Democracy and Human Rights in East Asia and Beyond

– Critical Essays

edited by Marta Kosmala-Kozłowska

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Marta Kosmala-Kozłowska

Democracy and Human Rights in East Asia and Beyond: An Introduction

The idea for the book came to my mind when three years ago I started to conduct courses on democracy, international human rights and cross-cultural communication for the students of Collegium Civitas. Many of the topics discussed in those courses revolved around East Asia. As a result, some students have become deeply interested in those scope areas, and when encouraged, they committed their creative faculties to research and writing essays on key issues related to democracy and human rights in East Asia. Their approaches differed, though they could be described in three broad categories.

Monika Zając, Weronika Składanek and Anton Ruliou devoted their essays to tracing relationships between key structural factors operating in East Asia at both conceptual and practical levels. Those were, respectively, the interaction between social responsibility of East Asian transnational corporations and human rights; between normative foundations of ASEAN and its practice towards the issues of democratisation and promotion of human rights; between democracy and Confucianism as a key social philosophy in East Asia.

Aleksandra Wieliczko and Ibrahim Aktas presented case studies on the situation of Rohingya in Myanmar and Uighurs in China, respectively. In each of those cases, difficult relations between the state and/or privileged group on one side and a disadvantaged one on the other, often underscored by escalating violence, constitute both a proof of salience of the subject of introducing and protecting democracy and human rights in East Asia and a major contemporary challenge to the credibility of current systemic solutions functioning in the region with regard to those issues at state and international levels.

And finally, three students took it upon themselves to conduct comparative studies, juxtaposing a certain issue related to human rights or democracy across two or more Asian countries. Thanks to that, regional trends as well as major similarities and differences in the field could be diagnosed. For Adriana Pignuolo such issue is the use of torture, while the states whose practices are analysed are China, Singapore and Indonesia. Oksana Kurylo selected the practice of death penalty for comparison between China, Japan and Taiwan. Finally, Anastasiia Kovalyshyna comparatively looked into key

features behind the Indian and Chinese experiences of respective socio-economic transformations, democracy or its lack among those.

This diverse approach is valuable and interesting. In most cases students engaged in exercising critical thinking toward issues at hand, generating insights on the subject which run against the media discourse or conventional wisdom. Because of that, they are good pieces of early scholarship and they should be seen as such – not for their inevitable deficiencies, but for their novel, insightful approaches to matters otherwise superficially discussed or ignored.

However, upon editing the essays, I felt compelled to put them against a broader framework, to provide proper context to how they address the democracy and human rights-related issues in East Asia. Thus, the aim of the introduction to this volume is to both outline conceptual frameworks for discussing these issues as well as to provide a wider comparative context, reaching across East Asia and beyond, to the inevitable template for any discussions on democracy and human rights – the Western experience.

I do not, therefore, put forth a set of hypotheses for concrete aspects of the research agenda outlined above, leaving it to the students themselves, except perhaps a general overarching one. That to understand real conditions of and progress on human rights and democracy in East Asia as well as how and why these conditions and progress are generated and shaped one needs to move beyond Western preferences, solutions and understandings of the issues and embrace the perspective from the analysed region. This is why, while most works related to human rights and democracy mark everything else than the West as beyond, in this book this logic is reversed.

The main idea of the above article is to establish a substantive underpinning for the collection of student essays contained in the book. Thus, introduction is divided into sections, each introducing a part of the picture, gradually laying the groundwork for appreciating the critical nature of the essays. Hence, first I present the very emergence of human rights as an internationalised concept in the specific historical moment of post-war Western normative hegemony, and yet mediated by pluralistic understandings later lost in the flurry of liberal orthodoxy. Second, I present the Western approach to human rights not as the universal one, but as a specific and particular viewpoint, typical of the Western experience. Third, I put the issue of democracy and human rights against the backdrop of their wider evolving international context and the perils of the application of these principles in accord with Western designs that, nevertheless, has resulted in the emergence of the current normative landscape in the field, with a set of international treaties, doctrines and perceptions of legitimacy. Fourth, I turn to East

Asia and juxtapose its general experience with adapting (or not) to the above presented internationalised Western package of standards of democracy and human rights. Fifth, in order to sophisticate the research agenda I unbundle East Asia and engage in presenting dominant features, conditions, trends and specificities of categories of states of the region in regard to quality of democratic institutions and human rights standards. Those categories can be roughly described as ASEAN democracies, Confucian democracies and friendly authoritarianisms, though such descriptors are mostly functional and other ones can be no less legitimate, such as the term "half-democracies" for Malaysia and Singapore. The last category can thus be confusing, but it points to the reality that mostly unrigged voting procedures do not make a democracy in itself. Sixth, upon drawing conclusions from the comparative overview of the above polities, the sketch of shared features of East Asian illiberal model of the state is outlined. And seventh, the above is given a juxtaposition in a brief overview of human rights policies and stances in two arguably model Western states which share the Asia-Pacific space with East Asia – the US and Canada. The former demonstrates caveats of US approach, the latter – convergence of some, if not all, Canadian policies with how progress on human rights is preferably pursued in East Asia.

Emergence of the concept of international human rights

As a result of enormous human rights violations that happened during the two world wars in the 20th century, states, along with emerging international organisations and supported by the non-governmental sector, adopted liberal moral and normative standards as the universal ones, bringing attention to individual rights and protection by international legal regimes. Once political leaders of democratic powers recognised International Human Rights (IHR) protection as an inseparable element of international peace, the Lockean social construct was reintroduced into the realist reality of global International Relations (IR).

