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ARTICLES

Editors' Introduction

>>.....John Nelson and Dayna Barnes 4

Languages of Human Rights in Timor-Leste

>>.....David Webster 5

Two Rights Paths: East Asia's Emerging Regional Human Rights Framework

>>.....Silvia Croydon 22

Assertive or Reassuring Chinese Presence in Troubled Waters? The Decision-Making Process of Beijing's South China Sea Policy

>>.....Mike Chia-Yu Huang 36

Towards a Modern Context for the Traditional Whaling Songs of Japan

>>.....Felicity Greenland 52

"Think Piece" · When the Tide Goes out: Citizen Participation in Japan after the Fukushima Nuclear Disaster

>>.....Pablo Figueroa 74

Editor's Introduction

We are pleased to introduce the summer 2013 issue of *Asia Pacific Perspectives*. This issue brings together the voices of scholars from Canada, Australia, Britain, and Japan as it considers the interaction between the international and the local in East Asia today.

The first two articles examine the issue of human rights from different perspectives. **David Webster** looks at the struggle for independence in Timor-Leste in terms of local agency. He argues that a regional actor successfully appealed to the international community for support by using human rights norms as a leverage issue. **Silvia Croydon** analyzes the development of a concerted regional approach to the question of human rights in East and Southeast Asia. She finds that there are many challenges to the creation of a regional approach, but that progress is being made.

Looking at the recent tension surrounding maritime disputes in East Asia, **Mike Chia-Yu Huang** asks what drives China's increasingly "assertive" foreign policy. He argues that the number of actors in decision-making has led to inconsistent policy, and that this causes tension between domestic factions, neighboring states, and global powers. **Felicity Greenland** also addresses the conflict between local experiences and international norms, using research on traditional folk songs. She describes a rich and established cultural history of whaling in Japan, a legacy put under pressure by current global environmental concerns.

Finally, with this issue, *Asia Pacific Perspectives* introduces a new type of article, one we are calling "Think Piece." This new series will allow contributors to respond to current events and big ideas in the Asia-Pacific region in a shorter, more informal style that integrates personal opinion informed by scholarship and the author's expertise. We hope you will find value in our first "Think Piece" by **Pablo Figueroa** on the Fukushima nuclear-reactor situation in Japan.

Dayna Barnes, Managing Editor

John Nelson, Editor

Two Rights Paths: East Asia's Emerging Regional Human Rights Framework

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ABSTRACT

Until recently, a notable aspect of East Asia was its lack of a regional human rights mechanism. Two regional human rights initiatives towards providing the region with such are now being undertaken – an inter-governmental level one by the Association of Southeast Asian Nations, and one based on a network of domestic commissions by the Asia Pacific Forum of National Human Rights Institutions. This article surveys the evolution of these two initiatives, and considers them in the context of the enduring “Asian values” debate. It argues that even though there are shortcomings to both initiatives, their mutually propelling development improves the prospects for a human rights mechanism in the region.

KEYWORDS: *East Asia; human rights; regional human rights mechanisms; Association of Southeast Asian Nations; Asia Pacific Forum of National Human Rights Institutions*

In 1962, on the fourteenth anniversary of the proclamation of the Universal Declaration of Human Rights (UDHR), the Third United Nations (UN) Secretary-General U Thant of Burma reported with satisfaction with regards to the UDHR that “[t]he world has come to a clear realisation of the fact that freedom, justice and world peace can only be assured through the international promotion and protection of [the] rights and freedoms [this document describes]”. This widespread acceptance of the UDHR, persists today, making it the most authoritative document on human rights to date. With its 30 articles enlisting rights as diverse as those of holding a nationality, seeking asylum, enjoying equality before the law, owning property, marrying, belonging to an association, and having free choice of employment, social security and adequate health care, the UDHR continues to be the most cited and relied upon document in discussions about human rights. As it stands, however, the declaration does not offer even a word of advice on how all these rights are to be balanced against one another, which means that there is room for interpretation in their implementation.

This paper joins the body of literature on human rights, and in particular the work that treats the topic of divergent human rights implementation paths. It seeks evidence of culturally sensitive human rights implementation in the region of East Asia, which is, significantly, from where the boldest claims about such divergence have emanated. The paper focuses on regional human rights mechanisms (RHRMs) as the possible place where the East Asian cultural distinctiveness in human rights implementation could be manifested. After a brief introduction of the relevant theoretical debates and the situation hitherto with regards to RHRMs in East Asia, an assessment is offered of two recent initiatives for installing such a mechanism as an example of culturally sensitive human rights implementation.

