

**FREEDOM OF EXPRESSION IN ASEAN:  
CONTEXTUALIZING FREEDOM OF EXPRESSION  
IN TERMS OF ASEAN VALUES**

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## ABSTRACT

Freedom of expression is one of the fundamental human rights. Countries have different appreciation of this right but varies in terms of its protection and implementation. This thesis focuses on how the right to freedom of expression is regarded in a regional setting, more particularly, the ASEAN Region and its values. While Member States in the ASEAN supported the rights in the Universal Declaration of Human Rights, an ASEAN regional response to the protection of the right to freedom of expression remains indefinable. As such, this study examines how the ASEAN contextualizes its international and domestic obligations under the freedom of expression in relation to the ASEAN Human Rights Declaration's provision stating that "realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds."<sup>1</sup>

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<sup>1</sup> ASEAN Human Rights Declaration, Nov. 19, 2012.

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# Introduction

## *ASEAN Background*

Freedom of expression is a right recognized under the Universal Declaration of Human Rights (UDHR). Under Article 19 of the UDHR, “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>2</sup> This right is protected under Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and has been recognized in several international instruments. Despite the universality of this right, regional considerations in the Association of South East Asian Nations (ASEAN) impact State obligations on the enforcement of this right, especially with the concept of ASEAN Values. The “ASEAN Way” is described as non-interference by ASEAN States in each other’s affairs to maintain peace across the region without any form of accountability for any rights violations.<sup>3</sup>

The ASEAN was established on August 8, 1967 as an intergovernmental organization formed with the purpose of facilitating regional solidarity and cooperation in the “economic, social, cultural, technical, educational and other fields.”<sup>4</sup> ASEAN is primarily political in nature. Eventually, ASEAN Member States adopted a declaration affirming its commitment to human rights with the ASEAN Human Rights Declaration (AHRD).<sup>6</sup> It recognized that in the ASEAN, “[e]very person has the right to [freedom of expression], including freedom to hold

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<sup>2</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) Universal Declaration of Human Rights, Dec. 8, 1948.

<sup>3</sup> Mariam Sarwar, *Human Rights the “ASEAN Way”: Exploring the Possibilities for a Regional ADR and Adjudicative Body in Southeast Asia*, 52 LOY. L. A. L. REV. 27 (2018).

<sup>4</sup> At present, the member states of ASEAN are Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

<sup>5</sup> History, ASEAN | ONE VISION ONE IDENTITY ONE COMMUNITY, <https://asean.org/asean/about-asean/history/> (last visited Nov 20, 2020).

<sup>6</sup> ASEAN Human Rights Declaration (AHRD), Nov. 19, 2012.

opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person's choice.”<sup>7</sup>

However, a problem arises with AHRD's provision that “realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.”<sup>8</sup> Moreover, the AHRD is not a legally binding international instrument for the people in the ASEAN Region, which thereby affects the interpretation and determination of regional values, particularly, the recognition of the right to freedom of expression in the said region.

Further, present circumstances raise concerns on the exercise of freedom of expression in the ASEAN. For instance, the passage of the Philippine Anti-Terror Act of 2020 triggered local and international concerns on the curtailment of the freedom of expression due to the law's vague definition of terrorism and detention and arrest based on mere suspicion.<sup>9</sup> Meanwhile, more than 90 persons have been prosecuted since 2014 under Thailand's *Lese Majeste* Law (which penalizes any criticism of the king) and this has sparked ongoing protests against the monarchy.<sup>10</sup> In Malaysia, the Internal Security Act of 1960 and the Sedition Act of 1948 are utilized to scrutinize and censor internet use of criticisms against the government and towards Islam. These occurrences illustrate the limitations of the exercise of freedom of expression in ASEAN.

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<sup>7</sup> AHRD, General Principle, art. 23.

<sup>8</sup> AHRD, General Principle, art. 7.

<sup>9</sup> Business and Human Rights, *Philippines: Business associations, trade unions, human rights organizations & financial executives strongly push back against Anti-Terrorism Act*, <https://www.business-humanrights.org/en/latest-news/philippines-business-associations-trade-unions-human-rights-organizations-financial-executives-strongly-push-back-against-anti-terrorism-act/> [last visited Nov. 30, 2020].

<sup>10</sup> Aljazeera, *Thailand's lese majeste law: A weapon to silence dissent?* <https://www.aljazeera.com/news/2020/10/15/thailands-lese-majeste> [last visited Nov. 30, 2020].

## ***Research Question***

In light of the ASEAN regional values, the AHRD, including the challenges of its implementation, and the recent threats to freedom of expression in the ASEAN region, this thesis seeks to address the central question of how the right to freedom of expression, as a universal right, is interpreted in the ASEAN regional context. As such, it is also necessary to determine the implications of the “ASEAN Way” upon the exercise of freedom of expression and discuss how ASEAN Member States comply with their international and regional obligations to respect and protect the right to freedom of expression.

Therefore, a legal analysis of ASEAN instruments and international treaties containing the right to freedom of expression will be undertaken in this study. In considering how ASEAN Values are shaped, this thesis will scrutinize the legal history of ASEAN its politics, culture, social principles, and legal structures.<sup>11</sup> As ASEAN is not a homogenous region, a scrutiny of the interactions between domestic and regional norms will aid in conceptualizing an ASEAN value system. Scholarly narratives of ASEAN values will be critically examined and reviewed in order to identify how the “ASEAN Way” recognizes and protects the right to freedom of expression. The study will also entail examination of constitutional provisions, state practice, government statements, court cases, among others, in a human rights-based approach legal framework.

## ***Methodology***

Normative and contextual legal research methods will be employed to answer the research questions. First, this study will analyze the freedom of expression in the context of ASEAN regional values through a normative framework which considers the legal affairs for

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<sup>11</sup> Robert Leckey, *Review of Comparative Law*, 26 SOCIAL & LEGAL STUDIES 3–24 (2017).

evaluation.<sup>12</sup> Second, given the particularity of the ASEAN as an intergovernmental organization, the research will delve into the legal history and contextualization of the ASEAN and its Member States' actions with regard to the recognition, valuation, and protection of the right to freedom of expression and the fundamental principles upheld by ASEAN. An investigative approach shall be undertaken with respect to the contemporary status of the observation of the freedom of expression in the ASEAN.

The first chapter of this thesis will discuss how the ASEAN Values are understood in relation to the freedom of expression through a historical approach of the founding of ASEAN and its appreciation of human rights. The second chapter investigates country studies within ASEAN and their freedom of expression landscape. Finally, the third chapter analyzes how ASEAN Values are limiting the exercise of the freedom of expression and the challenges for this right in ASEAN.

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<sup>12</sup> Sanne Taekema, *Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice*, 02 LAW AND METHOD (2018).

## Chapter I: Understanding the ASEAN Values vis-à-vis the Right to Freedom of Expression

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### *ASEAN History and Values*

ASEAN was founded in Bangkok in 1967 by five Southeast Asian states: Singapore, Thailand, Malaysia, Indonesia and the Philippines, through the Bangkok Declaration.<sup>13</sup> The purpose of the regionalization into ASEAN was to accelerate economic growth, social progress and cultural development, and to promote peace and stability in the region.<sup>14</sup> There is no precise reference to the development of political matters, more so, human rights in the region. Nevertheless, it is believed that the regional cooperation also had political reasons, particularly, to strengthen the opposition against the territorial claims in the South China Sea by China, which still exists until now, and to prevent armed conflict and insurgency within the region.<sup>15</sup> There are three kinds of regionalized organization based on its purpose: the rational problem-solving entity, the value-based community, and the rights-based union. ASEAN was originally more of the first two kinds: a regional organization sought as a problem-solving entity using reactive diplomatic measures and a value-based community.<sup>16</sup>

At the early stages of the ASEAN, economic development was the primary purpose of the cooperation. In order to progress the welfare of the people of ASEAN Region, immediate importance was given to pursuing regional cooperation in the field of economics and development. A main concern of ASEAN States was the “elimination of poverty, hunger, disease and illiteracy” through rigorous cooperation in “economic and social development, with particular emphasis on the promotion of social justice and on the improvement of the

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<sup>13</sup> Anna-Karin Berglund, *Protection of Regional Values - A comparative study of EU and ASEAN*, October 1, 2008.

<sup>14</sup> ASEAN Declaration (Bangkok Declaration), 8 August 1967, <https://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967/> (last visited May 27, 2021).

<sup>15</sup> Berglund, *supra* note 12.

<sup>16</sup> *Id.*



living standards.”<sup>17</sup> Economic growth was observed as a vital means to encourage national resilience.<sup>18</sup> ASEAN governments supposed that poverty and economic dissatisfaction would stimulate internal communist conflicts and that the best way of neutralizing this phenomenon was through economic development in close association with the developing countries. This not only necessitated internal political stability to attract and shape donor and investor confidence, but would also buttress external economic stability.<sup>19</sup>

As decades passed, there was change in the perspective of the ASEAN Region. The ASEAN developed both geographically, with the accession of Brunei, and later the countries of Vietnam, Laos, Myanmar and Cambodia, and functionally, with the expansion of the range of cooperation.<sup>20</sup> ASEAN also was granted Observer Status at the UN General Assembly through the adoption of Resolution (A/RES/61/44) on December 4, 2006.<sup>21</sup>

Values and principles are two concepts that, to some extent, have been embraced interchangeably. However, there is actually a distinction between the two concepts: principles being legal rules; while values are a notion of absolute positive significance.<sup>22</sup> The initial values of the ASEAN Region involve cooperation, consensus, and non-interference, dubbed as the “ASEAN Way.”<sup>23</sup> The term “ASEAN Way” was first used by foreign ministers until it referred to the traditional way of the ASEAN.<sup>24</sup> It views the member nations’ sovereignty as absolute and holds a core value of non-interference while building consensus decision-making.<sup>25</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Li-ann Thio, *Implementing Human Rights in ASEAN Countries: "Promises to keep and miles to go before I sleep"*, 2 Yale H.R. & Dev. L.J. 1

<sup>20</sup> Anna-Karin Berglund, *Protection of Regional Values - A comparative study of EU and ASEAN*, (2008) Göteborgs Universitet.

<sup>21</sup> ASEAN Secretariat’s Information Paper, OVERVIEW OF ASEAN-UNITED NATIONS RELATIONS, <https://asean.org/storage/2020/04/Overview-of-ASEAN-UN-Cooperation-as-of-22-April-2020.pdf> (2020).

<sup>22</sup> Berglund, *supra* note 12.

<sup>23</sup> *Id.*

<sup>24</sup> Taku Yukawa, *The ASEAN Way as a symbol: an analysis of discourses on the ASEAN Norms*, 31 THE PACIFIC REVIEW 298–314 (2018).

