundamental freedoms set forth in this Declaration and international human rights instruments to which ASEAN Member States are parties.

Adopted by the Heads of State/Government of ASEAN Member States at Phnom Penh, Cambodia, this Eighteenth Day of November in the Year Two Thousand and Twelve, in one single original copy in the English Language.

THE PHNOM PENH STATEMENT ON THE ADOPTION OF THE ASEAN HUMAN RIGHTS
DECLARATION (AHRD)

WE, the Heads of State/Government of the Member States of the Association of Southeast Asian Nations (ASEAN), on the occasion of the 21st ASEAN Summit in Phnom Penh, Cambodia;

REAFFIRMING ASEAN's commitment to the promotion and protection of human rights and fundamental freedoms as well as the purposes and the principles as enshrined in the ASEAN Charter, including the principles of democracy, rule of law and good governance;

REITERATING ASEAN and its Member States' commitment to the Charter of the United Nations, the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and other international human rights instruments, to which ASEAN Member States are parties as well as to relevant ASEAN declarations and instruments pertaining to human rights;

ACKNOWLEDGING the importance of the role of the ASEAN Intergovernmental Commission on Human Rights (AICHR), as the overarching institution responsible for the promotion and protection of human rights in ASEAN, that contributes towards the building of a people-oriented ASEAN Community and as a vehicle for progressive social development and justice, the full realization of human dignity and the attainment of a higher quality of life for ASEAN peoples;

COMMENDING AICHR for developing a comprehensive declaration on human rights, in consultation with ASEAN Sectoral Bodies and other relevant stakeholders;

ACKNOWLEDGING the meaningful contribution of ASEAN Sectoral Bodies and other relevant stakeholders in the promotion and protection of human rights in ASEAN, and encourage their continuing engagement and dialogue with the AICHR;

DO HEREBY:

1. ADOPT the ASEAN Human Rights Declaration (AHRD);
2. AFFIRM our commitment to the full implementation of the AHRD to advance the promotion and protection of human rights in the region; and
3. REAFFIRM further our commitment to ensure that the implementation of the AHRD be in accordance with our commitment to the Charter of the United Nations, the Universal Declaration of Human Rights, the Vienna Declaration and Program of

Action, and other international human rights instruments to which ASEAN Member States are parties, as well as to relevant ASEAN declarations and instruments pertaining to human rights.

DONE at Phnom Penh, Kingdom of Cambodia, this Eighteenth Day of November in the Year Two Thousand and Twelve, in a single original in the English language.

For Brunei Darussalam:

HAJI HASSANAL BOLKIAH Sultan of Brunei Darussalam

For the Kingdom of Cambodia:

SAMDECH AKKA MOHA SENA PADEI TECHO HUN SEN Prime Minister

For the Republic of Indonesia:

SUSILO BAMBANG YUDHOYONO President

For the Lao People's Democratic Republic:

THONGSING THAMMAVONG Prime Minister

For Malaysia:

DATO' SRI MOHD NAJIB TUN ABDUL RAZAK Prime Minister

For the Republic of the Union of Myanmar:

U THEIN SEIN President

For the Republic of the Philippines:

BENIGNO S. AQUINO III President

For the Republic of Singapore:

LEE HSIEN LOONG Prime Minister

For the Kingdom of Thailand:

YINGLUCK SHINAWATRA Prime Minister

For the Socialist Republic of Viet Nam:
NGUYEN TAN DUNG Prime Minister

Appendix B : The International Bill of Human Rights

The International Bill of Human Right consists of the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights and its two optional protocols, and the International Covenant on Economic, Social and Cultural Rights. This is the list compiled by Jack Donnelly (1999) based on the aforementioned conventions:

1. Equality of rights without discrimination.
2. Life.
3. Liberty and security of person.
4. Protection against slavery.
5. Protection against torture and cruel and inhuman punishment.
6. Recognition as a person before the law.
7. Equal protection of the law.
8. Access to legal remedies for rights violations.
9. Protection against arbitrary arrest or detention.
10. Hearing before an independent and impartial judiciary.
11. Presumption of innocence.
12. Protection against *ex post facto* laws.
13. Protection of privacy, family and home.
14. Freedom of movement and residence.
15. Seek asylum from persecution.
16. Nationality.
17. Marry and found a family.
18. Own property.
19. Freedom of thought, conscience and religion.