Background

The issue of balancing rights became contentious in the international arena in the early 1990s. This debate was triggered by the frustration of some East Asian leaders with the criticism of Western governments with regard to local human rights practices at a time when these countries were making leaps towards economic prosperity. More specifically, it was the Singaporean and the Malaysian Prime Ministers Lee Kuan Yew and Mahathir bin Mohamad, that started this debate. Seeing the condemnations from the West of the local human rights record as a stratagem aimed at stifling the region's progress towards prosperity, Lee and Mahathir accused the Western critics of practicing a new, cultural, form of imperialism. They argued that Western governments are putting too much emphasis on civil and political rights, to the neglect of economic, social and cultural rights. In their view, in Asia, where the majority of the population lived in poverty, the more urgent necessity – and one on which many of the governments there were unquestionably delivering at the time – was for citizens to be provided with economic security and social stability. Once these more pressing needs were met, they asserted, advancements in the protection and promotion of civil and political rights would naturally follow.

Lee and Mahathir's rhetoric quickly gained popularity amongst other elites in Asia. In the run up to the 1993 World Conference on Human Rights, the world saw the ministers of 30 Asian states sign a joint declaration in Bangkok that encapsulated the two leaders' ideas. Although as a diplomatic document the declaration took a less aggressive tone than that of the two individual Prime Ministers, it still made the same argument. It stated that the human rights discourse had hitherto been dominated by Western countries, that there had been a bias towards civil and political rights, and that a balance needed to be struck between economic, social and cultural rights, and particularly the right to economic development.

The Bangkok Declaration, as the culmination of this unique discourse in Asia about the moral justifiability of implementing rights in different orders, came to represent one of the boldest statements ever made with regards to human rights. Soon thereafter, however, its whole underlying idea was tarnished. The outbreak of the 1997 Asian financial crisis and the consequent revelations about the malfunctioning of the Asian economies, their crony capitalism, corruption and poor banking regulations, convinced most observers that there was nothing more to this discourse than the Asian elite's desire to legitimize their authoritarian rule. Reinforcing this sense was the fact that the Asian governments were themselves unable to respond to their critics. Having lost the material base for their claims, and facing a disappointed and enraged citizenry, these governments grew increasingly hesitant to use their former rhetoric. What is more, there was even some back-peddling on the part of Lee and Mahathir, who were seen as trying to qualify some of their previous statements.

This tarnishing notwithstanding, the notion that there exists a plurality of morally acceptable ways to implement human rights did not die. Indeed, there remain a number of scholars, in the West and Asia alike, who still see value in the idea underlying the Asian leaders' proposition.¹ Stripping the Asian elite's argument from its persecution complex, Daniel Bell, for instance, calls for a recognition of human rights implementation diversity. He insists that trade-offs between civil and political rights and social and economic ones are not only

plausible, but do in fact occur, as much as in the West as in the East. Furthermore, he argues with regards to these trade-offs that since all rights are of equal importance, resolving them inevitably comes down to the value system, cultural traditions and circumstances of the particular society. With regards to East Asia, he contends that many of the rights trade-off resolutions appear to be made in line with what he perceives as the predominant tradition of Confucianism, and there is, in his view, nothing wrong with this. As he rhetorically asks, why would the decision of one government to restrict the civil right to form free labor associations in the name of promoting the economic right to financial security be any less acceptable than the choice of another to sacrifice the social right to universal health care for the sake of protecting the political right to choose whether or not to pay for a welfare state-type medical treatment?²

These philosophical constructions might well sound convincing. In the end, however, any authority claiming to curtail one set of rights for the purpose of advancing another still has the responsibility to demonstrate that this is indeed the case. Whether it places economic, social and cultural rights above civil and political liberties or vice versa, an authority can reasonably expect to garner approval for its actions only if it is able to show that it is doing its best to resolve difficult human rights trade-offs. Without such evidence, it will be easy for skeptics to question whether the duty to protect the rights of citizens is being fully undertaken. This approach could also lead to the enrichment of the international understanding regarding culturally sensitive human rights implementation.

A most obvious place to look for evidence of such culturally sensitive human rights implementation is in regional human rights mechanism (RHRM) apparatuses for monitoring, protecting and promoting human rights that function on a regional level. Since a RHRM is relatively local, a particular regional community's own cultural values about human rights can be realized. Building such a mechanism would be a way for East Asians to respond to their critics. What progress, if any, has it made towards the establishment of a RHRM? If the region does have a RHRM, does it diverge from those found elsewhere? What does this tell us about how human rights are understood in East Asia and the debate on human rights implementation diversity? These are indeed the questions which this article seeks to address.

East Asia and RHRMS: Introducing the ASEAN and APF Initiatives

As late as the early 1990s there was nothing in East Asia resembling the kind of mechanisms that Europe, the Americas, Africa and West Asia had created, these were based on a regional human rights commission, a regional human rights court and a regional human rights treaty (except that in West Asia only the first two of these institutions were established).³ This unique state of affairs was even more significant because East Asia is home to such a sizeable proportion of the world's population. Lack of an RHRM justified questioning East Asian commitment to human rights.

