



Confessing to the Politicization of the ASEAN Human Rights Agenda: A Case for the Modification of the Consensus Rule

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ABSTRACT

This paper explores proposals for a political decision-making procedure to supplement the strict application of the ASEAN decision-making modality, the Consensus Rule, to the human rights agenda. The Consensus Rule, simply stated, does not require unanimity; rather it requires the absence of open objections from any member state before a proposal can be collectively applied.

This paper first reorganizes the pragmatic decision-making modality of ASEAN in liberal theory, which emphasizes the requisites of (1) parity between and individuality of diverse political participants; and (2) the adherence to the existence of a rational consensus obtainable through deliberations. It then mobilizes the theory of Agonistic Pluralism to explain a lack of correspondence between the circumstances of the human rights debate and the ASEAN's decision-making modality. Briefly, Agonistic Pluralism posits the ineradicability of conflict and the impossibility of obtaining a rational consensus. By using the lenses of Agonistic Pluralism, this paper conceives the ASEAN human rights debate as a hegemonic/counter-hegemonic mobilization, which exposes a 'vertical dimension' in the negotiation landscape of the regional human rights agenda. Competing discourses are not simply arranged in a diverse horizontal splay; they are organized hierarchically, establishing inequality.

A re-examination of the ASEAN Charter negotiations, the first violent collision of differing human rights discourses, and subsequent negotiations of human rights, reveals the absence of both parity and a rational, fair and sensible consensus, despite the rigid adherence to consensus decision-making. This paper argues that ASEAN diplomatic conduct, anchored on the parity of member-states engaged in consensus-seeking, belies the persistent dominance of a conservative status quo discourse of non-interference in domestic human rights affairs. More importantly, it argues that 'consensus' obtained under these circumstances of hegemony is likely to be confounded,

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with agreements that are unfairly skewed in favor of the dominant discourse, despite any rhetoric on collegiality, mutuality and consensus.

This paper, thus, establishes an important impetus for ASEAN to finally undertake a serious departure from the strict application of the Consensus Rule on human rights issues. In order to avoid confounded outcomes that plague the consensus-based decision-making modality, this paper proposes that ASEAN should preserve a carefully measured level of already-existent politicization, rather than wholly attempt to depoliticize the negotiation of the human rights agenda. ASEAN should first acknowledge the *possibility* of unresolvable human rights issues to which no rational consensus exists. Thereafter, it must recognize the instances when this possibility is manifest in consensus-based negotiations. Thereafter, ASEAN should resolve such issues through a political decision-making procedure, such as a voting process, that mobilizes precisely the inherent politicization of ASEAN over human rights.

Keywords: *Asean, Consensus, Hegemony, Voting Procedures, Agonistic Pluralism*

PART 1: INTRODUCTION

The difference in Southeast Asian human rights discourse between 1967 and the present is staggering. From 1967 until 1978, none of the official documents of the Association of Southeast Asian Nations (ASEAN)¹ had ever mentioned the term 'human rights'.² From 1978 until 1993, it was unheard of to place human rights on a common regional agenda for the Association. From 1993 until 2007, the idea that ASEAN would sanction the establishment of an official regional human rights institution remained exactly that – an idea. Thereafter, ASEAN had appeared to have taken enormous steps in human rights discourse. Barely two years after the adoption of the ASEAN Charter of 2008³, the Association finally inaugurated the first regional institution dedicated to human rights development in Southeast Asia – the ASEAN Intergovernmental Commission on Human Rights (AICHR)⁴.

¹ The Association of Southeast Asian Nations (ASEAN) is a body politic composed of the ten nations of Southeast Asia, namely the Philippines, Indonesia, Thailand, Malaysia, Singapore, Brunei Darussalam, Cambodia, Myanmar, Laos and Vietnam.

² Joint Declaration of the ASEAN and European Commission Ministerial Meeting promulgated on 21 November 1978. Paragraph 11 provides, "They also agreed that this cooperation should serve their people by promoting greater prosperity, social justice and human rights." Available at <http://www.asean.org/1499.htm>, last viewed on 26 September 2011.

³ ASEAN Charter of 2008, promulgated on 20 November 2007 in Singapore. Available at <http://www.asean.org/21861.htm>, last viewed on 27 September 2011.

⁴ Terms of Reference of the AICHR was approved on 21 July 2008 by the 41st ASEAN Ministerial Meeting. Available at <http://www.asean.org/HLP-TOR.pdf>, last viewed on 13 September 2011.



To be mindful of the decades that had to pass, and the deeply divided discourses within the ASEAN membership that had to be bridged, in order to reach this era of human rights discourse in Southeast Asia, one would expect that the human rights community would have been delirious and thrilled at the inauguration of the AICHR. Instead, the AICHR inauguration was met with skepticism and disappointment. As Hao Duy Phan explained, “While there is reason to be upbeat about the establishment of AICHR, excessive optimism over the contributions it could make should be tempered... Given the region’s complex diversity and *ASEAN’s way of making decisions by consensus*, the establishment of AICHR represents a triumph of intent, but does not yet demonstrate follow-through.” He added that, “[the] AICHR is envisioned to merely serve as a consultative inter-governmental body with no authority to issue binding decisions, consider cases, or conduct investigative visits. *Its decisions are to be made by consensus* and its representatives accountable to the appointing governments” (Phan, 2010, p. 1) (emphasis supplied).

Much as the evolution of the ASEAN human rights framework is nothing short of spectacular, there remains much apprehension over what remains unchanged and how it affects the human rights aspirations of the Association. This paper does not intend to explore the breadth of weaknesses of the AICHR, which is already the subject of numerous scholarly inquiries. Instead, it inquires into one specific matter with which Phan (2010) takes issue – ASEAN’s long-standing tradition of consensus-based decision-making, referred to as the Consensus Rule. More specifically, this paper inquires into the soundness of employing consensus decision-making to the negotiation of the highly politicized regional human rights agenda.

1.1 ASEAN Consensus Rule

The Consensus Rule is derived from a larger body of established diplomatic practices of ASEAN called the ASEAN Way. Chiou (2011) organized the ASEAN Way into the following three elements: norms, forms of communication, and decision-making methods. The central norm of the ASEAN Way is the principle of respect for sovereignty. It is from this norm that other norms and practices emanate. The second element that Chiou elucidates is the forms of communication, which are embodied in the practices of consultation and dialogue. Finally, the third element is decision-making through consensus or the Consensus Rule (Chiou, 2011, p. 374-5). These elements are formally embedded into ASEAN diplomatic practices through the ASEAN Charter, specifically in Article 2⁵, which outlines the normative and some communicative elements, and Article 20⁶, which describes other communicative elements and the

⁵ Supra on note 3, Article 2 (2), which reads, “(a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States; ... (e) non-interference in the internal affairs of ASEAN Member States; ... (g) enhanced consultations on matters seriously affecting the common interest of ASEAN;”

⁶ Supra on note 3, Article 20, which reads, “1. As a basic principle, decision-making in ASEAN shall be based on consultation and consensus.”

consensus-based decision-making modality of the Association. The AICHR itself, through its Terms of Reference (TOR), is enjoined to abide by the same diplomatic practices in relation to its mandate on regional human rights cooperation.⁷

Severino's describes the Consensus Rule as follows:

“...consensus in ASEAN does not necessarily require unanimity, although many ASEAN decisions are arrived at on the strength of genuine unanimity. *Consensus on a proposal is reached when enough members support it* — six, seven, eight or nine, no document specifies how many — even when one or more have misgivings about it, but do not feel strongly enough about the issue to block action on it. Not all need to agree explicitly. *A consensus is blocked only when one or more members perceive the proposal to be sufficiently injurious to their national interests for them to oppose it outright.* (2006, p. 34) (emphasis supplied)

The introduction of human rights issues into the common regional agenda prior to the passage of the ASEAN Charter had posed a severe challenge to ASEAN diplomacy. Up to the present, deep division and severe polarization generated by the human rights agenda exposes the limits of ASEAN's traditional modality of friendly diplomacy any consensus-based politics. Unlike in the distant past, where human rights issues were comfortably placed beyond the ambit of plenary discussions, ASEAN now has to directly confront these issues. Against this backdrop of division and polarization, can consensus-based decision-making successfully secure a common policy on human rights that genuinely represents the 'collective will' of ASEAN member states?