<sup>25</sup> *Id.*

Accordingly, the “ASEAN Way” has been defined as the system of non-interference, informality, consultation, and consensus in collective decision making in the ASEAN Region.<sup>26</sup> ASEAN operates in its classic way, addressing events in a reactive way, instead of a proactive stance, contingent on the political and economic circumstances of the moment.<sup>27</sup> Its leaders have to a great extent relied on diplomacy and personal relations instead of strong institutions.<sup>28</sup> ASEAN Member States emphasized dialogue, reaching a form of consensus (consensus-building), to resolve problems.<sup>29</sup> The 1967 Bangkok Declaration lacked any provisions on imposition of sanctions against non-complying Member States, hence, diplomacy and consensus-building were the only frameworks to ensure stability within the region. At the same time, the principle of non-intervention in the internal affairs of one another is a prominent feature of the ASEAN cooperation, as supported by the principle of consensus in decision-making.<sup>30</sup>

The customary principle of the non-intervention in ASEAN encompasses four significant matters in the inter-regional relations: 1) abstaining from criticizing the internal actions of the Member States with respect to their own citizens; 2) disapproving actions of Member States which are observed to constitute a violation of the principle of non-intervention against other Member States; 3) repudiating acknowledgment, refuge, or other arrangements of support to any rebel group that seeks to subvert or defeat the government of a member State; and 4) delivering political support and material aid to Member States in their actions against

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<sup>26</sup> Sungjoon Cho & Jürgen Kurtz, *Legalizing the ASEAN Way: Adapting and Reimagining the ASEAN Investment Regime*, 66 Am. J. Comp. L. 233 (2018).

<sup>27</sup> Rodolfo C. Severino, *Southeast Asia in search of an ASEAN community – Insights from the former ASEAN Secretary-General*, ISEAS, Singapore (2006).

<sup>28</sup> *Id.*

<sup>29</sup> Col. Steven L. Roop, *ASEAN Regional Forum: How ASEAN Regional Values and Principles Are Shaping a Regional Security Framework for the Pacific in the 21<sup>st</sup> Century*, Strategy Research Project, US Army War College, (1996).

<sup>30</sup> Berglund, *supra* note 13.

rebel groups.<sup>31</sup> The 1967 Bangkok Declaration never provided a clear exception on the value of non-interference in the ASEAN Region.

The ASEAN Way, which gives primary importance to the principle of non-interference and which members have a general reluctance to meddle with other State's domestic state affairs, especially in the political sphere, has been subject to some criticisms.<sup>32</sup> Even though this ideology has served to establish a prolonged peace and harmony among the region, it has also tolerated an environment in which the Members States are not regionally held accountable with any tangible penalty or sanction for violations of human rights.<sup>33</sup>

### ***Human Rights and the ASEAN***

Based on ASEAN's initial organizational goal of regional cooperation on the areas of economy and security, human rights was not contemplated as a primary purpose or objective of the region. Compared to the concept of non-interference, the topic of human rights is one of the most contentious issues in ASEAN. Human rights are deemed to be within the scope of a State's internal affairs, hence ASEAN's hesitancy to discuss the matter was part of its discreet working way of non-intervention through reactive policies.<sup>34</sup>

The increased attention on human rights in ASEAN was prompted by a regional meeting in 1993, which resulted to the drafting of the 1993 Bangkok Declaration in view for the World Conference on Human Rights in Vienna that was conducted around the same time.<sup>35</sup> This declaration resonated the undertaking of the Member States to the principles included in the United Nations Charter and the UDHR. Additionally, it identified the imperative role of the

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<sup>31</sup> Acharya Amitav, *Sovereignty, Non-intervention and regionalism*, CANCEPS Papier Number 15, October 1997.

<sup>32</sup> Mariam Sarwar, *Human Rights the "ASEAN Way": Exploring the Possibilities for a Regional ADR and Adjudicative Body in Southeast Asia*, 52 LOYOLA OF LOS ANGELES LAW REVIEW 37 (2018).

<sup>33</sup> *Id.*

<sup>34</sup> Anne Maureen Manigbas, *PLANTING SEEDS OF COMMITMENT? A Legal Analysis of ASEAN's Human Rights Framework for the Development of a Regional Refugee Protection Regime*, Vrije Universiteit Amsterdam (2020).

<sup>35</sup> Attilio Pisanò, *Human Rights and Sovereignty in the ASEAN Path Towards a Human Rights Declaration*, 15 HUMAN RIGHTS REVIEW 391–411 (2014).

universality of the “observance and promotion of human rights and fundamental freedoms”<sup>36</sup> in global cooperation. While the declaration recognized the necessity to “explore the possibilities of establishing regional arrangements for the promotion and protection human rights in Asia,”<sup>37</sup> this pledge was tempered in a way that it should be undertaken through “consensus” and not by “imposition of incompatible values.”<sup>38</sup> Hence, the primordial importance of sovereignty in all matters of the Member States, including issues and matters concerning human rights in the ASEAN was maintained.

The principle providing for the protection of human rights as a legitimate concern of all nations resulted in a declaration during the World Conference on Human Rights in Vienna in 1993.<sup>39</sup> In that conference, 171 UN Member States approved the Vienna Declaration and Programme of Action (non-binding in nature), which provides that regional systems perform an essential role in boosting and protecting human rights and that these systems shall strengthen universal human rights standards across the globe.<sup>40</sup> It was also raised therein the necessity of launching regional systems for the observance of human rights.<sup>41</sup> However, despite participation to the 1993 Vienna Conference, which served as the reaffirmance of UDHR principles, some ASEAN states, notably Singapore, Malaysia and Vietnam still promoted the ASEAN Way, particularly, the doctrine of non-interference.<sup>42</sup>

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<sup>36</sup> Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights (The Bangkok Declaration), Preamble, par. 4, 29 March – 02 April 1993, [https://www.hurights.or.jp/archives/other\\_documents/section1/1993/04/final-declaration-of-the-regional-meeting-for-asia-of-the-world-conference-on-human-rights.html](https://www.hurights.or.jp/archives/other_documents/section1/1993/04/final-declaration-of-the-regional-meeting-for-asia-of-the-world-conference-on-human-rights.html) (last visited Jan. 15, 2021).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See Section 3.2.1 for an outline of the ASEAN stand on human rights with regard to the Vienna Declaration.

<sup>40</sup> Thi Minh Huong Ngo, *Between Law and Practice: Why Cannot Freedom of Expression and Information be Protected as a Constitutional Right in ASEAN?*, December 3, 2011.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

Human rights systems in the regional setting are important mechanisms to ensure compliance with standards of international human rights law.<sup>43</sup> These regional human rights systems accomplish an essential intermediate purpose between domestic institutions, which infringe or neglect to implement human rights, and the universally accepted system of human rights.<sup>44</sup> Conceiving a regional human rights framework necessitates three main mechanisms, which have been adopted by regional systems (European, Inter-American, and African): a convention, a commission, and a court. A regional human rights mechanism may be considered as effective reconciliation device between the domestic and international field, which is innovative, robust, perceptive, and compliant of international norms.<sup>45</sup> However, a regionalization of human rights system could also be a selective device, which subtly rejects international norms so as to cunningly embrace more conservative regional normative framework with respect to human rights.<sup>46</sup>

Thereafter, ASEAN adopted the Vientiane Action Programme (VAP) during the 2004 ASEAN Summit. The VAP is a non-binding regional document that furthered the promotion and protection of human rights as a means to preserve continuous success at the regional security front.<sup>47</sup> It aimed at plotting the path for the formation of the projected ASEAN Community and performed as a commencing stage for the development of a human rights protection framework in ASEAN. It laid out the following focuses: (1) combining knowledge on human rights; (2) producing the understanding and raising awareness on human rights; and (3) supporting for the inclusion of the rights of children, women, and migrant workers.<sup>48</sup>

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<sup>43</sup> Yvonne Xin Wang, *Contextualizing Universal Human Rights: An Integrated Human Rights Framework for ASEAN*, 25 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 42 (2015).

<sup>44</sup> *Id.*

<sup>45</sup> Jaclyn L Neo, *Realizing the Right to Freedom of Thought, Conscience and Religion: The Limited Normative Force of the ASEAN Human Rights Declaration*, 17 HUMAN RIGHTS LAW REVIEW 729–751 (2017).

<sup>46</sup> *Id.*

<sup>47</sup> Mathew Davies, *The ASEAN Synthesis: Human rights, Non-intervention, and the ASEAN Human Rights Declaration*, 14 GEORGETOWN JOURNAL OF INTERNATIONAL AFFAIRS 51–58 (2013).

<sup>48</sup> Vientiane Action Program, Annex 1, Action 1.1.4.

Pursuant to the VAP, ASEAN Member States consequently began discussing the possibility of establishing an ASEAN human rights body. However, during the meetings, there was some difficulty in reaching an agreement. The discussions were unclear on several matters with respect to the human rights body, such as: purpose, binding authority, and redress mechanism. The issue with respect to the primary value of non-interference in the ASEAN Region was consistently raised. During negotiations, Cambodia, Laos, Myanmar, and Vietnam strongly opposed the creation of the body.<sup>49</sup>

Meanwhile, the signing and ratification of the ASEAN Charter in 2008 marked a significant shift in the values of the region. Through the Charter, ASEAN provided a legal foundation and personality, more comprehensive rules of procedure, and strengthened institutions.<sup>50</sup> The Charter solemnized the values of cooperation, consensus, and non-interference, by confirming the respect for independence and sovereignty of each member-State, as the principles of ASEAN.<sup>51</sup> Interestingly, the Charter also mentioned that one of its purposes is to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the ASEAN Member States.<sup>52</sup> For the first time, collaboration in the field of human rights was developed as the united principle of ASEAN Member States and is legally established with the highest recognized value of ASEAN – which could be a sign of the diminishing stance in the ASEAN Way, particularly, the doctrine of non-interference.<sup>53</sup> However, the Charter did not explicitly define human rights promotion in ASEAN, and what rights are included therein – whether it will also encompass the freedom of expression.

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<sup>49</sup> *Id.*

<sup>50</sup> Berglund, *supra* note 13.

<sup>51</sup> ASEAN Charter, art. II (2)(a).

<sup>52</sup> ASEAN Charter, art. I (7).

<sup>53</sup> Ngo, *supra* note 40.

Then, in 2009, once the delegates reached a compromise on the contentious issue of human rights in the region, the ASEAN Intergovernmental Commission on Human Rights (AICHR) was formed - the Association's first human rights body.<sup>54</sup> Notably, AICHR's Terms of Reference (TOR) explicitly provides respect for sovereignty and non-interference in the internal matters of ASEAN States as its directing principles. Further, the AICHR only has recommendatory powers; it does not have authority to conduct investigations, hold trial, impose sanctions, and execute judgments against erring ASEAN Member States.<sup>55</sup>

In 2012, the AICHR prepared and finalized the ASEAN Human Rights Declaration, which was successfully adopted by the Heads of State of the ASEAN Member States. Markedly, the AHRD is a non-binding regional instrument, enlisting six primary parts, namely (1) General Principles, (2) Civil and Political Rights, (3) Economic, Social, and Cultural Rights, (4) Right to Development, (5) Right to Peace, and (6) Cooperation in the Promotion and Protection of Human Rights.<sup>56</sup> Conspicuously, freedom of expression is openly recognized as a human right within the ASEAN Region. With the adoption of the AHRD, it was hoped by the spectators that the ASEAN will shift its paradigm to a rights-based approach framework with respect to human rights issues.<sup>57</sup> Notably, some Civil Society Organizations (CSOs), including Human Rights Watch and ARTICLE 19, which demanded transparency and inclusiveness in the drafting of the AHRD, were excluded from participation.<sup>58</sup> The AICHR and CSOs only conducted two consultations, one in Kuala Lumpur on June 22, 2012 and in Manila on September 12, 2012.<sup>59</sup> The CSOs also pointed out that AHRD did not include basic

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<sup>54</sup> Tarik Abdel-Monem, *ASEAN's Gradual Evolution: Challenges and Opportunities for Integrating Participatory Procedural Reforms for the Environment in an Evolving Rights-Based Framework*, 29 PACIFIC BASIN LAW JOURNAL 48 (2012).