More recently, however, two initiatives have emerged there suggesting that this gap might soon be filled, and thereby offering an opportunity to assess the East Asian community's approach to human rights according to its own standards. Whilst one of these initiatives mirrors those in the other regions insofar as

it is on an inter-governmental level, the other is based on a network on national-level human rights institutions legislated for by the state but functioning independent of it. With these initiatives having emerged, it seems now for the first time possible to understand the position of East Asia towards human rights in terms of actions rather than politically motivated rhetoric. Towards the end of clarifying the East Asian such stance, the rest of this section presents in detail the abovementioned two initiatives.

ASEAN – The Inter-Governmental Initiative

The first initiative taken within East Asia towards filling the existing regional human rights void was that by the Association of South East Asian Nations (ASEAN).⁴ A geo-political and economic alliance in Southeast Asia dating back to 1967, ASEAN demonstrated willingness to help establish a RHRM the first time in the early 1990s. The specific expression of this wish is found in the foreign ministers' 1993 statement made in Singapore, which read that "... in support of the Vienna Declaration and Programme of Action of 25 June 1993, ... ASEAN should also consider the establishment of an appropriate regional mechanism on human rights".⁵

At the time, as is the case still today, ASEAN was known for its culture of consultation and consensus-building, commonly referred to as the "ASEAN way." Since its members were thought of as strongly committed to the principle of non-interference in the internal affairs of others, the apprehension existed that on a question as controversial as human rights, which anyway was not something these countries had originally sought cooperation on, no results would be achieved. On the other hand, there was also a significant amount of expectation and interest in this development. ASEAN had come to wield considerable influence in international relations, establishing itself as the most successful regional group comprising of developing countries, and it was thought that, if any initiative was to be made in East Asia towards creating a RHRM, it would come from ASEAN.

There was no immediate follow-up by the ASEAN governments on their 1993 statement. This prompted the non-governmental organization LAWASIA to create a Working Group whose aim was to produce a concrete draft proposal for the realization of an "ASEAN Human Rights Mechanism (HRM)." The resulting proposal, which envisioned the creation of a mechanism similar to those in existence on the rest of the world's regions, i.e. consisting of a commission and/or a court and a treaty, did not meet with ready acceptance by ASEAN. The reason for this was a disagreement amongst members on whether a centralized system with monitoring, promotional and recommendatory functions, and the capacity to accept complaints from states and individuals was the best way forward. The view also existed that it was more appropriate to have human rights commissions in all ASEAN countries, with the regional mechanism being born when they began coordinating efforts.

This setback notwithstanding, LAWASIA's Working Group sought to maintain the momentum for the creation of an ASEAN HRM by instigating a further and livelier debate about what the mechanism should be. In 2008, after conducting a series of informal seminars and meetings with various ASEAN representatives, this Working Group managed to push the organization to alter its Charter so as to include "human rights protection and promotion" as one of its core

functions, and to enshrine their new commitment to creating a HRM. The revised Charter, which vowed in Article 14 of Chapter IV that ASEAN will establish a regional human rights commission (to which it referred to as an “ASEAN human rights body”), was seen by some as a herald for a new beginning for human rights protection in East Asia. Others preferred to remain skeptical until they see what actual remit the terms of reference for this body endow it with.

Duly created in 2009, the ASEAN Inter-governmental Commission on Human Rights (AICHR) has now begun its operations. It has hitherto attempted to perform promotional and advisory functions, especially in the areas of migration, corporate social responsibility and human rights, and the right to peace. Furthermore, it aims to provide East Asia with human rights institutions like those present in the rest of the world. For example, AICHR has recently drafted an ASEAN Human Rights Declaration (AHRD) that aims to provide the East Asians with their own statement about human rights, and is expected to make efforts towards the establishment of a regional human rights court.⁶

Nearly two decades after ASEAN’s human rights initiative, the impact of its Human Rights Declaration has been mixed. Anxiety is widespread amongst the international community that the principles expressed in this document do not reach, let alone go beyond, the standard to which many of the ASEAN members have already committed by signing the UDHR, given its caveat that “the realisation of human rights must be considered in the regional and national context”. Additionally, the question is being asked with regards to the Declaration as to whether it will eventually lead to a human rights treaty. Drafting a Declaration, observers note, is all very well and good for giving an identity and unique voice to the region on the international arena, but if it does not prompt the creation of a truly binding document, it would be of little use to the East Asian people. Secondly, the revision of AICHR’s terms of reference in 2014 is also a point for discussion. The eyes are on these terms in order to determine if the Commission’s capacity will be strengthened, making it possible for it to function as a protective authority as well as a promotional and advisory one. In other words, the attention is on whether the AICHR will come to resemble a court that hands down binding judicial decisions.

The continuing evolution of ASEAN’s human rights initiative granted, it is not too early to render an appraisal of its achievements so far and of its future prospects in this area. Before this is done, however, an overview of another type of human rights initiative in the region is in order.