1.2 Questioning the Consensus Rule

Phan (2009) is not alone, as a host of other academics and stakeholders have questioned the effectiveness of consensus-based decision-making in fostering the future development of the human rights framework. On 20 July 2009, Amnesty International issued a public statement criticizing ASEAN's decision-making modality, and reasoned that “[it would mean] that each state would be able to reject and criticism of its own human rights record by veto. This could either lead to paralysis or the adoption of weak positions based on the lowest common denominator.”⁸ Amnesty offered no explicit alternatives, but the implication was that consensus-seeking, in their view, was clearly less than ideal. In October 2010, another civil society group, SAPA-TFHR, argued that AICHR have “hit a snag” in its internal deliberations on its procedural rules, illustrating “how *consensual decision making can slow down the progress* of AICHR in making important decisions.” SAPA-TFHR took a bolder stand and strongly recommended that

⁷ Supra on note 4, Article 6, which reads, “Decision-making in the AICHR shall be based on consultation and consensus in accordance with Article 20 of the ASEAN Charter.”

⁸ Press statement from Amnesty International dated 21 July 2009. Available at <http://www.amnesty.org/fr/node/11497>, last viewed on 27 September 2011.



the AICHR should adopt “voting procedures” when consensus cannot be reached. (SAPA-TFHR, 2010, p. 6) (emphasis supplied).

Proposals for ASEAN to adopt voting procedures are not new. Sirivuthcharungchit (2008) proposed a “Qualified Majority Voting” system to guide potential discussions on a future ASEAN voting procedure. He argued that because of the “prospective expansion of the organization and the *slow pace* of integration, ASEAN is required to have a more efficient decision-making process which can be approved by international society in the near future in order *to catch up* with the fast changing world, to prove itself against the critics of informality and soft method of the ASEAN way and, more importantly, to create a long term stable development not just economically but also other aspects in the region” (2008, p. 6) (emphasis supplied). In 2006, at the height of Eminent Persons Group (EPG) negotiations on the Draft ASEAN Charter, Ali Alatas, a former foreign minister of Indonesia and a member of the EPG, said, “We can no longer take decisions using the ASEAN way, which is *very slow*, consensual and flexible. Now, all decisions must be taken in accordance with strict rules.”⁹ Eventually, the EPG, in its Report to the 12th ASEAN Summit, recommended for an inclusion of 'selectively-applied' voting provisions in the ASEAN Charter, to wit:

“ASEAN’s consensus style of decision-making has allowed Member States to be comfortable with ASEAN decisions, and to be satisfied that the ASEAN membership does not compromise their sovereignty or national interests. Consensus decision-making is especially appropriate for decisions **in more sensitive areas** of security and foreign policy. However, while *decision-making by consultation and consensus should be kept for all important decisions, majority voting can be used in less sensitive and non-controversial areas*. The ASEAN Council and the relevant Community Councils shall prescribe the rules of procedure for voting.”¹⁰

None of the above-mentioned recommendations had materialized into an officially sanctioned voting procedure; consensus remains the decision-making modality of ASEAN on less sensitive areas and more so on sensitive matters such as human rights.

Detractors of a political decision-making modality, such as voting procedures, foresee dangers to employing voting procedures. Grimes posits, “[Any] formal voting procedure would run the risk of creating or reinforcing cleavages among members...”

⁹ AsiaViews, 2006 “Sanctions, voting proposed for ASEAN”, Edition: 13/III/April/. (available at http://www.asiaviews.org/index.php?option=com_content&view=article&id=26098:reportalias7273&catid=2:regional-news-a-special-reports&Itemid=9, last viewed on 14 September 2011).

¹⁰ Report of the Eminent Persons Group for the ASEAN Charter, Par. 29. Available at <http://www.asean.org/19247.pdf>, last viewed on 13 September 2011. Emphasis supplied.

(2009, p. 101). A 2009 report from the Institute of Southeast Asia Studies (ISEAS) considered the possibility of implementing some changes to dispute settlement mechanisms (DSM) on political issues, but warned that it is “important for ASEAN to develop this DSM for the right reasons; it will need to clarify the objective and assess whether a new political DSM is really necessary... [the] DSM process would lessen the spirit of cooperation in negotiating resolution to conflicts, although a good (strong) DSM process might encourage promotional compliance even if members may not use it” (ISEAS, 2009, p. 12).

Worse still, experts on ASEAN do not unequivocally support voting procedures. In an interview with Professor Alfred Gerstl, an expert on ASEAN human security, he flatly disagreed with voting procedures, with the exception of employing the same to minor, administrative matters (2011, pers. comm. 9 August 2011). Likewise, Professor Rosario Manalo, the Philippine Representative to the AICHR, dismissed the proposition of voting procedures (2011, pers. comm. 15 July 2011). Many other authors, such as Desierto (2009) and Severino (2009), have noted that the ASEAN Charter allows the Summit to decide on an alternative decision-making modality in the event that consensus cannot be achieved. Desierto noted that the Summit is empowered to make this decision, but she stops short of saying that it can sanction a voting procedure (2009, p. 91-2). Severino, in turn, states that the Charter “does not specify that the [Summit] should resort to voting on the matter, but neither does it rule out that modality” (2009, p. 8). Unlike Desierto, Severino says the Summit can sanction voting procedures, but he stops short also of asserting that it should. Even Phan (2009; 2010), who criticized consensus decision-making, suggested that the solution is not to employ voting procedures, but to allow ASEAN to split into “coalitions” – a human rights progressive coalition and conservative one, thereby bypassing the problem of collective decision-making altogether.

In the realm of regional human rights, does a compelling need for voting procedures exist? After all, consensus decision-making has, in fact, steadily pushed the development of the ASEAN human rights framework forward, beginning with the binding human rights provisions in the ASEAN Charter of 2008, the adoption of the AICHR TOR in 2009 and now, the ongoing negotiations of the ASEAN Human Rights Declaration (AHRD)¹¹. To justify the implementation of voting procedures on the human rights agenda, questions on the ASEAN's consensus-based decision-making modality must be framed in a radically different rubric. We cannot continue to endorse the debate in terms of 'slow' versus 'fast', 'traditional' versus 'innovative' or 'harmonious' versus 'divisive', as can be gleaned from much of the current literature.

¹¹ See <http://www.aseanhhrmech.org/news/sixth-meeting-of-the-aicrh-concluded.htm> (last viewed on 13 September 2011). The negotiations of the ASEAN Human Rights Declaration was extended to January 2012, with the last meeting held in Makati City, Philippines.



I submit that the true problem confronting ASEAN decision-making practices is not properly framed as a question of whether or not consensus is obtainable *per se*, but in the *kind* of consensus birthed by ASEAN diplomacy on a highly politicized agenda such as the regional human rights framework. I contend that in the politicized human rights landscape of ASEAN, discourses are not merely divergent, but hierarchically arranged. Between political participants within ASEAN human rights negotiations, there exists an inherent hegemonic order that cannot always be overcome by a call to consensus-seeking predicated on an assertion of equality between member-states. Operating on this tenuous notion of prevailing equality and the unquestioned obtainability of consensus, I contend that consensus-seeking demonstrates a very dangerous tendency towards retaining the status quo of ASEAN human rights. The proposed solution to decisions that invariably lead to a fortification of the status quo is the implementation of a voting procedure to supplement the initial consensus-based negotiations.