<sup>55</sup> ASSOCIATION OF SOUTHEAST ASIAN NATIONS, *ASEAN Intergovernmental Commission on Human Rights: Terms of Reference* (2009).

<sup>56</sup> AHRD.

<sup>57</sup> Abdel-Monem, *supra* note 55.

<sup>58</sup> Catherine Shanahan Renshaw, *The ASEAN Human Rights Declaration 2012*, 13 HUMAN RIGHTS LAW REVIEW 557-579 (2013).

<sup>59</sup> *Id.*

fundamental rights, such as the freedom of association and the right against forced disappearances.<sup>60</sup>

A thorough reading of AHRD's provisions demonstrates that the ASEAN Way – giving primary importance to the doctrine of non-interference and reactive diplomatic measures – still prevails in the realm of human rights.<sup>61</sup> Article 7 of the AHRD endorses the fundamental principles of universality, indivisibility, interdependent, and interrelatedness of human rights. However, it tempers this acknowledgement by providing that “the realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, and cultural, historical and religious backgrounds.”<sup>62</sup> Similarly, Article 8 of the AHRD permits the likelihood of limiting human rights to “meet the just requirements national security, public order, public health, public safety, public morality, as well as general welfare of the peoples in a democratic society.”<sup>63</sup> The AHRD does not differentiate between human rights that are derogable and absolute.<sup>64</sup>

There have been several criticisms against the effectiveness of AICHR and AHRD. The AICHR is only a consultative body; it cannot render judgment against an erring Member State. There are no explicit powers of judicial review for charged human rights violations in any Member States identified in the AICHR's TOR, or comprehensive procedures for penalties or repercussions to be imposed on Member States, which are found to have violated the human rights provided under the AHRD or any other instrument.<sup>65</sup> At best, the AICHR can only issue

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<sup>60</sup> Civil Society Denounces Adoption of Flawed ASEAN Human Rights Declaration, HUMAN RIGHTS WATCH (2012), <https://www.hrw.org/news/2012/11/19/civil-society-denounces-adoption-flawed-asean-human-rights-declaration> (last visited May 26, 2021).

<sup>61</sup> Attilio Pisanò, *Towards an ASEAN human rights mechanism: the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children*, 20 THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 321–342 (2016).

<sup>62</sup> AHRD art. 7.

<sup>63</sup> AHRD art. 8.

<sup>64</sup> American Bar Association Rule of Law Initiative (ABAROLI), *The ASEAN Human Rights Declaration: A Legal Analysis*, 21 (2014).

<sup>65</sup> Abdel-Monem, *supra* note 55.



documents that pertain to human rights, such as the AHRD. However, as the AHRD stands, it is not a binding international document because there is no clear-cut way to enforce the obligations therein. It is unclear if there is a necessity to issue a subsequent binding document for ASEAN Member States and their people to acquire substantive and procedural rights as, for example, the European Convention for Human Rights does. Both the unambiguous language in the AICHR Terms of Reference and enduring normative procedures of ASEAN signify that it will probably engage in development of any human rights instrument through a consensus-building system that will be constructive and non-confrontational, and reactive, instead of proactive, a reference to the ASEAN Way.<sup>66</sup>

### ***Legal Framework of the Freedom of Expression and the ASEAN***

#### *Theoretical Considerations of the Freedom of Expression*

To understand the legal underpinnings of the freedom of expression, it is necessary to examine its history and recognition. Admittedly, States recognized the right to freedom of expression in their constitutions in varying language. As defined, constitutions are “the basic principles and laws of a nation, state, or social group that determine the powers and duties of the government and guarantee certain rights to the people in it.”<sup>67</sup> These codified conduct of rules likewise embodied certain rights which interpretation of limits or restrictions developed over time. One such fundamental right is the freedom of expression.

Freedom of expression is one of the civil liberties which emerged through a long process of philosophical, political, and constitutional developments, especially over the last

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<sup>66</sup> *Id.*

<sup>67</sup> Merriam-Webster.com Dictionary, s.v. “constitution,” <https://www.merriam-webster.com/dictionary/constitution> (last visited May 26, 2021),

two centuries.<sup>68</sup> While the said freedom has western origins, it is not to suggest that the concept itself is alien to non-Western cultures.<sup>69</sup> After establishing that freedom of expression is a right with universal reach, there must be an understanding of its theoretical foundations which enabled its universal embeddedness in constitutions and international documents. In one of the early cases on the freedom of expression, Justice Oliver Wendell Holmes' dissent in *Abrams v. US*, enunciated the importance of a "marketplace of ideas" or the free trade of ideas wherein there is a healthy competition of thoughts among the citizenry as a matter of the right to free speech.<sup>70</sup>

Freedom of expression has been stated to cover several modes of communication like spoken language, musical performances, plays, written forms, among others.<sup>71</sup> It has been synonymous with freedom of speech or freedom of communication.<sup>72</sup> While most perceived the freedom of expression as a right of the speaker, it should also be construed as the right of the audience to receive information.<sup>73</sup> Further, the freedom of expression also has a public character, which necessitates that the act of speech or communication be made available to the public.<sup>74</sup> Alternatively, freedom of expression is a "right to actively participate in and

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<sup>68</sup> Abdullahi An-Na'im, *The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts*, 11 EMORY INTERNATIONAL LAW REVIEW (1997).

<sup>69</sup> *Id.*

<sup>70</sup> 250 U.S. 616 (1919). Justice Holmes eloquently described the nature of speech in his dissent reproduced below: "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."

<sup>71</sup> LARRY ALEXANDER, *IS THERE A RIGHT OF FREEDOM OF EXPRESSION?* (2005).

<sup>72</sup> *Id.*

<sup>73</sup> *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

<sup>74</sup> Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEGAL STUD. 303–324 (1991).

contribute to public culture,”<sup>75</sup> a perception that supports Justice Holmes’ theory of speech as the market place of ideas.

The universal character of human rights refers to two aspects - validity and application. With regard to universal validity, freedom of expression is legitimate national concern in all country states as embodied in their cultural, constitutional, and philosophical traditions.<sup>76</sup> On the other hand, universal application means that the freedom of expression can be applied to everyone at every place.<sup>77</sup> Universal validity and application are “mutually inclusive and supportive” terms, but its aspect of universality does not imply, nor does it assume the absoluteness of the freedom of expression.<sup>78</sup> Some degree of internal enforcement of human rights will always be necessary because it is unrealistic to expect voluntary compliance with the law of the land by the whole population. However, massive, coerced enforcement by a government is neither consistent with the nature and justification of human rights in general, nor is likely to succeed in practice. Further, other governments exerting external pressures for offending governments are not willing to maintain the economic, political, and security costs of such pressure.<sup>79</sup>

### *International Considerations of the Freedom of Expression*

The adoption of the UDHR is a culmination of countries coming together to express a common and universalistic approach to human rights protection. While not a binding document, the UDHR paved the way for the setting of an international legal framework for the protection of human rights. As a “common standard for achievement for all peoples and all nations,” UDHR wields considerable legal, political, and moral influence over States.<sup>80</sup> Article

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<sup>75</sup> *Id.*

<sup>76</sup> An-Na’im, *supra* note 69.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*, citing Henry J. Steiner & Philip Alston, *International Human Rights in Context*, pp. 811-83, Clarendon Press (1996).

<sup>80</sup> Hurst Hannum, *The UDHR in National and International Law*, 3 HEALTH AND HUMAN RIGHTS 144–158 (1998).

19 of the UDHR particularly states the freedom of expression as everyone's right to freedom of opinion and expression, which right likewise includes the "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."<sup>81</sup> Article 19 of the ICCPR reiterated the freedom of expression and imposed a limitation of its exercise as follows:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (order public), or of public health or morals.<sup>82</sup>

While the ICCPR expressly enumerates human rights that must be universally respected, it is clear that such freedom of expression is not absolute.<sup>83</sup> Article 19 of the ICCPR explicitly stated that the said freedom may be subject to some restrictions, namely: "provided by law," "necessary," and "protection of national security."<sup>84</sup>

The term "provided by law" connotes that the State has to demonstrate the legal basis for any government restriction against the exercise of the freedom of expression. Notably, the UN Human Rights Committee (HRCttee) requires that restrictions must pass through test of justification.<sup>85</sup> In other words, a State cannot arbitrarily or whimsically restrict the universal freedom of expression; there must be a genuine justification. In addition, HRCttee necessitates

<sup>81</sup> Universal Declaration of Human Rights, *supra* note 2.

<sup>82</sup> ICCPR, art. 19.

<sup>83</sup> ICCPR, Preamble.

<sup>84</sup> See UN Human Rights Committee, *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34.

<sup>85</sup> *Id.*

the State to offer particulars of the law and specific situation in which the law applies. Laws constraining the rights collated in international covenants must be well-suited with the goals and purposes of such covenants. On the other hand, “necessity” means that the State must provide evidence, through a restrictive measure to protect State interest and, if this is reasonable, it should be at the minimum necessary for that purpose. In this circumstance, the HRCttee has inclined to employ a more tough standard of democratic necessity. Even though the HRCttee has not utilized the proportionality test, it is implied that the requirement for “necessity” incorporates a standard of proportionality.<sup>86</sup> Finally, the restriction regarding national security may only be imposed on the freedom of expression if the State can demonstrate that: (a) the expression is projected to provoke imminent violence; (b) it is probable to provoke such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.<sup>87</sup>

Under the ICCPR, these restrictions are exceptions; rather than the general rule. Limitations on freedom of expression to defend national security are tolerable but only in grave cases such as danger to the entire nation, spreading of military secrets, demands for overthrow of a government with political turbulence or propaganda of war within the scope of Article 20 of the ICCPR.<sup>88</sup> Presently, several ASEAN Member States are party to the ICCPR, namely, Cambodia, Indonesia, Lao PDR, Philippines, Thailand, and Vietnam. On the other hand, Brunei Darussalam, Myanmar, Malaysia, and Singapore have taken no action on the ratification of the ICCPR.<sup>89</sup>

The right to freedom of expression enjoys protection and is recognized in other regional human rights system, namely in the European and Inter-American context. In the European

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<sup>86</sup> *Id.*

<sup>87</sup> Johannesburg Principles on National Security, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996).

<sup>88</sup> Ngo, *supra* note 40.

<sup>89</sup> OHCHR Dashboard, <https://indicators.ohchr.org/> (last visited Jan 15, 2021).

context, the European Convention on Human Rights (ECHR) is binding for all the Members States of the Council of Europe. The ECHR is a foundational document for the European Court of Human Rights, who serves as a regional human rights mechanism to in the interpretation of rights in the convention.<sup>90</sup> Under the ECHR, the right to freedom of expression includes the freedom to hold opinions and impart information without interference of public authority. However, the exercise of these freedoms is subject to limitations.<sup>91</sup>

### *Freedom of Expression and the ASEAN*

The right to freedom of expression, as an international and universally recognized right, must be recognized and protected by the regional human rights systems, which should include the AHRD. Fittingly, the right to freedom of expression is explicitly stated under the AHRD:

23. Every person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person's choice.<sup>92</sup>

A textual analysis of Article 23 of the AHRD shows that it is very similar to Article 19 of UDHR, which states that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>93</sup> Notably, Article 23 of AHRD did not indicate that the freedom of expression covers any type of media and regardless of frontier. This omission may provide a lesser recognition of the freedom to choose the medium of expression, or even the freedom granted to the press.