ASEAN Peoples’ Forum – The Initiative Independent of the State Structures

Perhaps a more intriguing initiative than the ASEAN’s is that which was made in 1996 by the National Human Rights Institutions (NHRIs) of Australia, India, Indonesia and New Zealand. These NHRIs were the first to be created in this region after the establishment in 1993 of the Paris Principles – UN standards relating to such institutions’ independence, mandate and functions.⁷ Being the region’s pioneers, these NHRIs decided to hold an informal meeting amongst themselves in the Australian city of Darwin in order to exchange ideas on how to overcome common challenges. Seeing their liaison as a success and resolved to continue meeting on an annual basis, they called their new framework the Asia Pacific Forum for National Human Rights Institutions (APF of NHRIs, henceforth

“APF” or the “Forum”) and laid down, in a document entitled the “Larrakia Declaration,” some terms and goals for their exchanges. Amongst the items on this declaration was that a concerted effort would be made to assist human rights advocates in neighboring countries in their bid to achieve the NHRI end, i.e. the creation of a Paris Principle-compliant NHRI. It was envisioned that, by recruiting more members and strengthening its role, the Forum could become a superior alternative to the human rights institutions ASEAN was preparing to institute. This evolving initiative has come a long way in this direction.

Although there was little attention on the APF at the outset, as the 1990s progressed, both its number of affiliates and its scope of activities rapidly expanded. As there was still no sign of any other formal regional human rights body in the region, the Forum began to attract attention as the structure around which a framework for regional human rights protection could develop. With regards to membership, as early as the year following APF’s formation four new NHRIs joined. By 2012 the number had grown to eighteen, with fifteen full and three associate members, the new additions being: Afghanistan, Bangladesh, Jordan, Malaysia, the Maldives, Mongolia, Nepal, Palestine, the Philippines, Qatar, South Korea, Sri Lanka, Thailand, and Timor Leste. With legislation for the establishment of NHRIs being currently in preparation in a number of other Asia Pacific countries, including, for example, Myanmar and Papua New Guinea, the APF looks as if it has not yet reached the limits of its membership expansion.

It is not only quantitatively that the APF has strengthened. A remarkable evolution is observable on a qualitative level as well. Indeed, the APF has developed an intricate system of programs through which to support human rights implementation. Firstly, its secretariat provides guidance to the governments in the region planning to establish NHRIs so as to ensure that the resultant bodies satisfy the standards contained in the Paris Principles. Examples of such activity include APF’s interactions with the governments of: Pakistan in 2005 and 2008, Saudi Arabia in 2006, Cambodia in 2006, China in 2006, as well as a workshop for 13 Pacific countries in 2009. Secondly, APF supports the activities of the existing regional NHRIs, providing their staff with specialist training that equips them with skills necessary to conduct their responsibilities effectively. Courses are offered on a range of issues, from purely substantive ones that relate to knowledge on specific human rights problems, to the most practical ones, such as the manner of handling the media. Owing to such training, a number of NHRIs have begun to interpret their mandate more creatively, going further than the Paris Principles by, for example, facilitating UN commissioners’ visits, preparing “shadow reports” and conducting inspections of relevant facilities such as detention centers.

The structure of the Forum has become more intricate as well. Since 1998, it has also had the capacity to consider specific situations or human rights questions that the region faces through an Advisory Council of Jurists (ACJ). This body, which consists of one senior jurist from each member state, regularly produces reports on human rights issues that the region as a whole faces, with the list of the specific reports hitherto produced being: Child Pornography (2000), the Death Penalty (2000), Trafficking of Women and Children (2003), Anti-terrorism Legislation and the Rule of Law (2004), Torture (2005), the Right to Education (2006), the Right to Environment (2007), Corporate Accountability and Government Responsibility (2008) and Sexual Orientation and Gender Identity (2010).

The APF has produced results. First, the body is credited with the abolition of the death penalty from the Fiji Penal Code. Second, the report on terrorism is seen as having been instrumental in the overruling of a decision about the continued detention of a person considered a “national security risk” in New Zealand. Third, the passage of the Anti-torture Bill in the Philippines in late 2009, which ended the twenty-three year wait for the enactment of legislation to implement the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) is also cited as a result of the efforts of the Commission on Human Rights of the Philippines to push the government to implement what the ACJ saw as Minimum Interrogation Standards.⁸ In relation to the ACJ’s report on torture, it has also been remarked that:

There is evidence to indicate that at least some Asia-Pacific NHRIs have undertaken actions at the national level that are in line with the ACJ torture recommendations. For instance, in line with the ACJ’s recommendation for NHRIs to encourage ratification and full implementation of the UNCAT and OPCAT, the Australian Human Rights Commission reported to the APF that it had developed position papers concerning Australia’s compliance with the UNCAT and [the Optional Protocol to the Convention against Torture]. The Commission on Human Rights of the Philippines, and the National Human Rights Commission of Mongolia, are also known to have undertaken activities that have referred to the ACJ’s recommendations....⁹