Part II of this paper first frames ASEAN's pragmatic diplomacy in a rubric of liberal theory. Liberal theory provides a framework that illustrates the process of how consensus-seeking, much in the mold of ASEAN diplomacy, resolves competing discourses that make up a politicized agenda. More importantly, it underscores the requisites for a successful obtainment of consensus. Part III mobilizes the tenets of Chantal Mouffe's theory of Agonistic Pluralism, which is a scathing rebuke of liberal theory and consensus-seeking. This paper will employ Mouffe to expose the inherent dangers of liberalism's obsessive pursuit of consensus, specifically in the context of high politicization. This part also revisits the negotiations of the ASEAN Charter and the regional mechanism, which represent the first serious collisions of differing human rights discourses in ASEAN. Armed with the theoretical frameworks of liberal theory and agonistic pluralism, this paper attempts to identify the failures of ASEAN's decision-making practice in producing a *sensible and fair* consensus on the regional human rights regime. Finally, this paper concludes with a proposal to implement supplemental voting procedures. The justification for such a procedure is precisely to enable ASEAN to avoid the failures of rigid consensus-seeking in a highly politicized decision-making landscape. It enjoins ASEAN from its misguided pursuit of attempting to thoroughly depoliticize the human rights agenda through consensus-seeking, thereby allowing the Association to confess to the possibility of unresolvable disputes in the human rights agenda to which no sensible and rational consensus exists. Where a genuine departure from the human rights status quo is supported by a majority of member-states, ASEAN is thus equipped to advance the human rights agenda.

PART II: LIBERAL THEORY AND ASEAN DIPLOMACY

Liberal theory is typically described as “a view that sees the world as a place of admittedly many perspectives and values and that, owing to empirical limitations, we will never be able to adopt them all, but that *when put together*, they constitute a harmonious and non-conflictual ensemble” (Mouffe 2005, p. 10) (emphasis supplied). There are many features to liberal theory, but for our purposes, this paper will focus on two: parity and individualism. Central to liberal theory are the notions of parity of political participants and an emphasis on individualism, geared towards achieving a 'harmonious and non-conflictual' ensemble. The ultimate aim of any liberal theory, much like ASEAN's pragmatic diplomacy, is the obtainment of a middle ground between differing perspectives and values that elicits no conflict between political participants – otherwise known as a consensus.

The entire process of negotiating a consensus, from deliberations until obtaining agreement, requires a non-conflictual tack as well. Hannah Arendt's views on politics spells out a liberal view of difference and conflict, to wit:

“...the real ‘meaning of politics’ only ‘comes to the fore where people are *with others and neither for nor against them* – that is, in sheer human *togetherness*” (Arendt, 2005, p. 117; Arendt, 1958, p. 180 cited by Breen, 2007, p. 349)(emphasis supplied)

This statement encapsulates the entire breadth of ASEAN diplomacy – “quiet diplomacy” and the ability to “disagree without being disagreeable”, “always striving to arrive at a consensus through deliberation”, “avoiding open conflict or confrontation”, and “giving as much importance to process as to outcome” (Katsumata, 2003, p. 106; Anwar, 2001, p. 31). The tenor of Arendt's politics is a familiar one in ASEAN relations and on all fours with Malaysian Foreign Minister Datuk Seri Syed Hamid Albar, who said during the 11th ASEAN Summit in Kuala Lumpur in December 2005 that,

“The crafting of the ASEAN Charter must be based on the spirit of 'togetherness' and 'we' feeling... 'Togetherness' is something that seems to have eluded ASEAN all these years. The missing ingredient in our interactions has been this 'we' feeling between and among the ASEAN people,”¹²

¹² The 11th ASEAN Summit produced the ASEAN Declaration on the Establishment of the ASEAN Charter. See The People's Daily news item, “ASEAN Charter to be based on spirit of 'togetherness'”, 8 December 2005 (available at http://english.peopledaily.com.cn/200512/08/eng20051208_226386.html, last viewed on 20 September 2011).



It is this liberal rhetoric of 'togetherness' that permeates all discussions within ASEAN. Even incendiary issues like human rights, which politicizes ASEAN very deeply, are addressed ostensibly with an attempt to negate conflictuality and foster 'togetherness', thereby depoliticizing the issue and the membership. In order to animate the liberal endeavor of togetherness and the negation of conflictuality, liberal theory emphasizes the fundamental notions of parity and individualism.

2.1 Parity and Individualism

In liberal democratic theory, parity, or equality, among political participants is derived from the foundational liberal tenet of respect. Liberal theorist John Rawls says in *A Theory of Justice* that “each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override” (1971, p. 3). Nussbaum elaborates this inviolability, to wit:

“...dignity is the correlate of respect: The reason why respect is so central is that people are ends, have a dignity, have something about them that makes it wrong to violate them for the sake of overall well-being, or to use them as mere means. Respect is an attitude that recognizes that dignity, *and the fact that it is equal*” (2011, p. 2)(emphasis supplied).

As it is with individual persons in liberal democratic theory, states, too, treat one another with the same respect and equal standing in liberal international relations. In this sense, the notion of respect and equality in liberal democratic politics is analogous to the notion of 'state sovereignty', which is the normative element of the ASEAN Way. One way that the respect that ASEAN states accord one another is manifested is through their deferential regard for each member-state as an *equal*.

Respect and ultimately equality are salient features of ASEAN diplomatic practices. Indeed, ASEAN states are impressed with the same liberal notion of parity. In the constitutive documents of ASEAN, the Bangkok Declaration, the TAC and finally in the ASEAN Charter, the theme of 'equality' resonates. The Declaration refers to “the spirit of *equality* and partnership”¹³, the Treaty of Amity and Cooperation calls for “mutual respect for the ... *equality*... of all nations”¹⁴ and the Charter emphasizes

¹³ The ASEAN Declaration (Bangkok Declaration), Bangkok, Thailand, signed on 8 August 1967 by the founding nations of ASEAN, preamble. See <http://www.asean.org/1212.htm>, last viewed on 31 October 2011.

¹⁴ Treaty of Amity and Cooperation (TAC), signed on 24 February 1976 in Bali, Indonesia, Art. 2(a) and 5. See <http://www.asean.org/1217.htm>, last viewed on 31 October 2011..

“the fundamental importance of *equality...*”¹⁵ Indeed, ASEAN diplomacy is predicated on the equal standing of all member states.

Equality is not sameness, however. The test of respect is in the recognition of equality despite an encounter with 'difference'. Dryzek anchors difference on his concept of 'discourse', which he describes as,

“A discourse is a shared set of concepts, categories, and ideas that provides its adherents with a framework for making sense of situations, embodying judgments, assumptions, capabilities, dispositions, and intentions. *It provides basic terms for analysis, debates, agreements, and disagreements...* Discourses construct meaning, distinguish agents... delimit what counts as legitimate knowledge, and define common sense.” (2006, p. 1-2) (emphasis supplied)

Dryzek here describes a discourse as a set of beliefs with determines a collective identity; different discourses determine equally different collective identities. A collective identity is relational in that it is predicated on a recognition of its difference with other collective identities (Mouffe, 2005, p. 15). It is from the formation of a collective identity that a notion of a 'we' can be formulated, but only in relation to a 'they'.

The interaction between differing collective identities (i.e. 'we' as against 'they') is a potential flashpoint for disagreements. It is in this context of difference and disagreement that the liberal tenet of respect is tested. Indeed, in liberal theory, it is essential that adherents of differing discourses afford each other respect and treat each other's discourses, identities and preferences as *equally valid*. In the international sphere, liberalism correlates again with sovereign equality in that states may be different in their discourses, identities and choices, but they treat one another as equals nevertheless.

After parity, individualism is the next key feature of liberal theory. It is a crucial element of liberal theory that is less salient, but ultimately integral, in ASEAN diplomacy, as I will demonstrate hereafter. For the liberal theorist, the focus of managing disputes within a polity is neither the competing collectives nor their choices; it is the differing *discourses* that inform collective identities and their choices. Stated differently, to overcome disagreement, liberal theory must *reduce the differences between discourses*. This is a vitally important point that clarifies the actors in liberal

¹⁵ Supra on note 3, Art. 2, par. 2(a).



politics. Through a reduction of differences between discourses, liberalism is ultimately able to reduce differences between competing (1) collective identities and (2) discernible proposals.

