

BETWEEN LAW AND PRACTICE:

**WHY CANNOT FREEDOM OF EXPRESSION AND
INFORMATION BE PROTECTED AS A CONSTITUTIONAL
RIGHT IN ASEAN?**



University of Oslo

Faculty of Law

Thi Minh Huong NGO

Supervisor: Inger-Johanne Sand

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LIST OF ABBREVIATIONS

AICHR	ASEAN Intergovernmental Commission of Human Rights
ASEAN	Association of South East Asian Nations
CAT	Convention Against Torture
COE	Council of Europe
CRC	Convention on Rights of Child
FOE/I	Freedom of Expression and Information
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EU	European Union
ECtHR	European Court of Human Rights
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICERD	International Covenant on Elimination of Racial Discrimination
UDHR	Universal Declaration of Human Rights
UPR	Universal Periodical Report

Chapter 1

INTRODUCTION

1.1 Context

The Association of South East Asia Nations (ASEAN),¹ 40 years after its establishment in 1967, recently incorporated regional human rights principles into its Charter (the ASEAN Charter)² together with a human rights mechanism.³ Whilst the ASEAN community aims at common objectives for peace, stability and prosperity, other values constructing ASEAN communities are mutual respect, consensus, and tolerance. The challenge in implementing the ASEAN Charter lies in the region's cultural diversity and notions of state sovereignty embraced by many ASEAN states.

ASEAN member states are experiencing an accelerating process in the regionalism of human rights. States have different interpretations of, and practices related to fundamental human rights, although many have joined with core international human rights instruments. The establishment of ASEAN's Intergovernmental Commission of Human Rights (AICHR) in 2008 was a radical step in regionalism of human rights.⁴ AICHR's mandate fits into the roadmap of making the ASEAN Charter work for all member states. Although ASEAN states have gradually committed to progress on human rights by setting up this sub-regional human rights mechanism by means of a cosmopolitan approach, the ASEAN charter as the regional constitution, the AICHR as the regional human rights mechanism, and the ongoing

¹ At its establishment in 1967 ASEAN included 10 countries: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thai Land and Vietnam.

² Refer to the ASEAN Charter, ratified fully by all 10 states, which came into force on 15 December 2008

³ The ASEAN Intergovernmental Commission for Human Rights was set up on 23 October 2009

⁴ Terms of Reference for AICHR, session 4. (AICHR) has its early mandate to "conduct study in thematic issues; to develop common approaches and positions on human rights matters of interest to ASEAN; therefore to promote full implementation of ASEAN human rights instruments".

Human Rights Declaration, the ASEAN human rights mechanism is based upon consensus between member states and non-intervention with each other's affairs.

ASEAN was established on 8 August, 1967 in Bangkok, Thailand, with the signing of the Declaration (ASEAN Declaration also named Bangkok Declaration). The founding members of the Association were Thailand, Indonesia, Malaysia, Singapore and the Philippines and they shared the common goal of eliminating violence and instability in member states. After the Bali Conference in 1976, the organization began a program of economic cooperation, but by the mid-1980s states had generally failed to cooperate. Economic cooperation only began to be successful when Thailand proposed a free trade area in 1991. Today, ASEAN consists of 10 members including the Philippines, Thailand, Indonesia, Singapore, Malaysia, Brunei, Cambodia (in 1999), Laos (in 1997), Myanmar (in 1997) and Vietnam (July 28, 1995). The Association, since the Treaty of Amity and Cooperation in Southeast Asia (TAC) in 1976 confirmed basic principles such as respect for all rights and non-interference in each other's internal affairs.

Still now, many ASEAN states do not fully participate in the implementation of and adherence to international human rights instruments. They joined these core covenants in different stages. Some governments even criticised the universality of human rights as defined in the 1948 Universal Declaration of Human Rights (UDHR). Even in 1966, when the Covenants of Rights was adopted by UN General Assembly, after most ASEAN countries had gained independence, human rights were still not welcomed. ASEAN was established with a Charter that commits member states to secure peace, democracy, prosperity, security and human rights for the region.⁵ Nevertheless, even before an effective regional human rights mechanism is established, some ASEAN states

⁵ ASEAN Charter. See <http://www.asean.org/21069.pdf>. The Charter outlines the obligation of the member states to uphold principles of rule of law, good governance, democracy and human rights (article 1.2: Principle) but also 'respect fundamental freedoms, promote and protect human rights and promote social justice (article 2.2 Principles). Also, the same principles are respect for the different cultures, languages and religions of the people of ASEAN, while emphasizing their common values in the spirit of unity in diversity".

have ratified key international conventions on human rights but they did not ratify at the same period and at the same par. Only Philippines, Cambodia, Thailand, Indonesia ratified all six first core instruments (ICCPR, ICESCR, CEDAW, ICERD, CAT and CRD). Other member states either do not ratify yet or have taken only small steps to implement these conventions (see Table 1). The different stage of ratification and implementation amongst ASEAN states may explain the difficulties for members to reach the same par of implementation of human rights. The remaining issues are that human rights conventions often use general formulations and standards – with a certain margin of appreciation - and that there is a lack of a sanction system in the UN, apart from through the work of the Conventions' committees.

Whilst ASEAN states have together made commitments on human rights there are different levels of implementation of fundamental freedoms, notably freedom of expression and information (FOE/I). Many states have established tight restrictions on FOE/I on grounds of national security. The challenge in implementing FOE/I is that human rights are seen more as political concepts and mechanisms than as a strictly legal principle. This means that in many countries there may be a greater openness to blurring boundaries between political and legal spheres than is, for example, the case in European states.

Experience from the European human rights system is that a regional human rights mechanism helps to promote the implementation of international human rights norms and standards in regional systems complied with by all member states. The ECHR and the ECtHR are attempts to create a more efficient system of adjudication of human rights. With regard to FOE/I, in Europe and in European states there has been a process of increasing focus on freedom of expression and less tolerance of exceptions to this right.

ASEAN Parliamentarians raised the need to build one ASEAN with common understandings and practices around FOE/I as they state: "*We believe that the dream of*

*a true ASEAN community and the formation of an ASEAN human rights body must recognize free expression, press freedom, and people's access to information as essential to human rights".*⁶ However, norms and standards of human rights will need to be accepted and adopted by member states. It is necessary to have clearer interpretation and scope of application of the restriction if any. But this process of building consensus and adoption may be not an instance. Through this process, the ASEAN states beg the question of how to interpret this fundamental human rights freedom and under what modalities and systems states can balance freedom of individuals with other national interests to fulfil the regional aim to preserve peace, security and democracy and human rights as committed to the ASEAN Charter.

1.2 Statement of Problem

FOE/I contain restrictions as provided by Article 19 (3) of the ICCPR.⁷ But in the ASEAN states, restrictions on FOE/I are often applied within member states' laws and practices. The interpretation of restrictions stated in Article 19 (3) varies amongst ASEAN states. Therefore, in application, states may apply a broader range of restrictions to protect state interests over the interests of individual citizens in light of Articles 19 (1) and (2) of ICCPR. Amongst other notions of human rights, FOE/I is often seen as creating the greatest tension in the practices of states in their compliance with international human rights standards. In practice, restrictions may not always comply with the principles in Article 19 (3). This means that such practices do not meet the test of legitimacy for restrictions on freedom of expression, including being "necessary", "provided by law" and "proportional". Such restrictions are often based on grounds of 'protecting the nation' or 'national security'. In the ASEAN context, FOE/I remain a pressing and controversial aspect of debates on human rights. FOE/I are often perceived as being threats to national security or to a state's power or to the capacity of those

⁶ Statement made by ASEAN Pparliamentarians at the ASEAN officials summit in February 2009 in Thailand

⁷ ICCPR, Art. 19 (3) provides for restrictions on the grounds of (i) respect for the rights and reputations of others and (ii) protection of national security or of public order, public health and morals. Article 20 provides for restrictions on the grounds of war propaganda and 'incitement of hatred' speeches and writings.

who benefit from the silencing of dissent, stifling of criticism and blocking of public discussion. The restrictions were politically-based restrictions on FOE/I in many ASEAN states as such, provided that the states lack of understanding on norm and governance of FOE/I and claim over the 'ASEAN way'. The ASEAN human rights mechanism has just been newly established so it may be still difficult to have FOE/I protected by ASEAN states. The UN mechanism has not reached to ASEAN more effectively due to lack of full membership to international human rights system. States may argue for constraints based on their sovereign political ideology and structure. States which do not support the ideals of democracy and human rights as individual rights often restrict FOE/I on the grounds of political, legal and judicial practices. In some states, such as Singapore, Malaysia and Vietnam, the supposed cultural relativity of human rights, framed around the notion of Asian Values, is typically used by states to justify restrictions on human freedom greater than those that would be tolerated in western nations. The practice of restriction depends heavily on political ideology and consequential decisions rather than on any 'gap' in domestic legal systems.

There are two key challenges for the ASEAN states in implementing FOE/I in ways that align them closer to international human rights standards. First, how can a norm of fundamental human rights, like FOE/I, be developed and commonly accepted by all ASEAN states in the process of regionalism of human rights in ASEAN. Second, how can ASEAN states come up with a common philosophical understanding of the nature of rights when they apply exceptions and how can ASEAN states legalize FOE/I over claims based on cultural relativity.⁸

ASEAN states may need to examine the norms and standards on FOE/I, in light of international and regional law and practice in implementing FOE/I. The thesis therefore provides analysis of problems and challenges to ASEAN and its member states that may

⁸ Jerome J. Shestack. The Philosophical Foundations of Human Rights, in Human Rights: Concept and standards. Janusz Symonides, Eds. Ashgate Dartmouth. pp.31-66

have implications for ASEAN's regional quasi-judicial human rights mechanism to implement FOE/I to bring it closer to international norms and standards.

1.3 Research objective

The ultimate objective of this research is to add to the capacity of regional actors of all kinds concerned with human rights to develop a better process and a better understanding of how to build a consensus on norms and standards around freedom of expression and information for the ASEAN states. This objective will not result directly from what follows in the thesis but rather from the dissemination of the ideas and analyses in regional media and forums.

The specific objectives of this research are:

1. To identify restrictions on FOE/I in ASEAN nations compared with international human rights standards and benchmarks in other regions notably Europe.
2. To analyse the situation in selected ASEAN states, where the ground of national security has been often used to restrict FOE/I, to assess the extent to which such restrictions are legitimate as per international legal principles.
3. To analyze and discuss the extent to which the ASEAN member states can legitimately impose restrictions as per international human rights standards.
4. To identify factors that may have an impact on the practice at regional and state level which can strengthen the ASEAN human rights system.

1.4 Research questions

Although FOE/I are internationally recognised as human rights, they have not been coherently implemented in many ASEAN States. As already noted, there are clear reasons why states restrict these freedoms. The reasons might be rooted in states' political, ideological, and structural differences but, in many cases, it is because of lack of common interpretation and dialogues to achieve consensus on minimum accepted

standards. The main research question, admittedly, is why freedom of expression and information cannot be protected as constitutional rights in ASEAN states.

Specific research questions are:

- Are there laws in place at the state level regarding FOE/I?
- If so, what could be legitimate restrictions on the grounds of national security?
- Why has FOE/I not gone further in ASEAN?
- What are the challenges for states to comply with international standards on FOE/I?
- What can ASEAN do to align FOE/I practice to be closer to international standards?

1.5 Research scope

The study focuses on standards and practices of restrictions on FOE/I on the grounds of national security or national interest as used by lawmakers in ASEAN states. The study deploys a legal approach in reading international human rights law, focusing particularly on Article 19 of ICCPR with regard to freedom of expression and other related domestic laws on FOE/I together with case law. By reviewing laws and practices on restrictions on FOE/I in several ASEAN member states, the notion of a state's 'margin of appreciation' and principles of 'provided by law' and 'necessary' will be tested to challenge states which tend to broaden the scope of Article 19 (3) of ICCPR. The thesis then re-examines the philosophical, political ideals and moral justifications that states often use to justify restrictions of freedom of expression against norms and legal interpretations as per Article 19 (3) and Article 20 of ICCPR.

Four of the 10 ASEAN states, Indonesia, Singapore, Thailand and Vietnam, were chosen as case studies. These countries represent different models and status of democracy. Indonesia represents liberal democracy after its transition from dictatorship. Singapore represents the case of an 'authoritarian withholding democracy' and a view of human rights based on the Confucian value of collectivity and the notion of Asian Values (more definition and description of this idea will be presented in the following chapters). Thailand is transforming to political pluralism and liberal democracy but still under a constitutional monarchy. Vietnam still holds to a Marxist-Leninist

political ideology with regard to human rights and democracy. The review of practices of these four states may provide a clearer understanding of how states perceive and practice restrictions on freedom of expression and information and the challenges for ASEAN in getting states to agree on a commonly accepted norm.

1.6 Significance of research

Regionalism of human rights in ASEAN includes the process of establishing human rights mechanisms. ASEAN needs to identify a common understanding and acceptance of minimum standards to strengthen the regional human rights system. In particular, ASEAN is taking steps to support the constitutionalisation of human rights, typified by the draft Human Rights Declaration, which recognizes the controversial nature of freedom of expression in regional constitution-building and how this will contribute to the norm-setting process for ASEAN. In particular, the empirical approach in the review of laws and practices regarding restrictions of FOE/I on grounds of national security will provide examples of practice and reasons why states are not yet protecting FOE/I as codified in Article 19 of ICCPR.

The process of regionalism and especially during the on-going drafting of an ASEAN Human Rights Declaration have attracted the author as it will enhance her capacity to take part in the setting of human rights norms in ASEAN nations based on a clear understanding of regional particularities and values, in particular with regard to FOE/I and especially the extent to which member states of ASEAN can legitimately pose restrictions on FOE/I.

1.7 Research method

The thesis applies the sociology of law by examining international human rights instruments, domestic constitutions and law in practice around restrictions on FOE/I on grounds of national security, national interest and public order in the ASEAN context.

The study is also based on a review of scholarly debate on the subject matter, including legal interpretation based on case law, cultural relativity and Asian values, the current Universal Periodical Reports of the concerned states (UPR), and reports of the Special Rapporteur of freedom of expression. The other major source is cases that were brought to the Human Rights Council (HRC) and some prominent domestic cases of ASEAN states which can be analysed for the purpose of interpretation of such limitation. State responses to these cases in respective UPR and other domestic media coverage are referred to while there is limitation on accessing case documents from judicial sector because some countries do not allow public access to case documents. In addition to literature review, interviews were held with a small number of regional human rights advocates and national representatives to ASEAN inter-governmental commission to get more view on FOE/I.