In light of these developments the Forum, with the ACJ as its most powerful part, is seen within as a potential candidate for the region’s HRM. Amongst those who have expressed positive views about the future of the APF as a RHRM has been Prof. Muntarhorn of Thailand’s Chulalongkorn University. According to him, the APF is “the closest that the Asia-Pacific region has come to a regional human rights arrangement or machinery for the promotion and protection of human rights” and the most promising framework for the future.¹⁰ Prof. Muntarhorn’s support for the APF is in fact so strong that he urges the UN to abolish the rest of its activities within its five-year Asia Pacific regional program so as to ensure that it can provide sufficient support for the Forum.¹¹ Furthermore, there is a group of scholars based in Australia as well (Durbach et. al), who have stated, on the basis of a rigorous analysis, that the APF has, “in a comparatively short period of time, conducted its primary function of strengthening and establishing national human rights institutions to good effect, developing ‘a reputation as the pre-eminent regional human rights forum.’”¹²

Neither ASEAN nor the APF has yet developed into a formal RHRM which could be used to assess the questions put forward at the outset of the article. However, what do the prospects look like for either of them becoming a RHRM, and what would the specific structure or character of this potential mechanism say about human rights implementation? The rest of the article examines this question.

An Appraisal

At a first glance it might appear that ASEAN is well on the way to providing a HRM in East Asia parallel to those on regional levels in Europe, the Americas, Africa, and West Asia, and that even if the efforts of the latter organization fall short in this direction, those of the state-independent APF might instead succeed. However, a closer inspection of each of these two initiatives reveals that, on their own at least, neither of them looks set to fill the regional gap.

To start with ASEAN's initiative, its development has been slow. Indeed, for the nineteen years since ASEAN's articulation of the plan to create a sub-regional HRM, only a commission – the AICHR – has been created, and even this modest output is not particularly impressive. As it stands today, the AICHR is significantly weaker than its counterparts in other world regions. In contrast to these other commissions, it lacks protective powers. It does not, more precisely, accept complaints of alleged human rights violations – not that it has the authority anyway to produce binding decisions even if it held trials, which is another example of its deficiency. That the AICHR would not take on cases became clear in 2010 when the individual plea of Noemi Parcon was rejected. Parcon was a widow of one of the 32 Filipino journalists killed in Ampatuan, Maguindanao in November 2009. Having been ignored by the Philippine government, she attempted to obtain justice via AICHR. Although there had been leaders, like the former Singaporean Foreign Minister George Yeo, who had presciently predicted that an ASEAN human rights body would have “tongue but not teeth,”¹³ the Parcon case was nonetheless a source of great disappointment for many.¹⁴

A further drawback of the AICHR is that its remit only goes as far as encouraging the ASEAN member states to ratify international human rights instruments and to honor their commitments towards human rights protection made through such ratifications. The AICHR's terms of reference do not authorize it to oversee the member states' progress in implementing the latter instruments, conducting such activities as investigative visits of controversial sites, for example, or obliging the production of and evaluating states' periodic reports on the matter. Nor do they allow AICHR to enforce compliance with the international norms.¹⁵ What is more, this situation, which is also a reason for AICHR to be seen as “lacking in teeth,” appears unlikely to change given ASEAN's preference for decision-making by, as the Assistant Director for Programme Coordination and External Relations ASEAN Termsak Chalermpanupap puts it, “friendly discussion and persuasion.”¹⁶

Because the AICHR is an internal organ of ASEAN, which contains undemocratic member states, there is concern that it may simply serve governmental interests. Chalermpanupap has responded to such criticism by stating that the AICHR was never intended to be an “independent watchdog.” From the very beginning it was envisioned as a part of ASEAN, and that “[t]o moan [about this aspect of the AICHR] is to bark up the wrong tree.”¹⁷ Yet, the anxiety over the AICHR's decision-making process and its elected government representatives' autonomy is difficult to dispel, especially in the face of reports that the drafting of the AHRD continues to be a secretive affair.¹⁸ The fact is that the grassroots organizations in most member states feel they have been side-lined from the process, as their AICHR representatives had not held national level consultations. Many of these organizations were represented at the civil society coalition which submitted a detailed joint statement with specific recommendations on a large variety of issues and rights during the Fifth Regional Consultation on ASEAN and Human Rights. There was also criticism during the AICHR's drafting process that other stakeholders, such as NGOs, had been excluded.

Finally, the AICHR is also undermined in that regardless of the close connections on economic matters between ASEAN and Japan, South Korea and

China, it has not yet managed to engage them on this subject. The bringing on board of these three actors is important because they wield significant influence within Southeast Asia, and so any project that does not involve them could have only limited success. ASEAN clearly has strong links with Japan, South Korea and China through the ASEAN+3 framework, meaning that AICHR could possibly recruit them on its initiative. However, there has been no sign of this occurring.