By reducing differences in discourse, collectives (that adhere to different discourses) may not be able to distinguish one collective from another. Without any discernible discourses, all parties to a disagreement can no longer be grouped into distinguishable sets of collective identities; parties are reduced to an ambiguous mass of *individuals*. Thus, the ultimate participant in liberal theory is *an individual*. Liberal theory espouses the enabling power of free *individuals* to advocate on their own behalf and to engage other individuals in a respectful and rational manner.

ASEAN has no policy of individualism underlying its cooperative mechanisms. Nevertheless, the Association does not officially recognize collectives within the membership; all references to ASEAN discussions and decisions are framed as collegial efforts. Collectives smaller than the 10-state membership do exist, however, especially in the human rights agenda, as noted by Singapore's Minister of Foreign Affairs Tommy Koh, to wit:

“Even Singapore's Minister of Foreign Affairs Tommy Koh recognized the division within ASEAN between the two groups: the first one comprised of Indonesia, Malaysia, the Philippines and Thailand and the second one comprised of Myanmar, Laos, Cambodia, and Vietnam. The first group attempts to *rethink traditional norms or even calls for norm changes*. The second group tries to *preserve the status quo*, which could best serve their political interests” (Phan, 2009b, p. 387)

That collectives do not have any bearing in liberal or ASEAN decision-making has serious consequences on the manner ASEAN addresses its own politicization and its ability to decide politically. Essentially, individualism results in a depoliticization of a political association.

2.2 Depoliticization

Gerstl defines depoliticization as, “portray[ing an issue] as to be discussed from a technical or scientific perspective; consequently, it has to be resolved by 'neutral' experts rather than politicians” (2010, p. 8; Laclau and Mouffe, 2001, p. 173). This is a common definition, but ultimately, it is not a useful one for our purposes. When we speak of depoliticization, we must conceive it in a 'liberal' sense (i.e. anchored on

individualism and rationalism) rather than a 'libertarian' one (i.e. minimal state participation), primarily because ASEAN diplomacy is state-driven.

We begin the search for depoliticization with an insightful definition of *politicization*, which reads, "to make an issue appear to be *open, a matter of choice*, something that is *decided upon...* " (Buzan, Wæver & de Wilde, 1998, p. 29)(emphasis supplied). Crafted in a simpler way, politicization means, 'to make an issue open to decision between choices.' What are choices? What is a decision? To be completely useful to us, these two terms require some clarifications.

'Choices' can be understood in the context of Dryzek's notion of 'discourse'. We noted earlier that a discourse establishes a collective identity and further "provides its adherents with a framework for making sense of situations, embodying *judgments...*" (Dryzek, 2006, p. 1)(emphasis supplied). A collective's judgment of a situation prescribes an equally specific 'choice' on how a situation must be dealt with. Between a plurality of clearly discernible discourses and collectives, there will also be a plurality of *clearly discernible choices*.

'Decision', meanwhile, must be understood in the Rawlsian notion of the 'burden of judgment' (i.e. the limits of reasonable judgment between incompatible doctrines). Stated otherwise, it must mean a 'definite decision' between 'clearly discernible' choices emanating from a plurality of discourses. As Mouffe put it, it is a decision in the strict sense of "deciding in an undecidable terrain" (2005, p. 12).

A clarification of 'choice' and 'decision' allows us to more specifically define politicization as: 'to make an issue open to **definite decision** between **clearly discernible choices**.' Derived inversely, a general meaning of *depoliticization* would read: 'to **foreclose** an issue to definite decision between clearly discernible choices.' This definition is not far removed yet from the libertarian definition of Gerstl, which forecloses decision *by referring an issue to independent experts*. Hereafter, we must make a clear departure from libertarianism by elucidating the specific manner by which a liberal notion of depoliticization forecloses decision.

2.3 Depoliticization in Liberal Terms

We noted earlier that a reduction of differing discourses also blurs the lines between competing choices. Since choices are derived from a specific discourse, a reduction of discourses ultimately *blurs discernible choices to indiscernible choices*. Without certainty and discernibility underwriting the proffered choices, liberalism effectively forecloses the possibility of making a definite decision; there are simply no clear choices to decisively choose from. Once choices lose the hard edges that certainty inspires, all proposals are left shrouded in doubt – and doubt is exactly the condition within which liberal theory thrives.



Doubt is a crucial concept in Ulrich Beck's (1997) liberal theory of 'reflexive modernity'. In his vision of human societies, he stresses that man has entered an "era of ambivalence wherein no one can believe that they possess the 'truth'". The positive role of doubt is that it leads to a "pacification of conflicts", wherein people must be "tolerant" of others' views. Stripped of the possibility of imposing one's *doubtful* assertion on another, individual political participants are left with no choice except to engage in this 'pacification' through the cold rationality of *deliberations and consensus-seeking* (Mouffe, 2005, p. 41).

By obliterating the differences between discourses and collectives, proposals cannot be politically propounded; the same are simply offered to the membership. Since the collective strength behind a given proposal is not recognized, it cannot be tallied either. Individualism, thus, negates the ability of a polity to politicize itself and consequently, it negates the possibility of political decision-making modalities such as voting procedures.

2.4 Applying Liberal Theory to ASEAN Diplomacy

There are two material points in our examination of liberal theory which must be underscored in ASEAN diplomacy. First, liberal theory provides a theoretical framework that explains how ASEAN diplomacy results in consensus-seeking. The requisites of parity and individualism clarify ASEAN's pragmatic approach to diplomacy, highlighting the expressed value of equality in ASEAN statutes, and the unstated tendency of eroding collective identities, paving the way for a polity of individuals stripped of politicization. Second, our examination of liberal theory leads us to the conclusion that ASEAN diplomacy does not empirically omit voting procedures; rather, the liberal designs render ASEAN diplomacy constitutively *unable* to decide politically. Individualism takes center stage here, where 'smoothing over differences', a renowned habit of ASEAN diplomacy, leads to a blurring of discourses, collectives and finally, choices. Without discernible choices, ASEAN *cannot* decide definitively. Hence, consensus remains the overarching method of obtaining decisions.

PART III: AGONISTIC PLURALISM AND THE HUMAN RIGHTS AGENDA

Launching a critique of ASEAN's consensus-based decision-making modality begins with establishing the difference between 'politics' and 'the political'. As Mouffe points out, it is "not very common to speak of 'the political' in ordinary language" (2005, p. 8), much less in ASEAN discourse, but distinguishing between the two terms eventually paves the way to a keener insight on the consequences of the ASEAN Way's avowed purpose to depoliticize ASEAN human rights engagement. Mouffe employs Heidegger's philosophical distinction, wherein *politics* refers to the 'ontic' level, while

the political refers to the 'ontological' level. The ontic has to do with "the manifold practices of conventional politics", while the ontological refers to "concerns the very way in which societies are instituted" (Mouffe, 2005, p. 8-9). It is a definition of *the political* that we are concerned with – the very way by which human societies are instituted. More specifically, we must inquire into the way by which ASEAN institutes itself as a human rights community.

There is no agreement between scholars as to a uniform definition of 'the political'. The fundamental assertion of Mouffe is that the political is "a space of power, conflict and antagonism" (2005, p. 9). Some authors, such as Hannah Arendt, define the term as "a space of freedom and public deliberation", which seems to correspond to the general tenets of ASEAN diplomacy (Mouffe, 2005, p. 9; Breen, 2007, p. 343-355). A keen eye on these two different approaches to *the political*, however, is essential to contrasting Mouffe from liberal theorists. Mouffe, more precisely, defines *the political* as power, conflict and antagonism, which are constitutive of human societies, while *politics* as "the set of practices and institutions through which order is created, organizing human coexistence in the context of *conflictuality* provided by the political" (2005, p. 9) (emphasis supplied). Transposing Mouffe's definition of *politics*, the liberal theorists' alternative would read, "[the] set of practices and institutions through which order is created, organizing human coexistence in the context of *freedom and public deliberation* provided by the political." In either case, *politics* operates directly based on the context provided by *the political*.