20. Freedom of opinion, expression and the Press.
21. Freedom of assembly and association.
22. Political participation.
23. Social security.
24. Work under favourable conditions.
25. Free trade unions.
26. Rest and leisure.
27. Food, clothing and housing.
28. Healthcare and social services.
29. Special protections for children.
30. Education.
31. Participation in cultural life.
32. A social and international order needed to realise rights.
33. Self-determination.
34. Humane treatment when detained or imprisoned.
35. Protection against debtor's prison.
36. Protections against arbitrary expulsion of aliens.
37. Protection against advocacy of racial or religious hatred.
38. Protection of minority culture.

**Appendix C : Annotations of the Right to Life in the Zero
Draft**

C.1 National Constitutions Cited in the Annotations of the Right to Life in the Zero Draft

The national constitutions were cited in the following sequence: Cambodia (Arts. 32, 38, 48); Indonesia (Art. 28A); Malaysia (Art. 5.1); Myanmar (Art. 353); Philippines (Art. III.1); Singapore (Art. 9.1); Thailand (Art. 32); Viet Nam (Art. 71). The national constitutions of Brunei Darussalam and Lao PDR were not included. I have classified the constitutional articles according to the status of the death penalty in order to avoid duplication in the presentation of data and show early on some of the elements which reflect patterns in the positions of the countries as the provision on the right to life was negotiated. The texts cited in this table have been drawn from the copies of the national constitutions (in the English version) that were examined for the Zero Draft. The reader may also check online versions at Oceana Law Online (<http://www.oceanalaw.com/default.asp>). Please note, however, that discrepancy in translation that may arise.

Table 4: Retentionist ASEAN States with Mandatory Death Penalty

Malaysia	Singapore
Part II: Fundamental Liberties Liberty of the person 5. (1) No person shall be deprived of his life or personal liberty save in accordance with law. (2) Where complaint is made to a high Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.	Part IV: Fundamental Liberties Article 9 Liberty of the Person (1) No person shall be deprived of his life or personal liberty save in accordance with law. (2) Where a complaint is made to the High Court or any Judge thereof that a person is being unlawfully detained, the Court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the Court and release him.

<p>(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.</p> <p>(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority:</p> <p>Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka Day:</p> <p>Provided further that in its application to a person, other than a citizen, who is arrested or detained under the law relating to immigration, this Clause shall be read as if there were substituted for the words "without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey)" the words "within fourteen days":</p> <p>And provided further that in the case of an arrest for an offence which is triable by a Syariah court, references in this Clause to a magistrate shall be construed as including references to a judge of a Syariah court.</p> <p>(5) Clauses (3) and (4) do not apply to an enemy alien.</p>	<p>(3) Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.</p> <p>(4) Where a person is arrested and not released, he shall, without unreasonable delay, and in any case within 48 hours (excluding the time of any necessary journey), be produced before a Magistrate and shall not be further detained in custody without the Magistrate's authority.</p> <p>(5) Clauses (3) and (4) shall not apply to an enemy alien or to any person arrested for contempt of Parliament pursuant to a warrant issued under the hand of the Speaker.</p> <p>(6) Nothing in this Article shall invalidate any law —</p> <p>(a) in force before 16 Sep 1963¹⁴¹ which authorizes the arrest and detention of any person in the interests of public safety, peace and good order; or</p> <p>(b) relating to the misuse of drugs or intoxicating substances which authorizes the arrest and detention of any person for the purpose of treatment and rehabilitation,</p> <p>by reason of such law being inconsistent with clauses (3) and (4), and, in particular, nothing in this Article shall affect the validity or operation of any such law before 10 March 1978.</p>
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¹⁴¹ The online version uses the phrase, "the commencement of this Constitution", in lieu of the exact date.