It is more concerning that Articles 7 and 8 of the AHRD impose restrictions on the human rights provided therein, including the freedom of expression.<sup>94</sup> Although Article 7 of

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<sup>90</sup> Ngo, *supra* note 40.

<sup>91</sup> European Convention on Human Rights art. 10 par. 2.

<sup>92</sup> AHRD, art. 7.

<sup>93</sup> UDHR, art. 10.

<sup>94</sup> AHRD article 7 provides:

the AHRD states that “all human rights are universal, indivisible, interdependent and interrelated,” it nevertheless continues that “at the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.”<sup>95</sup> This provision suggests the ASEAN Way mentality and proves unresolved the difficult tension between the objective to promote universal human rights and the unwillingness of the Member States to cede any of their sovereignty.<sup>96</sup> The limitation provided by Article 7 shows that the Member States’ refusal to relinquish their sovereignty by considering the definition of the freedom of expression based on their own domestic inclinations. This is problematic as the standards for observation of the protection and promotion of the right to freedom of expression in the ASEAN is not consistent and subject to the discretion of the Member States.

Similarly, Article 8 does not identify a significant and essential principle in international human rights law: that particular human rights, such as the right to freedom from slavery or torture, are inviolable, sacrosanct, and non-derogable under any conditions. Rather, due to its poor wording, it would tolerate the States’ violation of human rights, including freedom of expression, in the name of “national security, public order, public health, public safety, public morality [and the] general welfare of the peoples.”<sup>97</sup> Unlike Article 19 (3) of the

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7. All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.

Alternatively, article 8 states:

8. The human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society.

<sup>95</sup> AHRD, art. 7.

<sup>96</sup> Sarwar, *supra* note 3.

<sup>97</sup> AHRD, art. 8.

ICCPR, which requires that the restrictions against the right of freedom of expression must be for a legitimate objective and must not be overbroad,<sup>98</sup> the same cannot be said with Article 8 of AHRD. Without any explicit requirement of “legitimate objective” in the restrictions imposed against human rights, this provision gives States a wide latitude to justify human rights abuses or validate non-compliance with human rights obligations by claiming it is for any vague and all-encompassing purpose, which may include public morality or simply the general welfare of the people.<sup>99</sup> Evidently, the provision provides extensive and broad exceptions on how human rights, particularly the right to freedom of expression, are observed in the region, so much so that it may defeat the protection of the said freedom.

A historical analysis, before the advent of the AHRD, can be undertaken to explore the how the language of the instrument was eventually acceptable and adopted in the region even though enforcement of human rights is obstructed by ASEAN Way. For instance, Singapore previously justified the heightened restriction to the freedom of expression based on national security. The first Prime Minister of Singapore, Lee Kuan Yew, once emphasized three main interests in the development of their country – national security, the economy, and social issues.

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<sup>98</sup> UN HRC General Comment no. 34 on Article 19 states:

33. Restrictions must be “necessary” for a legitimate purpose. Thus, for instance, a prohibition on commercial advertising in one language, with a view to protecting the language of a particular community, violates the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression. On the other hand, the Committee has considered that a State party complied with the test of necessity when it transferred a teacher who had published materials that expressed hostility toward a religious community to a non-teaching position in order to protect the right and freedom of children of that faith in a school district.

34. Restrictions must not be overbroad. The Committee observed in general comment No. 27 that “restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected...The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law”. The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.

<sup>99</sup> *Id.*



It was thought that keeping national security, at the expense of other freedoms, including freedom of expression, is obligatory to ensure good governance. Yew even stated that:

“With few exceptions, democracy has not brought good government to new developing countries ... What Asians value may not necessarily be what Americans or Europeans value. Westerners value the freedoms and liberties of the individual. As an Asian of Chinese cultural background, my values are for a government which is honest, effective and efficient.”<sup>100</sup>

The concept of political opposition has been viewed as being contrary to the Singaporean notion of good government, which consequently stifled the freedom to dissent against the State.<sup>101</sup>

Another historical justification sought for the stringent limitation to the freedom of expression in the ASEAN Member States can be found in the racial diversity and tension within the ASEAN States. In Malaysia, its 1957 Constitution was created out of acceptable terms and compromises among the various racial components of the Malaysian society, especially on matters of communal interests.<sup>102</sup> Singapore left the Federation of Malaysia in 1965 due to the rising racial tensions. By 1969, serious racial violence erupted in Kuala Lumpur, Malaysia wherein the government blamed the violent actions on the inflammatory speeches by political candidates from various parties during the election campaigns, and the victory processions staged by some opposition parties. Thus, in order to prevent the rise of racial hatred and violence among the diverse groups in the country, the government justified the restraint on the freedom of expression therein.<sup>103</sup>

Nevertheless, in light of the adoption of Article 23 of the AHRD, has the status and promotion of the freedom of expression at the ASEAN Region changed? This thesis shall next

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<sup>100</sup> Ngo, *supra* note 40.

<sup>101</sup> *Id.*

<sup>102</sup> Scott L. Goodroad, *The Challenge of Free Speech: Asian Values v. Unfettered Free Speech, an Analysis of Singapore and Malaysia in the New Global Order*, 9 Ind. Int'l & Comp. L. Rev. 259, 270 (1998).

<sup>103</sup> *Id.*

conduct investigative research and case study on two representative ASEAN countries: the Philippines and Myanmar. Philippines was chosen for the country narrative for the constitutional underpinnings of the right to freedom of expression and its current situation impacting such right despite the democratic backdrop. On the other hand, Myanmar's present concerns on the freedom of expression due to the expulsion of the ruling government by the military provides an academic scrutiny in terms of the protection of freedom of expression. Interestingly, in these countries, rising authoritarianism is observed, resulting to the shrinking of democratic spaces.

## Chapter II: Contemporary Case Studies of the Freedom of Expression in the ASEAN Region

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### *Overview*

The role of the ASEAN with respect to the protection and promotion of the freedom of expression is essential for its Members States. Based on the 2019 AICHR Consultation on Freedom of Expression and Opinion in ASEAN held in Nusa Dua, Indonesia, ASEAN Member States committed to ensure freedom of expression in line with Article 23 of the AHRD.<sup>104</sup> This is part of the ongoing commitment of ASEAN States for respecting the rights stated in the Vienna Declaration and Programme of Action in 1993.<sup>105</sup> This commitment, however, has shown to be varied by ASEAN States in terms of their response to international human rights instruments relating to the right to freedom of expression. The varying stances can be attributed to the view of human rights as jeopardizing state sovereignty or as a tool for gaining trade agreements favorable to their countries.<sup>106</sup>

To illustrate the level of commitment to the international human rights law, especially with respect to the freedom of expression of ASEAN Member States, the table below shows the ratification status of treaties, which include provisions relating to freedom of expression and the varying commitment of ASEAN Member States:

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<sup>104</sup> The 2019 AICHR Consultation on Freedom of Opinion and Expression in ASEAN, ASEAN | ONE VISION ONE IDENTITY ONE COMMUNITY (2019), <https://asean.org/2019-aichr-consultation-freedom-opinion-expression-asean/> (last visited Mar 26, 2021).

<sup>105</sup> Paragraph 16, Joint Communique of the Twenty-Sixth ASEAN Ministerial Meeting Singapore, 23-24 July 1993, [https://asean.org/?static\\_post=joint-communique-of-the-twenty-sixth-asean-ministerial-meeting-singapore-23-24-july-1993](https://asean.org/?static_post=joint-communique-of-the-twenty-sixth-asean-ministerial-meeting-singapore-23-24-july-1993) (last visited May 26, 2021).

<sup>106</sup> Yuyun Wahyuningrum, *AICHR: Ten Years of Promoting and Protecting Human Rights in ASEAN*, ASIA-PACIFIC HUMAN RIGHTS INFORMATION CENTER, <https://www.hurights.or.jp/archives/focus/section3/2019/12/aichr-ten-years-of-promoting-and-protecting-human-rights-in-asean.html#1> (last visited May 26, 2021).

Country	UDHR	ICCPR	ICESCR	CEDAW	Rome Statute	Genocide Convention	ICERD
Brunei	✓			✓			
Cambodia	✓	✓	✓	✓	✓	✓	✓
Indonesia	✓	✓	✓	✓			✓
Laos	✓	✓	✓	✓			✓
Malaysia	✓			✓		✓	
Myanmar	✓			✓		✓	
Philippines	✓	✓	✓	✓		✓	✓
Singapore	✓			✓		✓	
Thailand	✓	✓	✓	✓			✓
Vietnam	✓	✓	✓	✓			✓

At present, freedom of expression has come under grave attack. ASEAN Member States who vowed and committed to uphold human rights are the same entities who propagate such assaults on rights. In this chapter, country studies will be conducted to determine the present situation of the freedom of expression. Two countries will be examined to determine the level of state obligations in relation to the situation on the ground and how the ASEAN responded to freedom of expression obligations of its Member States.

### Country Narrative: Philippines in Perspective

The Republic of the Philippines is one of the founding Member States of ASEAN when it was formed in 1967.<sup>107</sup> From its previous attempts in creating a regional cooperative block through the Association of Southeast Asia to MAPHILINDO,<sup>108</sup> the Philippines established itself as part of the Southeast Asian narrative through ASEAN.<sup>109</sup> Notably, the Philippines signed and ratified the ICCPR, which contains the provisions regarding the international human rights framework on the right to freedom of expression.<sup>110</sup>

<sup>107</sup> Helen E. S. Nesadurai, *The Association of Southeast Asian Nations (ASEAN)*, 13 NEW POLITICAL ECONOMY 225–239 (2008).

<sup>108</sup> MAPHILINDO refers to Malaysia, Philippines, and Indonesia, or the three countries in the Malay Archipelago.

<sup>109</sup> Chin Kin Wah, *ASEAN: The Long Road to “One Southeast Asia”*, 5 ASIAN JOURNAL OF POLITICAL SCIENCE 1–19 (1997).

<sup>110</sup> The Philippines signed the ICCPR on December 19, 1966 and ratified the same on October 23, 1986.

The 1987 Philippine Constitution was enacted after a dark past with martial law under then President Ferdinand Marcos. The new constitution was oriented towards a “strong entrenchment of a rights-culture that appears more universalist in character.”<sup>111</sup> This approach was attributed to the Philippine involvement and integration of international human rights law into the domestic constitutional dialogue.<sup>112</sup> As such, several individual rights were textualized by the constitutional framers apart from adopting the doctrine of incorporation for a dynamic approach on the protection and interpretation of individual rights.<sup>113</sup>

Article III of the its Constitution, or the Bill of Rights, contains the individual rights and freedoms the constitutional framers textualized. Section 4 of Article III provides for the freedom of expression herein stated below:

Section 4. No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.