The liberal theorist's view of *the political* does not mean, however, it is bereft of any form of disagreement. Anwar points out that it is "clearly unrealistic to expect that the existence of ASEAN [and its practice of the ASEAN Way] can remove all ... disagreements" (2001, p. 30). ASEAN will always have to contend with disagreements. Indeed, both Mouffe and advocates of liberal theory begin at the same starting point: disagreements are inherent. What generally distinguishes them from each other is *how* they address disagreement. On one hand, a range of theorists under the umbrella of liberalism view *the political* as deliberative, and that *politics* is utilized to facilitate this order-setting deliberation. *Politics* in this conception is designed to **overcome** disagreement through a 'reduction of discourses'. Mouffe proffers, on the other hand, that *the political* is an eruption of conflict when different discourses collide, and that *politics* creates order by **facilitating** this conflict (2005, p. 9). Stated otherwise, Arendt, liberalism and the ASEAN Way's politics attempt to remove differences, and therefore conflict; Mouffe's politics *embraces* conflict, and therefore attempts to preserve differences.

3.1 Hegemony and Inequality

Mouffe decries the liberal obsession with parity and equality. Her objection to parity is anchored on Antonio Gramsci's concept of hegemony, defined as, "the



supremacy of one group or class over other class or groups; it is established by means other than reliance on violence or coercion" (Fontana, 2008, p. 84-5). Hereafter, we incorporate Mouffe's conception of hegemony. Ernesto Laclau and Mouffe's complex but enlightening definition qualified Gramsci by emphasizing that under a hegemonic order ostensibly beneficial to the dominant group, the subordinate group (or class) performs social tasks to which it "does not identify with" (Laclau and Mouffe, 2001, p. 47-54). According to Mouffe, we must "[recognize] the *hegemonic nature of every kind of social order* and the fact that **every society** is a product of a series of practices attempting to establish order in a context of contingency" (Mouffe, 2005, p. 17) (emphasis supplied).

We are able to derive two notions from the concept of hegemony. First, in hegemony, there is always a dichotomy between a dominant group/class (i.e. collectives) and a subordinate one. Second, the subordinate class does not identify, whether fully or partially, with its role in the hegemonic order; it has its *own identity separate from the dominant class*. Mouffe's notion of classes, or collective identities, is somewhat similar to the one in liberalism, where different discourses, dominant or subordinate, establish different collectives, except that for her, these identities are not merely different – they are hierarchically *unequal*.

As mentioned earlier in Part II, ASEAN experts like Phan (2009b) have recognized differing classes or collectives within ASEAN. Indeed, Petok (2011) later remarked,

"The divide between these two groups has been characterized as one group moving toward *reform of 'traditional norms'*, while the other is more conservative and 'tries to *preserve the status quo*, which could best serve their political interests'" (2011, p. 17) (emphasis supplied).

Phan and Petok were able to recognize that the human rights discourse of ASEAN is divided between sets of established (i.e. status quo) norms and alternative (i.e. subordinate) norms. Essentially, for these two authors, the debate is envisioned as a battle between the 'old' and the 'new', the 'existing' and the 'possible'. However, when we put on the lenses provided to us by Mouffe, we are able to identify what is crucially missing from Phan and Petok's formulations – hegemonic dominance. In Mouffe's formulation, the clash between two discourses in a hegemonic intervention is between a dominant, established discourse and a subordinate, alternative discourse.

Dominance establishes more than just difference; it ordains inequality. Phan and Petok, together with many others, have all pointed out a 'cleavage' in ASEAN human rights discourse, assigned protagonists to each side and named each faction by many appellations such as 'status quo-adherents' and 'status quo-reformists', or 'non-democracies' or 'pro-democracies'; few, however, have recognized the 'dominance' of the status quo and how it changes terms of ASEAN's liberal diplomacy.

Dominance and inequality are particularly evident in the ASEAN human rights debate. By viewing the human rights debate in ASEAN as a hegemonic mobilization, it becomes clear that the competing collectives are not on equal terms. What is the consequence of inequality on the liberal ethos of individualism?

3.2 Inequailty and Unequal Reductions of Discourse

The High Level Task Force (HLTF) negotiations on the prospective ASEAN Human Rights Body was "the most explosive and tense of all", the "most sensitive, controversial and difficult subject" (Patra, 2009, p. 7 and 13). Throughout the whole process, HLTF negotiators "fought hard to protect... respective national [interests]" but also allegedly committed themselves to "compromise for the common good" (Koh, 2009, p. 68). Ambassador-at-large Abdul Razak noted that "persuasion and power of arguments" were the "basis for compromise and final agreement", and that "*[no] single member state could claim to play the dominant role...*" (Abdul Razak, 2009, p. 20)

Ambassador Abdul Razak's statement blindly reinforced what I think is a false notion of equality between negotiating member states. This falsehood is compounded by Foreign Secretary Patra of Brunei, who described the negotiation as an attempt at "striking an acceptable balance of competing pressures" (2009, p. 3). Various other members of the HLTF assert that the Charter is a "finely-balanced document" that takes into account "the different perspectives, interests and concerns of the ten member states" (Koh, Manalo & Woon, 2009, p. xxi).

I assert, however, that all the claims of balance and equality belie the true nature of the HLTF negotiations on the human rights mechanism. A key statement from Ambassador Abdul Razak himself acknowledged what I think is manifest inequality typically seen in hegemonic mobilizations, to wit:

"The older ASEAN member states, Indonesia, Malaysia, the Philippines, Singapore and Thailand even had to counter *the notion of being seen to be 'too generous' in conceding to the CLMV (Cambodia, Laos, Myanmar and Vietnam) member states on various critical and sensitive issues* in the Charter" (Abdul Razak, 2009, p. 21) (emphasis supplied).



To my mind, there are two possible ways of interpreting this statement from Ambassador Abdul Razak. First, it appears that the older members demonstrate some form of benevolence towards the CLMV. This 'benevolence' implies that the older members are in a more privileged position that grants them the liberty to concede to the CLMV. I disagree with this interpretation because it suggests that the older members have been *voluntarily* generous in conceding to the CLMV – after all, consensus is essentially voluntary. I think that not all instances of consensus represent genuine, mutual agreement; sometimes consensus is obtained begrudgingly or out of necessity. Sometimes, the older member states of ASEAN *had* to concede generously to the CLMV.

I contend that there is a second interpretation of Ambassador Abdul Razak's statement. He impliedly recognized that the 'older' members held an *inferior* negotiating position relative to the CLMV, thus causing the former to suffer from the propensity of conceding more in negotiations. I assert that the CLMV, by virtue of its plain adherence to the status quo, occupies the dominant position in ASEAN human rights negotiations. Chiou (2010) supports this contention when he recognized that status quo-adherents in ASEAN possessed a dominant strategy of rejecting proposals (2011, p. 380-82). Stated simply, status quo-adherents (i.e. the CLMV) can reject proposals, thereby resulting in a retention of the social order they desire. Alternative discourse-adherents, meanwhile, **always fail** to obtain their desired social order when they enter their rejection. This negotiation inequality virtually places the onus of discourse reductions on the reformist states, if only to obtain a consensus and some part of their desired social order.

Thus, the consequence of inequality on individualism, or the habit of reducing discourses, is exactly what Ambassador Abdul Razak observed – human rights reformist states in ASEAN concede more of their discourse. Discourse reductions are not equally applied in a hegemonic landscape; subordinate collectives undertake more reductions while dominant collective, less. The evidence of one-sided reductions is embodied in the tepid human rights provisions of the Charter and later, the AICHR TOR.