As for the APF, this initiative too is not as healthy as it might appear at first sight. In addition to sharing the same problem as ASEAN of not having incorporated as influential regional players as Japan and China, the APF is also afflicted with the problem of pseudo-NHRIs. Indeed, a number of APF's NHRIs are counterfeit ones, created by authoritarian regimes for the purpose of whitewashing rights violations and providing a shield from international criticism and scrutiny. It is true, as Brodie argues, that the APF NHRI (re-) accreditation process has over the years become more stringent.¹⁹ Evidence for this is provided by the instances of Paris Principles non-compliant NHRIs having been downgraded or altogether expelled.²⁰ However, it is also true, as pointed out by Peterson, that there are considerable accreditation omissions, and that the Principles themselves are probably not the most suitable criteria for judging the independence of an NHRI. NHRIs with dubious credibility (such as that of Nepal, to use Peterson's example) have not only been allowed access to the Forum on the first place but have also been tolerated as members despite repeated failure to produce evidence of their meeting the Paris Principles' standard.²¹ Furthermore, and to use another of Peterson's examples, it is highly irregular that a human rights commission as effective and accomplished as that of Hong Kong's Equal Opportunities Commission is awarded the same rank in the APF as Iran's Islamic Human Rights Commission. Whilst it might indeed make sense to give Hong Kong's Equal Opportunities Commission the lowest rank in light of its status as a sub-national human rights body (itself due to Hong Kong's standing as merely a Special Administrative Region of China) or its limited mandate, this body still has so much more to show for itself when compared to other NHRIs.²² In short, not only is the peer-review accreditation process fallible, but the criteria according to which NHRIs are judged is also problematic.

The Prospects: Mutual Symbiosis?

For all their faults and deficiencies, the ongoing initiatives of ASEAN and APF to provide the region with a HRM still seem to hold some promise for success, albeit more as a set or a complementing pair than individually. They reinforce each other. Their co-existence could be said to have the effect of propelling their individual development, making each take steps that they might well not have taken on their own.

Consider, for example, the very formation of the APF. According to a senior official of the Asia and Pacific Region at the UN Office of the High Commissioner for Human Rights, the plan for creating this Forum emerged as a reaction to the 1993 ASEAN announcement that it intended to launch a RHRM.²³ In the words of this official, the announcement prompted a group of Australia-based human rights activists to "take things [with regards to creating a RHRM] in their own hands." They believed that an initiative by a body such as ASEAN, whose

original purpose is so far detached from human rights, and whose organizational culture is so un conducive to realizing any aspirations and goals whatsoever, is likely to do more harm than good to the human rights cause (presumably because it would give the false impression that measures are being taken with regards to protecting rights there). They reportedly decided to make an initiative of their own that would put ASEAN to shame. The fact that the APF's inauguration meeting was held in Australia corroborates the claims of the informant, and it could thus be concluded that the birth of APF came out of a thrust to counteract ASEAN. Had ASEAN not taken a step to create a HRM, APF would have never been established, nor would its founders have been catapulted into this long term venture to strengthen it so dramatically.

That the vice versa effect also exists, i.e. of the APF in turn reinforcing ASEAN's human rights initiative, is also a case for which evidence could be found. This becomes clear when the work of the ASEAN NHRI Forum is reviewed. This NHRI Forum, comprised of four APF NHRIs – namely those of Indonesia, Malaysia, the Philippines and Thailand - has been involved with ASEAN since 2007, and has now managed to establish a clear foothold. Identifying them collectively as a “partner,” ASEAN regularly invites the NHRI Forum to take part in their consultations.²⁴ Having gained a position of influence within the ASEAN through the NHRI Forum, the APF has begun to function as a watchdog of ASEAN. Some of the areas in which it has been active include: encouragement of NHRIs compliant with the Paris Principles in ASEAN member states where these still do not exist; monitoring ASEAN's delivery on promises such as, for example, the one it made through the Cebu Declaration on the Protection and Promotion of the Rights of Migrant Workers; and correction of AICHR's shortcomings with regards to power, mandate and output.²⁵

Of the two initiatives, the APF is the more credible as it has a screening process that at least aspires to leave out bogus members. However, given that the inter-governmental ASEAN initiative is more authoritative and could thereby lead to a more effective (read “binding”) RHRM, it seems the best direction in which the current situation could develop is for the APF to become the voice that seeks to enhance the ASEAN human rights institutions. In addition to infiltrating the ranks of ASEAN and seeking to improve from within, the APF could attempt to generate greater pressure on the former externally. The Forum could achieve this by regularly sending reports to the UN on the state of ASEAN's initiative.