This provision bore striking resemblance to the United States’ First Amendment on the freedom of expression.<sup>114</sup> The constitutional provision on the freedom of expression imposes a limitation on the powers of the State in restricting the exercise of the right to freedom of expression. However, recent domestic legislations and political events have been claimed as unduly restricting the right of free expression in the Philippines.

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<sup>111</sup> Diane Desierto, *A Universalist History of the 1987 Philippine Constitution (II)*, HISTORIA CONSTITUCIONAL: REVISTA ELECTRÓNICA DE HISTORIA CONSTITUCIONAL 427–484 (2010).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> The First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## *Current Freedom of Expression Landscape*

Domestic legislations enacted in the Philippines demonstrate how the right of freedom of expression is respected or curtailed. One of the notable legislations affecting the freedom of expression is the passage of the Cybercrime Prevention Act of 2012.<sup>115</sup> The Cybercrime Law was deemed to “pose serious risks to freedom of expression” upon its adoption, according to Amnesty International.<sup>116</sup> The law was challenged before the Supreme Court of the Philippines. In *Disini v. Secretary of Justice*, the Supreme Court ruled that some provisions of the law were unconstitutional for being vague and lacking definiteness, which infringed on the right to freedom of expression.<sup>117</sup> However, problematic provisions in the law remained, such as the crime of cyber libel imposes a heavy penalty and was contended to be incompatible with the guarantees of free expression.<sup>118</sup>

Since Rodrigo Duterte was elected as President in May 2016, many have been wary of his human rights record. As early as 2009, Human Rights Watch raised concerns about vigilante style killings in Davao City, Mindanao, where Duterte was the longest serving mayor.<sup>119</sup> Duterte justifies the killings as a deterrent on criminal activities.<sup>120</sup> Despite this track record, Duterte was elected to the highest post of the land and then launched his violent campaign against “War on Drugs.” President Duterte’s repeated rhetoric in disregard of human

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<sup>115</sup> Cybercrime Prevention Act of 2012, Republic Act No. 10175, [September 12, 2012].

<sup>116</sup> Amnesty International, *Philippines: ‘Cybercrime’ law threatens free speech and must be reviewed*, AMNESTY INTERNATIONAL (2012), <https://www.amnesty.org/en/latest/news/2012/10/philippines-cybercrime-law-threatens-freedom-expression-and-must-be-reviewed/> (last visited Apr 5, 2021).

<sup>117</sup> *Disini, Jr. v. Secretary of Justice*, G.R. Nos. 203335, 203299, 203306, 203359, 203378, 203391, 203407, 203440, 203453, 203454, 203469, 203501, 203509, 203515 & 203518, [February 18, 2014], 727 PHIL 28-430.

<sup>118</sup> Human Rights Watch, *Philippines: New ‘Cybercrime’ Law Will Harm Free Speech*, HUMAN RIGHTS WATCH (2012), <https://www.hrw.org/news/2012/09/28/philippines-new-cybercrime-law-will-harm-free-speech> (last visited Apr 5, 2021).

<sup>119</sup> Philippines: Dismantle ‘Davao Death Squad,’ HUMAN RIGHTS WATCH (2009), <https://www.hrw.org/news/2009/04/06/philippines-dismantle-davao-death-squad> (last visited Apr 5, 2021).

<sup>120</sup> *Id.*

rights has been his running mantra in combating criminal offenses in the Philippines.<sup>121</sup> Those who criticized President Duterte were subjected to harassment.

One notable critic of President Duterte is journalist Maria Ressa (Ressa). Ressa co-founded Rappler, an online news website that publishes critical stories about President Duterte and his government policies which necessarily goes into human rights violations and corruption.<sup>122</sup> Ressa's journalistic stories visibly displeased President Duterte who issued threats against Ressa for being a 'fraud' and declared that he is gathering evidence against her<sup>123</sup> and led to tax evasion cases and the criminal charges of cyber libel filed against her and Rappler.<sup>124</sup> Given that Ressa is a journalist and the right to freedom of expression likewise covers the protection of the press, President Duterte's actions stifles the exercise of free expression. Notably, the study accomplished by Internews Europe for the Embassy of Sweden showed that the attacks and death of journalists and human rights defenders transgress the right to freedom of expression as the Philippines continuously appeared in the Community to Protect Journalists Impunity Index.<sup>125</sup> Additionally, local civil society organizations raised concerns on the stifling effect of the 2012 Cybercrime Law and President Duterte's tirades against journalists and human rights defenders.<sup>126</sup>

<sup>121</sup> Franco Luna, "I don't care about human rights," Duterte says, urging cops to "shoot first," PHILIPPINE STAR, December 3, 2020, <https://www.philstar.com/headlines/2020/12/03/2061268/i-dont-care-about-human-rights-duterte-says-urging-cops-shoot-first> (last visited Apr 5, 2021).

<sup>122</sup> Maria Ressa: The celebrated Philippine news boss enraging Duterte, BBC NEWS, June 15, 2020, <https://www.bbc.com/news/world-asia-49601038> (last visited Apr 5, 2021).

<sup>123</sup> CNN Philippines Staff, *Duterte threatens to expose journalist Ressa as a "fraud,"* CNN PHILIPPINES, July 8, 2020, [https://cnnphilippines.com/news/2020/7/8/Duterte-Rappler-Maria-Ressa-fraud.html?fbclid=IwAR0TD23Z43uOfU0bjq2yOcoc0HPqIthPJ7SkKwORpSCjX4z0M6GAI\\_s2Iqq](https://cnnphilippines.com/news/2020/7/8/Duterte-Rappler-Maria-Ressa-fraud.html?fbclid=IwAR0TD23Z43uOfU0bjq2yOcoc0HPqIthPJ7SkKwORpSCjX4z0M6GAI_s2Iqq) (last visited Apr 5, 2021).

<sup>124</sup> Tetch Torres-Tupas, *Rappler CEO Maria Ressa, writer found guilty of cyber libel*, INQUIRER.NET (2020), <https://newsinfo.inquirer.net/1291681/rappler-ceo-maria-ressa-writer-guilty-of-cyberlibel> (last visited Apr 5, 2021).

<sup>125</sup> PUTSATA REANG, *Freedom of Expression and Right to Information in ASEAN Countries: A Regional Analysis of Challenges, Threats and Opportunities* 60 (2014).

<sup>126</sup> United Nations, General Assembly, *Summary of stakeholder's submissions – the Philippines, Human Rights Council, A/HRC/WG.6/27/PHL/3* (27 February 2017), available from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/046/69/PDF/G1704669.pdf?OpenElement>

Another notable critic that earned the ire of President Duterte is former Chief Justice Maria Lourdes Sereno. She exercised her right to express her displeasure on President Duterte's list of purported drug suspects, of which some public officials were included, as it violated the rule of law requirements under the 1987 Philippine Constitution.<sup>127</sup> As a consequence of her action against Duterte, Sereno was removed by the Supreme Court in a *quo warranto* petition filed by the Office of the Solicitor General, an office under the supervision of the President.<sup>128</sup>

Given the grave examples of the exercise of the right to freedom of expression in the Philippine backdrop, it is important to explore how the ASEAN and its Member States responded to the situation of freedom of expression in the country. It must be noted that the ASEAN Way of non-interference contributed to the lack of sanction against Member State, which are violating human rights.<sup>129</sup> Despite the flagrant statements of President Duterte against freedom of expression and the deplorable human rights situation in the Philippines since Duterte came into power in 2016, the ASEAN has yet to issue any condemnation or statement, preferring to relegate it as a domestic affair.<sup>130</sup>

### **Country Narrative: Myanmar in Focus**

Myanmar, or formerly recognized as Burma, is one of the Member States of ASEAN. Myanmar joined ASEAN in 1997 for external economic matter concerns and to integrate itself

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<sup>127</sup> Felipe Villamor, *Philippines' Top Judge Took On Duterte. Now, She's Out.*, THE NEW YORK TIMES, May 11, 2018, <https://www.nytimes.com/2018/05/11/world/asia/philippines-chief-justice-rodrigo-duterte.html> (last visited Apr 5, 2021).

<sup>128</sup> *Id.*

<sup>129</sup> Jürgen Rüland, *Democratic Backsliding, Regional Governance and Foreign Policymaking in Southeast Asia: ASEAN, Indonesia and the Philippines*, 28 DEMOCRATIZATION 237–257 (2021).

<sup>130</sup> *Id.*



in the region.<sup>131</sup> Mya Than suggested that the “ASEAN Way” of non-interference appealed to Myanmar into joining the regional block.<sup>132</sup> However, Myanmar’s act of joining ASEAN was met with opposition by Western countries, notably the United States and European Countries for its military rule.<sup>133</sup> The United States and the European Union pressured ASEAN to refuse admitting Myanmar until the latter restored its democracy from military rule.<sup>134</sup> Despite this opposition, ASEAN Member States welcomed Myanmar for the political reason of “improv[ing] its political clout and bargaining power in international fora”<sup>135</sup> and for disregarding external attempts on ASEAN policy.<sup>136</sup> Notably, Myanmar has neither ratified nor signed the ICCPR, which implies a lesser incorporation of the international human rights framework on the freedom of expression in the domestic setting. Despite this, the right to freedom of expression is domestically accessible to the citizens of Myanmar through its constitution.

The Constitution of Burma was enacted in 2008. Chapter VIII, entitled “Citizen, Fundamental Rights and Duties of the Citizens,” contains the rights and freedoms that the Myanmar Government guarantees to its citizens.<sup>137</sup> Chapter VIII, Section 354 provides the guarantee of freedom of expression and assembly to its citizens herein provided below:

354. Every citizen shall be at liberty in the exercise of the following rights, if not contrary to the laws, enacted for Union security, prevalence of law and order, community peace and tranquility or public order and morality:

- (a) to express and publish freely their convictions and opinions;
- (b) to assemble peacefully without arms and holding procession;
- (c) to form associations and organizations;
- (d) to develop their language, literature, culture they cherish, religion they profess, and customs without prejudice to the relations between

<sup>131</sup> Mya Than, *Myanmar in ASEAN*, in MYANMAR IN ASEAN: REGIONAL COOPERATION EXPERIENCE (2005) at 84-86.

<sup>132</sup> *Id.* at 84.

<sup>133</sup> *Id.* at 83.

<sup>134</sup> Catherine Shanahan Renshaw, *Democratic Transformation and Regional Institutions: The Case of Myanmar and ASEAN*, 32 JOURNAL OF CURRENT SOUTHEAST ASIAN AFFAIRS 29–54 (2013).

<sup>135</sup> Mya Than, *Myanmar in ASEAN*, in MYANMAR IN ASEAN: REGIONAL COOPERATION EXPERIENCE (2005) at 86.

<sup>136</sup> Renshaw, *supra* note 134.