In reaction to the developing form of the ASEAN Charter, then-President Gloria Macapagal-Arroyo of the Philippines threatened that the Philippine Senate would withhold ratification of the ASEAN Charter if the Myanmar junta did not free Aung San Suu Kyi. Indonesia, thereafter, called the approved Charter "garbage", while another unnamed ASEAN official called the same a "victory for some of the least democratic states in the region (Emmerson, 2008, p. 81). Crucial to the human rights agenda is the fact that ASEAN Human Rights Body and human rights provisions had been subject to tremendous reductions, having left reformists states to accept the establishment of a regional human rights regime ostensibly subordinated to ASEAN's deep-seated adherence to the principle of non-interference (Chiou, 2010, p. 386).

On the AICHR, Drummond (2011) provides an exhaustive and balanced assessment that further illustrates the frustrated efforts to hold member states accountable to the Association for human rights violations. For our purposes, we do not need to go into finer detail about strengths and weaknesses of the AICHR. What is important is the conclusion that Drummond arrived at, to wit:

“Notwithstanding its deficiencies, this mandate [of the AICHR] provides opportunities for regional human rights norm building and *domestic internalisation*, the *strengthening of national capacities* for human rights promotion and protection, and the potential to move towards monitoring of human rights issues of concern. In particular, this report has proposed a ‘hub-and-spoke’ model whereby the AICHR coordinates the *strengthening of each ASEAN State’s national capacity* for human rights promotion and protection by facilitating assistance programs through a variety of stakeholders and service providers.” (2011, p. 34) (emphasis supplied)

My interpretation of Drummond's even-keeled assessment is that the AICHR bears its strongest potential by supporting *domestic* regimes, aimed at improving national capacities to promote and protect human rights. Drummond's study is important to us not for its clarification of the strengths and weaknesses of the AICHR, but in illustrating that the ASEAN human rights status quo of the early 1990s remains relatively intact in this century – *human rights are still a domestic matter*.

This does not mean that the AICHR is not a 'historic milestone' and nothing had changed in ASEAN human rights discourse. The only point I wish to emphasize is that ASEAN consensus, through its promulgation of the Charter and AICHR TOR, has upheld its long-standing status quo wherein human rights are still within the competence of domestic regimes, despite the mobilization of majority of ASEAN states to implement a stronger mandate for the human rights mechanism since HLTF debates in 2007. In an interview with Prof. Ibu Tuti and Dr. Seree Nonthasoot, respectively the Indonesian and Thai representatives in the ASEAN Human Rights Declaration Working Group, they noted the extreme difficulty of the AHRD negotiations. They lament that it is only status quo-adherent states, a minority of the membership, who opposed stronger human rights language in the regional framework (Tuti and Nonthasoot, pers. comm., 9 January 2012; Manalo, pers. comm. 19 January 2012). As it were in 2007, a minority dominates the current negotiation. Their dominance is not predicated on numbers but on their simple adherence to the status quo.



PART IV: VOTING PROCEDURES AND ADVANCING THE HUMAN RIGHTS AGENDA

Consensus-seeking bears its weakness when confronted with the terrain of hegemonic inequality. Against the backdrop of hegemony, any consensus achieved has a tendency to be skewed in favor of the dominant collective, as ASEAN's human rights outcomes have demonstrated. In order to avoid confounded consensus, I propose that ASEAN must utilize its inherent politicization over human rights, rather than attempt to wholly eradicate it.

4.1 Agonistic Pluralism

Mouffe asserts, “[The] democratic debate is conceived as a real confrontation ... [and] adversaries do fight – even fiercely – but *according to a shared set of rules*, and their positions, despite being ultimately irreconcilable, are *accepted as legitimate perspectives*” (2005, p. 52) (emphasis supplied). Mouffe makes a careful distinction between two varying degrees of politicization. She asserts that “[what] is required is distinguishing between the categories of 'antagonism' (relations between enemies) and 'agonism' (relations between adversaries) and envisaging a sort of 'conflictual consensus', providing a common symbolic space among opponents who are considered as 'legitimate enemies'”. Crucial to Mouffe's political theory is the conception of adversaries locked in definite conflict, who recognize that “there exists no rational solution to their conflict but nevertheless recognize the legitimacy” of each one's incompatible discourses. Though they are locked in definite and ineradicable conflict, “they see themselves in as belonging to the same political association” (2005, p. 19-21).

At its essence, agonistic pluralism advocates the preservation of a *measured politicization* in order to energize the democratic process. Though discourses are ultimately irreconcilable and that a definite political decision between irreconcilable discourses necessarily results in privileging one discourse at the expense of others, the unity of the political association is demonstrated by the common adherence to a 'shared set of rules' of decision-making, a commitment to respect the results this set of rules produces and most importantly, the acknowledgement that every prevailing discourse is 'contingent' and that the democratic process will always provide a renewed debate over the validity of the prevailing order.

4.2 Applying Agonistic Pluralism to ASEAN Diplomacy

I understand ASEAN's cautious attitude towards upheavals on human rights policy or any other regional issue for that matter. Again, radical change is not always necessary, desirable and wise; sometimes, adherence to the status quo is the best course of action. However, I opine that there are times when radical change is necessary, desirable and perhaps even the wiser course of action. There are times when a discourse radically different from the status quo should not be substantially reduced, diluted or

compromised by ASEAN's habit of extensive deliberations and committed consensus-seeking.

Of course, a genuine consensus is always desirable because, where it is obtainable, it consolidates the common ground between political participants. Sometimes, however, a contested course of action should be taken even if some parties disagree with, or even vehemently object to it. There are times when complete harmony, full agreement and an all-inclusive consensus are simply not possible without producing "self-defeating" or even absurd results that simply mirror the existing status quo, as demonstrated by the Charter and AICHR TOR negotiations (Chiou, 2011).

This paper proposes that in cases where differing ASEAN discourses are diametrically opposed and a sensible consensus is not possible, as they will invariably be in future human rights debates, a voting procedure should supplement the traditional modality of deliberations and consensus-seeking. It is not a complex modality nor an intricate procedure – it must simply be a process where there is a definite end to deliberations and discourse reductions, a moment where votes are taken and counted, and where a prevailing proposal is declared. While the form of voting, whether by simple majority, qualified majority or any other model, is beyond the scope of this paper, it is sufficient that there exists a procedure that definitively determines the passage or failure of contested human rights proposals.

In ASEAN literature, some authors have made gratuitous, but nevertheless plausible, claims that political decision-making processes may "lessen the spirit of cooperation" or run a "risk of creating or reinforcing cleavages" (Grimes 2009; ISEAS 2009). This has been carelessly used to justify continued adherence to strictly consensual decision-making. I contend that ASEAN must confront the reality that the human rights debate is fiercely conflictual and that it will continue to be so for an appreciable length of time considering the heterogeneous composition of the membership. The 'cleavages' will persist with every new opportunity to debate the future trajectory of the human rights framework. Until the times comes when ASEAN membership develops a genuinely homogeneous human rights mindset, this issue will always be highly sensitive and politicized.

We can only speculate on whether or not ASEAN, equipped with a voting procedure, can successfully and radically move the human rights agenda forward. Put another way, no one can be certain that ASEAN will vote in favor of a more progressive human rights policy. The point to be emphasized here, however, is that the outcomes of ASEAN's human rights politics cannot be limited to mere variations of the status quo, as we had already observed of the outcomes of ASEAN negotiations on human rights; there must be *a real opportunity* to obtain a wide gradation of outcomes that either



retain, mildly depart, or even vastly change the human rights status quo, whichever one is deemed the most appropriate choice by the Association.

If ASEAN does employ a voting procedure on the human rights agenda, it does not automatically mean that every progressive proposal on human rights will garner enough votes to be incorporated into the regional framework. Just as much as there is an opportunity to change the status quo in a political procedure, the opportunity to retain is just as likely. What is important is that in a political decision-making modality, such as a voting procedure, either outcome is a genuine possibility, thus avoiding the liberal tendency of descending into absurd reductions, confounded consensus and an unavoidable retention of the ASEAN human rights status quo.