This is precisely how ASEAN envisions its and APF's role in the future. As attested by the following passage from its website:

[The] Working Group [for an ASEAN HRM] is ... encouraged by the progress of the national human rights institutions (NHRIs) in ASEAN States. ... Poised to sign a declaration of cooperation among themselves, [the] Working Group believes that cooperation among NHRIs is a precursor to an intergovernmental human rights mechanism. With these developments at hand, the possibility of having a regional human rights mechanism may not be as unlikely as it seems.²⁶

Conclusion

This article has discussed the ASEAN and the APF initiatives towards creating a RHRM. After introducing and evaluating the two, the argument was made that despite the developments unfolding slowly and with many uncertainties and

drawbacks, not all is yet lost with regards to East Asia's prospects for emerging equipped with a HRM.

The HRM evolving in this region is an unconventional one, comprised of the ASEAN as a main part, with its AICHR possibly developing into a court that renders decisions which carry weight with the countries involved, and the APF, with its network of NHRIs active both within and outside of the ASEAN structure, as an additional part that works to improve the quality of the inter-governmental institutions.

Whilst it cannot be taken for granted that this is indeed what the future holds for the region in terms of the development of a HRM, at the present stage the outlook is not gloomy. The development of the ASEAN and APF initiatives is still ongoing and there is good evidence to suggest that they are mutually reinforcing each other.

Returning to the question posed at the outset of the article about what, if anything, a mechanism such as the above-described one might be telling us about how human rights are understood in East Asia, to start with, the very existence of such initiatives as the ASEAN and the APF and their endurance contradicts some of the earlier versions of the "Asian values" argument – those in particular which assume that human rights are fundamentally at odds with an Asian culture. On the issue of whether there is anything different in the way these initiatives implement human rights, it is still early to tell. However, their continued development can only increase the Asian voice in the international arena with regards to human rights, so that in the future Asia will be able to contribute more equally.

Finally, whilst ASEAN's human rights initiative looks set to mirror those of other regions, the bottom-up alternative provided by the APF will provide the world with valuable lessons about the different modes through which human rights can be advanced. Apart from compelling ASEAN to move more quickly than it might have otherwise done, the APF gives human rights activists within individual states the chance to experiment with strategies that they deem best for their own situation. This should lead to a richer dialogue based on concrete experiences rather than abstract theories. How these developments unfold over the next decade will be the subject of great interest for both those who are optimistic and skeptical about universal human rights protection ever being achieved.

Endnotes

- ¹ Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates about "Values in Asia"*, Indiana International & Comparative Law Review (2002); Randall Peerenboom, (ed.) *Asian Discourses of Rule of Law, Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US*, London: Routledge Curzon (2004); Anthony Woodiwiss, *Making Human Rights Work Globally*, London: GlassHouse Press (2003); Anthony Woodiwiss, "Community in the East: Towards a New Human Rights Paradigm," in Chua, B-H, (ed.), *Communitarian Politics in Asia*, London: Routledge, (2004), 139-156; Anthony Woodiwiss 'What Could it Mean to Take Human Rights Seriously?', unpublished paper, (2006) 1-18; Daniel Bell, *Beyond Liberal Democracy: Political Thinking for an East Asian Context*, Princeton: Princeton University Press (2006); Damien Kingsbury, Leena Avonius (eds.) *Human Rights in Asia: A Reassessment of the Asian Values Debate*, New York: Palgrave Macmillan (2008).
- ² Daniel Bell, *Beyond Liberal Democracy: Political Thinking for an East Asian Context*, Princeton: Princeton University Press (2006), 61.
- ³ The full list of the institutions of which these RHRMs were comprised include: the European Commission of Human Rights, the European Court of Human Rights, the European Convention of Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the American Convention on Human Rights, the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, African Charter on Human and Peoples' Rights, the Arab League Permanent Human Rights Commission and the Arab Charter on Human Rights.
- ⁴ ASEAN's current members are Brunei, Cambodia, Indonesia, Malaysia, Myanmar, Laos, the Philippines, Singapore, Thailand and Vietnam. ASEAN also has links with Japan, South Korea and China through the so-called "ASEAN+3 framework".
- ⁵ *Joint Communique of the Twenty-Sixth ASEAN Ministerial Meeting Singapore, 23-24 July 1993*, Human Rights Section, Clause 18. Retrieved on 14 June 2012 at: www.aseansec.org/2009.htm.
- ⁶ For the full text of the Declaration see: www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration.
- ⁷ The Paris Principles were established through General Assembly Resolution 48/134. The Principles require that NHRIs have a constitutional or legislative mandate to promote and protect human rights but function at an arm's length from the state. NHRIs, while creatures of law depending on a statutory basis for their existence and actions, and a part of the State structure, are not to be placed under the control of either the executive, or the legislature or the judiciary.
- ⁸ Suraina Pasha, "National Human Rights Institutions and the Struggle against Torture in the Asia-Pacific Region", unpublished article available at: projects.essex.ac.uk/ehrr/V6N2/Pasha.pdf. See in particular Pasha's discussion of the developments within the APF Secretariat, 95-96.
- ⁹ *Ibid.*, 91.
- ¹⁰ Vittit Muntarbhorn, "In Search of the Rights Track: Evolving a Regional Framework for the Promotion and Protection of Human Rights in the Asia-Pacific Region" (Draft paper prepared for the Office of the UN High Commissioner for Human Rights). Prof. Muntarbhorn's discussion paper was delivered at the Opening Ceremony of the 13th Annual Workshop of the Framework on Regional Cooperation for the Promotion and Protection of Human rights in the Asia-Pacific Region. Beijing, 30 August 2005.
- ¹¹ *Ibid.*
- ¹² Andrea Durbach, Catherine Renshaw and Andrew Byrnes, "A Tongue but no Teeth?: The Emergence of a Regional Human Rights Mechanism in the Asia Pacific Region", *Sydney Law Review*, 31 (2009), 211-238.
- ¹³ This is the expression Minister Yeo used in 2007 with regards to AHRB, and it is cited in *Herald Tribune*, 17 November 2007. Retrieved on 14 June 2012 at: www.iht.com/articles/as/2007/11/18/asia/AS-GEN-ASEAN.php.