Table 5: Retentionist ASEAN States with No Mandatory Death Penalty

Indonesia	Thailand	Vietnam
<p>Chapter XA: Human Rights</p> <p>Article 28A.</p> <p>Every person shall have the right to live and to defend his/her life and existence.</p>	<p>Chapter III: Rights and Liberties of Thai People</p> <p>Part 3 Rights and Liberties of an Individual</p> <p>Section 32.</p> <p>A person shall enjoy the right and liberty in his life and person.</p> <p>A torture, brutal act or punishment by a cruel or inhumane means shall not be made; provided that punishment under judgments of the Courts or by virtue of the law shall not be deemed the punishment by a cruel or inhumane means under this paragraph.</p> <p>Arrest and detention of person shall not be made except by order or warrant issued by the Courts or there is a ground as provided by the law.</p> <p>Search of person or act affecting the right and liberty under paragraph one shall not be made except by virtue of the law.</p> <p>In the case where there is an act affecting right and liberty under paragraph one, the injured person, public prosecutor or any person acting for the benefit of the injured person shall have the right to bring lawsuit to the Courts so as to stop or nullify such act and to impose appropriate measure to alleviate damage occurred therefrom.</p>	<p>Chapter V: Basic Rights and Obligations of the Citizens</p> <p>Article 71</p> <p>Citizens have the right to physical inviolability and to have their lives, health, honour and dignity protected by law.</p>

Table 6: Abolitionist De Facto ASEAN States¹⁴²

Brunei	Lao PDR	Myanmar
<p>The national constitution of Brunei Darussalam was not cited as a reference in the formulation of the right to life in the Zero Draft.</p> <p>Experts at Death Penalty Worldwide argue that, “the Constitution of Brunei Darussalam makes no reference to fundamental rights of any nature and prohibits judicial review”.¹⁴³</p>	<p>The national constitution of Lao PDR was not cited as a reference in the formulation of the right to life in the Zero Draft.</p> <p>Experts at Death Penalty Worldwide argue that, “Article 6 states that “[all] acts of bureaucratism and harassment that can be detrimental to...[life]...are prohibited;” Article 42 protects the right to bodily integrity against unlawful search and seizure. While both provisions protect life from improper extrajudicial action, they do not explicitly limit a judicially applied death penalty”.¹⁴⁴</p>	<p>Chapter VIII: Citizen, Fundamental Rights and Duties of the Citizens</p> <p>353. Nothing shall, except in accord with existing laws, be detrimental to the life and personal freedom of any person.</p>

¹⁴² Brunei and Vietnam have mandatory death penalty whilst it is unsure whether death penalty is mandatory in Lao PDR.

¹⁴³ See Constitution of Brunei Darussalam, part XI, Art. 84(C), Rev. Ed. 2008

¹⁴⁴ See Constitution of the Lao People’s Democratic Republic, Art. 6, Law No. 25/NA, May 6, 2003; Constitution of the Lao People’s Democratic Republic, Art. 42, Law No. 25/NA, May 6, 2003

Table 7: Abolitionist ASEAN States

Cambodia	Philippines
<p>Chapter III: The Rights and Obligations of Khmer Citizens</p> <p>Article 32.</p> <p>Every Khmer citizen shall have the right to life, personal freedom, and security.</p> <p>There shall be no capital punishment.</p> <p>Article 38.</p> <p>The law guarantees there shall be no physical abuse against any individual.</p> <p>The law shall protect life, honor, and dignity of the citizens.</p> <p>The prosecution, arrest, or detention of any person shall not be done except in accordance with the law.</p> <p>Coercion, physical ill-treatment or any other mistreatment that imposes additional punishment on a detainee or prisoner shall be prohibited. Persons who commit, participate or conspire in such acts shall be punished according to the law.</p> <p>Confessions obtained by physical or mental force shall not be admissible as evidence of guilt.</p> <p>Any case of doubt, it shall be resolved in favor of the accused.</p> <p>The accused shall be considered innocent until the court has judged finally on the case.</p> <p>Every citizen shall enjoy the right to defense through judicial recourse.</p> <p>Article 48.</p> <p>The State shall protect the rights of children as stipulated in the Convention on Children, in particular, the right to life, education, protection during wartime, and from economic or sexual exploitation.</p>	<p>Article III: Bill of Rights</p> <p>Section. 1. No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.</p>

The State shall protect children from acts that are injurious to their educational opportunities, health and welfare.	
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C.2 International Human Rights Instruments Cited in the Annotations of the Right to Life in the Zero Draft

Table 8: International Human Rights Instruments Cited in the Annotations of the Right to Life in the Zero Draft¹⁴⁵