REFERENCES & RELATED MATERIALS

- [1] Abdul Razak, 2009. “Facing Unfair Criticisms”, in Tommy Koh, Rosario Manalo and Walter Woon (eds) *The Making of the ASEAN Charter*, World Scientific Publishing Co. Pte. Ltd. , Singapore., pp. 17-26.
- [2] Acharya, A., 2001. *Constructing a security community in South-East Asia: ASEAN and the problem of regional order*, London: Routledge.
- [3] Acharya, A., 2009. *Constructing a security community in South-East Asia: ASEAN and the problem of regional order* (2nd edition), UK, USA and Canada: Routledge.
- [4] Aggarwal V.K. and Chow, J.T., 2010. “The Perils of Consensus: How ASEAN's meta-regime undermines economic and environmental cooperation”, *Review of International Political Economy*, ISSN 0969-2290, 2010, Volume 17, Issue 2, pp. 262 – 290.
- [5] Anwar, D., 2001. “ASEAN's Enlargement: Political, Security and Institutional Perspectives”, in Than and Gates (eds), *ASEAN Enlargement: Impact and Implications*, Institute of Southeast Asian Studies, Singapore: p. 102-127.
- [6] Arendt, H., 1958. *The Human Condition*, Chicago, IL: Chicago University Press.
- [7] Arendt, H., 2005. “Introduction into Politics”, in Hannah Arendt, in Jerome Kohn (ed), *The Promise of Politics*, New York: Schocken Books, pp. 93–200.
- [8] Aung Bwa, 2009. “Jewel in My Crown”, in Tommy Koh, Rosario Manal and Walter Woon (eds) *The Making of the ASEAN Charter*, World Scientific Publishing Co. Pte. Ltd. , Singapore., pp. 27-36.
- [9] Beck, U., 1994. “The Reinvention of Politics: Towards a Theory of Reflexive Modernization” in U. Beck, A. Giddens and S. Lash, *Reflexive Modernization*, Cambridge, Polity Press.
- [10] Beck, U., 1997. *The Reinvention of Politics: Rethinking Modernity in the Global Social Order*, Cambridge, Polity Press.

- [11] Breen, K., 2007. "Violence and Power: A Critique of Hannah Arendt on the 'Political'", *Philosophy Social Criticisms*, Volume 33, Issue 3, pp. 343-372. doi: 10.1177/0191453707076143
- [12] Buzan, B., Wæver, O. & de Wilde, J., 1998. *Security: A New Framework for Analysis*, Lynne Rienner Publishers Inc., London and New York.
- [13] Canetti, E., 1960. *Crowds and Power*, London: Penguin.
- [14] Charney, J., 1999. "Anticipatory humanitarian intervention in Kosovo", *American Journal of International Law*, Volume 93, Issue 4, pp. 834 - 841.
- [15] Chiou, Y., 2010. "Unraveling the Logic of ASEAN's Decision-Making: Theoretical Analysis and Case Examination", *Asian Politics & Policy*, Vol. 2, No. 3, pp. 371–393. doi: 10.1111/j.1943-0787.2010.01199.x
- [16] Conlon, J., 2004. "Sovereignty vs. Human Rights or Sovereignty and Human Rights?", *Race & Class*, ISSN 0306-3968, 07/2004, Volume 46, Issue 1, pp. 75 - 100
- [17] Cooper, R. and Kohler, J. V., 2009. *Responsibility to Protect*, Palgrave Macmillan, available online at: <http://www.palgraveconnect.com/pc/doifinder/10.1057/9780230618404>
- [18] Cotton, J., 2004. *East Timor, Australia and the Regional Order: Intervention and its Aftermath in Southeast Asia*, RoutledgeCurzon, London.
- [19] Croxton, D., 1999. "The Peace of Westphalia and the Origins of Sovereignty", *International History Review*, ISSN 0707-5332, 09/1999, Volume 21, Issue 3, pp. 569 - 852
- [20] Cumaraswamy, P., 2009. *Institutionalizing Human Rights in South-East Asia: The birth of ASEAN's Intergovernmental Commission on Human Rights - An Interview with Param Cumaraswamy* by Christian Bothe, Austrian Journal of South-East Asian Studies, 23 October 2009.
- [21] Desierto, D., 2009. "Universalizing Core Human Rights in the 'New' ASEAN A Reassessment of Culture and Development Justifications Against the Global Rejection of Impunity". *Göttingen Journal of International Law* 1(1), p. 77-11.
- [22] Drummond, C., 2011. "ASEAN Intergovernmental Commission on Human Rights (AICHR) and the Responsibility to Protect (R2P): Opportunities and Constraints", Working Paper on ASEAN and R2P, Number 2, Responsibility to Protect in Southeast Asia Program, Asia-Pacific Centre for the Responsibility to Protect, University of Queensland [Online], Available at http://www.r2pasiapacific.org/documents/AICHR_and_R2P_Report_No_2_FIN_AL.pdf, last viewed on 27 September 2011.
- [23] Dryzek, J., 2006. *Deliberative Global Politics: Discourse and Democracy in a Divided World*, Cambridge: Polity Press.
- [24] Emmerson, D., 2008. "ASEAN's 'Black Swans'", *Journal of Democracy*, Volume 19, Number 3, pp. 70-84, The Johns Hopkins University Press, DOI: 10.1353/jod.0.0014 .



[25] Erman, E., 2009. "What is Wrong with Agonistic Pluralism? Reflections on conflict in democratic theory", *Philosophy Social Criticism* 35: 1039-1062. DOI: 10.1177/0191453709343385, available at <http://psc.sagepub.com/content/35/9/1039>, last viewed on 7 November 2011.

[26] Frederiksen, J., 2010. *An Eminent Critique of Chantal Mouffe's Agonism*. Ph. D. Thesis, Vanderbilt University, Tennessee.

[27] Fontana, B., 2008. "Hegemony and Power in Gramsci", in Richard Howson and Kylie Smith (eds) *Hegemony: Studies in Consensus and Coercion*, UK and USA: Routledge, pp. 80-106.

[28] Gates, C. and Mya Than, 2001. "ASEAN Enlargement: An Introductory Overview", Ed. by Than and Gates, *ASEAN Enlargement: Impact and Implications*, Institute of Southeast Asian Studies, Singapore: p. 1-27.

[29] Gerstl, A., 2010. "The Depoliticization and 'ASEANization' of Human Security in Southeast Asia: ASEAN's Counter-Terrorism and Climate Change Policies" Working Paper, prepared for Standing Group on International Relations, 7th Pan European International Relations Conference, Stockholm 9-11 September 2010.

[30] Ginbar, Y., 2010. "Human Rights in ASEAN – Setting Sail or Treading Water" *Human Rights Law Review* 10(3), Oxford University Press, pp. 504-518. Available at <http://hrlr.oxfordjournals.org/content/10/3/504.full.pdf>

[31] Haacke, J., 1999. "Flexible Engagement: On the Significance, Origins and Prospects of a Spurned Policy Proposal", *International Politics and Security Issues No.3*, ISEAS Working Papers, Singapore: ISEAS.

[32] Haacke, J., 2003. *ASEAN's diplomatic and security culture: origins, development and prospects*, London, USA & Canada: Routledge.

[33] Habermas, J., 1984. *The Theory of Communicative Action I: Reason and the Rationalization of Society*, Boston, Beacon Press.

[34] Hoang, A., 1996. "ASEAN Dispute Management: Implications for Vietnam and an Expanded ASEAN", *Contemporary Southeast Asia*, Volume 18, Number 1, pp. 61-80.

[35] Huong, L. T., 2010. "Many Faces One Identity: ASEAN in the case of human rights regime", *Asia-Pacific Journal of Social Sciences*, Special Issue No.1, December 2010 ISSN 2229 – 5801 (Print) / ISSN 0975 – 5942 (Online) Available at <http://socialsciences-ejournal.org/SP%206.%20Huong.pdf>, last viewed on 1 October 2011.

[36] Hooker, M., 1978. *A Concise Legal History of South-East Asia*. Clarendon Press, Oxford and New York.