1.8 Thesis structure

This first chapter laid out the background, goals, research questions and methodology of the study. Chapter 2 introduces basic concepts and understandings related to FOE/I and the ground of national security as defined under international human rights law. Text and case law are cited and analyzed to strengthen these understandings. Chapter 3 reviews the state of practice and situations regarding limiting freedom of expression on the grounds of national security in a number of ASEAN countries including Indonesia, Singapore, Thailand and Vietnam. This is achieved by reviewing legal grounds for FOE/I and its limitation on the ground of national security. Reasons why many ASEAN member states justify limitations are adduced. Broadly speaking they include political, moral, and legal grounds and, in some cases, the evocation of the Asian values discourse to broaden the scope of restriction to supposedly protect a state's security with the intended or unintended purpose of undermining individual freedom. Chapter 3 thus responds to the question as to why FOE/I in ASEAN has not aligned more closely with international human rights standards. Chapter 4 addresses challenges and factors that may drive the evolving acceptance of FOE/I in ASEAN. The increasing but gradual development of regionalism in ASEAN is the

broad driving factor for the human rights mechanism. Consideration of experiences of European regionalism and European systems of human rights benchmarks may provide implications for ASEAN. Chapter 5 concludes the thesis by arguing for possible ways in which ASEAN states might move towards greater acceptance and accelerate the implementation of coherent principles in practicing freedom of expression in the process of strengthening ASEAN human rights mechanisms.

CHAPTER 2

FREEDOM OF EXPRESSION AND INFORMATION AND THE RESTRICTIVE GROUNDS

This chapter discusses basic concepts and understandings on FOE/I as human rights and their limitations on the ground of national security. Norms and standards for FOE/I, including legitimate grounds for restricting FOE/I, are adduced from international human rights law (notably Article 19 of ICCPR) and the Human Rights Council's interpretations. Analysis of text, examples of cases in the UPR and other case law are used for the purpose of clearer interpretation of FOE/I. Law and practice of the European human rights system with regard to implementation of FOE/I are also referred to in regard to how FOE/I became more accepted as universal human rights. The chapter aims to imply that regional norm building in ASEAN could be aligned with international human rights standards.

2.1 Freedom of expression as a legal human rights norm

Under international human rights law,⁹ freedom of expression is clearly stated in Article 19 of UDHR: *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers...."*

Article 19 of ICCPR embodies the same meaning as UDHR. Article 19 (1) protects the right to freedom of opinion without interference and does not permit any restrictions to

⁹ Referring to 1946 UDHR and 1966 Two Bills of Rights (ICCPR and ICESCR)

be imposed on the right to hold an opinion.¹⁰ The national security ground has no relevance as a defense against violation of Article 19 of ICCPR. The same provision expresses the broad scope of application of Art. 19 (2) as ‘without interference’ and applied to “ideas of all kinds” including information, facts, critical comments and ideas and opinions, news, commercial advertising, art works, political commentary etc which are protected.¹¹ Article 19 (3) allows for certain restrictions on freedom of expression, including *‘[r]espect [for] the rights of and reputations of others and ..[p]rotection of national security or of public order, public health and morals’*. In many cases where government opponents were arrested or detained with criminal persecution because of their political opinions, the HRC found violations of Article 19 (1).

Protection of national security is often cited as requiring prevention or response to serious threats to a nation. This extends the meaning of Article 20 to include war propaganda, national, racial and religious incitement. So Articles 19 (3) and 20 can be read together. And measures to protect public order or public safety overlap those concerned with national security.

Other articles of ICCPR also permit restrictions of rights on the grounds of national security and thus parallel Article 19.¹² With regard to national security and other public order grounds, Article 14 (1) provides for the right to public hearings of criminal charges where the press and the public should not be excluded from the public hearing “for reasons of national security in a democratic society” except in certain strictly defined circumstances.¹³ Articles 21 and 22 allow only those restrictions that are imposed by law and that are necessary “in a democratic society” in the interests of

¹⁰ General Comments on article 19. No.10. 19th Session, para 1

¹¹ Discussion was cited in Malferd Nowak. UN Covenant on Civil and Political Rights, 2nd edition. N.P Engel Publisher. 2005.

¹² ICCPR. Article 14 (1), fair and public hearing; Article 21, right of peaceful assembly; and Article 22, right to freedom of association which may be read together with Article 14 (fair and public hearing), Article 21 (rights to peaceful assembly) and Article 22 (freedom of association).

¹³ General Comments on article 14 para. 6

national security and/or public safety. In several cases, the Committee found violations of these articles together with Article 19.¹⁴

2.2 Limitations of freedom of expression on the ground of national security

Frequent issues and concerns arise around the scope of restrictions on FOE/I permissible understood as the two grounds of national security and public order. The HRC, in its General Comments on Article 19, expresses the view that any restrictions may not jeopardise the right itself.¹⁵ Restrictions on FOE/I to protect national security are permissible but only in serious cases such as threat to the entire nation, dissemination of military secrets, calling for overthrow of a government with political unrest or propaganda of war within the meaning of Art. 20.¹⁶

Many governments, however, tend to apply this notion to justify restrictions on opposition groups, politicians and critical media.¹⁷ However, the Committee found that criminal prosecution for subversive activities is a violation of Article 19.¹⁸ Article 19 means FOE/I encompasses oral transmission, print forms, writing or art and other form

¹⁴ In case *Le Lopez v. Uruguay*, the alleged victim, a trade union organizer, was arrested and detained under “security measure” and charged with subversive association. The committee found violation of Articles 22, 19 (1) and 19 (2).

¹⁵ General Comments on article 19. No.10. 19th Session, para. 4.

¹⁶ Nowak. *ibid.* p. 355-464 .

¹⁷ In the case of *Laptsevich v. Belarus* and *Dergachev v. Belarus*, the Government of Belarus confiscated leaflets and posters of political opponents on this ground but the Committee found violation of Art. 19. By limiting and fining print-outs of leaflet in as few as 200 copies, the State has put obstacles to restrict the author’s freedom of expression and information as it is protected under Article 19. *Laptsevich v. Belarus* (no. 780/1997) and *Dergachev v. Belarus* (no. 921/2000). Also in the case of *Mukong v. Cameroon*, a journalist and writer opposed the one party system of Cameroon and advocated for multi-party democracy. He was arrested by the Government on the grounds of threat to national security and public order.

¹⁸ In several cases against South Korea, *Park v. Republic of Korea*, *Kim v. Republic of Korea*, and *Kang v. Republic of Korea*, *Sohn v. Republic of Korea*, the ground of national security under the National Security law 1980 against threat of North Korean communists used by South Korea, the Committee found violation of Art. 19.

of media. All are regarded as being equally worthy of protection and no formould bear broader restrictions than the others.¹⁹

There are rules for permissible restrictions on FOE/I within the meaning of Article 19 (3) and Article. 20 of ICCPR. Such restrictions might be allowed under the following conditions:

- (i) Being ‘provided by law’. Meaning the state has to show the legal basis for such restriction. Human Rights Council (HRC)²⁰ required that restrictions must meet a strict test of justification.²¹ In addition, HRC requires the state to provide details of the law and particular circumstance in which the law applies. Laws restricting the rights codified in international covenants must be compatible with the aims and objectives of such covenants. In case of a law which may be too broad in scope to be a justifiable restriction in itself, it may nevertheless be compatible with the Covenant.²²
- (ii) Being ‘necessary’: Meaning that the state shows evidence and need for a restrictive measure to protect national security and, if this is reasonable, it should be at the minimum necessary for that purpose. In this circumstance the Committee has tended to apply a more demanding criterion of democratic necessity.²³ Even though the Committee has not applied the proportionality test, it is understood that the requirement for being ‘necessary’ includes a standard of proportionality.²⁴
- (iii) being ‘legitimate’ to the purpose: The criterion of ‘legitimate aim’ is to determine whether some restrictions or limitations of rights are pursued for

¹⁹ This view is expressed in the case of Ballantyne, Davison and McIntyre v. Canada (Communication No. 385/1989; CCPR/C/47/D/385/1989) para 11.3

²⁰ After replacing the Commission on Human Rights, the Human Rights Council decided to extend the mandate for another three years in its [resolution 7/36](#) of March 2008.

²¹ No. 628/1995. CCPR/C/64/D/628/1995 Tae Hoon Park v. Republic of Korea para 10.3 states: “The right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification”

²² Case Toonen v. Australia. No. 488/1992 View adopted 8 March 1994 is “ Even interference provided for by the law should be in accordance with the provisions, aims, and objectives of the Covenant and should be, in any event, reasonable in the circumstance”

²³ Nowak, pp 350. Also in the case of Mukong v. Cameroon. Also See Supra note 17 (cases against South Korean).

²⁴ Elizabeth Evatt (1999) in Secrecy and Liberty. Pp.89

a legitimate purpose, and thus permissible. In some cases the HRC took the view that restrictions by state parties were necessary for one of the legitimate aims set out in Article 19 (3). However, there are also cases that the Committee reviewed where the restriction of FOE/I was deemed to be permissible.²⁵

In addition, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (the Johannesburg Principles)²⁶ clearly state: *“Mere publicity of activities that may threaten national security. Expression may not be prevented or punished merely because it transmits information issued by or about an organization that a Government has declared threatens national security or a related interest”* (principle 8) and *“expression may be punished as a threat to national security only if a government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence”* (Principle 6).

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

- (i) Laws imposing restrictions or limitations must not be arbitrary or unreasonable and must not be used as a means of political censorship or of silencing criticism of public officials or public policies.²⁷

²⁵ The case *Handyside v. UK*, the court ruled that freedom of expression may be limited for the sake of community' morality. So noted that though having differences in political cultures and ideologies, the Western and Eastern have shown to share the same view. Other case ruled by ECHR was conviction for attempting to re-establish a fascist party of *M.A v. Italy* (Communication No. 117/1981 (21 September 1981), U.N. Doc. Supp. No. 40 (A/39/40) at 190 (1984) was permissible for restriction under art 19(3) because it meet the test of necessity for the purpose of interference.

²⁶ The Johannesburg Principles was endorsed by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in E/CN.4/1996/39 on 22 March 1996. In addition, the Special Rapporteur reiterated that any restriction to the right to freedom of expression on the grounds of protecting national security is only legitimate if the Government can demonstrate that the expression is intended to incite imminent violence, it is likely to incite such violence, and there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence. Cf. A/HRC/17/27 dated 16 May 2011. Para 36

²⁷ Para 79 (f)

- (ii) States may not extend the notion of state security so far as to penalize and suppress mere expression of opinion.²⁸ Although it is often seen that anti-state acts, or any preparations to topple a government may likely fall under criminal acts.²⁹

The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur)³⁰ reaffirmed that cases deemed justifiable under principles of permissible limitations and restrictions “must constitute an exception to the rule and must be kept to the minimum necessary to pursue the legitimate aim of safeguarding other human rights established in the Covenant or in other, international human rights instruments”.³¹

2.3 Freedom of expression and information in other regional human rights systems– the experience of Europe

In order to establish benchmarking views and understandings for the analysis of ASEAN practices regarding freedom of expression and information practiced under international law, a brief review of European experiences on the same rights is now presented. In Europe, although FOE/I is rooted in legal tradition and democratic political culture, it is not surprising that Europe had gone through a paradox between

²⁸ This view is understood from several cases against Uruguay (no.8/1977 para. 16; no. 11/1977 para 17; no. 33/1978 para 12 and no. 44/1979 para 15). The HRC expresses that if a person is arrested or sentenced for prison for trade unions, political parties, journalism or other anti-regime activities is *inter alia* the violation of freedom of expression under art. 19. This view is also seen in the case of *Womah Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994).

²⁹ No. 458/1991 para 9.6 – 9.7 and U.N. Doc. CCPR/C/51/D/458/1991, 10 August 1994. For instance, in the case of *Adyayom et al. v. Togo*, two university teachers and a civil servant had been detained and charged in 1985 with the offence of *lèse-majesté* because of their minor criticisms of the Togolese Government. The Commission on Human Rights observed that they may “criticize or openly and publicly evaluate their Governments without fear of interference or punishment within the limits set out by article 19 paragraph 3”. Also in case no.422-424/1990 and *supra* note. 17 (cases of South Korea). Many similar cases in the number of non-democratic African regime, the Committee considered that “the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances can not be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights”

³⁰ The Special Rapporteurs are part of the [Special Procedures](#) of the Human Rights Council. In 1993, the United Nations Commission on Human Rights established the [mandate](#) of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

³¹ A/HCR/14/23 dated 20 April 2010. 14th Session. Special Rapporteur report. Para 77

guaranteeing individual FOE/I as lawful rights and legitimate restrictions on the ground of national security or nation's interest.³²

FOE/I are well recognised as a constitutional right by the Council of Europe because they were enshrined in international law. Although the Treaty of Europe does not mention specific rights it does recognise the principles of human rights under the European Convention of Human Rights (ECHR). Such recognition results from the constitutional traditions common to the Member States. Community rights sometimes directly involve fundamental rights guaranteed in the Convention.³³ The European Court of Justice (ECJ) saw this standard as a general principle enshrined in Articles 8,9,10 and 11 of ECHR to the effect that "no restrictions in the interests of national security of public safety shall be placed on the rights secured by above articles other than necessary for the protection of those interest in a democratic society".³⁴

Article 10 of ECHR provides more scope for restrictions of FOE/I but at the same time stresses the three tests on 'prescribed by law'; 'legitimate aims' and 'what may be necessary in a democratic society'. It says: *"Everyone has the right to freedom. [The exercise of these freedoms carries duties and responsibilities] ... which may be subject to formality, conditions, restrictions as per prescribed by law and are necessary in a democratic society in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of reputation or rights of others..."*

Because Article 10 of ECHR is still general, the inherent feature and constitutional characteristics of FOE/I in this provision are made clearer by case law of the European Court of Human Rights.³⁵

³² Mahoney and Early (ibid) in *Secrecy and Liberty*. National Security, Freedom of Expression and Access to Information. Sandra Coliver, Paul Hoffman, Joan Fitzpatrick and Stephen Bowen (eds) Martinus Nijhoff Publisher. The Hague, Boston, London, Kluwer Law International 1999. p. 109 - 128

³³ For instance, restrictions to workers from writings imposed by the Member States on the ground of public security could be ruled impermissible because it interferes with freedom of expression under ECHR.