Since the enactment of the Universal Declaration of Human Rights (UDHR) in 1948, the UN members have agreed on a modern version of the IHR. Nevertheless, debates over such philosophical matters as the "true nature" of IHR, including their axiological origins and contemporary contents, are being continued, with greatest intensity among non-Western political elites, intellectuals and wider societies, but also among their Western counterparts. As Jacques Maritain, one of prominent drafters of the UDHR, stated: "Yes, we agree about the rights, but on condition that no one asks us

why" (Forsythe, 2004, p. 34), which could have reflected rhetorical endorsement and diplomatic approval for the idea, that on many occasions has not been and still is not followed by compliance in terms of divergent cultural, developmental and socio-political practices. Also Eleanor Roosevelt, the Chair of the first UN Human Rights Commission (1947-51), strongly involved in the process of drafting and enactment of the UDHR, allegedly named it "the statement of aspirations" (Forsythe, 2006, p. 39).

In fact, since the very beginning, the liberal-democratic normative heritage regarding human rights and freedoms, including the political commitment of UDHR, along with a set of increasingly legalistic and institutionalised solutions (ICCPR, ICSECR, CAT, CRC, CEDAW[1] and their Committees; Human Rights Council with its Universal Periodic Review etc.) have been perceived as a progressive socio-political project. The above was also true about the perspective of non-Western, illiberal regimes, including USSR and China, whose leaders, in part in response to the emergent Western liberal orthodoxy, have focused on promoting second (social, economic and cultural) and third (group and collective rights, right to self-determination, healthy environment etc.) generations of IHR.

Referring to the East Asian, particularly Chinese, perspective on progressive character of IHR, Zhou Enlai, the first Premier of the People's Republic of China, claimed in 1968: "It is too early to assess the implications of the French Revolution" (Bailey, 201, p. 861). Actually, the period between 1789 and the end of the World War 2 may seem as a kind of "middle ages" for the concept of IHR that has proved to be hardly an issue of vital concern in the field of International Relations (IR). In fact, key developments in the field started to emerge only after Franklin Delano Roosevelt and the Allies during World War 2 had arrived at a conclusion that IHR were intermingled with international peace and security and, thus, they could become a formal part of IR, affecting the national interest calculus of the state. In 1945, the human rights language was written into the UN Charter as one of the factors contributing to preventing aggression because of the aim to address deprivation and political persecution. Simultaneously, the document did not specify any particular set of IHR. The early UN, nevertheless, sought to achieve the goal, 30 principles of the UDHR agreed in 1948 being the effect. Even though the document was not legally binding, it proved to be too much to accept for some illiberal states at that time like Saudi Arabia, South Africa, Soviet Union and its five allies, including Poland, who abstained from acceding to it.

[1] International Covenant of Civil and Political Rights (1976), International Covenant of Economic, Social and Cultural Rights (1976), *Convention against Torture* and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987), *Convention on the Rights of the Child* (1990), Convention on the Elimination of all Forms of Discrimination Against Women (1981).

Still, for the majority of UN member states at that time and especially for the Western European democracies, which identified themselves with liberal values contained in the UDHR, there were no specific obstacles to enter the document which often paralleled their domestic normative orders and practices. Moreover, most governments were comfortable with the notion of individual fundamental rights as abstract and its elaboration in a general form (Forsythe, David P., 2012, p.p. 65-69). Thus, even though in the negotiating process a broad range of views by African and Asian states was underrepresented, most essentially the Western approach was strongly supported by Latin American political elites as well as Lebanese and Philippine authorities, due to French and American postcolonial influences respectively.

At that particular time, the UDHR was the most basic statement of international ethics – liberal in tone and content, adopted as the ashes of the World War 2 had not yet completely fallen and prospectively the spirit of liberal cooperation could emerge. For the same reason, at least for a while, liberal democratic ideas dominated the political discourse and the IHR protection system based on them could be introduced. Thus, one may assume that on a certain level UDHR did mirror the "cross-cultural consensus", basing on the common revulsion of Holocaust and mass atrocities perpetrated before 1945 (Schmitz & Sikkink, 2002, p. 691). Still, shortly after the process of establishing the IHR standards and institutions started to emerge, the Cold War dynamics overlaid it both politically and discursively to a significant extent. Coupled by the strategic conflict between the US and the USSR, the realist paradigm of IR dominated the discussion of international relations, marginalising human right-centred approach for the sake of hard security goals (Freeman, 2007, pp. 54-62).

The complex "nature" of Western Approach to international human rights

So how it is possible that the liberal idea of IHR and its correlates (including "Human security", "Responsibility to protect", "Responsibility while protecting") has gained international recognition in the realist reality of contemporary IR? For Zbigniew Brzeziński, human rights constitute "the single most magnetic political idea of the contemporary time" (Brzeziński, 1990, p. 256). Taking into consideration the realist persuasion of the scholar, it may mean for him that while the reality of IR (International Relations) may be shaped mostly by material power struggles among states, most of contemporary international actors still find it desirable to at least give their formal endorsement to the liberal notion of human rights. On many occasions, however, the

formal approval is not followed by practical compliance. As it will be indicated later in this article, a lot of contemporary states, including some East Asian democracies (Japan, Taiwan, Indonesia, the Philippines), illiberal democracies (Malaysia, Singapore) and, last but not least, the authoritarian regimes like China or Vietnam on one hand wish to be identified with support for (at least some) human rights, while on the other hand they wish to maintain national (or, more broadly, regional) independence in policy-making both at home and within their foreign policies. This dualist approach to human rights issues can be derived from state-centric security approach (in particular represented by policies of great powers or of illiberal regimes), as opposed to human-focused security trends popularised since mid-90s within the UN System, and by some middle powers included ever since as the element of their niche foreign-policy making, positive self-presentation of a state and developing its soft power capacities (e.g. Japan, Australia or Canada).