<sup>137</sup> Constitution of Burma of 2008.

one national race and another or among national races and to other faiths.<sup>138</sup>

Related to this provision is Section 364<sup>139</sup> which states a prohibition on hate speech which shall be regulated by a law penalizing such action. Pursuant to the National Report submitted by Myanmar on November 2, 2020 to the UN General Assembly, Myanmar is developing the Protection Against Hate Speech Bill aimed at preventing hate speech and incitement to violence or hatred.<sup>140</sup> Worth noting is that Myanmar has a law protecting peaceful assemblies or processions, which the police are obligated to take protective measures in line with Pyidaungsu Hluttaw Law No. 38 of 2016 or the Peaceful Assembly and Peaceful Procession Law. The CSO, called ARTICLE 19, stated that based on its legal analysis, some provisions of the law violate the international human rights law standards on freedom of expression and assembly. ARTICLE 19's analysis drew concern on some of the vague provisions which could restrict expression and criminalization of the act of peaceful protest.<sup>141</sup> Human Rights Watch also expressed grave concerns on the "overly broad and vague restrictions on speech contrary to international standards" of Myanmar's Peaceful Assembly and Peaceful Procession Law as it allows for criminal sanctions and enables the police to disperse any peaceful assembly for violating rules, be it minor or major in nature.<sup>142</sup> Amnesty International likewise raised similar concerns about the content of the law and seeks the Myanmar Parliament's compliance with international human rights law standards.<sup>143</sup>

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<sup>138</sup> *Id.*

<sup>139</sup> Section 364 of the Constitution of Burma of 2008 states:

The abuse of religion for political purposes is forbidden. Moreover, any act which is intended or is likely to promote feelings of hatred, enmity or discord between racial or religious communities or sects is contrary to this Constitution. A law may be promulgated to punish such activity.

<sup>140</sup> United Nations, General Assembly, *Myanmar National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, A/HRC/WG.6/37/MMR/1 (2 November 2020), available from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/278/46/PDF/G2027846.pdf>

<sup>141</sup> ARTICLE 19, Myanmar: Peaceful Assembly and Peaceful Procession Bill – Legal Analysis, May 2016, [https://www.rightofassembly.info/assets/downloads/Article\\_19\\_analysis\\_of\\_the\\_2016\\_Peaceful\\_Assembly\\_Law\\_of\\_Myanmar.pdf](https://www.rightofassembly.info/assets/downloads/Article_19_analysis_of_the_2016_Peaceful_Assembly_Law_of_Myanmar.pdf) (last visited May 26, 2021)

<sup>142</sup> Burma: Proposed Assembly Law Falls Short, HUMAN RIGHTS WATCH (2016), <https://www.hrw.org/news/2016/05/28/burma-proposed-assembly-law-falls-short> (last visited Apr 3, 2021).

<sup>143</sup> Amnesty International, *Myanmar: Open Letter on Amending the Peaceful Assembly and Peaceful Procession Act*, (2016),

## *Current Freedom of Expression Landscape*

As of the present writing (May 2021),<sup>144</sup> the right to freedom of expression of Myanmar citizens is under heavy attack. The present freedom of expression situation is shifting in Myanmar but it is nonetheless important to assess how the situation enables or stifles this right. Last February 1, 2021, the military detained important officials from the National League for Democracy (NLD), the ruling party, which included Aung San Suu Kyi, President Win Myint, to name a few.<sup>145</sup> The military takeover and the detainment of the NLD happened after the NLD won in a landslide election and was about to open the new session of Parliament.<sup>146</sup> The military, domestically recognized as the Tatmadaw, declared a state of emergency effective for one year, claiming election fraud and placed all governmental powers (executive, legislative, and judicial) to Senior General Min Aung Hlaing.<sup>147</sup> Social media platforms such as Facebook, WhatsApp, Twitter, and Instagram, were blocked by the military, hindering its use by Myanmar citizens.<sup>148</sup> Pro-democracy demonstrations against the military takeover were organized across the country but were met by brutal crackdown which resulted in an estimated 550 people killed and 2,751 people arrested by Myanmar's military.<sup>149</sup>

The military takeover and crackdown can be seen as a repression of the freedom of expression of Myanmar citizens as modes of communication and peaceful protests are being

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<https://www.amnesty.org/en/documents/document/?indexNumber=asa16%2f4024%2f2016&language=en> (last visited Apr 4, 2021).

<sup>144</sup> It must be emphasized that the situation in Myanmar is shifting at the time of writing, hence, it is moving target with respect to its protection or violation of the freedom of expression.

<sup>145</sup> Reuters Staff, *Timeline: The two weeks since Myanmar's coup*, REUTERS, February 15, 2021, <https://www.reuters.com/article/us-myanmar-politics-timeline-idUSKBN2AF04C> (last visited Apr 4, 2021).

<sup>146</sup> Alice Cuddy, *Myanmar coup: What is happening and why?*, BBC NEWS, April 1, 2021, <https://www.bbc.com/news/world-asia-55902070> (last visited Apr 4, 2021).

<sup>147</sup> Protests, sanctions, killings: Key events in Myanmar since coup, AL JAZEERA, February 15, 2021, <https://www.aljazeera.com/news/2021/2/23/timeline-of-events-in-myanmar-since-february-1-coup> (last visited Apr 4, 2021).

<sup>148</sup> Protests, sanctions, killings: Key events in Myanmar since coup, AL JAZEERA, February 15, 2021, <https://www.aljazeera.com/news/2021/2/23/timeline-of-events-in-myanmar-since-february-1-coup> (last visited Apr 4, 2021).

<sup>149</sup> CNN, SANDHI SIDHU & SALAI TZ, *At least 550 people killed by Myanmar's military since February coup, says advocacy group* (2021), <https://www.cnn.com/2021/04/03/asia/myanmar-yangon-interview-arrests-intl/index.html> (last visited Apr 4, 2021).

limited by the military force, in contrast to the guarantee of freedom of expression under Chapter VIII, Section 354 of its Constitution. Domestic, regional, and international attentions are directed to the events surrounding Myanmar. The international community has responded to the military coup by denouncing it. The United States, United Kingdom, Japan, Australia, among other countries, issued strong disapprovals against the violence perpetrated by the military.<sup>150</sup> The United Nations, through its Secretary-General Antonio Guterres, condemned the use of lethal force against protestors.<sup>151</sup>

It becomes relevant then to determine how the ASEAN responds to the situation in Myanmar. In an Informal ASEAN Ministerial Meeting on March 2, 2021, the ASEAN Chair headed by Brunei Darussalam, issued a statement calling for “adherence to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms” in view of the current events in Myanmar.<sup>152</sup> ASEAN issued a statement herein reproduced below:

We, as an ASEAN family, have been closely following the current developments in the ASEAN region and concurred that the political stability in any and all ASEAN Member States is essential to achieving a collective peaceful, stable and prosperous ASEAN Community. We expressed our concern on the situation in Myanmar and called on all parties to refrain from instigating further violence, and for all sides to exercise utmost restraint as well as flexibility. We also called on all parties concerned to seek a peaceful solution, through constructive dialogue, and practical reconciliation in the interests of the people and their livelihood. In this regard, we expressed ASEAN’s readiness to assist Myanmar in a positive, peaceful and constructive manner.<sup>153</sup>

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<sup>150</sup> Myanmar coup: Generals celebrated amid global fury over massacre, BBC NEWS, March 28, 2021, <https://www.bbc.com/news/world-asia-56547381> (last visited Apr 4, 2021).

<sup>151</sup> Secretary-General condemns deadly violence against protestors in Myanmar, UN NEWS (2021), <https://news.un.org/en/story/2021/02/1085322> (last visited Apr 4, 2021).

<sup>152</sup> ASEAN Chairman’s Statement on The Developments in The Republic of The Union of Myanmar, Association of Southeast Asian Nations (2021), <https://asean.org/asean-chairmans-statement-developments-republic-union-myanmar/> (last visited Apr 4, 2021).

<sup>153</sup> *Id.*

From the statement above, ASEAN detracted from its strict principle of non-interference to condemn Myanmar's violent. However, ASEAN Member States themselves are not unified in this statement as Malaysia, Indonesia, and Singapore spoke against Myanmar's military takeover and violence<sup>154</sup> while Thailand, Cambodia, Philippines, and Vietnam had muted reactions to the violence, terming it as a domestic affair.<sup>155</sup> Despite this division, ASEAN remains committed to open channels of communication and dialogue between the present military regime in Myanmar and the regional bloc, along with other international dialogue partners to address the situation of concern in Myanmar.<sup>156</sup>

***Synthesizing the Country Experiences of  
ASEAN Member States with Regard to  
Freedom of Expression***

These country narratives may be construed as representative of an ASEAN approach or valuation of the right to freedom of expression in the region. These are examples of ASEAN's response or lack of response thereto, which are indicative of the principle of non-interference, the characteristic of the ASEAN approach, and fundamentally in tension with human rights. While domestic considerations are primarily given weight, regional considerations, particularly of the ASEAN are likewise important in shaping the legal and political landscape of the freedom of expression in ASEAN Member States. This ASEAN Regional approach was demonstrated in the statement issued by the ASEAN in relation to the military takeover of the government in Myanmar. It must be noted that the ASEAN Way of non-interference

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<sup>154</sup> Kentaro Iwamoto & Shotaro Tani, ASEAN ministers urge Myanmar to find domestic solution to crisis, Nikkei Asia (2021), <https://asia.nikkei.com/Spotlight/Myanmar-Coup/ASEAN-ministers-urge-Myanmar-to-find-domestic-solution-to-crisis> (last visited Apr 4, 2021).

<sup>155</sup> Rodion Ebbighausen, *Myanmar coup: ASEAN split over the way forward* / DW / 29.03.2021, DEUTSCHE WELLE, March 29, 2021, <https://www.dw.com/en/myanmar-coup-asean-ties/a-57042503> (last visited Apr 4, 2021).

<sup>156</sup> Kavi Chongkittavorn, *An ASEAN way to resolve the Myanmar crisis*, EAST ASIA FORUM (2021), <https://www.eastasiaforum.org/2021/03/21/an-asean-way-to-resolve-the-myanmar-crisis/> (last visited Apr 4, 2021).

contributed to the lack of sanction against a human rights violating Member State.<sup>157</sup> However, another perspective was offered such that Bellamy and Drummond opined that there is a “changing conception of the principle of non-interference” and a “recognition that sovereignty cannot be used as a shield for violations of fundamental human rights.”<sup>158</sup> Nevertheless, ASEAN is hoped to operate as a “collective mechanism through which national developmental agendas can be attained, to address emerging regional problems without having to compromise too much on national sovereignty.”<sup>159</sup>

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<sup>157</sup> Rüländ, *supra* note 129.

<sup>158</sup> Alex J. Bellamy & Catherine Drummond, *The Responsibility to Protect in Southeast Asia: Between Non-interference and Sovereignty as Responsibility*, 24 PACIFIC REVIEW 179–200 (2011).

<sup>159</sup> Nesadurai, *supra* note 108.

### Chapter III: Analysis on the Shortcomings on the Protection of the Freedom of Expression in the ASEAN Region

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#### ASEAN Values as a Limitation

Despite the adoption of AHRD, particularly Section 23 therein regarding the freedom of expression, ASEAN Values were construed as a limitation to the protection of human rights. To reiterate, the “ASEAN Way” reflects the ASEAN Values, which collectively limit organizational development, and it can be summarized to two essential components. First, the ASEAN Way highlights decision-making through informal consultation among diplomats, which is enabled through group consensus at official or non-official meetings.<sup>160</sup> Second, it is a series of six behavioral values: (1) respect for state sovereignty; (2) freedom from external interference; (3) non-interference in internal affairs; (4) peaceful dispute settlement; (5) renunciation of the use of force; and (6) cooperation.<sup>161</sup> Among these values, Member States have over time particularly emphasized on the value of non-interference in each other’s internal affairs.<sup>162</sup>

As discussed in the previous chapter, there are several issues regarding freedom of expression in some ASEAN Member States, particularly, in the Philippines and Myanmar. However, the ASEAN Values have not significantly helped in resolving the matters involving freedom of expression. The doctrine of non-interference perpetuates among the Member States, which creates the lack of response to protect freedom of expression in the region that should have been guaranteed by Article 23 of the AHRD.