³⁴ cf. *Rutly v. Minister for the Interior* (Case 36/75) ECR 1219 para 32

³⁵ Paul Mahoney and Lawrence Early. *Freedom of Expression and National Security: Judicial and Policy Approaches under the European Convention on Human Rights and Other Council of Europe Instruments*. In *"Secrecy and Liberty*. Sandra Coliver, Paul Hoffman, Joan Fitzpatrick and Stephen Bowen (eds) Martinus Nijhoff Publisher. The Hague, Boston, London, Kluwer Law International 1999

The first principle, 'prescribed by law', means that any interference must have a basis in, or comply with, the law of the country. But this principle is together understood to include the structure that domestic law must itself be compatible with the minimum standards of the rule of law. Moreover, the issue in the quality of law is to ensure that there is no arbitrary interference on freedom of expression.³⁶ The principles of 'legitimate aim' and 'democratic necessity' are also articulated in Article 10 of ECHR. However, under EU tradition, national security represents one of the legitimate grounds to justify restriction on FOE/I. On the other hand, it is noted that all European member states have to provide concrete measures being genuinely necessary for any restriction. These two principles could be both presented when there is a social need to apply legitimate aim to restrict freedom of expression.³⁷

The doctrine of 'margin of appreciation' becomes a judicial self-restraint in the case of EU law and national law of EU member states. The trend in the EU is that the Convention increasingly requires member states to undertake measures to protect the fundamental FOE/I, including political speech. Press receives more freedom to hold the right and duty to comment on political matters and other public concerns as public hold the right to be informed.³⁸

Looking at the law and practice of FOE/I, EU laws and the member states' laws and practices show that FOE/I has evolved synchronously. The ECHR came into being in 1953 but even after ratification by member states, violations were common.³⁹ At its beginning, the Council of Europe (COE) did not view FOE/I as absolute. FOE/I were viewed not from the viewpoint of individual rights but pertaining to community-oriented value. Only in October 1993, at the Vienna Summit Conference, did Heads of State and Government of Member States of the COE reaffirm that "guaranteed freedom

³⁶ Ref. *Sunday Time v. UK* Judgment of April 26, 1979, Series A vol 30. *Malone v. UK*, Judgment of August 2, 1984 Series A Vol 82, para 67; *Huvig v. France* Judgment of April 24, 1990 Series A vol 176-B para 26-29

³⁷ *Handy v. UK* para 52. The applicant published obscene material, an anti-authoritarian handbook on living addressed to children and adolescence tended to deprave and corrupt' its intended readers and was therefore criminal obscene. The judgment of December 7, 1976 vol 24, the Strasbourg Court found no violation of ECHR art 10 on the ground of public morals. Although few case law on this principle but the *Handy* case was repeatedly cited.

³⁸ Case *Sunday Time* *ibid*.

³⁹ Case *Handy Side v. UK* (1976); *Malone v. UK* (1984), *Lingen v. Austria* (1986); *Higvif v. France* (1990); *guardian v. UK* (1991)

of expression and notably of media must remain decisive criteria for assessing any application for membership”.⁴⁰

In sum, this review of European systems of human rights as well as its case law with regard to restriction of FOE/I has underlined some legal and structural issues of concern. National legislation contravenes the Covenant in ways that may be interpreted as permissible under the Covenant. This means that constitutions and states’ laws might allow a broad scope of restrictions as well as a broader scope to justify such restrictions. There may be cases where the application of law may not be based on the same interpretation as international standards by means of domestic law. There are cases where legitimate tests of restrictions are not met by the judicial process at the state level. However state parties of ICCPR make reservation for joining Optional Protocol therefore it limits communication to be heard and taken by the HRC and for HRC to recommend corrective methods.

Overall, ratifications to international human rights instruments may not guarantee that FOE/I is protected, and that permissible restrictions must be under internationally accepted norms and standards. This encourages the present author to examine, in the next chapter, the state of practice in selected ASEAN states, so as to enable a better understanding of the law in practice in ASEAN states and why it is so.

⁴⁰ Vienna Summit, Final Declaration, 9 October 1993.
http://www.coe.int/t/dghl/monitoring/ecri/archives/other_texts/2-vienna/declaration/declaration_vienna_summit_EN.asp

CHAPTER 3

LAW AND PRACTICE OF FREEDOM OF EXPRESSION AND INFORMATION IN ASEAN

This chapter provides an overview of ASEAN as a world sub-region in relation to its status in the international human rights arena. The chapter also outlines the state of practice regarding restrictions on FOE/I on the ground of national security in a number of ASEAN countries, namely Indonesia, Singapore, Thailand and Vietnam. The legal review of texts, and analysis of cases as applicable and where sources are available, enable conclusions as to whether or not such restrictions are legitimate by international human rights standards and in respect of domestic laws. The country case studies also provide situational justifications which states use to justify limitations on the ground of national security or other national interests. This helps explain why FOE/I in ASEAN has not so far generally conformed with international human rights standards.

3.1 ASEAN and international human rights instruments

ASEAN states ratified the core human rights instruments at different stages and degrees of choice. Table 1 shows the ratification status of all 10 countries on the six core human rights instruments. It concisely shows differences in ideologies subscribed to, and choices made by, states on human rights. While CRC and CEDAW are ratified by all member states, ICCPR, IECSR, ICERD and CAT remained un-ratified by states such as Brunei, Malaysia and Singapore. Furthermore, not all state members have ratified the Optional Protocol of ICCPR allowing individual communications to the HRC.

Table 1 – Status of Ractification of ASEAN into core international human rights conventions

State parties	ICCPR	ICESCR	CEDAW	ICERD	CAT	CRC
Brunei	x	x	2006	X	x	1996
Cambodia	1992	1992	1992	1986	1992	1992
Indonesia	2006	2006	1984	1999	1998	1990
Lao PDR	2009	2007	1981	1974	X	1981
Malaysia	X	x	1995	1995	X	1995
Myanmar	1997	X	1997	x	x	1991
Philippines	1987	1976	1981	1969	1986	1990
Singapore	X	x	1995	x	x	1995
Thailand	1996	1999	1985	2003	2007	2006
Vietnam	1982	1982	1982	1982	x	1990

The 1993 Vienna World Conference on Human Rights opened up a new dimension in regional arrangements to secure human rights but also a strong argument for cultural relativism – i.e. Asian Values – as a qualifier to the validity of the universality of human rights from some ASEAN states. 171 UN member states adopted by consensus the Vienna Declaration and Programme of Action in agreed statement that: ‘... *regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards [t]he World Conference on Human Rights reiterates the need to consider the possibility of establishing regional and sub-regional arrangements for the promotion and protection of human rights where they do not already exist*’. ⁴¹ Controversially, some ASEAN states, notably Singapore, Malaysia and Vietnam embraced ‘Asian Values’. Hence, years later, ASEAN governments have not yet put forward ideas on the shape and substance of such mechanisms even shortly after the Conference, the Foreign Ministers of ASEAN states met and agreed that they should consider the establishment of an appropriate regional mechanism on human rights.

⁴¹ National Assembly, 1993, Article I.37.
[http://www.unhchr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en)

Since 2002, the concept of a regional human rights mechanism became clearer with the Roadmap for an ASEAN Human Rights Mechanism, suggested by a Working Group to prepare for an ASEAN Human Rights Commission. The review from the Working Group indicated that, at that time, ASEAN was the only world region without a regional mechanism to monitor and protect human rights of citizens of member states. Therefore, the region was seen to be exposed to being monitored from sources outside the region. The Working Group thus urged the establishment of an ASEAN regional mechanism in order to better incorporate ASEAN perspectives and to complement international human rights standards in the region.⁴²

The ASEAN Charter encodes human rights principles and was formally discussed at the 11th ASEAN Summit in Kuala Lumpur, Malaysia in December 2005.⁴³ Ten ASEAN leaders had the task of this draft charter. At the 12th ASEAN Summit, held in Cebu, Philippines in January 2007, Cebu Declaration on Promoting the establishment of an ASEAN community block 2015 was adopted. One of the recommendations in this statement is the removal policy of not interfering with each other since ASEAN was founded in 1967. The Charter was adopted at the ASEAN Summit on 13 October 2007.

The Charter represents a breakthrough in ASEAN to set goals, basic principles of human rights and commitment to build an ASEAN human rights body. Article 1 (7) of the Charter affirms that one of the objectives of ASEAN is "... to promote and protect human rights and fundamental freedoms." For the first time in history, cooperation in human rights became an agreed principle of ASEAN member states and is now legally recognized with highest accepted value of ASEAN.⁴⁴ Beyond the Charter, the drafting of an ASEAN Human Rights Declaration is underway.

⁴² Vivit Muntarbhorn. 2003 in 'Roadmap for ASEAN Human Rights' May 2003.

⁴³ ASEAN Charter <http://www.asean.org/21069.pdf>

⁴⁴ Article 2.2 (h, i) of ASEAN Charter notes: *...adherence to the rule of law, good governance, the principles of democracy and constitutional government; ...respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;*

3.2 State of practice in limiting freedom of expression in ASEAN

FOE/I as part of ICCPR is the most difficult in getting a common sense and the same level of implementation in ASEAN. The reality is that many states restrict FOE/I at the state level by not accepting the same interpretations and principles outlined in Article 19 (3).⁴⁵ The codification of the FOE/I in UDHR and ICCPR and other regional human rights conventions like Europe proves to be itself a legal principle of universal validity. However, equally important, the FOE/I should also be justified on moral and political grounds into domestic rule of law to be legitimate in practice. The following part examines states of practice on FOE/I notably Indonesia, Singapore and Thailand, Vietnam to describe how the right is implemented domestically in some ASEAN states and how these states justified the imposed limitations on FOE/I.

In general, among the ASEAN states, restrictions on FOE/I on the ground of national security is common despite differences in political ideology and adherence to democratic principles. In Indonesia and Thailand, the rise of FOE/I was recognized along with democracy in the early 1990s. However, with the financial crisis during 1997 and major leadership change in the early years of the 21st century, the protection of the freedom became fragile with much evidence of backsliding. Singapore and Malaysia learnt from Indonesia's experiences and also systematically cracked down on reform movements. FOE/I have been tightly controlled in law and practice in Singapore, Vietnam and Myanmar by the one-party systems of those states. The Philippines has long established democratic institutions but this has had little impact on FOE/I. Cambodia established its supposed new democracy under the 1993 Constitution and signed various international human rights treaties but still retained strangleholds on

⁴⁵ Non of ASEAN states except the Philippines ratified the Optional Protocol of ICCPR⁴⁵ which allows cases and communications to be received by HRC and thus HRC can make concluding observations regarding issues which becomes the main sources of justifying a situation non-compliance.

basic freedoms and a electronic media, newspapers and citizens' freedom to talk about politics.⁴⁶

The recognition of FOE/I in the ICCPR, which some ASEAN member states have ratified, is one useful step but the battle is far from won. Since FOE/I is never absolute, and hardly defined as a rigid norm in ASEAN countries, the level of protection of, and restrictions on the right depends on a state's political system, legal system and institutional guarantee at state level. Across South East Asia, FOE/I is increasingly under threat as governments seek to control media and individual views expressed via the internet, alternative media, and opposition organizations.⁴⁷ The Press Freedom Index (PFI)⁴⁸ shows ASEAN member states ranking very low over the years.⁴⁹ HRC's General Comment on Article 19 (para 3) states: *"Many reports of States parties confine themselves to mentioning that freedom of expression is guaranteed under the Constitution or the law. However, in order to know the precise regime of freedom of expression, in law and in practice, the Committee needs in addition pertinent information about the rules which either define the scope of freedom of expression or which set forth certain restrictions, as well as any other conditions which in practice affect the exercise of this right.."*

Indonesia

Political settings

Indonesia inherited not only laws but colonial institutions and a legal system with an essentially authoritarian character with long term and military leadership from the 1960s to the 1990s. The consequence was centralisation of power in state institutions

⁴⁶ Promoting Three Basic Freedoms – Towards Greater Freedom of Association Assembly and Expression in Asia. Elizabeth Nissan. Eds. 1999. The Three Freedom Project. www.threefreedoms.org pp. 19

⁴⁷ Views shared in press event on 'Freedom of Expression - Rights Under Threat in Southeast Asia' at the Foreign Correspondents Club of Thailand on September 14, 2011

⁴⁸ The Press Freedom Index is an annual ranking of countries compiled and published by Reporters Without Borders based upon the organization's assessment of their press freedom records. www.freedomhouse.org.

⁴⁹ Based on PFI survey criteria, the 2011 survey shows that Thailand moved from Partly Free to Not Free of Press Zone while Cambodia, Vietnam and Lao remained on the lowest rank (respectively 165, 168 and 171 out of 178 countries in survey in 2010).

and minimal participation from the broader society. The Soekarno government initially attempted to facilitate a pluralistic political life under the 1950 Provisional Constitution. This ceased in the period of military suppression of Communists and other left-wing groups in the 1960s. In Indonesia, the regime of the first President, Soekarno, and the seizure of power by the military, with the New Order initiated in October 1965, authorized the Command for Restoration of Security and Order (Kopkamtib). Bresnan (1993:293) argued that the ensuing Indonesian political regime was a 'managed pluralism'.⁵⁰ After the Suharto regime. Which ruled for 32 years until 1998, democracy took root and flourished as a pluralistic system through elections. Indonesia's national motto "Unity in Diversity" received a surprising degree of consensus

With increasing violations and abuse of fundamental human rights, including arrest, torture, and other violent acts by the military during the 1960s, the international call on human rights problems in Indonesia prompted critical responses from the government. First, the government attempted to counter accusations of human rights violations and rejected recommendations which they thought threatened the state's independence and sovereignty. They argued that human rights values are not universal and sometimes human rights abuses helped to regulate diverse societies. Two journalists were killed there and several others received death threats, mainly for their reports on the environment.⁵¹ Indonesia (117th of PFI ranking in 2010) cannot seem to pass under the symbolic bar separating the top 100 countries from the rest, despite remarkable media growth recently.

Law, practice and justifications of restriction of FOE/I

The 1945 Constitution Fourth Amendment, article 28J, states: "(1) Every person shall have the duty to respect the human rights of others in the orderly life of the community, nation and state ...(2) ... have the duty to accept the restrictions established

⁵⁰ Bresnan. J. (1993). *Managing Indonesia: The modern Political Economy*. New York: Columbia University Press. 1993

⁵¹ Promoting Three Basic Freedom. Towards Greater Freedom of Association, Assembly and Expression in Asia. P. 151-178

based upon considerations of morality, religious values, security and public order in a democratic society”.

The New Order reduced freedom of press through numerous security restrictions.⁵² Restriction of political activities went hand in hand with repression of expression with no institution or judicial arbitrator was able to examine government conduct. In December 1966, the new authority of Soeharto released the Press Law (No. 11 of 1966) which required newspapers and publishers to obtain Publishing Permits. The tighter restriction was applied by the decree from Ministry of Information (No. 3/Per/Menpen/1969). Though ‘disruption of public order’ is not defined in any legislation, criteria for banning of press included: opposing Pancasila (state ideology) and the 1945 Constitution; damaging people’s confidence in the national leadership; opposing state policy; endangering the unity of Indonesian society, nation and state.

The period from 1966 until 1982 witnessed the arrests of hundreds of journalists and many newspapers being banned because they were alleged to criticize the government in ways that damaged the national interest and impeded the maintenance of public order. Media and press suppression began with the banning of 46 out of 163 newspapers by Kopkamtib after the October 1965 incident.⁵³ In 1982, two magazines, *Topik* and *Fokus*, were banned because they published articles about the President’s wealth.