For Jeremy Bentham and Alasdair MacIntyre it would be an absurd to base HR on natural rights as such a thing in their opinion does not even exist (Forsythe, 2006, pp. 29-30). Both philosophers seem to be sharing Edmund Burke's conviction about the non-existence of human rights as self-evident truths, which may in part explain the difficulties, threats and challenges for implementation of IHR in contemporary world (Schmitz & Sikkink, 2002, pp. 518-521). On the other hand, in his IHR manual David Forsythe quotes a Canadian scholar Michael Ignatieff as saying: "Our grounds for believing that the spread of human rights represent moral progress are pragmatic and historical. We know from historical experience that when human beings have defensible rights they are less likely to be abused or oppressed." (Ignatieff, 2004, p. 4). As Forsythe concludes, in the notion of human rights we perhaps have to do with a matter of a "secular religion", which is metaphysical because it can be taken on belief and, while studying history through its lenses, we can see the results of our belief that they have the capacity to improve human lives. (Forsythe, 2012, p. 44)

In general, the contemporary Western debate on human rights focuses mostly on which individual should have ensured their inherent, inseparable and equal rights; whether intolerance should be accepted within liberal societies; what are the boundaries of individual freedom with regard to the use of hate speech; who, besides individuals, should have ensured their rights (e.g. vulnerable groups or communities); whether human rights should go beyond the 1st generation of human rights; where exactly do rights originate from (e.g. God`s will, natural law, positive law); what is the best way to

implement rights (emphasis on encouraging or sanctioning; either promotion or penalising in courts). David Forsythe indicates significant differentiation in a group of Western human rights experts (Forsythe 2006, pp. 30-31). Attracta Ingram puts emphasis on the importance of positive rights featuring entitlements to minimal standards of food, clothing, shelter and healthcare (Ingram, 1994). Maurice Cranston recognizes only civil and political rights (Cranston, 1967, pp. 43-53). Jack Donnelly highlights that economic and social rights are important, yet rights can only be individual, not collective (Donnelly, 2014, pp. 7-21). William F. Felice does recognise the legitimacy of group rights (Felice, 1996, pp. 17-34).

Thus, even if at first glance the Western perspective on the nature and content of IHR may seem a monolith, it is not the case. Still, various Western and non-Western understandings of the concept of human rights may be most fully described and understood once explained as social constructs, "invented social categories that exist only because people believe and act as if they exist, that nevertheless come to have the capacity to shape the social and political world". (Schmitz & Sikkink, 2002, p. 517). Simultaneously, according to Michael Freeman, one should sceptically explore highly idealistic interpretations of IHR in contemporary international politics as states still often give preference to diplomatic, economic, strategic or other interests when considering whether to include human rights in their (internal and foreign) political agendas (Freeman, 2007, p. 203). Particular understandings of the status of IHR depend on a chosen theoretical perspective (realist, liberal or constructivist). Still, Forsythe claims that one should not take the strictly realist approach when he or she assumes that human IHR will not change a thing in contemporary world politics, and he points out the vital role that human rights played in stopping atrocities perpetuated by communist states during the Cold War. (Freeman, 2007, p. 203). The author of this article agrees with the constructivist claim that recognises values and ideas as having capacity to shape international reality in both, positive and negative ways which will be highlighted in this article once analysing IHR from the perspective of divergent IR theoretical approaches.

International human rights as a liberal concept in a realist world

Once recognising liberal human rights paradigm as a set of normative ideas about treatment to which all the individuals are inherently, inseparably and equally entitled on the basis of being humans, IHR laws create a relationship between a person who is a holder of rights and other social entities (mainly states) having obligations. Belief systems and

traditional customs that foster illiberal socio-political structures within which rights are granted to individuals on condition that they perform duties towards community, society, nation and state contradict the universality of "natural rights" theory according to which such ideas as the Lockean social contract exists independently of a set of socio-cultural backgrounds. One way or another – whether perceived as a universal intellectual construct or a widespread but not universal political-legal practice – human rights were firstly associated with initial Western democratic polities which emerged in France and the US in the 18th century. Other regions and cultures had displayed significant moral principles in favour of human dignity, but none of them developed a parallel human rights discourse. It was in the West, where individuals were firstly recognised as entitled to possess fundamental personal rights, giving rise to institutional claims state authorities were supposed to respect. To the contrary, in many non-Western cultures individuals were still dependent on rulers recognising abstract principles of good governance, whose subjects were nonetheless not seen as having personal rights and means to compel rulers to respect them. Worth highlighting is the fact that human rights, recognised by Western colonial powers as universal and commonly applicable to their citizens, were refused to be granted to inhabitants of their colonies. For instance, during the negotiations of provisions of ICCPR, there emerged a controversy whether the ratification of the Covenant would oblige a colonial metropolis to apply its human rights provisions in dependant territories (Forsythe, 2006, p. 42).