1966 International Covenant on Civil and Political Rights (ICCPR), Art. 6.	1989 Convention on the Rights of the Child (CRC), Art. 6.	2006 Convention on the Rights of Persons with Disabilities (CRPD), Art. 10.	1990 International Convention on the Protection of All Migrant Workers and Members of Their Families (ICRMW), Art. 9.
<p>PART III</p> <p>Article 6</p> <p>1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.</p> <p>2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out</p>	<p>Part I</p> <p>Article 6</p> <p>1. States Parties recognize that every child has the inherent right to life.</p> <p>2. States Parties shall ensure to the maximum extent possible the survival and development of the child.</p>	<p>Article 10 - Right to life</p> <p>States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.</p>	<p>Article 9</p> <p>The right to life of migrant workers and members of their families shall be protected by law.</p>

¹⁴⁵Certified true copies of the UN treaties and their current status may be verified at United Nations Treaty Collection website: http://treaties.un.org/Pages/DB.aspx?path=DB/MTDSG/page1_en.xml&menu=MTDSG. For the actual texts cited in this paper, I have consulted the website created by the Office of the High Commissioner for Human Rights on "Core International Human Rights Instruments": <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>.

<p>pursuant to a final judgement rendered by a competent court.</p> <p>3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.</p> <p>4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.</p> <p>5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.</p> <p>6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.</p>			
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C.3 Regional Instruments Cited in the Annotations of the Right to Life in the Zero Draft

Table 9: Regional Instruments Cited in the Annotations of the Right to Life in the Zero Draft¹⁴⁶

1950 European Convention on Human Rights, Art. 2	1969 American Convention on Human Rights, Art.4	1981 African Charter on Human and Peoples' Rights, Art.4	2004 Arab Charter on Human Rights, Art. 5
<p>Section I: Rights and Freedoms</p> <p>Article 2</p> <p>Right to Life</p> <p>1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.</p> <p>2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:</p> <p>(a) in defence of any person from unlawful violence;</p> <p>(b) in order to effect a lawful arrest or to</p>	<p>Part I – State Obligations and Rights Protected</p> <p>Chapter II - Civil and Political Rights</p> <p>Article 4</p> <p>Right to Life</p> <p>1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.</p> <p>2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to</p>	<p>Part I: Rights and Duties</p> <p>Chapter I: Human and Peoples' Rights</p> <p>Article 4</p> <p>Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person.</p> <p>No one may be arbitrarily deprived of this right.</p>	<p>Article 5</p> <p>Every human being has an inherent right to life.</p> <p>This right shall be protected by law. No one shall be arbitrarily deprived of his life.</p>

¹⁴⁶ The University of Minnesota Human Rights Library (see: <http://www1.umn.edu/humanrts/regional.htm>) has a complete and updated archive on regional human rights instruments. I have, however, opted to access the instruments via the official websites of the regional organisations, except in the case of the 2004 Arab Charter on Human Rights.

<p>prevent the escape of a person lawfully detained;</p> <p>(c) in action lawfully taken for the purpose of quelling a riot or insurrection.</p>	<p>which it does not presently apply.</p> <p>3. The death penalty shall not be re-established in states that have abolished it.</p> <p>4. In no case shall capital punishment be inflicted for political offenses or related common crimes.</p> <p>5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.</p> <p>6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.</p>		
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Appendix D : Comparative Table on Common Crimes Punishable by Death in ASEAN Member States Based on National Legislation

I have drawn this comparison, firstly, in order to gain an assessment of the similarities and contrasts in the national legislation that uphold the death penalty, and secondly, in order to provide an idea of the range of forms of legal text in use and the relevant national discourses which inform notion of the right to life. The facts that I have tabulated have been drawn entirely from the excellent database provided by the website (<http://www.deathpenaltyworldwide.org>) of the Death Penalty Worldwide Project created by the Center for International Human Rights at Northwestern Law School's Bluhm Legal Clinic, in partnership with the World Coalition Against the Death Penalty. Many of the references on the textual-legal sources under each of the countries have been revised and amended - they have not been cited here in full in the interest of brevity and format restrictions. . For the same reason, where there are two or more identical national law instruments for species of crimes punishable by death, only one reference is included (*i.e.* there may be two references or more from the national penal code but only one is cited). Full references and their current status must be verified on the website provided above.