In 1982, Press Law 1966 was replaced by Law No. 21/1982 which regulated the new authority for publication permits in the Ministry of Information, instead of the military. Article 4 of the Law states that there is no censorship of the national press but it allows guidance and supervision by the government to intervene in press matters. There was, however, often guidance to journalists from the state. The Indonesian Journalists’ Association was supposedly charged with protecting the interests of

⁵² This term ‘Orde Baru’ is used when the former Indonesian President Suharto to characterize his regime as he came to power in 1966

⁵³ The incident on 1 October 1965 was when six army generals and an officer were kidnapped and killed and the Indonesian Communist Party (PKI) was blamed for the killings. Far from allowing these allegations to be tested in a court of law, almost all the communist leaders were hunted down and killed within days. Hundreds of thousands of people were killed and many more thrown into prison, many for up to fourteen years, and almost all without trial.

journalists and thus put pressure on editors. The victims in this period were the daily Sinar Harapan and daily Prioritas that covered political matters to a greater degree than was permitted. In 1982, Sunardi, a lawyer was sentenced to jail for three years and four months because he sued President Soeharto for seizing power in 1965.

During the 1990s, the Indonesian press expanded with growth of the internet and electronic media. The demand from the public for news coverage created competitions among the press. During the late 1990s, some press companies were acquired by state officials and military.⁵⁴ The increasing openness of the media industry, in line with interests of high state officials, came to be seen as challenging the state's 'security and order'. During 1994, alternative media grew, such as Suara Independent, Bergerak or Internet email list. Despite this, journalists continued to be in danger. Journalist C. Sukina of Ummat weekly was beaten by 20 security personnel and had his camera confiscated and film destroyed. On August 10, 1996, a lecturer at a private university in Yogyakarta, Central Java, was arrested by military personnel because he circulated information about the 27 July incident⁵⁵ that he obtained from the internet. Recently, the anti-blasphemy law and the Criminal Code (sec. 156, 156A, 310) have been used for suppression of expression of feelings of hostility against official religions.⁵⁶

In sum, the transition since President Habibie opened a new arena for the process of democratization in Indonesia, including new law on political parties and elections. Nevertheless the government retained Pancasila as state ideology and promoted the growth of media taking part in promoting democratic society. The Government remained worried about social unrest and imposed new law on demonstrations.⁵⁷ Many of the State's controls on FOE/I were lifted in practice when

⁵⁴ According to Alliance of Independence Journalist, some press companies were acquired by Minister of Information Harmoko and Army Chief of Staff Hartono and some members of President's family.

⁵⁵ The beginning of the end for Suharto could be said to have started with the storming of the PDI offices on the 27th of July, 1996. The July 27 incident did stand out as a small milestone on the road to Suharto's demise, and was one of a few historical back-references used by the student movement in their campaign for political reformation.

⁵⁶ Report of Special Rapporteur on Freedom of Religion or Belief, A/65/207, para 44 and A/HRC/10/8/Add1, para. 55-68

⁵⁷ The Law no. 9/1998 on Freedom of Express Opinion in Public

President General Soeharto stepped down and ended the authoritarian regime in May 1998. The economic crisis and protest against New Order made the new government of Baharuddin Joesoef Habibie unable to retain the same character of its predecessor and was pre-disposed to greater openness.

Singapore

Political settings

On 16 September 1963, Singapore became part of Malaysia in a federation of Malaya, Singapore, Sabah and Sarawak in 1962 to end British colonial rule. However, the union was short-lived after the 1964 race riots in Singapore. Being recognized to be a sovereign, independent state in 1963 with UN admission opened the new face for Singapore to start a policy of neutrality in international relations, against threats from multiple sources including the communists and Indonesia with its Confrontation stance. The first Prime Minister of Singapore, Lee Kuan Yew, stressed three main concerns – national security, the economy, and social issues – during his post-independence administration. Mr. Lee then began to seek international recognition of Singapore's independence. Singapore joined the United Nations on 21 September 1965, and founded the Association of Southeast Asian Nations (ASEAN) on 8 August 1967 with four other South-East Asian countries.

In the four decades after independence, Singapore transformed from being a developing country into being one of the most developed in Asia. The inspiring leadership during the separation from Malaysia saw the emergence of the notion of Singaporean “Exceptionalism” which refuted the idea that liberal democracy must automatically flow from economic prosperity.⁵⁸ Over the discourse on Asian Values in the international arena, Singapore developed the Shared Values thesis: *“the concept of government by honourable men (junzi) who have a duty to do right for the people, and who have the trust and respect of the population, fits us better than the Western idea that a government should be given as limited powers as possible, and should always be*

⁵⁸ Democracy and Development in South East Asia...

treated with suspicion unless proven otherwise."⁵⁹ The People's Action Party (PAP) as the ruling party, justifies this approach in the concept of the *junzi* (a Confucian term referring to the ideal human), in which emphasis is placed on Asian values and moral legitimacy, in order to protect the economic stability of Singapore.⁶⁰ The PM, Lee Hsien Long, when he came into power in 2004, required the revisiting of the Confucian notion of governance wherein public policy and rule of law depend on executive discretion and remain sensitive to public debate, especially on democratic culture or popular demands on state policies. Such policy limited an effective participatory process including pervasive manner of state penetration of civil society.

One of the reasons for Singapore's lagging behind international human rights commitments is the upholding of Asian values and cultural relativism in human rights. Along with China and Malaysia and some other ASEAN countries like Vietnam, during the Vienna International Conference in 1993, Singapore strongly supported the concept of Asian Values and Confucianism. The key elements of Asian Values include respect for and trust in public authorities, social security and public order, harmony and collective commitments in all levels of society (Koh, 1993).⁶¹ Asian Values in Singapore also include principles of community over self, upholding the family as the basic building block of society, consensus rather than conflict, and the maintenance of racial and religious harmony. Singaporean leaders remain strong in their upholding of national security by deploying the term of good governance.⁶² Lee Kuan Yew in his ruling stated: *"With few exceptions, democracy has not brought good government to new developing countries ... What Asians value may not necessarily be what Americans or Europeans value. Westerners value the freedoms and liberties of the individual. As an Asian of Chinese cultural background, my values are for a government which is honest, effective and efficient"* (Lee Kuan Yew 1992).⁶³ It has been argued by Singapore leaders like Lee

⁵⁹ White Paper on Singapore's Shared Values (Cmd. 1 of 1991), p8

⁶⁰ Thio (2002)

⁶¹ Koh, Tommy (1993). The 10 values that Undergrid East Asian Strength and Success'. International Herald Tribune, 12 December 1993. p6

⁶² Philip J. Eldridge. Human Rights, Democracy and development in South East Asia. in Politics of Human Rights in South East Asia. Routledge 2002. P.33-60

⁶³ Lee Kuan Yew stated this in a speech in Tokyo, in 1992

Kuan Yew (Prime Minister from 1959 to 1990), Goh Chock Tong (Prime Minister from 1990 to 2004) then Lee Hsien Long to the present that Singapore needs to adhere to Asian Values and the ideological model of “pragmatic democracy” as the core to maintaining its strong economic development and stability from which people can enjoy economic, social and educational benefits, and an orderly society, as a collective good.

⁶⁴ The notion of political opposition has been viewed as being contrary to the Singaporean notion of good government, as then PM Goh Chock Tong stressed the communitarian ideology. In this respect, the criticism of communitarian ideology is made that consensus building structure has its tension with the practice of international individual rights. ⁶⁵

Law, practice and justifications of restriction of FOE/I

Singapore joins only two conventions, CEDAW and CRC, in six core international human rights conventions. However, together with Malaysia, Singapore reserves many other provisions for the reason that their domestic laws need to be to be supreme in effect over international law.

Civil and political rights in Singapore are constrained by powerful legal and structural obstacles. The constitution in Article 14 (2) provides legal rights for freedom of speech, assembly and association. However, the constitution gives power to the Parliament, not the executive, to consider restrictions of those rights as necessary and expedient in the interest of the security of Singapore or its public order. Related acts regulating FOE/I include the Criminal Code (section 505 - intent to make, publish or circulate any statement, rumor or report in written, electronic or other media that causes harm, fear or alarm to the public), the Defamation Act (section 6-on slander); and the Undesirable Publication Act that put controls on media. In addition, the Internal Security Act (Article 20 – prohibition of printing, sales, etc. of documents and publications) gives authority to the Minister for censorship and responsibility for

⁶⁴ Kausikan, Bilahari. The Asian Values Debate: A view from Singapore’ in Democracy in East Asia. Eds. Larry Diamond and Marc F. Plattner, The John Hopkins University Press, London and Baltimore. Pp.17-27. He is also analytical critics on communitarianism of Singapore.

⁶⁵ Ulrik Rebele. Freedom of Expression and Asian values in Singapore. In Asia Rights Journal. issue 5/2005

printing presses and publications. The International Security Act (ISA), in force since colonial times, allows the Minister of Home Affairs to detain people who are considered as being menacing to national security without trial for up to two years.

There is a structural obstacle to freedom of expression, especially in treatment by the press of political opinions. The News Paper Printing Act 1974 (NPPA) ⁶⁶ and Public Entertainment and Meeting Act (PEMA) limit freedom of the press by prior censorship. Broadcasting is owned by the state. The Public Licensing Unit is an agency of the Police Department in the Ministry of Home Affairs. ⁶⁷ Citizens fear to publicly express political opinions since they may be considered as an offence against national interests and social norms, and there is also fear of invisible surveillance of telephones or emails by the International Security Department (ISD). The Societies Act furthermore empowers the Registrar of Society to deny or withdraw a request for registration of a civil society organization on the grounds of it being a danger to public order or public security. ⁶⁸

Another structural obstacle lies in Singapore's rule of law which is not focused on democracy, but is rather concerned to secure social stability. This stability is further secured through the prioritization of community interests and constructed Confucianism values. ⁶⁹ Singapore's judiciary has embraced a form of communitarian legalism, whereby the rights of the state trump those of the individual. Singapore's courts have embraced cultural relativism, even if deviating from common law norms. ⁷⁰ The constitutional interpretation in Singapore now comes primarily "from within its own

⁶⁶ The Newspapers and Printing Presses Act, ch. 206 (1975) (Sing.) was amended in 1974 to give the Minister discretionary powers to deem if foreign publications were interfering in Singapore's domestic politics. This can be done through the publication of an order in the *Gazette*, which leads to the restriction of its circulation (§ 24)

⁶⁷ Public Entertainments and Meetings Act, ch. 257 (1959) (Sing.) § 3 (a police permit is required to hold a public talk or to deliver a political speech)

⁶⁸ an amendment to § 4 of the Societies Act in 1988 to permit deregistration of any society that made political statement beyond its stated mandate.

⁶⁹ See Li-Ann Thio, *Lex Rex or Rex Lex Competing Conceptions of the Rule of Law in Singapore*, 20 UCLA PAC. BASIN L. J. 1, 22, 24 (2002). P 26

⁷⁰ Tan... in 'We v I', p7

four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia.”⁷¹

Defamation laws are used to silence political opposition. Singapore’s judiciary feels there is a need to protect the government’s reputation and to defend stability and order, even if this means providing new grounds for executive power. In defamation cases, the courts must determine the balance between protecting free speech, and protecting the perceived integrity of Singapore’s leaders.⁷² The leadership is called moral authority which is the cornerstone of effective government.⁷³ The current state of the law discourages the opposition from commenting on government policy whilst affording protection to the executive.⁷⁴ A recent case is *Lee Hsien Loong v. Singapore Democratic Party*. Lee Kuan Yew and Lee Hsien Loong sued the Singapore Democratic Party (SDP), its secretary-general, Dr. Chee Soon Juan, and a member of its Central Executive Committee, Ms. Chee Siok Chin, for defamation in respect of two articles and a photograph concerning the NKF scandal⁷⁵ published in *The New Democrat*, the SDP’s newspaper. Another case related to the NKF scandal is *Review Publishing Co. Ltd. v. Lee Hsien Loong*⁷⁶. The Court of Appeal, in a stunning interpretation of common law legitimacy in these jurisdictions, has demonstrated that there is a need to decide how to strike an appropriate balance between the “competing” interests of freedom of speech and protection of reputation in the context of local conditions but ruled that protection of reputation was not preferred over freedom

⁷¹ Nappalli Peter Williams v. Inst. of Technical Educ., 2 Sing. L. Rep. 569, 574 (1999). See Li-Ann Thio, *Beyond the “Four Walls” in an Age of Transnational Judicial Conversations—Civil Liberties, Rights Theories, and Constitutional Adjudication in Malaysia and Singapore*, 19 COLUM. J. ASIAN L. 428 (2005-2006).

⁷² See Eugene Kheng-Boon Tan, “We” v. “I”: *Communitarian Legalism in Singapore*, 4 AUSTRALIAN J. OF ASIAN L. 1, 11-18 (2002). There have been major defamation cases *Lee Hsien Loong v. Singapore Democratic Party*

⁷³ *Lee Kuan Yew v. Vinocur*, 3 Sing. L. Rep. 491 (1995). In *Lee Kuan Yew v. Vinocur*, 100 Goh, J. held that an accusation against three ministers of government of corruption and nepotism “was an attack on the very core of their political credo [and] would undermine their ability to govern.” In *Lee Kuan Yew v. Seow Khee Leng*, case 1 Malayan L. J. 172 (1989) Chua, J. stated “If this moral authority is eroded, *the government cannot function*”

⁷⁴ *Jeyaretnam v. Goh Chok Tong* 1 Malayan L. J. 334 (1985), *aff’d*, *Jeyaretnam v. Goh Chok Tong* Sing. L. Rep. 106 (1986), *aff’d*, *Jeyaretnam v. Goh Chok Tong*, Sing. L. Rep. 4 (1989).

⁷⁵ The National Kidney Foundation Singapore scandal, also known as NKF scandal was a July 2005 scandal involving National Kidney Foundation Singapore (NKF) following the collapse of a defamation trial which NKF and T. Durai, the former Chief Executive Officer of the National Kidney Foundation Singapore (NKF) brought against Singapore Press Holdings (SPH) and journalist Susan Long.

⁷⁶ *Review Publ’g Co. v. Lee Hsien Loong*, 1 Sing. L. Rep. 52 (2010)

of speech.⁷⁷ This implies that the judiciary has normalized the PAP's exceptionalist platform and has no intention of re-normalizing the regime of exception and how the exception can become the norm. It is also importantly noted that the judicial normalization of the government's politics of communitarian legalism has created a statist and procedural rule of law that encourages defamation laws to quell political opposition.⁷⁸ With such an exceptionalist philosophy, Singaporean law may retain uncertainty and divergence over precedents from common law principles.

The ideological justification for restricting freedom of expression as civil and individual rights can be viewed as political ideology in the context that Singapore after independence become a multicultural society, and thus has to maintain racial harmony through a "logics of groups". This logic helps to govern and tighten a multicultural nation and ensure ethnic equality. Restrictive policies, as is often claimed to be the case in regard to Asian Values and other cultural arguments could be reformulated. The insistence on communitarian ideology with the colonial background can be also an explanation for the PAP-led government imposing pragmatic policies and ideas of non-individualistic modernity regarding individual participation in political life.⁷⁹

The challenge from within Singapore is changes in society. The social order, based on collectivist-oriented values and pragmatism has gradually transformed into weak loyalty and appreciation within the society. The court felt that "[p]roponents of change must produce evidence of a change in Singapore's political, social and cultural values in order to satisfy the court that change is necessary ..."⁸⁰ There is increasing demand by young generations to live a Western life style, including demands for information and participation in public life, even engaging in political discussion.