Much in accordance with the realist paradigm of IR before World War 2 human rights were largely perceived as strictly belonging to the sphere of internal affairs of a particular state, interfering in which was neither legitimate, nor approved among other states. The Treaty of Versailles really had no significant provisions related to human rights, and the non-discrimination clauses (race, religion) that had been debated in Paris during the post-war conference of 1919 did not ultimately make it into the final document. Thus, a discourse on international human rights was largely absent from the Western-inspired institutions in the period preceding the World War 2 and their protection or abuses remained largely a national rather than international matter. Even though by addressing minorities' and workers' rights as well as by abolition of slavery the League of Nations ultimately proved progressive on human rights, it was still in a very limited way. Minorities Protection Treaties were expected by their signatories to provide for peaceful coexistence of ethnic groups within their territories which was in the best interest of national states (Clapham, 2007, pp. 26-28). Interestingly, Poland and Haiti were the most vocal advocates of "universal human rights" during the era of the League of Nations.

Great Britain and the US had tried to contain the principle of individual religious freedom in to the organisation's Covenant, but withdrew their approval of the case in order to block Japan from advancing the principle of racial equality (Shimazu, 1998).

As indicated above, the post-World War 2 "never again" doctrine and anti-genocide historical awareness approach acted as the catalyst for the IHR "norm cascade" (Schmitz & Sikkink, 2002, pp. 692, 695, 697), which, however, due to international political constraints has become a long term process. At the same time, during the Cold War communist states were committing violent abuses, in particular of civil and political rights, and Western liberal democracies turned a blind eye on serious human rights violations of their anti-communist allies (Freeman, 2007, p. 202). The normative spill-over of IHR and their legalistic evolution have proved to be harder ever since the UDHR was signed as the number of UN member states has increased over threefold, mainly because of African and Asian states. In mid-50's, the General Assembly started to change its composition. Many non-Western, neither rich nor highly developed nor democratic post-colonial states were added as members, which complicated negotiations on the IHR treaties within the UN human rights protection system. The above developments put into question the implementation possibilities of IHR by non-Western states (mostly illiberal democratic regimes). The human rights concept included in the UDHR, which in fact has constituted the base for the entire structure of universal human rights regime, is derived directly from John Locke's idea of natural rights and the state model of liberal democracy, which gives priority to individual freedom of a person over their duties towards other people and society as well as recognises civil and political rights as more important than collective, economic and social rights (Kosmala-Kozłowska, 2013, p. 88).

Despite the fact that many states (including the US) were significantly more hesitant to place themselves under a set of more specific legal obligations of IHR agreements than the UDHR, the declaratory language of diplomatic promises was eventually translated into supposedly enforceable treaties. Even though the superpowers were largely preoccupied with the Cold War threats and challenges, it was possible to enact the two International Covenants in 1966 (ICCPR and ICESCR). Still, it took another decade to bring the two treaties into legal force in 1976. Among the complications that caused the above slowdown was the American reluctance towards the dynamic evolution of legally binding international IHR framework. Some influential domestic groups (mainly conservative Republicans) forced the US executive to prevent the international law influences that could challenge 'American values'.

Secondly, the Soviet block and the developing countries took the opportunity to push for economic and social rights as having priority over civil and political rights which have been commonly violated in communist states during the World War. Interestingly, it were the Latin American social democrats cooperating with the Canadian UN civil servant John Humphrey (Forsythe, 2006, p. 40) who were largely responsible for wording second generation rights within the issuing process of the UDHR that later served as the fundament for the following Covenants. Finally, the two separate treaties were agreed, equipped with divergent supervisory mechanisms. In fact, the ICESCR Optional Protocol, establishing individual complaint procedure and inquiry mechanism for the Convention, was only adopted in 2008 and entered into force in 2013. Thirdly, developing countries, supported by the communist coalition, pressed hard for the inclusion of national self-determination as a collective human right. As a result, art. 1 of both treaties includes the right to collective self-determination. Finally, worth noticing is the fact that in mid-50's of 20th century the UN General Assembly changed its composition as illiberal, non-Western and developing states (including a significant number of East Asian ones), strongly hesitant to place themselves under a set of specific legal obligations, became members.

As for the Western international politics on human rights, until the 70s their promotion was rarely perceived as an appropriate part of foreign policies or even registered on the agenda of state diplomacy. Michael Freeman highlights Jimmy Carter's human rights diplomacy in the 70s as a landmark development in this regard. The idea of human rights diplomacy expanded its reach thanks to democratisation processes in Latin America, Europe (Portugal, Spain and Greece) and Asia (The Philippines) till mid-80's as well as with the triumph of liberal democracy in the Central-Eastern Europe at the end of the Cold War. Further contributions to the trend included the processes of European integration, liberal in spirit, and recognition of universality of IHR during International Human Rights Conference in Vienna.

However, neither has prevented the escalation of national-ethnic violence in the last decade of 20th century in many places of the world. Before the beginning of new era, in accordance with the mostly realist Gilpin's hegemonic stability theory of IR, there was established a hegemonically ideological world order, within which a spill-over of the liberal American values as well as human rights doctrine evolving within the UN System could occur, affecting dynamic development of IHR laws and institutions. Yet, unresolved political-ethnic tensions lead to brutal mass atrocities, including the Rwandan genocide (1994) and the massacre in Srebrenica (1995). This, in turn, contributed

to the evolution of international criminal laws and instruments – most importantly the emergence of international courts and tribunals addressing individuals as targets of international criminal responsibility: i.a. the International Criminal Tribunal for the former Yugoslavia in 1993, the International Criminal Tribunal for Rwanda in 1994, The Extraordinary Chambers in the Courts of Cambodia in 1997, the East Timor Tribunal in 2000. Emergence of the above tribunals could be significantly associated with the dynamics of enacting International Criminal Court on the base of the Rome Statute in 1998, which defined crimes against humanity, war crimes and the crime of genocide, with the definition of crime of aggression pending (Clapham, 2007, pp. 53-58).