Crime Punishable by Death	Country	
	“Retentionist” ¹⁴⁷	“Abolitionist de facto” ¹⁴⁸

¹⁴⁷ The term refers to states which continue to uphold laws meting out capital punishment.

¹⁴⁸ The term refers to states which continue to uphold laws meting out capital punishment but have held execution at least in the last ten years.

	Indonesia 149	Malaysia ¹⁵⁰	Singapore 151	Thailand 152	Vietnam ¹⁵³	Brunei 154	Laos ¹⁵⁵	Myanmar 156
Murder	Indonesia Penal Code Law No. 732 of 1945, Art. 340,	Not including infanticide. Penal Code of Malaysia, Art. 309(A) & (B), 1936; Penal Code of Malaysia, Art. 302, 1936.	Penal Code of Singapore, ch. XVI, arts. 299-302, Cap. 224, 2008 Rev.	Thailand Criminal Code, sec. 289(4), B.E. 2499, 1956;		Brunei Penal Code, Art. 302, No. 16 of 1951;	Lao People's Democratic Republic, Penal Law, Art. 128	Burma Penal Code, Art. 302, No. 45 of 1860, May 1, 1861.

¹⁴⁹ All the Indonesia Penal Code entries in this section are the versions amended through 1976, translated by: Ministry of Justice, 1982; for current status, see Imparsial, *Inveighing Against the Death Penalty in Indonesia*, 2010; the information for Indonesia is current as of April 2, 2011. To verify, see: <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Indonesia>.

¹⁵⁰ All the Penal Code of Malaysia entries in this section are the versions amended by Act 574 of 2006; the information for Malaysia is current as of January 3, 2013. To verify, see: <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Malaysia>.

¹⁵¹ The information for Singapore is current as of April 4, 2011. To verify, see <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Singapore>.

¹⁵² All the Thailand Criminal Code entries in this section have been amended under Thailand Criminal Code B.E. 2547, 2003; the information for Thailand is current as of April 4, 2011. To verify, see: <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Thailand>.

¹⁵³ The information for Vietnam is current as of February 5, 2013. To verify, see: <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Vietnam>.

¹⁵⁴ All the Brunei Penal Code and Brunei Misuse of Drugs entries in this section are taken from Laws of Brunei Ch. 22, Rev. Ed. 2001; the information for Brunei is current as of April 1, 2011. To verify, see: <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Brunei>.

¹⁵⁵ All the Lao PDR Penal Law entries in this section are taken from Law No. 12/NA, Nov. 9, 2005; the information for Lao PDR is current as of April 2, 2011. To verify, see: <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Laos>.

¹⁵⁶ The information for Myanmar is current as of February 21, 2011. To verify, see: <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Myanmar>.

Crime Punishable by Death	Country							
	"Retentionist" ¹⁴⁷					"Abolitionist de facto" ¹⁴⁸		
	Indonesia 149	Malaysia ¹⁵⁰	Singapore 151	Thailand 152	Vietnam ¹⁵³	Brunei 154	Laos ¹⁵⁵	Myanmar 156
			Ed., 2008.					
Other Offenses Resulting in Death	Indonesia Penal Code Law No. 732 of 1945, arts. 365, 444.	Penal Code of Malaysia, Art. 396, 1936.	Penal Code of Singapore, ch. XVI, Art. 396, Cap. 224, 2008 Rev. Ed., 2008.	Thailand Criminal Code, sec. 289(6), B.E. 2499, 1956		Brunei Penal Code, Art. 305, No. 16 of 1951;	Lao People's Democratic Republic, Law on the Development and Protection of Women, Art. 49, Law No.08/NA, Oct. 22, 2004.	Burma Penal Code, Art. 194, No. 45 of 1860, May 1, 1861.
Terrorism-Related Offenses Resulting in Death	Indonesia Penal Code Law No. 732 of 1945, arts. 438-441, 444, 479.		Terrorism (Suppression of Bombings) Act of Singapore, sec. 3(1), Cap. 324A, 2008 Rev. Ed., 2008.	Thailand Criminal Code, sec. 218, B.E. 2499, 1956		Brunei Penal Code, Art. 435(1)(a), No. 16 of 1951	Lao People's Democratic Republic, Penal Law, Art. 98	
Terrorism-Related Offenses	Indonesia Penal Code Law No. 732	Internal Security Act of Malaysia, arts. 57(1), 58(1), 59(1), 59(2), 1960, revised 1972	Penal Code of Singapore,	Thailand Criminal Code, sec.	Vietnam Penal Code, Art. 84(1), No.	Brunei Internal Security	Lao People's Democratic Republic,	