⁷⁷ Review Publ'g Co. v. Lee Hsien Loong, 1 Sing. L. Rep. 52, 132 (2010) p. 183 Although the court ruled that the defendants were not citizens of Singapore, they were not entitled to enjoy constitutional free speech, and so there was no need to decide what approach the courts should adopt to the interpretation of such freedom. The court suggested that Singapore has no place in its political culture for the making of "false defamatory statements which damage the reputation of a person (especially a holder of public office) for the purposes of scoring political points"

⁷⁸ Cameron Sim "The Singapore Chill: Political defamation and the normalization of a statist rule of law" Pacific Rim Law & Policy Journal Association.. March 2011.

⁷⁹ Wee (1999) Wee, C.J.W.-L. "Asian Values' Singapore and the Third Way: Reworking Individualism and Collectivism" Sojourn, 15 (p), pp 332-358

⁸⁰ Review Publ'g Co. v. Lee Hsien Loong, 1 Sing. L. Rep. 52 (2010). P 178

Restrictions on FOE/I via printed forms of publication cannot accommodate the increasingly availability of cyberspace information channels. Academic critics from within the State argue that under these conditions, the process of collective consensus-building in Singapore can no longer work.⁸¹

Thailand

Political settings

Thailand underwent a transition from monarchy to monarchical democracy by means of recent constitutions. The values of monarchical loyalty do not support the concept of human rights. In the name of preserving political stability if there is a threat to the constitution, the King can intervene to grant or withhold legitimacy from rival contenders for power.⁸²

Thailand has a history of more than 20 governments and 17 constitutions since 1932. The FOE/I situation has not been stable. In 1976, the military successfully took control of the country and installed the new government of Thanin Kraivixian, thus resulting in tighter controls on freedom of expression. This explains why national security concerns were the focus under the influence of military over the government from 1940 to the 1970s. Then, during the 1980s, anti-communism in Thailand led to hostility and tension and consequent concern to oppress the voice of the people demanding justice on the ground of communism. It was seen as threat to national security. The Constitution of 1997, with its major changes, marked an important step in the advancement of human rights. It paved the way for political reform to make the government more accountable to the public and created new institutions such as administrative courts, an Ombudsman, and national bodies to promote and protect

⁸¹ Chua, Bang Huat 2004. Communitarianism without competitive politics in Singapore, in *Communitarian Politics in Asia*. Ed. Chua Bang Huat. Routledge Curzon, Taylor and Francis Group. London and New York. Pp 78-101. Chua and Kwok (2001). *Social Pluralism in Singapore, in the Politics Of Multiculturalism. Pluralism and Citizenship in Malaysia*, ed. Robert W. Hefner. University of Hawai'i Press. Honolulu, Singapore and Indonesia, pp 86-118

⁸² Muscat. 1994. *The Fifth Tiger: A study of Thai Development Policy*. New York. E.E Sharpe, for the United National University. pp129

human rights. However, after 1997, under Thaksin's regime, the human rights commission has been limited in its power and authority. The current 2007 Constitution still upholds all fundamental rights (such as civil rights, political rights of individuals and especially rights of communities to participate in resource management and public work). This Constitution specifically empowers more legislation for national institutions on human rights to handle the violation of human rights, including the right to investigate and take forward the results investigations to court hearings.⁸³

The Thai Government has gradually moved to uphold human rights values in the political and social sphere. The concept of human rights in Thailand emerged dramatically in the social movements of the democratization process in the 1990s. Initially, Thai authorities discouraged a notion of human rights based on Western values. Instead, they promoted the social values of Buddhism of love, compassion and royalty and 'elements of Thai-ness' as opposed to liberal human rights. Moral ideology was emphasized with respect for the king and interests of the community being prioritised. Thus Thai governments have not responded to the universality of human rights as the UDHR with common values as such.⁸⁴ Civil society is also limited to not spreading any views or undertaking actions contrary to the elements of Thai-ness.⁸⁵

Changes in the governing regime over recent years in Thailand has led to a decline in the practice of FOE/I and Thailand's ranking on the Press Freedom Index slipped from 153rd to 178th in 2010 and fell back into the Not Free Press country in 2011.

⁸⁶ On-going political violence caused this drop in Press Freedom Index ranking. For example, two journalists were killed and some 15 wounded while covering the army crackdown on the "red shirts" movement in Bangkok in 2010.

⁸³ Personal interview the HR commissioner of Thailand to AICHR

⁸⁴ Muscat (1994) Ibid p242. Noted that the Order 66/2525 stressed to maintain 'elements of Thainess' being understood that the duty of government is to ensure political, economic and social development, and at the same time, prevent the undesirable effects of those changes which might possibly harm national security and unity as well as public moral.

⁸⁵ Union for Civil Liberty, Understanding Government – NGO relations in Thailand, *ibid*, p.235 – 255. The strict rule of registrar for NGOs under the Civil and Commercial Code 1925 amended in 1992 are used to assure the foundations or associations will not undermine the bureaucratic polity by spreading any political ideology different from the state, as to ensure 'elements of Thainess' including good moral and public order and national security. View of Ms. Noi, chairperson of Cross Culture Foundation, one Local NGO in Thailand.

⁸⁶ Freedom House

Law, practice and justifications of restriction of FOE/I

The 2007 Constitution legitimated FOE/I as liberal rights (Section 28). Right to information is established in Section 56.⁸⁷ Exceptions, especially on grounds of security of state and public order, are stated in section 45

1. A person shall enjoy the liberty to express his or her opinion, make speeches, write, print, publicise, and make expression by other means.
2. The restriction on the liberty under paragraph one shall not be imposed except by virtue of the provisions of the law specifically enacted for the purpose of maintaining the security of the State...
3. The closure of a newspaper or other mass media business in deprivation of the liberty under this section shall not be made....
4. The censorship by a competent official of news or articles before their publication in a newspaper or other mass media shall not be made except during the time when the country is in a state of war;.... except by virtue of the law enacted under paragraph two.

The 2007 Constitution stressed the role of radio and television broadcasting and telecommunications as national resources in the public interest but the liberty of expression is carried with duty. Section 47 of Constitution says that: "In carrying out the act under paragraph two, regard shall be had to optimal benefits of the people at national and local levels in education, culture, state security, other public interests and free and fair competition, provided that public participation in the operation of public mass media shall also be encouraged".

Restrictions on the right to freedom of opinion and expression in Thailand are specifically regulated, mainly through the Emergency Decree, lèse-majesté law (in particular article 112 of the Penal Code), and Computer-related Crimes Act of 2007.

The Emergency Decree on Public Administration in Emergency Situation, BE 2548 (2005), states the need to prohibit assembly and freedom of expression under a "state of emergency", understood as a situation that affects or may affect the public order of

⁸⁷ Section 56 of the Constitution reads: "A person shall have the right to know and have access to public data or information in possession of a Government agency, a State agency, a State enterprise or a local government organisation, unless the disclosure of such data or information shall affect the security of the State, public safety or interests of other persons which shall be protected or purport to be personal data, as provided by law".

the people or endangers the security of the State, or may cause the country or any part of the country to fall into a state of difficulty, or contains an offense relating to terrorism under the Penal Code. Moreover, a war is to be controlled under the power of the Prime Minister to “preserve the democratic regime ... the interests of the nation public order, ... terrorism” and other grounds.⁸⁸

FOE/I is also often viewed as being contrary to the notion of public morals, defined under lèse-majesté law when the government might use this reason to suppress the liberty of individuals to share opinions through different means of communication such as websites. So far, about 10,000 websites have blocked on the grounds of national security and breaches of lèse-majesté law.⁸⁹

The case of the shutdown of online newspaper Prachatai on 8 April 2010, by order of Deputy Prime Minister Suthep Thaugsuban, is a prominent example of how the Thai Government applies such law.⁹⁰ In addition, with the claim of protecting national security, 35 other websites, supportive of the United Front for Democracy Against Dictatorship (**UDD**), were also reportedly shut down.

⁸⁸ Section 4 and Section 9 of the Emergency Decree. On April 12, 2009, Thailand declared a state of emergency was, when the anti-government movement "red-shirts", the supporters of ex-premier Thaksin Shinawatra, led by United Front for Democracy against Dictatorship (UDD), launched the rally on March 26, 2009 held a prolonged rally in Bangkok for more than two weeks. The declaration for emergency restrictions have been in place on Bangkok again since April 7th 2010, following the protracted anti-government protests, ending in violent confrontations after a military led crackdown on the 19th of May 2010. The extension of emergency decree was made in the three southern border provinces of Yala, Pattani and Narathiwat for another three months until 19 Dec 2011. [Source: Thai media. Pattaya Daily News on 28 Jul 2010) According to Bangkok Post visited 13.9.2011]

⁸⁹ in accordance with article 8 of the 2007 Thai Constitution. The lèse-majesté law is part of Thailand's criminal code, which also contains general provisions on defamation and libel of private individuals. It provides a non-violable position of the King. Mr. Suwisha Thakor was arrested on 14 January 2009 for the criminal charges of having disseminated information and pictures allegedly offensive to His Majesty the King via the Internet. On 26 March 2009 the Attorney-General issued an opinion to institute prosecutions against Mr. Takor on two counts: (1) defaming, insulting or threatening the King.

⁹⁰ The Special Rapporteur submitted his Annual Report to the 14th Session of the Human Rights Council (31 May to 18 June) para 2140. According to information received, on 6 March 2009, Ms. Chiranuch Premchaiporn, also known as Jiew, was arrested on the basis of a warrant alleging that she violated articles 14(1), 14(3), 14(5) and 15 of the Computer Crimes Act for having allowed readers to post comments on Prachatai's online discussion forum that allegedly defamed the King of Thailand. On 31 March 2010, she was arrested again for the same alleged offence, but with the additional charge of violating the Lèse majesté provision of the Criminal Code (article 112). The UN Special Rapporteur especially stressed the in compliance with international human rights law, he says, “these have in no way affected the media in their normal dissemination of facts and information”⁹⁰

In sum, Thailand was heading towards a more open, pluralistic polity by rule of law suggesting that the law would not allow people to interpret the laws too liberally and abuse them.⁹¹ The Government confirmed that as a democratic country Thailand values equality and freedom, particularly freedom of expression. However, it is universally recognized that freedom of expression has limits and comes with certain responsibilities, but that such limitations must be put in place by law. As such, freedom of expression does not allow a person to verbally attack, insult or defame anyone, not to mention the Head of State. Lèse-majesté law in Thailand is not aimed at restricting the legitimate right to freedom of expression but for “the will of the majority of Thai people, Thai society, ethics and culture as a whole”.⁹²

Vietnam

Political settings

Vietnam was a long time governed by feudalism and then, for a brief period, was a French colony until the August Revolution in 1945. The first Constitution in 1946 gave birth to a new republic and democratic nation. However, in three decades of war after the new nation was formed, until 1975, Vietnam was led by the Communist Party in light of Marxist-Leninist ideology in all fields of socio-political life, economics and governance system. The 1980 Constitution formally brought Vietnam into being as socialist state. Since then, it has remained an authoritarian state under a one party system with a state-centric and centralised democracy model.

In Vietnam, the understanding of human rights is complex, bound up as it is in culturally contested political positions.⁹³ The concept of human rights has been heavily influenced by the Chinese-political-moral system, under which Confucian values stressed social duties, hierarchies and obligations. French colonial legalism imported

⁹¹ Other political rights such as right to participate in the decision making (section 58); right to present petition or sue the government (section 59,60), form a political party (section 47) are not restricted on ground of national security but with principle ‘provided by law’.

⁹² <http://thaipoliticalprisoners.wordpress.com/2010/06/12/un-thailand-and-lese-majeste/>

⁹³ Gammeltoft T. and Hernø R. (2000). p. 159

Western rights-based law and political morality into Vietnam. Even Ho Chi Minh – the leader of the August Revolution - incorporated human rights into the 1946 Constitution. Later on, Communist party leaders raised to pre-eminence Marxist-Leninist principles of socialist ideals together with Confucian ideals about power and rule. The 1982 Constitution reaffirmed the Marxist Leninist ideology in Article 4: “*the Vietnamese Communist Party, acting upon the Marxist-Leninist doctrine and Ho Chi Minh thought, is the force leading the State and society*”. After *Doi Moi* in 1986, and the collapse of the Soviet Union, the nation shifted radically to an ‘open door’ policy and integration with the wider world and hence the state engaged more in human rights discourses. Vietnam also acceded to UN human rights instruments (ICCPR, IECSCR) in 1982, but overall the western idea of human rights is still controversial in Vietnam. “Doi Moi” and the subsequent evolution of a socialist-oriented, market economy required legal reform to ensure that human rights are not only framed in moral and nationalistic terms, but as part of the rule of law.⁹⁴ However, until the 1993 Bangkok Declaration, Vietnam joined Singapore and others in upholding the principle of ‘non-interference in the internal affairs of states’ and highlighting the ‘significance of national and regional particularities and various historical, cultural and religious background’.

At present, Vietnam is still ranked low with regard to Freedom of Press and Access to information. According to the survey of Global Integrity in 2006,⁹⁵ civil society and media ranked 28 (i.e. very weak) and public access to information received a score of only 5. On the Press Freedom Index, in 2010 Vietnam ranked 165th among 178 countries in survey with a score of 75.5).⁹⁶ According to the International Telecommunication Union (ITU), Vietnam has the world’s fastest rate of internet take-up.⁹⁷ Whilst this is a positive sign with respect to the implementation of FOE/I it is also seen as a potential threat to government.

⁹⁴ Gillespie. p 452-478. Subsequently, the reform has led to amendment of Penal Code 1985 and Criminal Procedure Code 1989. The

⁹⁵ <http://www.globalintegrity.org/reports/2006/VIETNAM/scorecard.cfm> [visited December 2009]

⁹⁶ Reporters Without Borders. Online service <http://en.rsf.org/press-freedom-index-2009,1001.html> and http://en.rsf.org/spip.php?page=classement&id_rubrique=1001

⁹⁷ Vietnam UPR, *ibid*, para 14

Law, practice and justifications for restricting FOE/I

FOE/I are considered constitutional rights but have been given little effect due to the enormous discretionary power of government. The 1992 constitution guarantees freedom of expression. Article 69 states: *“Citizens are entitled to freedom of speech and freedom of press; they have the right to receive information and the right of assembly, association and demonstration in accordance with the law”*. Based on the Constitution, the Party indicated a rule of law reform but this has had little visible effect in defining restrictions on freedom of expression and state practice. Domestic laws, including Press Law, Anti-Corruption Law and Law on Complaint and Denunciation (and the upcoming Law on Information Access) have been established to regulate FOE/I. However, there are other laws, such as the Penal Code, that restricts FOE/I on the ground of national security.⁹⁸

The first prominent case involved two journalists publically expressing opinions and demanding information in a corruption case of *PMU 18* regarding Mr. Bui Tien Dung, the then PMU18-chief of the government-run construction project. During their search for truth, journalist Chien of the Thanh Nien Newspaper and journalist Nguyen Van Hai of *Tuoi Tre* newspaper, were convicted for ‘abuse of power’ under Art. 281 of the Penal Code.⁹⁹ This case obviously shows that public and media were demanding information on public officials’ duties. But instead of being able to access such information, the journalists were restricted in their freedom as members of the press and received criminal convictions.