Due to the failure of international community to prevent mass atrocities in Rwanda, a dynamic anti-genocide movement evolved, primarily in the US, having capacity to press the government on more human rights-centred approach to foreign policy. Moreover, within the UN System a new approach called "human security" started to emerge. In 1994, a report of the United Nations Development Program (UNDP) defined the doctrine identifying seven key areas, including:

1. economic security that requires an assured basic income for individuals;

2. food security which requires that all people at all times have both physical and economic access to basic nutrition;

3. health security that aims to guarantee a minimum protection from diseases and unhealthy lifestyles;

4. environmental security which aims at protecting people from the short- and long-term effects of deterioration of the natural environment;

5. personal security focused on protecting people from physical violence, 6. community security aiming at protecting people from the loss of traditional relationships and values and from sectarian and ethnic violence;

7. political security concerned with whether people live in a society that honours their basic civil and political human rights – along with considering whether repressing individuals and groups occur, or governments try to exercise control over ideas and information.

In sum, the human security paradigm challenges the traditional notion of national security. Its main assumption is that the people-centred view of security is necessary for national, regional and global stability and the proper referent for security should be the individuals and groups of people rather than the state. By the UN-originating definition, human security is: "(…) a child who didn't die, an epidemic that didn't spread, a worker who wasn't fired, a brutal ethnic conflict which was averted, a dissident whose lips

weren't shut. Human security is not about weapons, it is about human life and dignity." (HDR, 1994, p. 22)

Human security approach within foreign policies can be understood as based on the so-called "enlightened national interest", according to which states exist to serve the interests and concerns of people; architects of foreign policies recognise the humanitarian imperative and seek high moral/ethical standards; civil servants, soldiers and citizens are educated in human rights and human security issues, respect international laws and local values. "Enlightened national security" recognises that security of all people is in the national interest. (Dorn, 2003, p. 23-24).

The idea of human security doctrine was implemented in international politics mostly via the doctrine of "Responsibility to Protect" (R2P) that was unanimously adopted at the UN World Summit in 2005 as a diplomatic means aimed at preventing genocide, war crimes, ethnic cleansing and crimes against humanity. Gareth Evans, who played a central role in R2P's development, was quoted as claiming: "The whole point of the R2P doctrine, in the minds of those of us who conceived it, was above all to change the way that the world's policymakers, and those who influence them, thought and acted in response to emerging, imminent and actually occurring mass atrocity crimes." (Evans, "R2P: Looking Back, Looking Forward", 2015). The key purpose of R2P was "to create a new norm of international behaviour which states would feel ashamed to violate, compelled to observe, or at least embarrassed to ignore." (Evans, 2015). Brazil moved even one step further issuing in 2012 a proposal that there is a need of "responsibility while protecting" (ECRtoP, Welsh, Quinton-Brown, MacDiarmid, 2013), which demands attention according to which one of R2P priorities ought to be ensuring that any time the Security Council mandates the use of force, "prudential criteria are seriously taken into account and publicly reckoned with." The point of the idea is to improve Security Council monitoring and accountability of missions pursued in the name of civilian protection and human security goals (Adams, 2015).

East Asian approach to international protection of human rights

As for prioritisation of socio-economic development and progressive character of the 1st (civic and political) generation of HR, in mid-90's of 20h century it was most accentuated by proponents of 'Asian Values', namely Malaysian PM Mahathir Bin Mohamad and Singaporean PM Lee Kwan Yew. Taking into account Western origins and Euro-Atlantic cultural specificity of the international system of HR protection (which

evolved within the UN System), even though more or less ambiguously recognising that non-Western states, East Asian in that numbers, require a right to specific interpretations of HR international laws and to assign particular meanings to some HR concepts (e.g. inherent, indivisible and inalienable character of HR; human dignity and its contents; relation between state security and human security; scope of personal integrity rights protection; proper relation between non-interference in private life of citizens vs. non-intervention in internal affairs of states). Just before the international HR conference that took place in Vienna in 1993 under auspices of the UN, Asian states met in Bangkok in order to deliver an alternative approach to universal HR (Brems, E., 2001, pp. 55-56). In the Bangkok Declaration of 1993, the participants agreed to underscore the necessity to take into consideration historical as well as cultural and religious divergences among states when assessing HR situations.

What could be considered the grounds to such claims of specificity? Through centuries most East Asian states were selective in adapting cultural, religious, aesthetic or ethical patterns from other civilisations – Chinese, Indian, Arabian or European. When shaping their statehood, however, they have built it either on the basis of Chinese civilisation (Japan, South Korea and Vietnam) or epiphenomenally adjusted themselves to long-distant existence within Sinocentric tributary relations, even though their statehood borrowed more from the Indian civilisation (the rest of Southeast Asia).