Crime Punishable by Death	Country							
	"Retentionist" ¹⁴⁷					"Abolitionist de facto" ¹⁴⁸		
	Indonesia 149	Malaysia ¹⁵⁰	Singapore 151	Thailand 152	Vietnam ¹⁵³	Brunei 154	Laos ¹⁵⁵	Myanmar 156
Not Resulting in Death	of 1945, arts. 438-441, 444, 479.	Joint Action Group Against Violence Against Women, Memorandum to the Special Select Committee on Penal Code (Amendment) 2004 and Criminal Procedure Code (Amendment) 2004, pp. 3-4, http://www.awam.org.my/images/jag_2004_memo.pdf , Oct. 28, 2004; Malaysia Act to amend the Penal Code (Amendment) Act 2007, Art. 4, 2007.	ch. XVI, Art. 364(A), Cap. 224, 2008 Rev. Ed., 2008. Singapore Internal Security Act, Art. 58, No. 18 of 1960, Rev. Ed., 1985	218, B.E. 2499, 1956,	15/1999/QH10, 1999. Vietnam Penal Code, Art. 83(1), no. 15/1999/QH10, 1999.	Act, arts. 40-41, Rev. Ed. 2008; Brunei Public Order Act, Art. 28, Laws of Brunei Ch. 133, Rev. Ed. 2002.	Penal Law, Art. 98 Lao People's Democratic Republic, Penal Law, Art. 175	
Arson Not Resulting in Death						Brunei Penal Code, Art. 435(1)(b), No. 16 of 1951		
Kidnapping Not Resulting in Death		Penal Code of Malaysia, Art. 364. Kidnapping Act of Malaysia, Art. 3(1), 1961, revised 1989. Firearms (Increased Penalties) Act of Malaysia, Art. 3(A), 1971.	Penal Code of Singapore, ch. XVI, arts. 364, 364(A), Cap. 224, 2008 Rev. Ed., 2008;	Thailand Criminal Code, secs. 313, 314, B.E. 2499, 1956,		Brunei Penal Code, Art. 364, No. 16 of 1951	Lao People's Democratic Republic, Penal Law, Art. 101 Lao People's Democratic	

Crime Punishable by Death	Country							
	"Retentionist" ¹⁴⁷					"Abolitionist de facto" ¹⁴⁸		
	Indonesia 149	Malaysia ¹⁵⁰	Singapore 151	Thailand 152	Vietnam ¹⁵³	Brunei 154	Laos ¹⁵⁵	Myanmar 156
			Kidnapping Act of Singapore, sec. 3, Cap. 151, Ordinance 15 of 1961, amended by 42 of 1999, 1999.				Republic, Law on the Development and Protection of Women, Art. 49, Law No.08/NA, Oct. 22, 2004.	
Drug Trafficking Resulting in Death						Brunei Misuse of Drugs, arts. 3-5, 15-16		Myanmar Narcotic Drug and Psychotropic Substances Law, Art. 20, No. 1 of 1993.
Drug Possession	Imparsial, Inveighing Against the Death Penalty in Indonesia, p. 22-23,			Narcotics Act, sec. 66, B.E. 2522, 1979 amended by Narcotics Act, B.E.		Brunei Misuse of Drugs, arts. 3A, 15-16	Lao People's Democratic Republic, Penal Law, Art. 146(1) Lao People's Democratic	Myanmar Narcotic Drug and Psychotropic Substances Law, Art. 26, No. 1 of