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<sup>160</sup> Lee Leviter, *THE ASEAN CHARTER: ASEAN FAILURE OR MEMBER FAILURE?*, 43 N.Y.U. J. INT’L L. & POL. 52 (2010).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

For emphasis, in the Philippines, journalist Maria Ressa (Ressa) was charged and found guilty with the crime of cyber libel for an online article published a few years before the cybercrime law took effect.<sup>163</sup> Despite the fact that it is apparent that there is *ex facto* application of a criminal law to curtail the freedom of expression of Ressa as a journalist, through the publication of a news article, she was still charged by the prosecutor, through the auspices of the President, and was found guilty by the trial court. It is claimed that President Duterte imposed censorship by trial so as to curtail Ressa's freedom of expression.<sup>164</sup> Indeed, there is an apparent violation of Ressa's freedom of expression as contemplated under Article 23 of the AHRD. Evidently, the censorship by trial employed against Ressa is an undue interference regarding the exercise of the freedom of expression as an individual and as a member of the press.

Despite the apparent violation of Article 23 of the AHRD, there has been no unified condemnation of the censorship by trial committed against Ressa from the AICHR or ASEAN Member States, through their official delegates. Instead, it was the other countries, which are not members of the ASEAN, that officially condemned the censorship by trial. It was the European Parliament that formally passed a resolution that urged the Philippines to drop all charges against Ressa and reminded that the States must ensure that the rights to freedom of expression, association and peaceful assembly are respected and protected.<sup>165</sup> The closest statement that came from the ASEAN region was declared by ASEAN Parliamentarians For

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<sup>163</sup> James Griffiths & CNN Business, *Philippines journalist Maria Ressa found guilty of "cyber libel" in latest blow to free press*, CNN (2020), <https://www.cnn.com/2020/06/14/asia/maria-ressa-philippines-cyber-libel-intl-hnk/index.html> (last visited May 25, 2021).

<sup>164</sup> Kathy Kiely, *Why Maria Ressa's fight for free speech and a free press should be America's fight, too*, USA TODAY OPINION (2020), <https://www.usatoday.com/story/opinion/2020/06/29/maria-ressa-press-censorship-stop-us-aid-duterte-column/3275264001/> (last visited May 25, 2021).

<sup>165</sup> Motion for a Resolution on the situation in the Philippines, including the case of Maria Ressa, (2020), [https://www.europarl.europa.eu/doceo/document/B-9-2020-0295\\_EN.html](https://www.europarl.europa.eu/doceo/document/B-9-2020-0295_EN.html) (last visited May 25, 2021).



Human Rights (APHR) Chairman Charles Santiago, a member of the Malaysian Parliament.<sup>166</sup> But this was not the official statement of the ASEAN or its Member States.

Similarly, with Myanmar, there has been no unified and specific stance regarding the attack of the Myanmar military against the civilians are who exercising their right to freedom of expression, particularly, to criticize the *coup de etat* committed against the duly elected government. The Philippines expressly disassociated itself with the UN Resolution condemning the military coup; rather, Philippines emphasized the maintenance of the internal sovereignty of the Myanmar.<sup>167</sup> On the same note, the other ASEAN Members States, particularly, Thailand, Cambodia, and Vietnam, are practicing quiet diplomacy despite the attack on the civilians who are merely exercising their freedom of expression.<sup>168</sup>

These recent events highlight the inherent weakness of the ASEAN Values in protecting the right to the freedom of expression.<sup>169</sup> Due to the ASEAN Way of non-interference and extreme respect of national sovereignty, not much can be done by the regional body when the human rights are on the line, including the freedom of expression. It should not have been the case considering that freedom of expression is a universally recognized right, as demonstrated by the UDHR and Article 23 of the AHRD. However, due to the inherent values restricting the ASEAN Region, it is unclear whether the freedom of expression might actually be protected in the regional system.

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<sup>166</sup> Asean lawmakers call for charges against Philippine journalist Maria Ressa to be dropped, THE STRAITS TIMES (2019), <https://www.straitstimes.com/asia/se-asia/south-east-asian-lawmakers-call-for-charges-against-philippines-journalist-maria-ressa> (last visited May 25, 2021).

<sup>167</sup> Job Manahan, *PH 'dissociates' itself from UN rights body's call for Myanmar to free Suu Kyi* / ABS-CBN News, ABS-CBN NEWS (2021), <https://news.abs-cbn.com/news/02/13/21/ph-dissociates-itself-from-un-rights-bodys-call-for-myanmar-to-free-suu-kyi> (last visited May 25, 2021).

<sup>168</sup> Joshua Kurlantzick, *Myanmar's Coup Emblematic of Regional Democracy Failures*, COUNCIL ON FOREIGN RELATIONS (2021), <https://www.cfr.org/blog/myanmars-coup-emblematic-regional-democracy-failures> (last visited May 25, 2021).

<sup>169</sup> Leviter, *supra* note 160.

## Cultural Relativism or ASEAN Value of Right Protection?

One aspect that can be attributed to the weakness of the system of rights protection in the ASEAN Regional level is the cultural relativism within the region. There has been an ongoing debate regarding the application between universality and cultural relativist regarding human rights development, particularly, on how realistic it is to form universal rights in the presence of vastly differing local cultures.<sup>170</sup> In universalist concept, it provides that human rights should be widespread, collective, and generally applicable to all states. Thus, the set of human rights for one State shall be exactly applicable and enforceable in any other state. On the other hand, cultural relativism can either be strict or moderate. In strict cultural relativism, the local culture and context of a particular state is so unique that the application of human rights shall only be relative to that locality. Thus, universal human rights are not applicable therein. Alternatively, moderate cultural relativism provides that while the local factors should be taken into consideration in the application of human rights, such as race, history, and culture, there are some inviolable human rights that are universally applicable therein.<sup>171</sup>

States should protect individuals' right to express themselves, without fear of reprisal. Only in exceptional cases should the freedom of expression be limited by the State.<sup>172</sup> However, as previously discussed, while the AHRD has stated that there is a regional right to freedom of expression, the limitation provided by the same instrument, particularly, Article 8 of the AHRD, does not identify a significant principle in international human rights law: that particular human rights are inviolable, sacrosanct, and non-derogable under any conditions.

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<sup>170</sup> Jason Morgan-Foster, *A New Perspective on the Universality Debate: Reverse Moderate Relativism in the Islamic Context*, 10 ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 35–66 (2003).

<sup>171</sup> *Id.*

<sup>172</sup> See Article 19(3) of the ICCPR regarding the three-part test as discussed by Jacqueline Van De Velde (The "Foreign Agent Problem": An International Legal Solution to Domestic Restrictions on Non-Governmental Organizations, 40 Cardozo L. Rev. 687, 720) where international law prescribes only a small number of situations in which freedom of expression can be limited: when the limitation is provided by law; when it pursues one of the two legitimate government purposes of article 19(3) of the ICCPR (respect of the rights or reputation of others, or national security); and when it is the least restrictive means required to achieve the aim. All three elements of this test must be met for the state's restriction to be permissible.

Rather, the rights enumerated in the AHRD, including freedom of expression, may be limited in the name of “national security, public order, public health, public safety, public morality [and the] general welfare of the peoples.”<sup>173</sup> This provision gives States wide leeway to evade the obligations to human rights obligations, particularly, the freedom of expression, by claiming any vague and all-encompassing purpose, including public morality or simply the general welfare of the people.<sup>174</sup>

It is accepted that the ASEAN Members States have a large array of differences with culture, history, and traditions. Thus, no two ASEAN Members States are alike. Nevertheless, as members of the ASEAN and signatories of the AHRD, these States explicitly affirmed that human rights, including freedom of expression, should be observed and protected. Thus, at very best, moderate cultural relativism should be applied in the ASEAN Region.<sup>175</sup> In other words, universal human rights must be applied throughout the ASEAN Region, which includes the universal right to freedom of expression, despite differences in culture, history, and traditions.

However, due to the ASEAN Values, even the application of the moderate cultural relativism in the protection of the freedom of expression may be far from achievable. As discussed earlier, even when there are blatant violations of the freedom of expression (such as in the Philippines and Myanmar), the ASEAN Member States tend to keep silent and merely take on a passive stance towards the protection of the freedom of expression. The Myanmar crisis, where the military attacked and even killed innocent civilians who were merely expressing their grievances to the military *coup de etat*, could have been a perfect opportunity for the ASEAN Region, including the AICHR, to demonstrate its capability in resolving regional disputes regarding the freedom of expression. The AICHR could have, at the very

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<sup>173</sup> AHRD, art. 8.

<sup>174</sup> *Id.*

<sup>175</sup> See Morgan-Foster, *supra* note 170.

least, issued a unified statement condemning the atrocious acts against the freedom of expression as enshrined under Article 23 of the AHRD and remind the Member State of their obligations to the ASEAN Charter to protect and promote human rights, including the freedom of expression of their citizens.

Nonetheless, pursuant to the inconsistent stance and lack of a common ground of ASEAN Member States, where some states even declaring to completely apply the doctrine of non-interference to the situation in Myanmar, it is highly inconceivable how the ASEAN Region could collectively resolve the crisis.<sup>176</sup> Due to the ASEAN Values, the protection of the freedom of expression is being pushed to the brink of confining it within strict cultural relativism. It shows how the ASEAN Regional Charter was only pragmatically suitable for coordination; and not for the active protection of the freedom of expression within the region. Further, it demonstrates how regional politics still highly control the protection of the freedom of expression within the region, and not the normative force of the legal obligations and international declarations, which were subscribed by the ASEAN Member States.

### **Challenges for the Freedom of Expression in ASEAN**

Freedom of expression in the ASEAN Region is given focus due to the unique situation of ASEAN and the contemporary issues that ASEAN Members experience. The following are some of the challenges and roadblocks against the protection and promotion of the right to freedom of expression in the ASEAN Region.

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<sup>176</sup> Kurlantzick, *supra* note 168.

## *Freedom of Expression and Democratic Backsliding*

Democratic backsliding is the occurrence where the democratic institutions of a particular state degenerates and develop towards illiberal democracy.<sup>177</sup> This phenomenon befalls on States that do not protect the rights and freedom of their citizens, for the benefit of a particular autocratic leader or regime. With respect to the freedom of expression, the constant failure of the ASEAN could eventually lead to the democratic backsliding of its Member States. For instance, in Myanmar, the *coup de etat* and arrest of its democratically elected leaders urged its citizens to exercise their freedom of expression, which however was repressed by the military. Indeed, when there is suppression of human rights, including freedom of expression, democratic backsliding is not far behind.

However, the advent of democratic backsliding in the protection of human rights is not an irreversible and helpless situation.<sup>178</sup> The robust protection of the freedom of expression through the courts is an effective manner by which this right is protected. As seen in the European setting, a regional court, more often than not, is an effective tool to protect universal freedoms, including the freedom of expression.<sup>179</sup> Once a Member State fails to provide adequate protection to the freedom of expression, the regional court can step in and declare the protection of such freedom (provided that the different tests of subsidiarity and margin of appreciation are satisfied).