China was the first to create the modern state in the Weberian sense including three categories outlined by Francis Fukuyama as emblematic: impersonal recruitment, meritocratic bureaucracy and uniform administration (Fukuyama, Francis, 2012, p. 15). Due to its unique capacity to spread in parts of East Asia through the tributary system, the Chinese model of good and legitimate governance was highly referential. It is possible to trace socio-political priorities and procedures likening the Confucian ones in collectivistic and hierarchically organised societies in the region, partly because their modernity in the 20th century was shaped under significant influence of another culturally Confucian state – Japan. In addition, sizeable and influential Chinese minorities in Southeast Asia often provide a point of convergence between indigenous cultural underpinnings and the Confucian model of society. Thus, the contemporary discourse on human rights in East Asia may be connected to pre-modern Chinese social thought and its appreciation for social harmony and prioritising order over civil and political freedoms. This is why the progress on first generation rights, individualistic in essence, is relatively low. Taking into consideration the level of per capita income, even in East Asian democracies like Japan or Taiwan, human rights are still being still perceived as

primarily belonging to internal jurisdiction of sovereign states, not subject to universal transnational accountability. This can be gleaned from political declarations, "soft" norms and legal frameworks jointly developed by the states of the region, particularly within the ASEAN-led regional architecture. For this reason, East Asia had long been, along with Arabian (mainly Muslim) states, the only region lacking regional human rights regime. This void has recently been partially filled by the nascent ASEAN human rights regime, being gradually shaped over the last decade. (Kosmala-Kozłowska, 2013).

Weak IHR culture does not mean that East Asian states refuse participation in the IHR regime within the UN system, but active participation like incorporating human rights goals in foreign policies is not characteristic for most architects of diplomacy in the region. Japan and China, however, are actively engaged in IHR discourse – each representing their own approach. Since the beginning of 90s of 20th century, Tokyo has included, with varying emphasis, human rights in its diplomatic agendas as well as has shaped, promoted and implemented policies in the field of human security (Kosmala-Kozłowska, 2013, pp. 307-317). As for Beijing, it has formally recognised the universality of human rights in 1993 during the World Conference in Vienna, at the same time emphasising its dependence on the context of cultural development of a country, on a condition of social progress and a stable situation in the state. (Kosmala, 2005, p.p. 32-33).

Once endangered with a threat of international condemnation for gross violations of human rights in mid-90s, Beijing launched its diplomatic offensive against the anti-China resolution of the then-UN Human Rights Commission (Kosmala-Kozłowska, 2012, pp. 51-52). In addition, elements of human rights-related diplomacy, though from positions contrary to their liberal code, may be identified in the cultural-political project of "Asian Values", promoted most dynamically by Singapore and Malaysia in early 90s, and to an extent supported also by China and Indonesia (Kosmala-Kozłowska Marta, 2013, pp. 64-65). Indonesia and the Philippines as well as, until recently, Thailand, regardless of imperfections of their democratic regimes, were more likely to support human rights agendas in the post-Cold War global normative landscape, though primarily within and via ASEAN, what substantiated in creation of ASEAN Intergovernmental commission on Human Rights (AICHR) and endorsement of ASEAN Human Rights Declaration (AHRD).

As far as integration with the universalistic human rights regime is concerned, as well as implementing its provisions at home, it is safe to assume that it is bound to be a particularly uneasy process. However, while analysing the ratification status of IHR

treaties in the group of East Asian states one may identify some characteristic patterns that point to a nuanced state of affairs. Certainly, death penalty, administrative detention, use of torture and some other measures undertaken in order to protect state security and social order are strongly rooted in most of East Asian legal orders, with the particular focus on penal systems and penitentiary procedures. This refers not only to autocracies in East Asia, but also to a significant extent to regional democracies, as it is mostly accepted by their societies, especially when juxtaposed with the extents of civil and political freedoms and personal integrity rights demanded by their liberal democratic counterparts in the West (Pereenboom, 2007, pp. 19, 32-33) However, almost all states in the region have already ratified treaties protecting rights of women and children, which have been also largely confirmed and emphasised within the emerging ASEAN human rights regime. Same refers to International Labour Organisation's conventions protecting workers' rights. Interestingly, most of East Asian states ratified them with reservations, most commonly regarding freedom of association and prohibition of forced labour.

Cambodia and the Philippines could be recognised as human rights protection leaders when taking the number of accessions to IHR agreements as measurement. The Cambodian case may be explained most accurately with liberal theoretical approach when analysing reasons of its integration with IHR regime. In the beginning of the 90s, during the post-conflict state-building process, Cambodian post-Khmer Rouge authorities intended to emphasise the new regime's devotion to humanitarian values and simultaneously once and for all separate themselves from gross human rights violations perpetrated by Pol Pot and his cronies. As for the Philippines, even though they have ratified all the basic IHR treaties as well as most of their Optional Protocols (OPTs), and are recognised in literature as the most liberalised in this regard in the region, the Philippine state apparatus still often gives priority to state security considerations and social order requirements, particularly with regard to freedom of media, freedom of speech and association.

Myanmar, Singapore and Malaysia belong to the group of states most reluctant in acceding to the treaties of the IHR regime. According to Lee Kwan Yew, "Asian values" were superior to Western values, as they could "protect Asia from economic stagnation, inefficiencies of political systems, violent delinquency and moral decay of societies" (Hood, 1998, p. 956). In sum, Lee, along with Mahathir bin Mohamad, justified non-compliance with the IHR regime highlighting optimal character of their socio-political

and normative illiberal solutions, which could be infringed or broken by non-optimal liberal human rights laws.