The second case concerns a Father Ly and a Mr Vi Hoi who were founding members of Bloc 8406, which in April 2006 launched an on-line petition signed by 118 democracy activists calling for peaceful political change and respect for human rights in Vietnam. On March 30th 2007, dissident Catholic Priest Thadeus Nguyen Van Ly was

⁹⁸ The Penal Code amended in 2009 remained some key provisions on article 87 (undermining the unity policy), article 88 (propaganda against the state), article 89 (disrupting security) and article 245 (causing public order). In the 2009 Penal code, increased sentence from ten to twenty years of imprisonment was imposed, compared with from three to twelve years of imprisonment under the 1999 Penal Code.

⁹⁹ Internet sources. [visited 12 Dec 2009] <http://english.vietnamnet.vn/social/2008/05/782837/> [visited 10 May 2010] and others. Noted that the case facts provided are news coverage in Vietnam because in Vietnam case laws concerned are not required to be published.

sentenced to eight years imprisonment and the court found him guilty of "extremely serious violations against national security" and "having distributed materials intended to undermine the government". Mr Vi Duc Hoi ¹⁰⁰ was charged for defaming the 'physical and psychological integrity' of the State under the Penal Code. The Court interpreted peaceful expression of political opinions as likely to precipitate violence and was thus a threat to national security. This understanding was nevertheless the same as the international standards. ¹⁰¹

This case law shows that the scope of criminal offences on the ground of national security is somehow extended solely by government interpretation. The offences of defamation and dissemination of false information against the government, press opinion and demand for information on duties of public officials or political views etc. are criminalized on the ground of harming national security or national interests. ¹⁰²

There are structural challenges for the judiciary in protecting FOE/I in practice. Although since the revised Criminal Code (1985) and Criminal Procedure Code (1989), the state provides guarantees of presumption of innocence, the provisions of the current laws still allow the state to apply double standards compared with what they have acceded to in the ICCPR. ¹⁰³. However, under the guidance of the party using an argument of political morality, the Court has less scope for reading these provisions

¹⁰⁰ Communication was sent to the Human Rights Council on 7 Jan 2011. A/HRC/18/5, 18th Session, distributed 9 September 2011 .

http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A.HRC.18.51_en.pdf

¹⁰¹ A/HRC/14/23. Para 79 (d). Under this meaning, the Special Rapporteur of Freedom of Expression have made it clear that "Governments should also refrain from introducing new norms which will pursue the same goals as defamation laws under a different legal terminology such as disinformation and dissemination of false information. Under no circumstances should criticism of the nation, its symbols, the Government, its members and their action be seen as an offence."

¹⁰² Also reflected in A/HRC/7/14, dated 28 April 2008. Para 79 and Report of Special Rapporteur.

A/HRC/17/27 dated 16 May 2011. Para 36

¹⁰³ For instance, article 88 of the Penal Code, which prohibits "conducting propaganda against the Socialist Republic of Vietnam", does not meet the above-mentioned criterion due to the vagueness of the types of expression or publication which are prohibited. Under article 88 of 2009 Penal Code, more specifically, it is unclear what types of expression or actions would constitute 'propagating against, distorting and/or defaming the people's administration, propagating psychological warfare and spreading fabricated news in order to foment confusion among people', or "making, storing and/or circulating documents and/or cultural products with contents against the Socialist Republic of Vietnam"..

consistently with international human rights treaties.¹⁰⁴ In practice, political trials still happen on the ground of maintaining peaceful order and protecting the rule of socialism.¹⁰⁵ So FOE/I are still restricted on the grounds of national security and political stability with the burden of proof not resting with the burden of proving of the State.¹⁰⁶

In addition to criminalization of offences on the ground of national security, the state has tightened media freedom via censorship and targeting control over journalists. Recently, the press has been even more strictly controlled.¹⁰⁷ 700 news outlets in Vietnam are state-controlled.¹⁰⁸ Banning media, publication or use of the internet for communication in the name of state security and social order has been increasing and includes limiting access to social media sites like Facebook. Newspapers can receive administrative fines in cases where they have provided information contrary to the control of the State.¹⁰⁹ Government bans the use of the internet for sharing information related to state secrecy, military secrecy or defamation and hacking.¹¹⁰ With the growth of the internet and bloggers, the State has also put in place stricter regulations.¹¹¹ The control of information and limits on the participation of citizens in decision-making have

¹⁰⁴ Report of the Working Group on UPR of Vietnam A/HRC/12/11)
<http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm>

¹⁰⁵ Human Right Watch, cited of undisclosed documents of the Politburo of Meeting of August 6, 2007. undisclosed. <http://www.hrw.org/en/news/2008/03/11/united-states-and-vietnam-examining-bilateral-relationship> [visited 10 May 2010].

¹⁰⁶ A/HRC/14/23. Para 79 (d). The UN Special Rapporteur states "Laws imposing restrictions or limitations must be accessible, concrete, clear and unambiguous, such that they can be understood by everyone and applied to everyone. They must also be compatible with international human rights law, with the burden of proving this congruence lying with the State".

¹⁰⁷ Instruction No. 37 (ref. 37/2006/CT-TTg dated 29 Nov. 2006) of the Prime Minister states: "Strictly prohibit the privatization of press in all forms any individual or organization can make use or control media for their own sake to harm the national interests" (in Vietnamese "Kiên quyết không để tư nhân hóa báo chí dưới mọi hình thức và không để bất cứ tổ chức hoặc cá nhân nào lợi dụng, chi phối báo chí để phục vụ lợi ích riêng, gây tổn hại lợi ích đất nước.")

¹⁰⁸ Human Rights Council (2009) A/HRC/WG.6/5/VNM/2. Vietnam UPR. Para 40

¹⁰⁹ Regarding the case regarding the Polymer money note during 2006 – a government public project containing a rumor on business involvement of family member of the Prime Minister, 8 big newspapers received administrative fines by Ministry of Culture and Information (including Thanh niên, Tuổi trẻ, Người lao động, Nhà báo và Công luận, Thời báo Kinh tế Việt Nam, Sài Gòn tiếp thị, An ninh Thủ đô, Thể thao và Văn hóa)

¹¹⁰ The new Circular of 07/2008/TT-BTTTT regulates internet management

¹¹¹ Reference is made to Circular No. 07 of the Ministry of Information and Communication of 18 December 2008 guiding the implementation of Decree No. 97

become more common.¹¹² Recently, over 30 individuals reportedly remain imprisoned, including members of banned political groups, independent trade unionists, bloggers, journalists and writers. By August 2011, a blogger and a poet were freed under amnesty, but 17 bloggers and three journalists were still held.¹¹³ Regarding limitations on media and other forms of expression, the HR Committee was concerned at reports of extensive limitations on the right to freedom of expression in the media and the fact that the Press Law does not allow the existence of privately owned media. It recommended Viet Nam put an end to restrictions on freedom of expression and that press law should be re-formulated in compliance with article 19 of the ICCPR.¹¹⁴

The state justifies these various restrictions on grounds of protecting national security, ethical values, national traditions and customs. Vietnam has stepped up in implementing the rule of law, but the justifications for such restrictions are mainly from political ideology and political decision making¹¹⁵. Dissidents expressing opposing political opinions are regarded as being harmful to the rights of other people and to peace and security and the general development of society.¹¹⁶

In sum, even though Vietnam committed, in ratifying ICCPR, to follow international human rights standards, restrictions on FOE/I in Vietnam are often based on defamation or dissemination of wrongful information against government policies or government officials, expression political opinions. The means of restrictions can be criminalisation of offences or prior censorship of media and press. The practice of restriction remains in the interpretation of law by the state's judicial system. The challenge for FOE/I is placed on political idea on the concept of FOE/I in relation to the

¹¹² Prof. Carl Thayer (2009). Also noted that a server by FPT has a notice to all bloggers registered into this webserver that it is "not a forum for discussions of politics. Source and BBCVietnamese http://www.bbc.co.uk/vietnamese/vietnam/2009/10/091005_viet_congress.shtml [visited 17 July 2009] and [12/12/2009]

¹¹³ According to Reporters Without Borders. <http://www.rsf.org>

¹¹⁴ Human Rights Council (2009) A/HRC/WG.6/5/VNM/2.Vietnam UPR.

¹¹⁵ Gillespie. *ibid* p.454.. Also: The Six Party Congress in 1986 says: 'management of the country should be performed through laws rather than moral concepts'. The recent legal reform is progressing to ensure that human rights are not only framed in moral and nationalistic terms, but towards a rule of law state.

¹¹⁶ In a letter dated 14 April 2011, the Government responded to the communication sent on 7 February 2011 to the Special Rapporteur of Freedom of Expression in the case of Mr. Vi Duc Hoi: "*causing harm to national security and public order must be punished in order to ensure the respect of law and to guarantee the rights of other people and the peace, security and development which are common interests of the society*"

meaning of democratic society as well as the withdrawing away from the double standards system in law.

Chapter Conclusion

FOE/I are universal human rights. Although many ASEAN states have ratified the ICCPR and have thus committed to protecting these rights, implementation at the state level is varied and uncertain due to the omnipresence of the political sphere. In all four country case studies, their Constitutions provide the legal basis for FOE/I. The states often, however, establish other laws and regulations to restrict those rights. The rule of law is challenged under the guise of political morality and is thus little in the hands of the judiciary. With their common history of post-colonialization and authoritarian governance, ASEAN states still uphold the Asian way or ASEAN values. Bystressing the risk of political instability discourages leaders from being more open to FOE/I when the exercise of these rights arguably results in defamation, and religious or political opposition contrary to the matter of national security. Given the widespread tightening of freedoms in many ASEAN states, The special Rapporteur on Freedom of Expression stresses: *“The right to freedom of opinion is absolute and may not be limited in any way, whereas the right to freedom is not absolute and may thus be subject to exceptional restrictions and limitations as defined in article 19, paragraph 3, and article 20 of the International Covenant on Civil and Political Rights. Such restrictions and limitations must be interpreted in accordance with international human rights law and the principles deriving there from”.*¹¹⁷

¹¹⁷ A/HRC/14/23. http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A.HRC.18.51_en.pdf

CHAPTER 4

ASEAN: CHALLENGES FOR FREEDOM OF EXPRESSION AND INFORMATION

This chapter identifies challenges and factors that may drive the evolving acceptance of human rights in ASEAN, specifically FOE/I, at both regional and state levels. As ASEAN is moving more rapidly to establish regionalism, a key consideration will be building a higher level of consensus on strengthening of a sub-regional human rights mechanism. Experiences of European regionalism and the evolution of a European system of human rights as discussed in this chapter may be useful to provide bench marking for ASEAN in the future.

a) Asian values and other moral ideologies

Asian values and other moral ideologies remain arguments against the practice of human rights. “Asian values”, in particular, is still a strong argument for Asian exceptionalism against universalism featured prominently in the 1993 UN Vienna Declaration process. Developing states of ASEAN often appraise national interest or claim that there are regional particularities with different historical, cultural and religious backgrounds other than the Western values on universality of human rights and fundamental freedoms.¹¹⁸ Despite the ongoing discourse internationally and even amongst ASEAN countries there is no clear definition of Asian values.¹¹⁹ Generally, Asian values are defined as including harmony, consensus and collectivity. Asian values represent an absence of individualism and a social contract that underpins a

¹¹⁸ Referring the Vienna and Bangkok Declaration by Asian Governments 1993

¹¹⁹ There are a number of Asian scholars who in their comparative studies seek interpretation of Asian values with regard to human rights for ASEAN. For instance, Randall Peerenboom, Carole J. Petersen and Albert H.Y Chen in Human Rights in Asia – A comparative legal study of twelve Asian Jurisdictions, France and USA; also Human Rights and Asian Values, Contesting National Identities and Cultural Representations in Asia edited by Michael Jacobsen and Ole Bruun

communitarian concept of societies (Koh, 1993). Key features of Asian values thus include the primacy of community over individual rights, authority, social harmony and stability.

Other distinctive features of Asian cultures that are pitted against ideas of human rights and democracy are notably Confucian-style values which include respect for personalized authority, a dominant political party and a strong state (Neher and Marlay, 1995). But many scholars reject these ideas.¹²⁰

Asian values and moralities are still often used as objections to international human rights standards. The rise of the Asian values debate in human rights discourse was the consequence of a misunderstanding of the so-called western formulation of human rights. It was, in contrast, proposed by some ASEAN governments as a means of shirking their duty and respect for human rights. By Asian values, ASEAN state leaders often put collective interests over individual rights, giving priority to economic development and political stability over the political rights.¹²¹

The claim of Asian values is argued by some to override the 'rule of law' for permissible restriction on human rights in context (Kingsburry, 2008).¹²² Although Asian values can be recognized, they are not necessarily sufficient to justify claims for absolute restrictions on human rights. The need for a common norm over the debate on the Asian values is expressed in the Bangkok Declaration which notes that: "*while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds*".

b) Cultural relativism and Asian exceptionalism

¹²⁰ Weming argued that Confucius nowhere advocates individual subordination to state or community (Tu Weming 1989). Refer to proceedings of 1995 Conference on Confucianism and Human Rights. Also see note of Sunner B. Twiss in Confucianism and Human Rights, Columbia University Press. 1998

¹²¹ Y. Ghai (2008)

¹²² Damien Kingsburry (2008)

ASEAN includes a diversity in cultural and socio-political systems amongst member states. ASEAN states display varying levels of economic development, cultural diversity, political and democratic settings. These differences underpindifferences in interpretations and practices of human rights compared to international human rights norms. It is also a common view that a regional human rights mechanism cannot easily encompass the entire range of diversity among states within the region in terms of historical background, cultures and traditions, religions and levels of economic and political development.¹²³ Claims to relativism of rights continue in the ASEAN States while cultural relativism opens a door for not just differences but also for persecution rationalised – to explain the special circumstances of particular cases.