Crime Punishable by Death	Country							
	"Retentionist" ¹⁴⁷					"Abolitionist de facto" ¹⁴⁸		
	Indonesia 149	Malaysia ¹⁵⁰	Singapore 151	Thailand 152	Vietnam ¹⁵³	Brunei 154	Laos ¹⁵⁵	Myanmar 156
	2010 ¹⁵⁷			2545, 2002.			Republic, Penal Law, Art. 146(2)	1993.
Treason	Indonesia Penal Code Law No. 732 of 1945, Art. 104, 111, 140.	Penal Code of Malaysia, Art. 121, 1936.	Penal Code of Singapore, ch. IV, arts. 121, 121(A), 121(B), 121(C), Cap. 224, 2008 Rev. Ed., 2008.	Thailand Criminal Code, secs. 107 - 110, 132, B.E. 2499, 1956,	Vietnam Penal Code, Art. 78(1), No. 15/1999/QH1 0, 1999.	Brunei Penal Code, Art. 121, No. 16 of 1951	Lao People's Democratic Republic, Penal Law, arts. 56-57, 67	Burma Penal Code, arts. 121, 122, No. 45 of 1860, May 1, 1861.
Military Offenses Not Resulting in Death	Impartial, Inveighing Against the Death Penalty in Indonesia, p. 17, 2010.	Penal Code of Malaysia, Art. 132, 1936.	Armed Forces Act of Singapore, secs., 11, 12, 15, 39, Cap. 295, 2000 Rev. Ed., amended by	Thailand Criminal Code, sec. 122, B.E. 2499, 1956,	Vietnam Penal Code, Art. 316(4), No. 15/1999/QH1 0, 1999.	Brunei Penal Code, Art. 132, No. 16 of 1951		Burma Penal Code, Art. 132, No. 45 of 1860, May 1, 1861.

¹⁵⁷ Impartial is an Indonesian human rights NGO. Its report on the death penalty is what appears as the source of the Death Penalty Worldwide for some of the crimes which are punishable by death in Indonesia. See <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Indonesia>.

Crime Punishable by Death	Country							
	"Retentionist" ¹⁴⁷					"Abolitionist de facto" ¹⁴⁸		
	Indonesia 149	Malaysia ¹⁵⁰	Singapore 151	Thailand 152	Vietnam ¹⁵³	Brunei 154	Laos ¹⁵⁵	Myanmar 156
			28 of 2009, 2009.					
Robbery Not Resulting in Death	Indonesia Penal Code Law No. 732 of 1945, Art. 365	Firearms (Increased Penalties) Act of Malaysia, Art. 3(A), 1971.			Vietnam Penal Code, Art. 133(4), No. 15/1999/QH10, 1999		Lao People's Democratic Republic, Penal Law, Art. 107	
Drug Trafficking Not Resulting in Death	Indonesia Narcotics Law, arts. 80-82, No. 22 of 1997.	Dangerous Drugs Act of Malaysia, Art. 39B, 1952, revised 1980.	Misuse of Drugs Act of Singapore, secs. 15-33(A), Second Schedule, Cap. 185, 2008 Rev. Ed., amended by S 402/2007, 2007.	Narcotics Act, secs. 65, B.E. 2522, 1979, amended by Narcotics Act, B.E. 2545, 2002.	Vietnam Penal Code, Art. 193(4), No. 15/1999/QH10, 1999.		Lao People's Democratic Republic, Penal Law, Art. 146(1) Lao People's Democratic Republic, Penal Law, Art. 146(2)	
Economic Crimes Not Resulting in Death	Imparsial, Inveighing Against the Death		Arms Offenses Act of Singapore,	Thailand Criminal Code, sec. 149, B.E.	Vietnam Penal Code, Art. 278(4), No. 15/1999/QH1		Lao People's Democratic Republic, Penal Law,	Myanmar Narcotic Drug and Psychotropi

Crime Punishable by Death	Country							
	"Retentionist" ¹⁴⁷					"Abolitionist de facto" ¹⁴⁸		
	Indonesia 149	Malaysia ¹⁵⁰	Singapore 151	Thailand 152	Vietnam ¹⁵³	Brunei 154	Laos ¹⁵⁵	Myanmar 156
in Death	Penalty in Indonesia, p. 26, 2010.		sec. 6, Cap. 14, 2008 Rev. Ed., 2008.	2499, 1956,	0, 1999.		Art. 62,	c Substances Law, arts. 20, 22, No. 1 of 1993.
Espionage	Imparsial, Inveighing Against the Death Penalty in Indonesia, p. 22, 2010.			Thailand Criminal Code, secs. 122, 124, B.E. 2499, 1956,	Vietnam Penal Code, Art. 80(1), No. 15/1999/QH10, 1999.		Lao People's Democratic Republic, Penal Law, Art. 58	
Aggravated Murder				Thailand Criminal Code, sec. 289(5), B.E. 2499, 1956,	Vietnam Penal Code, Art. 93(1), No. 15/1999/QH10, 1999.			Burma Penal Code, Art. 302, No. 45 of 1860, May 1, 1861.
Burglary Not Resulting Death		Firearms (Increased Penalties) Act of Malaysia, Art. 3(A), 1971.						