What is worth observing, is also the fact that not many regimes (democratic or not) in East Asia have ratified OPTs to IHR treaties. The main reason for that is the supervisory character of institutionalised human rights instruments they provide for, while East Asian authorities are not eager to participate in any international or transnational monitoring systems, in particular once any legal responsibly is included – e.g. like in the case of the Rome Statute establishing the International Criminal Court (ICC). What is more, reservations are often made by East Asian states in case of relatively demanding provisions of IHR treaties. For example, to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which provides for individual complaint procedure, China made reservation regarding article 20, which empowers the Committee to investigate allegations of systematic torture. South Korea refused to accede to article 21, which establishes an optional dispute resolution mechanism between the parties and article 22, which (optionally) allows the parties to recognise the competence of the Committee to hear complaints from individuals about violations of the Convention by a state-party. Indonesia made a reservation with regard to article 30 providing for an optional arbitration mechanism of disputes among the parties. Due to the fact that OPT CAT established an advanced in-the-field monitoring mechanism alongside the procedure of regular visits undertaken by independent and national bodies to places where people are deprived of their liberties in order to prevent torture and other forms of treatment, it was ratified only by Cambodia and no other of East Asian states.

Unbundling East Asia on Democracy and Human Rights

Indonesia, Thailand (until recently) and the Philippines, as well as Japan, Taiwan and South Korea belong to a group of East Asian democratic regimes that have, nevertheless, experienced periods of authoritarian rule before. Except for Japan, whose divorce with authoritarianism has so far held in the post-war world, for the rest of them these are either relatively recent post-Cold War turns or even intermittent experiences like in the case of Thailand, which has experienced two military coups in the last decade, the junta under Prayuth Chan-ocha staying in power since 2014.

ASEAN's Volatile Democracies

Of the group, the three Southeast Asian states are significantly less influenced by the Confucian civilisational model than their northern neighbours. As for its cultural-religious background Indonesia, Thailand and the Philippines belong to the Hindu-Muslim, Buddhist and Christian traditions respectively. Moreover, whereas Taiwan and South Korea belong to the group of highly developed, industrialised economies, the three Southeast Asian democracies are still categorised as developing. All these three ASEAN states are characterised by a structure of political elites and political culture that is based on military or civilian oligarchies which favour security issues and social order over civil and political rights, with particular emphasis on constraining freedom of media, freedom of speech and association in times of state insecurity and/or political turmoil. Military elites of these states, in connection with political and business establishment, rely on and make use of a complex web of interpersonal interdependencies and exchanges of favours, which leads to socio-political and legal malaises of clientelism, cronyism, corruption and nepotism. Relatively dynamic social advancement and professional promotion has been possible in the armed forces in the case of Indonesia and Thailand, while belonging to oligarchical families is the decisive factor in the case of the Philippines. Politicians, officials and public activists that aim at counteracting the abovementioned problems do not enjoy enough power and political support in order to act effectively, which causes muddling about in many aspects of democratic and legal transformations and, at the same time, makes significant damage to the quality of these Southeast Asian democracies. In practice, state security and socio-political stability are prioritised over civil liberties and personal integrity rights.

Indonesia

Indonesia is the youngest from amongst East Asian democracies and the third largest democratic society in the world, after the US and India, gradually emergent as one in the decade of the post-Suharto *reformasi*, since 1998. The specificity of its socio-political system derives to a large extent from the fact that Muslims constitute great majority of its citizens, and Indonesia is the most populous Muslim state in the world (Brunn, Jacobsen, 2000, p. 122). However, in part due to the national pluralist ideology laid down by Sukarno, the founding father of Indonesia state, the *pancasila*, Indonesia has remained

a secular state throughout its independent existence, despite lasting pressures for islamisation of its legal and political foundations. As the state ideology, the *pancasila* has been evolving and adjusting to transforming political conditions, yet it has always comprised features converging with "Asian values", namely: the superior status of the state, preference for group rights over individual ones, emphasis on obligations of a person. Still, neither during authoritarian rules of Sukarno and Suharto, nor after coming to power of the democratically-minded president Abdurrahman Wahid, the islamisation of the state did happen, even though Wahid himself was the leader of a powerful traditionalist Sunni Islamic association, the Nahdlatul Ulama. Endorsing the secular state, Wahid claimed that each democracy may transform into most draconian authoritarianism, if based on islamisation of politics (Bruun, Jacobsen, p 125). During his term in office it was legalised to practice Confucianism, use Chinese characters and import publications in Chinese. (Juwana, 2006, p. 371).

Even though the Indonesian Salafis support the idea of islamisation of the entire country, a trend most vivid in the emergence of Jemayyah Islamiyah terrorist network in the 90s, for now only Aceh remains an isolated "island" for Muslim religious extremism. Interestingly, it was in 1999, within the democratisation process, when Indonesian government agreed for using Sharia regulations in the penal law of the province as well as established the only Sharia police unit in the entire country, responsible for enforcing religious norms of decent behaviour on Aceh's citizens – e.g. it is compulsory for women to wear hijab and men are obliged to pray each Friday in a mosque under the threat of 6-month imprisonment. Caning is the main punishment for such offences as: gambling, drinking alcohol, improper relations with representatives of opposite sex (Juwana, 2006, 370-371). Moreover, it is forbidden for women to wear trousers in Western Aceh and in case of disobedience of the rule females may be stopped and instructed by police on the street as well as refused state services (e.g. medical care) due to indecent appearance (Simanjuntak, "The Jakarta Post", 2009).

Until recently, the most draconian penitentiary measures prescribed by Islamic law, seriously infringing personal integrity rights, like cutting off a hand for stealing or stoning women under a charge of adultery (commonly used in some states of Malaysia), had not been practiced in Aceh. It appears, however, that the more democratised Indonesia becomes, the less secularised and more opposed to individual rights and freedoms Aceh turns. In 2009, its provincial parliament legalised stoning for adultery and public caning for homosexual acts (Human Rights Watch, New Aceh Law imposes torture, 2010). The specific status of Aceh may be also highlighted in the context of Indonesian

policies against the province's separatist movement of the Free Aceh Movement (GAM). As a consequence of peace agreement reached in 2005 and in the pluralist "spirit" of unity in diversity enshrined in the *pancasila,* Aceh was granted a special autonomic status as well as obtained a package of economic benefits and a wide self-governance capacity (even if moving Aceh effectively backpedalling on democratisation process).