In South East Asia, there is tension between rights and legitimacy and between rights and public goods. Legitimacy of rights and laws remains as political unity, the power held by authorities on one hand, as the reason upon which the nation intends to secure and preserve its national interest on the other hand. Following Weber's theory of legitimacy of rule, the test of rational belief needs to be applied to moral values and the extent to which their legality is accepted by society. This is so called Asian Exceptionalism or the Asian way on which leaders of ASEAN states argue to protect their nations. Here again, the often seen claims of Asian Values on which many ASEAN leaders, including Singapore's Lee Kuan Yew, Malaysia's Mahathir Mohamad, Indonesia's Soeharto and other like authoritarian leaders, relates to the sense of community and collectivity over individual civil and political rights, and thus rejects the universality of rights.

c) Notion of sovereignty

The notion of sovereignty was enshrined in ASEAN to define human rights as the subject of state internal affairs. In political and international relations, the notion of state sovereignty is underlined in the aim and purpose of ASEAN in its Charter. Member

¹²³ An-Na'im (eds) (1995) p. 9-10

states are deemed to give priority to prosperity, peace and security. Human rights, democracy and rule of law come after in priority. And since the principle of non-intervention in internal affairs is upheld, human rights still remain as state matters.

d) Institutional challenges

The lack of an effective regional human rights mechanism in ASEAN must be highlighted. Efforts to strengthen an ASEAN human rights mechanism have met moral obstacles from debates on universalism versus relativism of human rights and the question of what human rights norms non-western states should adopt. The ASEAN human rights roadmap, ASEAN inter-governmental human rights commission (AICHR), was established in 2009 to promote and protect human rights in light of international human rights instrument.¹²⁴ However, this commission is very new and there is yet no jurisdiction to handle human rights violations of member states. So the protection of rights will first depend on national legislation and domestic jurisdictions. Although ASEAN has set a goal of "an identity" (Article 35 of the Charter), the dialogue between states on common interests and a minimum standard for any human rights mechanism for the region is ongoing.

The continuing and increasing trend to restrict human rights in ASEAN place challenges before the ASEAN Human Rights mechanism and raises a need for the nations to reconcile differences in legal and judicial systems and norms with the international human rights standards.

e) Structural challenges

Even though consensus building is a principle for ASEAN, it is not yet clear how consensus mechanisms work within traditional political cultures and institutions of ASEAN member states (Medina , 1999).¹²⁵ Moreover, the range of issues on which consensus might be sought is wide. The universal human rights, as Donnelly argued,

¹²⁴ Session 4, Terms of Reference of ASEAN Intergovernmental Commission on Human Rights

¹²⁵ Medina, Carlos. 1999. 'Background of the Working Group for an ASEAN Human Rights Mechanism' Human Rights Now, <http://codewan.com.ph/>

should be properly understood and norm-setting must account for national interests, national security and cultural particularity and should be built on a common dialogue (Donnelly 2003, Chan, 1999).¹²⁶ There is also room for states which have a 'thin' democracy to learn from others of 'thick' democracy culture under the implications of rapid development of globalization, interconnected communication of media and growth of dissenting non-state voices and civil society in the region.

Ahead, there are challenges for governments to be able to achieve consensus on common norms within different political ideologies and standards to adjust their rules of law to protect FOE/I in ASEAN at the regional level as analyzed below.

4.1 Challenges for FOE/I at regional level

a) Absence of norms and standards for FOE/I

With the idea of upraising collective and community interests, the exercise of fundamental human rights such as FOE/I becomes uncertain in ASEAN states because of the absence of norms and standards in implementing rights. The political culture of many member states still supports suppressing freedom of expression, not disclosing information and heavy press censorship for the sake of community morality and national security. There is, of course, the paradox of the conceptions of freedom and law where law can pose some limitations on freedom but normatively only when such freedom restricts freedom of others.

The norm setting process, as stressed in the ASEAN roadmap for a Human Rights Mechanism for "crafting of the norms/standards behind the establishment of an ASEAN Human Rights Mechanism"¹²⁷ needs to include the right 'to' freedom of speech and expression etc. as stated in Article 19 of ICCPR read together with restriction provisions in paragraph 3 of the same Article. As such, a common understanding and accepted

¹²⁶ Jack Donnelly (2003) and Chan, J. (1999).

¹²⁷ Vitit Muntarbhorn (2003)

norms and mechanisms to protect and safeguard FOE/I are yet to be endorsed at regional level.

b) Weakness in governance and mandate of regional human rights mechanism

Notions of sovereignty and non-interference remain obstacles for implementation of human rights under international law because these denote the right of a nation state to enforce its own version of human rights (Moore and Pubantz, 2002, p45-46).¹²⁸ So in the case where there is an absence of a supranational enforcement agency in international or regional human rights regimes, challenges can be coupled with the resistance of states for reasons of sovereignty which pose challenge for international law.

With institutional constraints in the rule of law at the state level for protection of FOE/I, where domestic laws can impose limitations to freedom, and the rule of law itself normatively cannot guarantee freedom from arbitrary restrictions, it is challenging to have a powerful regional human rights mechanism that embodies “respect for the principle of exhaustion of local remedies prior to access to the regional Commission in the framework of international law” with “power to monitor and investigate allegations”.¹²⁹

4.2 Challenges for FOE/I at the state level

As a consequence of examining the situation and practice of FOE/I in several countries in Chapter 3, it is obvious that ASEAN is facing some critical challenges the practice of FOE/I.

The first challenge lies in systems of political ideology and internal politics and models of democracy in relation to political stability within each state. The end of the Cold War and fall of the Berlin Wall and Leninism were the catalysts for transforming

¹²⁸ Moore, Micheal and Pubantz, Jerry (2002), Encyclopedia of the United Nations, Facts on File Inc, New York

¹²⁹ Muntarbhorn (2003)

world politics and also impacted in ASEAN. However, many states in the region still hold strongly to nationalism from decolonization by stressing centralization enforced by political and military dictatorship as in the Philippines during 1970s, Indonesia during the 1960s, Myanmar (to the present). Another form of political system is 'technocratic authoritarianism' as in Singapore, Malaysia and Indonesia after Suharto. In other ASEAN states, the fall of Leninism is still transformed into communism with some respect for the rule of law, as in Vietnam and Laos. Perhaps, while ASEAN will continue with significant political variations rather than a uniform political order, FOE/I will remain under the hand of state leaderships and prey to internal politics. Over the past 30 years, the 'Asian values' discourse has continued in Singapore, Malaysia and Vietnam whose state leaders are most vocal in resisting individual human rights. 'Asian values' thus directly influence the notion of FOE/I because governments fear that such freedoms may bring threats to the national security and political stability. In practice, Singapore and Malaysia, under this claim, have put up Internal Security Acts that challenge individual liberty and the sense of law in applying effective judicial systems. States like Vietnam and Myanmar uphold strongly national security and political stability over freedom with zero tolerance manner, while states like Singapore and Malaysia set very restrictive laws on media and state security while contesting the concept of outlaw states.¹³⁰

The ASEAN states uphold their authoritarian governance so that individual rights to FOE/I are often overridden in the community's name. In other words, states can impose restrictions the FOE/I based on their political moralities and ideologies.¹³¹ This 'Asian Values' discourse continues contrary to notions of FOE/I as liberal human rights codified in ICCPR where states have no obligation to interfere. Those states thus do not recognize rights of individuals on FOE/I, including the right to pursue communication with the human rights body.¹³²

¹³⁰ The concept of outlaw state is contested by Rawls (Rawls, 1992)

¹³¹ Yash Ghai, (1997) Ghai recognized the importance of political moralities which decide how political regime recognizes FOE/I as human rights.

¹³² Those states do not ratify the Optional Protocol of ICCPR to allow individual case being heard and protected by the Human Rights Council.

The second challenge is the absence of legal positivism and rule of law. The case is that legal interpretation may depend on moral reasoning and purpose of law (Dworkin, 2002).¹³³ In the ASEAN states, it is often seen that law and morality are not separated within the argument that a positive legal system which meets the values system can function with effect. Unlike Western politics, which is based on legalism, Asian politics is often based on reciprocity. But in terms of human rights, legalism may not yet function to protect human rights because it lacks internal morality. Thus the struggle to accept legalism for human rights in its fullest dimensions continues.¹³⁴ Based the practices identified in Chapter 3, the critical observation is that ASEAN States have not fully established effective legal and judicial systems to meet the three main tests of freedom of expression, namely: (i) provided by law; (ii) legitimate aim; and (iii) necessity/proportionality. Thus, justice, or a just society where liberties and rights are equal and secured, as contested by John Rawls, is still subject to political bargaining.¹³⁵ The challenge for application of restrictions on FOE/I relates to how states see its legitimacy.¹³⁶

The third challenge is the lack of participative democracy by which liberty on FOE/I should be protected with equal concern and respect by the states.¹³⁷ In ASEAN, over the past three decades, there has been an advance in democracy, but democracy remains fragile in different forms, such as ‘monarchical people democracy’ of Thailand, ‘guided and pragmatic democracy’ of Singapore, ‘central democracy’ or semi-authoritarian of Vietnam etc. States such as Thailand and Indonesia, with transformed but fragile democracies, gradually allow the growth of FOE/I but may still use other grounds for suppression such as religious harmony and lese majeste. In reality the participation of civil society and media in the public sphere is limited by legal and judicial constraints.

¹³³ Ronald Dworkin. 2002. Pp. 3-15

¹³⁴ Robert A. Scalapino (1997)

¹³⁵ ICCPR Art. 19. This view is also understood that FoI is a liberal right that State has no obligation to ensure the right with positive measures. See also Manfred Novak.(2005) p. 439

¹³⁶ The concern raised during the 1995 Conference on Confucianism and Human Rights

¹³⁷ R. Dworkin. Law’s Empire (1986). With this regard, Dworkin (1978) offers a reconciling of liberty and equality which should work within the institutions of participatory democracy. He argued that some freedom such as freedom of speech do require special protection against government interference.

The fourth challenge remains participation of ASEAN states in international human rights instruments.¹³⁸ Not all ASEAN member states ratified the ICCPR, so that FOE/I is not fully recognized and protected by all ASEAN states. Although the ASEAN Charter promotes principles of human rights and justice, the Charter does not provide any specific provision for FOE/I or on what conditions such freedoms can be restricted. The Charter does not recognize any regional human rights convention as it is yet in place. This gives wide room for states to impose control and restrictions on FOE/I which range from preventing public from policy debates to strict censorship on media from many forms of social communication, criminalized sanctions of perpetrators for expressing different political opinions or government defamation and religious blasphemy.

4.3 Driving factors for FOE/I in ASEAN

Despite challenges, human rights and FOE/I in ASEAN and its member states seem to have room to grow. There are factors that push the recognition and enforcement of FOE/I at both regional and state level.

a) Effect of international law and international human rights regime push for the legalisation of FOE/I

International law is premised on a system of sovereign states and characterized by the absence of legislature, judiciary and executives (Evan, 1998: 262). Sovereignty remains a fundamental principle of international legitimacy. This view is supported by Hart (1994) whose is that view that international law is 'law' but not a 'legal system' and thus resembles municipal law in form.¹³⁹ But international law refers to a system of rules that are binding on states (Evan, 1998: 261).¹⁴⁰ So the question is whether international law can encompass legislative, executive, and judicative structures which

¹³⁸ In addition to article 19 of ICCPR, FOE/I is articulated in Article 10 of Convention on Elimination of Discrimination and Advancement of Women, Article 9 (1,4) and article 13, 17 of Convention on Rights of the Child article 13 (2) and 13 (3) of Convention on Migrant workers

¹³⁹ H.L.A. Hart (1994) Chapter X. pp213-232

¹⁴⁰ Evan, Graham (1998).

are able to perform the same functions as the legal order of a nation state, and which thereby overcome the defects of a primitive social order. Donnelly believes that there is '*evidence of changing international understanding of sovereignty*' (Donnelly, 2003: 250). The process of international relations alongside state sovereignty and international human rights regimes calls for enforcing human rights instruments at state level, thus states are faced with the demand to respond to human rights. Donnelly also pointed out that the 'voluntary acceptance of the regime by participating states itself creates 'voluntary compliance' which is the heart of the regime's strength. (Donnelly, 2003: 138)

The Charter of the United Nations denotes the rights of nation-states as "independence and sovereignty of equal member states and principle of non-interference in the domestic or internal affairs of states' (article 2). Thus, by the Charter, resolutions of the General Assembly of the United Nations are not legally binding on states. Institutions such as ICJ and ICC are institutions with international jurisdiction to compliment national legal systems. The International Court of Justice, with the status recognized in the Charter, can only decide on cases where both sides agree without enforcement power. The UDHR, and then 1966 two Covenants of human rights, required states to recognize human rights in their legal systems and states of practice.

Success cases mainstreaming international human rights regime at the regional level are both the Council of Europe with the ECtHR and the European Union (EU) with the ECJ.¹⁴¹ The experience of first the COE and then the EU showed that it first established constitutional ground with state's representation and deliberation and market place for all members, and with legislation with direct effect for the citizens. The EU was first established as the European Community and has later been changed by

¹⁴¹ There are two separate treaties and organizations: COE was founded on 5 May 1949 by 10 countries with the aim to develop throughout Europe common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals. See more on <http://www.coe.int>. EU which now have 27 members and Council of Europe which now have 47 member states. COE was founded on 5 May 1949 by 10 countries with the aim to develop throughout Europe common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals. See more on <http://www.coe.int>.

several treaties,¹⁴² The law of the European Community was seen also as having constitutional qualities, the international law was attached with values and the power and sanctions to implement them. Although EU law takes precedence over conflicting national laws, in certain cases, the international human rights law, understood the European Convention of Human Rights, is not above the domestic law. The EU had a Human Rights Charter since 2001, but not as part of the treaties. From the Lisbon treaty of 2009 the human rights chapters were included in the treaty.¹⁴³

b) Norm setting and legal interpretation for human rights is enhanced by the effect of international law.

International human rights instruments are moving towards a common law for a world of community where states are acquiring the role to implement universal human rights instruments by accepted standards. The acceptance by states of universal human rights norm is crucial. Donnelly argues that human rights are universal as it is also in the sense of “being most universally accepted, at least in work, or as ideal standards’ by states”. Donnelly mentioned: ...[I]nternationally recognized rights imposed obligations on and are exercised against sovereign territorial states. ... Human rights norms have been largely internationalized. Their implementation, however, remains almost exclusively national. [In effect], contemporary international and regional human rights regimes are supervisory mechanisms that monitor relations between states and citizens.¹⁴⁴

¹⁴² The treaty was signed on 7 February 1992 led to the creation of the euro, and created what was commonly referred to as the pillar structure of the European Union. This conception of the Union divided it into the European Community (EC) pillar, the Common Foreign and Security Policy (CFSP) pillar, and the Justice and Home Affairs (JHA) pillar. The first pillar was where the EU's supra-national institutions — the Commission, the European Parliament and the European Court of Justice — had the most power and influence. The other two pillars were essentially more intergovernmental in nature with decisions being made by committees composed of national politicians and officials

¹⁴³ The EU is now regulated by the Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU), both parts of the Lisbon treaty.