Crime Punishable by Death	Country							
	"Retentionist" ¹⁴⁷					"Abolitionist de facto" ¹⁴⁸		
	Indonesia 149	Malaysia ¹⁵⁰	Singapore 151	Thailand 152	Vietnam ¹⁵³	Brunei 154	Laos ¹⁵⁵	Myanmar 156
Rape of Adult Not Resulting in Death				Thailand Criminal Code, secs. 276, 277(3), B.E. 2499, 1956,	Vietnam Penal Code, Art. 112(3),(4), No. 15/1999/QH10, 1999.			
Rape of Child Not Resulting in Death				Thailand Criminal Code, secs. 277(3), 280, B.E. 2499, 1956,				
Other Offenses Not Resulting in Death		Firearms (Increased Penalties) Act of Malaysia, Art. 3(A), 1971. Penal Code of Malaysia, Art. 307(2), 1936	Penal Code of Singapore, ch. VI(A), Art. 130(B), Cap. 224, 2008 Rev. Ed., 2008.	Thailand Criminal Code, sec. 283, B.E. 2499, 1956	Vietnam Penal Code, Art. 342, No. 15/1999/QH10, 1999.		Lao People's Democratic Republic, Penal Law, Art. 158 Lao People's Democratic Republic, Law on the Development and Protection	Burma Penal Code, Art. 307, No. 45 of 1860, May 1, 1861. The Anti Trafficking in Persons Law, arts. 3(e), 29, No.

Crime Punishable by Death	Country							
	"Retentionist" ¹⁴⁷					"Abolitionist de facto" ¹⁴⁸		
	Indonesia 149	Malaysia ¹⁵⁰	Singapore 151	Thailand 152	Vietnam ¹⁵³	Brunei 154	Laos ¹⁵⁵	Myanmar 156
							of Women, Art. 49, Law No.08/NA, Oct. 22, 2004.	5 of 2005.
Does the country have mandatory death penalty?	No	Yes	Yes	No	No	Yes	Unsure	Yes
Year of Last Known Execution	2013	2011	2009	2009	2011	1957	1989	1988
Party to the 1966 ICCPR?	Party / Year of Accession: 2006 / Not signed	Not party	Not party	Party / Year of Accession: 1996 / Not signed	Party / Year of Accession: 1982 / Not signed	Not party	Year of Accession: 2009 /Signed in 2000	Not party

Appendix E : The Principle of Non-Discrimination in Regional Human Rights Charters

1950 European Convention on Human Rights	1969 American Convention on Human Rights	1981 African Charter on Human and Peoples' Rights	2004 Arab Charter on Human Rights
<p>Section I: Rights and Freedoms</p> <p>Article 14</p> <p>Prohibition of Discrimination</p> <p>The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.</p> <p>Protocol 12</p> <p>Article 1</p> <p>General prohibition of discrimination</p> <p>The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion,</p>	<p>Part I – State Obligations and Rights Protected</p> <p>Chapter I – General Obligations</p> <p>Article 1</p> <p>Obligation to Respect Rights</p> <ol style="list-style-type: none"> 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. 2. For the purposes of this Convention, "person" means 	<p>Preamble</p> <p>Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions;</p>	<p>Article 3</p> <ol style="list-style-type: none"> 1. Each State party to the present Charter undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth herein, without distinction on grounds of race, colour, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth or physical or mental disability. <p>Article 34</p> <ol style="list-style-type: none"> 1. The right to work is a natural right of every citizen. The State shall endeavor to provide, to the extent possible, a job for the largest number of those willing to work, while ensuring production, the freedom to

national or social origin, association with a national minority, property, birth or other status	every human being.		choose one's work and equality of opportunity without discrimination of any kind on grounds of race, colour, sex, religion, language, political opinion, membership in a union, national origin, social origin, disability or any other situation.
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