[37] Institute of Southeast Asian Studies (ISEAS), 2009. *Life After the Charter*, ASEAN Studies Centre, Singapore.

[38] Kao, K. H. (Ed.), 2000. *ASEAN's non-interference policy: Principle under pressure*. London: ASEAN Academic Press.

[39] Katanyuu, R., 2006. "Beyond non-interference in ASEAN: The association's role in Myanmar's national reconciliation and democratization" *Asian Survey*, Volume 46, Number 6, 825–845.

[40] Katsumata, H., 2003. "Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the 'ASEAN Way'", *Contemporary Southeast Asia: A Journal of International and Strategic Affairs*, Volume 25, Number 1, April 2003, pp. 104-121.

[41] Katsumata, H., 2004. "Why is ASEAN Diplomacy Changing? From 'Non-interference' to 'Open and Frank Discussions'" *Asian Survey*, Volume 44, Number 2, March-April, pp. 237-254.

[42] Katsumata, H., 2009. "ASEAN and Human Rights: resisting Western pressure or emulating the West?" *Pacific Review*, ISSN 0951-2748, 2009, Volume 22, Issue 5, pp. 619 – 637.

[43] Kratchowil, F., 1989. *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, Cambridge: Cambridge University Press.

[44] Krucken, G. and Drori, G., 2009. *World Society: The Writings of John S. Meyer*. Oxford University Press.

[45] Koh, P. M. C., 2000. "Enhancing Economic Co-Operation: A Regional Arbitration Centre for Asean?" *International and Comparative Law Quarterly*, ISSN 0020-5893, 04/2000, Volume 49, Issue 2, pp. 390-412.

[46] Koh, T., Manalo, R. and Woon, W. (eds), 2009. *The Making of the ASEAN Charter*, World Scientific Publishing Co. Pte. Ltd. , Singapore.

[47] Koskiennemi, M., 2006. *From Apology to Utopia: The Structure of the International Legal Argument - Reissue with a new Epilogue*, Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo : Cambridge University Press

[48] Laclau, E. and Mouffe, C., 2001. *Hegemony and the Socialist Strategy: Towards a Radical Democratic Politics (2nd edition)*, London; New York: Verso.

[49] Leifer, M., 1999. "The ASEAN peace process: A category mistake" *Pacific Review*, Volume 12, Issue 1, 25–38.

[50] Moravcsik, A., 1997. "Taking Preferences Seriously: A Liberal Theory of International Politics". 51(4) *International Organizations* 513-553.

[51] Mouffe, C., 2005. *On the Political*, London, New York, Routledge.

[52] Narine, S., 1997. "ASEAN and the ARF: The limits of the 'ASEAN way'" *Asian Survey*, Volume 37, Number 10, 961–978.

[53] Nussbaum, M., 2011. "Rawls' Political Liberalism: A Reassessment" *Ratio Juris*, ISSN 0952-1917, 03/2011, Volume 24, Issue 1, p. 1-24.

[54] Patra, P. D., 2009. "Heart Labour", in Tommy Koh, Rosario Manal and Walter Woon (eds) *The Making of the ASEAN Charter*, World Scientific Publishing Co. Pte. Ltd. , Singapore., pp. 1-16.



[55] Petok, B., 2011. "Non-Intervention, Regional Stability and the ASEAN Court of Human Rights", *UDC Student Law Journal (first issue)*, University of the District of Columbia, 2010-11 [Online]. Available at <http://www.udclawreview.com/student-law-journal/2010-11-student-law-journal/>, last viewed on 29 September 2011.

[56] Phan, H., 2008. "The Evolution Towards an ASEAN Human Rights Body" *Asia-Pacific Journal of Human Rights and Law, Volume 1*, pp. 1-12.

[57] Phan, H. D., 2009. *A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia: The Case for a Southeast Asian Court of Human Rights*. SJD Thesis. American University, Washington D.C.

[58] Phan, H. D., 2009b. "A Blueprint for a Southeast Asian Court of Human Rights", *Asian-Pacific Law & Policy Journal*, ISSN 1541-244X, 2009, Volume 10, Issue 2, p. 384-433

[59] Phan, H. D., 2010. "ASEAN Inter-governmental Commission on Human Rights and Beyond", *Asia Pacific Bulletin*, no. 20, East-West Center Washington D.C., 20 July 2010. [Online] Available at http://www.eastwestcenter.org/sites/default/files/private/apb040_1.pdf, last viewed on 27 September 2011.

[60] Ramcharan, R., 2000. "ASEAN and Non-interference: A Principle Maintained" *Contemporary Southeast Asia*, ISSN 0129-797X, Volume 22, Number 1, pp. 60 – 88.

[61] Rawls, J., 1971. *A Theory of Justice*, USA: Harvard University Press.

[62] Rawls, J., 1996. *Political Liberalism. Expanded Edition*, New York, NY: Columbia University Press (1st edition 1993).

[63] Renshaw, C., 2010. "Understanding the new ASEAN Intergovernmental Commission on Human Rights: the Limits and Potential of Theory", *University of New South Wales Law Research Series, Volume 53* [Online] Available at <http://www.austlii.edu.au/au/journals/UNSWLRS/2010/53.html>, last viewed on 15 April 2011.

[64] Schmitz, H. P. and Sikkink, K., 2005. "International Human Rights", in Walter Carlsnaes, Thomas Risse and Beth a Simmons (eds) *Handbook of International Relations*, Sage Publications, 2nd Ed. 2005, at 521.

[65] Severino, R., 2006. *Southeast Asia in search of an ASEAN community: insights from a former ASEAN secretary-general*, Southeast Asia background series, Volume no. 10, Institute of Southeast Asian Studies, Singapore.

[66] Severino, R., 2009. "ASEAN: New Charter, New Optimism", *Regional Outlook*, ISSN 0218-3056, 04/2009, Southeast Asia 2009/2010, pp. 7-9.

[67] Simon, S., 2008. "ASEAN and multilateralism: The long, bumpy road to community" *Contemporary Southeast Asia*, Volume 30, Number 2, pp. 264–292.

[68] Sirivuthcharungchit, S., 2008. "The Weighted Voting Systems for ASEAN", Msc Dissertation, University of Warwick, unpublished. Available at

<http://www.bot.or.th/Thai/EconomicConditions/Semina/Thesis%20Workshop/The%20weighted%20voting%20systems%20for%20ASEAN.pdf>, last viewed on 13 September 2011.

- [69] Solidarity for Asian People's Advocacy – Task Force on ASEAN and Human Rights (SAPA-TFAHR), 2010. "Hiding Behind Its Limits: A Performance Report on the first year of the ASEAN Intergovernmental Commission on Human Rights (AICHR)", available at http://www.hrwg.org/attachments/590_Report%20Performance%20of%20AICH%201st%20year.pdf. Last viewed on 15 April 2011.
- [70] Song, J. H., 2010. "ASEAN's New Human Rights Commission: 'Toothless Tiger' or Catalyst for Change', *Foreign Policy Digest*, January 2010, available at <http://www.foreignpolicydigest.org/2010/01/01/aseans-new-human-rights-commission-toothless-tiger-or-catalyst-for-change/> (last viewed on 23 February 2011).
- [71] Toope, S. J., 2000. "Emerging Patterns of Governance and International Law" in Michael Byers (ed) *The Role of Law in International Politics: Essays in International Politics and International Law*, Oxford University Press.
- [72] Thambipillai, P., 1985. "ASEAN Negotiating Styles: Asset or Hindrance", in Pushpa Thambipillai, Jayaratnam Saravanamuttu (eds) *ASEAN Negotiations – Two Insights*, Institute of Southeast Asian Studies, Singapore, pp. 3-28.
- [73] Yee, S., 2004. 'The Role of Law in the Formation of Regional Perspectives in Human Rights and Regional Systems for the Protection of Human Rights: the European and Asian models as illustrations' *Singapore Year Book of International Law and Contributor*, 8 SYBIL, pp. 157-164.