¹⁴⁴ Donnelly, Jack (2003). pp 33-34

Since 1948, European states have attempted to institutionalise democratic and human rights values. Even EU member though states retain big differences, they could decide on a common norm and mechanism for the European region. The challenge for the Council of Europe, when it extended membership to Eastern and Central Europe whose traditions of reconciling freedom of expression and security were significantly different from the Western European democracies, show that regional norms on certain rights and freedoms can be expanded to adopt diversity but still converge on EU standards. The requirement to adopt EU Law and its rules into membership applications has seen pressure on potential new members to achieve common standards and unity in application of EU law. The influential jurisprudence of the European Court of Human Rights and European Commission of Human Rights have significantly been constructive to the norms and standard setting with philosophical guiding and justification of FOE/I to the member states.¹⁴⁵ In this regard, ASEAN has also seen increasing pressure on members to align with regional interests even when it is difficult to get consensus on the issues. For instance, when ASEAN's civil society proposed suspension of Myanmar from the association unless it released opposition leader Aung San Suu Kyi from imprisonment during SAFFRON Revolution in 2007, many ASEAN states shared the view that detaining Aung San Suu Kyi is not acceptable.

It is acknowledged that the achievement of human rights in Europe was not just one moment. Stronger regional legitimacy of human rights in Europe as an effect of Community Law and case law, has evolved through changes in law and practice of the member states. In the case of Europe, case law from the Commission and the Court help to facilitate a clear interpretation of community law and thus contribute to the process of norm setting in the region. The practice of freedom of expression by states with regard to protection and restriction of the right has varied based on different concepts, and clearer interpretation of law has developed from case law of the Commission and

¹⁴⁵ The EU is the comprehensive structure with market integration and with supranationality and with the European Court of Justice. The ECJ did however early start an argumentation concerning human rights where it referred to the member states and their human rights commitments as the part of the EU even before the EU had formally committed to the ECHR. Human rights obligations became a part of the argumentation of the court - without formal obligations.

the Court.¹⁴⁶ ECHR case law could push for a strong need to reconcile the exercise of this freedom with the protection of other lawful rights and legitimate interests, including national security.¹⁴⁷

c) Evolving regionalization of human rights mechanism

The emergence of a new global human rights regime after the collapse of the Westphalia [?] grows with hope but it is not guaranteed. An international human rights regime is a supervisory mechanism consequence on implementation of universally accepted norms and standards on human rights, not as an international order at the state level.

Regionalism of human rights becomes an increasingly accepted alternative to making human rights regimes work more effectively and more constructively. The notion of regionalism refers to the process of regionalisation towards regional social formations, organisations and institution (Close and Askew, 2004).¹⁴⁸ In such processes, sovereign nation-states will increasingly come under pressure and in some case lose their authority and power to the international community, or to extra-, inter- and supra-nation state forums.

The notion of the nation-state is a political ideal to evolve to a bonded political community – ASEAN – whereas nation-state being less represented by factors that go across states such as labor, trade, human rights and terror. Alternatively, assuming that all interests – for examples of economic, capital, technology, labor and security focus, are crossing over states, there is a greater common ground to form a single community. To a certain extent, the lost of national sovereignty is also weakening of democracy – or like in the case of EU, result ‘democracy deficit’.

The Constitution of European Union though does not include a statement of individual rights, as found in most national constitutions. But the Lisbon Treaty have

¹⁴⁶ J.A Andrews (1994). He commented that European Court of Human Rights found it impossible to have a uniform European conception of morals to guide on interpretation of rights

¹⁴⁷ Mahoney & Early, *ibid*.

¹⁴⁸ Paul Close and David Askew, 2004. P.109

adopted Human Rights chapter and EU have adopted its Human Rights Charter in 2001. The Treaty recognises ECHR as guiding principles for human rights.¹⁴⁹ European Court of Justice (ECJ) declares that it would recognise and be guided by the constitutional principles common to Member States.¹⁵⁰ The ECJ approach is very important for the member states of EU but have not yet incorporate the ECHR into domestic law to have the Convention rendered directly enforceable for the community rights. Nevertheless there is limitations to the human rights because the ECJ is not a surrogate for the European Court of Human Rights which has no mandate to review the policies or actions of Member States on the ground of infringe the ECHR nor give interpretative guidance for a national court whether their national legislation was in conformity with ECHR in the situation which did not fall within the field of Community Law.¹⁵¹

Even though we know that the Western values for democracy and human rights in the human rights history dominated the global discourse, we have to acknowledge that the members of Council of Europe were all trying together to institutionalise human rights to establish a regional feasible human rights mechanism and bring the international human rights standards home. Knowing the experiences that global human rights institutions largely lack of coercive power, Council of Europe adopted cosmopolitan system as means to legitimately and politically enforcement of internal human rights commitment of nation-states. The legitimacy of the constitution bring effects to the regional human rights mechanism with judicial power and institution. EU also establishes supranational internal policy making process with both majority voting and national veto based on the principle of consensus and deliberate democracy. Directives require the member states to bring their domestic laws into conformity of the EU law with direct effect. With regard to FOE/I for instance, insitutional changes to protect better FOE/I was also made based on the case law. For example, in the case of

¹⁴⁹ Treaty of European Union, Article F (2) states: “.. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms... and as they result from the traditions common to the Member States, as general principles of Community Law”. Also the article 6 of the Council Directive 76/207/EEC reflects the principles of law which underlies the constitutional traditions common to the Member States, as well as in Article 6 and article 13 of ECHR.

¹⁵⁰ Refer to case 11/70. 1970 ECR 1125.

¹⁵¹ Andrew Nicol, (1999) Pp129-143

Lingen v. Austria, the role of press in democracy by imparting information and ideas on political issues as on others of public interest and public watchdog was remarkably recognized.¹⁵²

European Union (EU) represents sophisticated approach of supranational institutions. The Council of Ministers and the Commission have been given powers to make subsidiary legislation in the form of regulations and directives- the Community Law, which serve as common framework for the Member States to take measures of their own sovereignty. There has been cases that the measures differs, the case law of European Court of Justice (ECJ) revealed to uphold the principle of binding nature and uniform application of Community Law. The case of *Johnston*, ECJ rejected argument by the United Kingdom that the Treaty is inherent to allow the Member States to take all measures for reasons of public security.¹⁵³ EU law takes precedence over conflicting national laws and directive has direct effect that the Member States are required to bring their domestic laws into conformity with the directives. With regards to human rights, the Treaty, agreed in Maastricht recognised the rights in ECHR. This process of recognition has gone through time and proved by case law. Even in the process of considering mechanisms to protect human rights under the European human rights treaties, the United Kingdom also has objection to the protection of individual rights and judicial institutions as the European Court of Human Rights. But the member states and people of Europe could move ahead gradually from the dialogue-based consensus to resolve the differences and diversity in the region.

The jurisprudence of European Commission of Human Rights (ECHR) and European Court of Human Rights (ECtHR) shows that this is strongest machinery in international regime in checking backsliding, applying pressure on human rights progress and interpreting controversial cases of states.¹⁵⁴ ECtHR uses doctrine of

¹⁵² Judgment of July 8, 1986 Series A Vol 103: The case concerned prosecution of Journalist writing critical article on the political stance of the Austrian Chancellor. The Court found violation of ECHR art 10 because they found no defense of fair comment in Austrian libel law.

¹⁵³ This statement was shown in the case of *Johnston v. Chief Constable of Royal Ulster Constabulary* (Case 222/84) [1986] ECR 1651 para.27, 60.

¹⁵⁴ Saladin. *ibid*

‘margin of appreciation’. Sometimes, often in the case of public order, morals and national security, the ECHR left the case to the domestic courts to decide the matter.

d) Pressure from globalisation and transnational actors

Globalisation process is pushing for regionalism of human rights. The growth of transnational regimes becomes more proactive in favours of democracy, human rights and market. Transnational institutions as WTO, IMF demand nation-states to change their domestic policies to meet the standards of the organisation in financial and trade markets is a clear cut example of interference in domestic politics that the denial of state on the ground of absolute sovereignty would be rejected as illegitimate. Globalisation itself creates increasing convergences of political ideals, ideologies and systems as well as broadens the global acceptance of universal values and mechanism such as human rights, democracy and free market globally and regionally.

Media becomes transnational actor that enables wider exercise of freedom of expression and access to information across borders. With the emergence of global media, internet or regional television and radio, the ability of state to decide what information they give or their citizens can access is obviously curtailed. States nowadays cannot easily ignore criticisms by overseas media which once was the case for the reason of inappropriate attempt to interfere into the internal politics. The demand by the international community is that democracy and free press would be permitted aspiration.

CHAPTER 5

THE WAY FORWARD: WHAT NEEDS TO BE DONE FOR FREEDOM OF EXPRESSION AND INFORMATION IN ASEAN?

The preceding chapters lay out the law and context for freedom of expression and information. It has been ascertained that FOE/I is a fundamental human right encoded in international human rights instruments. In political history and international relations, there were debates on this freedom during the process of development of the UDHR in 1948 and ICCPR in 1966 because of different political ideals on liberal rights as between the West and non-Western states. The dilemma of liberal rights and individual duties and the authority of the state to intervene in individual liberty is the core controversial issue in international forums. The end of the Cold War and fall of the Berlin Wall opened up a new phase for reconciling different political ideas in international relations where more dialogues for norm setting and building international law order and standards have been had. However, even as recently as the 1993 Vienna Conference, many ASEAN states, representing the East, still upheld their Asian Values or Asian ways in their understanding and undertaking of human rights.

International human rights regimes have also been established and flourished over the same period. Thus, human rights are widely accepted as not solely internal matters of the state, but subject to global monitoring and enforcement, to the extent that states join international agreements. The experiences of Europe in developing human rights mechanisms, especially with regard to FOE/I experienced a similar dilemma. It took Europe a long time to establish Community Law and an effective regional human rights regime that now protects fundamental human rights to which

states no longer have sole sovereignty to intervene. FOE/I have been always restricted on the ground of national interest.

FOE/I are now more recognized under international human rights law, but not all ASEAN states have ratified ICCPR. However, even in the case of ratification, the practice of FOE/I differs from what would be interpreted by ICCPR and international human rights standards. The question that follows is, if states do not participate in international human rights commitments, can FOE/I be protected without illegitimate restrictions under domestic laws?

The legal review of four out of 10 ASEAN member states shows that all states give legality to FOE/I under their constitutions – FOE/I is a constitutional right. However, other laws and regulations are made that restrict this freedom. Laws and regulations, such as Penal Code, Media and Press Law, Internal Security Act or Computer Act, are placed to restrict FOE/I in legitimate ways. Looking at the state of practice, however, FOE/I are commonly violated as per international standards. Restrictions mostly concern expression of opposing political opinions, defamation and access to information from governments and public offices, practice of freedom of religion or expressing religious opinions. Press, religious groups, and other political dissidents are often restricted and, in some cases, trials have been conducted out of the judge's hand. Why are states doing so, and why cannot FOE/I be further protected in ASEAN?

The answer to this question is that the political ideologies and regimes of most ASEAN countries have been crafted on a history of de-colonization under long term dictatorships or other forms of authoritarian leaderships. This explains why ASEAN leaders viewed FOE/I as a threat to political stability, which is the *sin qua non* in ensuring a nation's prosperity, growth and stability. Asian values and, in some cases, Confucian ways of governance, also weigh significantly in political decisions in restricting FOE/I. Therefore, with such political morality, restrictions on FOE/I are often made without the power of the rule of law at the state level. The rapid expansion of global

communications and telecommunication networks facilitates a vastly freer flow of communications and, paralleling this, has been growth in demand for information by individuals. In the meantime, terrorism, transnational crimes and other morally concerning trends are supported by communications increases and have heightened state concerns over security and moral issues. So the threat from FOE/I will continue. But governments will eventually lack ultimate power to restrict rights in illegitimate ways.

The second question posed above is also addressed by identifying challenges for FOE/I within ASEAN states. Whilst FOE/I is a constitutional right at state level, it should also be constitutionalised at a regional level. This includes institutional and structural constraints. Until now, ASEAN states have not been able to agree on a common norm and standard for FOE/I. And yet, there is an effective regional human rights mechanism beside the recently established ASEAN Intergovernmental Commission on Human Rights (AICHR). This questions the need for legalizing an ASEAN Human Rights Treaty, mandate and power of AICHR and possibility of the human rights court. This institutional arrangement showed successes from the experience of the Council of Europe, so why cannot ASEAN, with its 10 member states, do the same? As ASEAN states endorse the principle of consensus building, it could take longer for states to achieve common agreement on human rights norms as well as a regional mechanism. So this leads to the question: What can ASEAN and ASEAN member states do further in aligning FOE/I with international standards?

First, ASEAN needs to enhance the process of regionalism for recognising human rights of expression and access to information into the regional sphere. ASEAN's structure is based on consensus and political commitment, and has not gone further toward a community law or regional regime following the cosmopolitan approach as in Europe. This process and system may take longer to grow in ASEAN, even when learning from the experiences of other regions. ASEAN, as a region, has many issues and matters of governance that must be addressed beyond the territorial sovereignty of the state. With that direction, ASEAN may also need to evolve into a constitutional and

supranational model when it becomes more mature. Nevertheless, in terms of human rights, ASEAN states are no doubt becoming closer and collectively linked to global human rights regimes in the construction of a regional human rights regime and international relations. But since the process of consensus-building is based on diplomacy, ASEAN is shown as having a weak capacity to enforcement its new-born human rights mechanism. The inter-governmental regional human rights commission (AICHR) has not got power as an important community of government representatives on human rights discussions. But, in the future, it may be transformed into a more structured and empowered body to advise states as well as to monitor the human rights situation in the region.

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

Third, the exercise of FOE/I, or in other words freedom, can only be restricted in legitimate ways when a state has the political will to make constitutional responses to the issue of freedom as per international standards. As the regional system of law and its enforcement is strengthened, states will adopt and adjust in their domestic systems. In the end, states take responsibility for guaranteeing freedom at state level. Experiences

from many European Union member states, as they have endorsed Community law, is that states have been required to adjust their constitutions and domestic legal systems in line with regional law. The Human Rights Commission and the Court have power to advise or to rule over cases where states should also take into account the need to adjust if their legal systems and judicial practices do not meet the standards. Over the past few decades, many ASEAN States have undertaken the constitutional building process which gives rise to democracy and human rights including FOE/I. So the matter at hand is that ASEAN states can already refer to international standards to ensure the legality of FOE/I and to guarantee the legitimacy of any restrictions on freedom of expression and information, especially on the ground of national security.

"We believe that the dream of a true ASEAN community and the formation of an ASEAN human rights body must recognize free expression, press freedom, and people's access to information as essential to human rights".¹⁵⁵ But to do this, ASEAN as an association and community will need to take on stronger consensus-building processes and ensure that all member states and their citizens can participate in these processes. ASEAN can apply a legal approach in its regionalism and norm setting for every human right and freedom.

¹⁵⁵ Statement made by ASEAN parliamentarians at the ASEAN official summit in February 2009 in Thailand

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