- ¹⁴ For example, see the Amnesty International press release “ASEAN human rights commission stumbles at first hurdle”, *The Online Citizen*, 31 March 2010.
- ¹⁵ See “ASEAN Intergovernmental Commission on Human Rights (Terms of Reference)”. Retrieved on 14 June 2012 at: www.aseansec.org/publications/TOR-of-AICHR.pdf.
- ¹⁶ Termsak Chalermphanupap, “10 Facts about ASEAN Human Rights Cooperation”, unpublished paper available at: www.aseansec.org/HLP-OtherDoc-1.pdf.
- ¹⁷ *Ibid.*
- ¹⁸ For an example of a most recent such report, see: ihrlaw.org/2012/01/09/draft-asean-human-rights-declaration-remains-confidential-to-be-completed-in-2012.
- ¹⁹ For more details on this, see Meg Brodie, “Processing Norm Socialization: Why Membership Matters. The Impact of the Accreditation Process of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights”, 80 *Nordic Journal of International Law* 143 (2011).
- ²⁰ One such example is the Fiji Human Rights Commission, whose APF membership was suspended in 2007 as a result of the chairwoman expressing controversial statements about the country’s 2006 coup. During the same year, Sri Lanka’s NHRI was also downgraded due to its lack of independence, political impartiality and regular rapport with civil society. For further details about these incidents, see: Catherine Renshaw, Andrew Byrnes and Andrea Durbach, “Implementing Human Rights in the Pacific Through National Human Rights Institutions: the Experience of Fiji” 40 *Victoria University Wellington Law Review* 251 (2009-2010); “Fiji Human Rights Commission suspended from international body”, *Radio New Zealand International*, 2 April 2007; and “Sri Lanka and Fiji: Ghost Human Rights Commissions” *The Financial Express*, 24 September 2011.
- ²¹ Carole J. Petersen, “Bridging the Gap?: The Role of Regional and National Human Rights Institutions in the Asia Pacific” 13 *Asian-Pacific Law & Policy Journal* 174 (2011).
- ²² *Ibid.*, pp. 205-209. Hong Kong’s Equal Opportunities Commission stands as an exemplar of an effective NHRI. One of its most significant achievements is that whereby, upon failure to persuade the government to correct its secondary school allocation program, which skewed towards boys, making it easier for them, compared to girls, to enter a top institution, it sought judicial review. The outcome of the trial, which was in favour of the Commission, had a systematic impact.
- ²³ Personal communication, London, 2 June 2011.
- ²⁴ This is how ASEAN identifies the ASEAN NHRI Forum on its website. See in particular the following webpage on the ASEAN website: www.aseanhrmech.org/partners.html.
- ²⁵ For further details see: ASEAN NHRI Forum’s website at: www.aseannhriforum.org; ASEAN NHRI Declaration of Cooperation at: www.asiapacificforum.net/working-with-others/regional-mechanisms/downloads/asean-nhri-forum/ASEAN_NHRI_Forum_Declaration_of_Cooperation.pdf; and the Seoul Guidelines on the Cooperation of NHRIs for the Promotion and Protection of Human Rights of Migrants in Asia, Seoul, South Korea, 2008, at: www1.umn.edu/humanrts/instree/Seoul-Guidelines.html. See for example: *Position Paper Concerning the Political Declaration on the ASEAN Inter-governmental Commission on Human Rights (AICHR)*. Submitted at the 3rd Consultation Meeting with the High Level Panel, 28 August 2009, Jakarta. Retrieved on 23 June 2012 at: www.aseannhriforum.org/en/home/joint-statements.html.
- ²⁶ Retrieved on 20 September, 2012 at: www.aseanhrmech.org/aboutus.html.

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