In the ASEAN context, there is noticeably still no regional human rights court in existence. While the AICHR was created by the ASEAN Member States, it has no adjudicatory powers. It does not even have investigatory or recommendatory powers to sanction erring Member States. It is high time to revisit the mandate of the AICHR. It could be proper venue

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<sup>177</sup> Tom Ginsburg, *International Courts and Democratic Backsliding*, 37 BERKELEY J. INT'L L. 265 (2019).

<sup>178</sup> Tom Ginsburg, *Democratic Backsliding and the Rule of Law*, 44 OHIO N.U.L. REV. 351, 351 (2018).

<sup>179</sup> *Id.*

to ensure that universal freedoms, including the freedom of expression, must be protected especially when the domestic state can provide adequate safeguards. The AICHR should be the leading authority to urge the ASEAN Member States to comply with their obligations under the AHRD and other international human rights treaties. It is through a rules-based ASEAN setting with an institutional framework in place shall there be an effective method of settling disputes instead of having the usual lethargic diplomatic coordination which usually bore no concrete results.<sup>180</sup>

### *COVID-19 and Human Rights*

Presently, the Coronavirus Disease 2019 Pandemic affected the world in numerous ways. From economic decisions, health, and political strategies, COVID-19 also impacted how States approach human rights. First identified in Wuhan, China in December 2019, this contagious disease has spread globally and lead to a pandemic currently being battled by countries worldwide. COVID-19 is more than a health issue as it also raised concerns on human rights protection. Prompted by these concerns, the UN HRCtee issued a “Statement on derogations from the Covenant in connection with the COVID-19 pandemic” on April 30, 2020.<sup>181</sup> In this Statement, the UN HRCtee reiterated that despite the pandemic and public health goals of States, States should not derogate from its obligations under the ICCPR and should not restrict rights such as the freedom of expression or the right to peaceful assembly.<sup>182</sup> Furthermore, access to information and freedom of expression should remain as vital safeguards for States to comply with their ICCPR obligations.<sup>183</sup>

<sup>180</sup> Hao Duy Phan, *Towards a Rules-Based ASEAN: The Protocol to the ASEAN Charter on Dispute Settlement Mechanisms*, 5 ARBITRATION LAW REVIEW 24 (2013).

<sup>181</sup> UN Human Rights Committee, *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*, CCPR/C/128/2 (Apr. 30, 2020), available from <https://digitallibrary.un.org/record/3863948?ln=en>.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

Given that there are international expectations with respect to the obligations connected to the freedom of expression, there must be also a regional approach to be considered. When the pandemic started, ASEAN States issued a coordinated approach on April 14, 2020 in its Declaration of the Special ASEAN Summit on Coronavirus Disease 2019. While commendable for having a unified approach, ASEAN's statements raised concerns on the restriction of the freedom of expression. Asian Forum for Human Rights and Development (FORUM-ASIA) stated that ASEAN Member States adopted a blanket approach which will lead to a deterioration of freedom of expression.<sup>184</sup> FORUM-ASIA particularly pointed out Point (iii) of the Declaration which provides:

Enhance effective and transparent public communication involving multiple forms of media including timely updates of relevant government policies, public health and safety information, clarifications on misinformation, and efforts to reduce stigmatization and discrimination. Encourage the ASEAN information sector to strengthen cooperation in countering misinformation and fake news, as well as to develop a set of guidelines and a possible common platform to facilitate timely sharing of information in ASEAN.<sup>185</sup>

In an effort to combat “fake news” and “disinformation,” several ASEAN Member State adopted measures for national security purposes and social unrest prevention. However, this approach, which were termed as “authoritative and repressive,” has resulted in a number of rules restrictions and legislations that restricted speech and liberty among ASEAN citizens. An example would be the Anti-Terror Law enacted by the Philippines on July 3, 2020, which was prioritized as a key measure during the pandemic. Just recently, on March 11, 2021, the Cambodian Government enacted Law on Measures to Prevent the Spread of Covid-19 and Other Serious, Dangerous and Contagious Diseases. This law, aimed at “protecting public health and mitigate the socio-economic impact of the pandemic”<sup>186</sup> was seen by Human Rights

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<sup>184</sup> FORUM-ASIA, *ASEAN must not compromise freedom of expression in response to COVID-19*, FORUM-ASIA (2020), <https://www.forum-asia.org/?p=31561> (last visited Mar 26, 2021).

<sup>185</sup> ASEAN, Declaration of the Special ASEAN Summit on Coronavirus Disease 2019 (COVID-19), (Apr 14, 2020).

<sup>186</sup> Niem Chheng, *Law on Covid-19 control takes effect*, THE PHNOM PENH POST, March 11, 2021, <https://www.phnompenhpost.com/national/law-covid-19-control-takes-effect> (last visited Mar 27, 2021).

Watch as allowing for abuses because of the vague provisions of the law and the extensive powers given to the Prime Minister on the distribution and control of information and media.<sup>187</sup>

In Myanmar, ARTICLE 19 mentioned that the government prosecuted those who opposed the its narrative on the COVID-19 pandemic and has blocked access to media websites.<sup>188</sup>

Meanwhile, those who criticized the Indonesian Government's response to the COVID-19 Pandemic was met with alleged intimidations, which ranged from verbal attacks, social media hacking, to death threats.<sup>189</sup>

These incidents paint an unflattering landscape of the freedom of expression in ASEAN Member States. These situations on the freedom of expression were raised as a cause for concern by UN High Commissioner for Human Rights Michelle Bachelet. In her statement in June 2020, she reiterated that citizens “must be allowed to express opinions on vitally important topics of public interest” while governments take action against the propagation of false information about the COVID-19 Pandemic.<sup>190</sup>

### *Fake News in the ASEAN Region*

Another rising challenge that the ASEAN Region faces with respect to the freedom of expression is the proliferation of fake news. The propagation of fake news is a recent problem that is haunting almost every state in the world. Fake news is the broad spread of stories treated by those who spread them as having been produced by standard journalistic practices, but that

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<sup>187</sup> Cambodia: Scrap Abusive Covid-19 Prevention Bill, HUMAN RIGHTS WATCH (2021), <https://www.hrw.org/news/2021/03/05/cambodia-scrap-abusive-covid-19-prevention-bill> (last visited Mar 27, 2021).

<sup>188</sup> Myanmar: ARTICLE 19 briefing highlights freedom of expression concerns amid the COVID-19 pandemic response, ARTICLE 19, <https://www.article19.org/resources/myanmar-article-19-briefing-highlights-freedom-of-expression-concerns-amid-the-covid-19-pandemic-response/> (last visited Mar 27, 2021).

<sup>189</sup> Ghina Ghaliya, Intimidation of government critics raises concerns about freedom of speech, The Jakarta Post, June 2, 2020, <https://www.thejakartapost.com/news/2020/06/02/intimidation-of-government-critics-raises-concerns-about-freedom-of-speech.html> (last visited Mar 27, 2021).

<sup>190</sup> Asian countries urged to honour right to freedom of expression, over pandemic fear, UN NEWS (2020), <https://news.un.org/en/story/2020/06/1065532> (last visited Mar 27, 2021).



have not in fact been produced by such practices.<sup>191</sup> Even the governments of ASEAN Member States are not immune from fake news. In the Philippines, human rights activists were charged with the crime of inciting to sedition based on fake news, which was not verified by the government whether they were indeed connected therein.<sup>192</sup> The reliance on fake news, without checking the verified facts of the news articles, has been directly used to stifle the freedom of expression of some citizens in the ASEAN Region.

Indeed, fake news is a growing field of concern, especially in light of the weak protection of freedom of expression in the ASEAN Region. Due to the poor understanding on the verification of news, citizens who may be legitimately airing their grievances could be censored through this fake news.

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<sup>191</sup> Eliot Michaelson, Rachel Sterken & Jessica Pepp, *What's New About Fake News?*, 16 JESP (2019), <https://www.jesp.org> (last visited May 25, 2021).

<sup>192</sup> Carlos Conde, *Philippine Activists Charged with Sedition, 'Fake News'*, HUMAN RIGHTS WATCH (2020), <https://www.hrw.org/news/2020/04/22/philippine-activists-charged-sedition-fake-news> (last visited May 25, 2021).

## Conclusion

The ASEAN was envisioned to become a robust regional organization among southeast Asian nations. It was intended, not only to maintain peace and prosperity among the members states, but also as a means to promote and protect human rights, including the freedom expression. Thus, the Member States adopted a declaration affirming its commitment to human rights with the AHRD, which recognized that “[e]very person has the right to [freedom of expression], including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person’s choice.”

Nevertheless, as also discussed, the ASEAN Region has six behavioral values: (1) respect for state sovereignty; (2) freedom from external interference; (3) non-interference in internal affairs; (4) peaceful dispute settlement; (5) renunciation of the use of force; and (6) cooperation.<sup>193</sup> The primary roadblock among these ASEAN values regarding the protection of freedom of expression is non-interference. This value constitutes as the “ASEAN Way” that prevents ASEAN Member States in interfering in each other’s affairs to maintain peace across the region without any form of accountability for any rights violations. As seen in the case study of the Philippines and Myanmar, despite the numerous and blatant violations of freedom of expression in the regional setting and the failure of the domestic government to protect the same, the ASEAN remained silent and tolerant on these violations. It goes to show that the ASEAN value of non-interference is pervasive and the regional body’s inaction actually results in the failure to protect the universal right to freedom of expression.

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<sup>193</sup> Leviter, *supra* note 160.

In addition to the constant adoption of the value of non-interference, there are other challenges that the ASEAN is facing regarding the protection of right to freedom of expression. Democratic backsliding is become a real threat in some of the Member States, and when the democratic institutions fail, it necessarily follows that there is also a breakdown of the mechanisms to protect freedom of expression. The COVID-19 pandemic was also utilized by the Member States to weaken the protection of the freedom of expression because of the higher restriction imposed regarding the exchange of information on the on-going crisis. Further, as in any other states, the problem of fake news is amplifying the failure of the Member States to protect human rights. These fake news add to the disinformation received by the citizens of the Member States. Without remedying the pervasiveness of fake news, the exercise of the freedom of expression in the ASEAN Region shall continue to deteriorate.

Nonetheless, there is still hope in improving the ASEAN Region's protection and promotion of human rights, especially the right to freedom of expression. It is high time to revisit the mandate of the AICHR to be the leading authority to urge the ASEAN Member States to comply with their obligations under the AHRD. Through a rule-based ASEAN setting, there can be an effective method on settling disputes, particularly those involving violations of freedom of expression. Additionally, the role of civil society organizations as the astute observers of rights violations and as harbingers of political change must not be discounted.

The freedom of expression landscape in ASEAN is constantly evolving. The current COVID-19 pandemic has also shaped the way in which this right is appreciated and or stifled. However, it must remain fundamental for all nation states, not just ASEAN, to give protection to this right as a matter of its obligation to the people. It is hoped that more research into the relations between authoritarian leaders and the COVID-19 response be undertaken to better indicate the policy reforms or how the ASEAN community or the international community will move forward towards the respect and protection of the right to freedom of expression.

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