However, following the illiberal (more 'Asian values'-like) dimension of the *pancasila*, the state of emergency has been imposed in Indonesia before due to security reasons, under which civil freedoms, and in particular personal integrity rights (e.g. the use of arbitrary detention) of citizens suspected of involvement in unconstitutional separatist activities have been significantly constrained. Regardless of harsh security measures in Aceh and in Irian Jaya (West Papua), since the end of 90s, Indonesia has succeeded in making a significant progress in the field of first generation rights, specifically guaranteeing freedom of speech, press and association to a much larger extent than during the prior authoritarian times.

The peculiar and nuanced balance between Islamic identity and commitment to civic rights is best reflected by the reaction of Susilo Bambang Yudhoyono, Indonesia's president, to the terrorist attack on 'Charlie Hebdo' satirical weekly in January 2015, during which 11 journalists were killed by radical Muslims, allegedly expressing their rage against publishing blasphemous cartoons of Muhammad. He said that: "For the West, the caricature of the Prophet Muhammad is part of freedom of speech or expression. It is absolute, it shouldn't be limited. But for the Islamic world, that act is defamation and blasphemous. That person must receive sanction. Here lies the problem. There is a fundamental difference. There is a 'clash of values' and 'clash of perceptions" (Parameswaran,"The Diplomat", 2015).

During *reformasi*, responding to international pressure and building its pro-human rights image, the government in Jakarta actually introduced an impressive number of Western liberal democratic norms and institutions. (Herbert, 2008, p. 461) Those included the Human Rights Law of 1999, consecutive constitutional amendments issued in the period 1999-2002 and enhancement of the operational scope of Komnas HAM (The National Commission on Human Rights), which has gradually extended the list of legally protected first-generation liberties as well as instruments of their protection.

The problem is that despite representing good legal standards, these human rights instruments often lack sufficient operational capacity to efficiently meet demands of local conditions or their original character is being distorted by the influence of local

political-business cliques and their cultural-normative underpinnings. Komnas HAM may be regarded as a suitable example in this matter. The Commission was established as early as during Suharto's authoritarian rule in 1993 (Komnas HAM/Indonesia, SEA NHR Forum, 2013). During *reformasi,* its legal status was confirmed by the human rights act of 1999 and supported by the Human Rights Tribunal in 2000. The statute of the Tribunal recognised Komnas HAM as the only national institution legitimised to conduct investigations in cases of blatant HR violations, namely the crime of genocide and crimes against humanity. (Eldridge, 2002, p. 3). It participates in the ASEAN NHR Forum as well as in the Asia-Pacific Forum of National Human Rights Institutions (APF). Even though in the years 2001-2007 Komnas HAM received positive reviews for its performance from the International Coordination Committee of National Institutions for the Promotion and Protection of Human Rights, it has been simultaneously criticised in literature for the lack of constitutional foundation for the body and its overwhelming dependence on political influences (Hood, Deva, 2013, pp. 85-86).

Post-Suharto officials constitute significant number of its members, new candidates are elected by the People's Representatives Council (*Dewan Perwakilan Rakyat*), the lower chamber of parliament, from the list designated by the Commission itself. In addition, transparency of its procedures is put into question as Komnas HAM effectively reports about its activities to influential military elites rather than to the representatives of civil society such as human rights activists or lawyers – no public releases are distributed. It also happens that members of the Commission represent the state authorities in international forums (Eldridge, 2002, pp. 145-147). Moreover, some sources highlight insufficient efficacy problem, as Komnas HAM does not make use of its judicial advisory potential in courts, and ineffectiveness of its penitentiary capacities, as with regard to state officials accused of using torture, adding to the common problem of their impunity despite Indonesia's early ratification of CAT. It also lacks legitimacy to conduct independent inquiry in Aceh and was not provided with the capacity to investigate ordinary cases of human rights abuses (Eldridge, 2002, pp. 3). Inadequate operational coordination of its activities with other human rights bodies (e.g. Ministry of Human Rights or the Ombudsman) is also indicated by experts (Juwana, 2006, p. 365).

Dynamic democratisation has not effected in comparable economic development and improvement of social well-being in Indonesia which (similarly to the Philippines and Thailand) still faces serious problems of poverty and unsustainable development. According to UN Human Development Report 2013 more than 46 per cent of Indonesians live below $2 a day; comparatively, the percentage in Thailand is 41, in China

– 27 and in India – 69 (World Development Indicators: Poverty rates at international poverty lines, Human Development Report – HDR, 2013). As a matter of fact, the democratic constitution (1999) contains 106 articles providing for protection of social and economic rights (e.g. state's responsibility to take care of impoverished citizens, especially children), in the spirit of fifth principle of the *pancasila* which recommends social justice. In recent years, popular Indonesian media have published some expert analyses relating "freedom from want" to Indonesian developmental goals and human rights protection challenges, and with regard to socio-political challenges such as reforming social security, healthcare and educational sectors (Budiono, "The Jakarta Post", 2010). According to the Human Development Report 2010, Jakarta has so far focused mainly on increasing GDP growth indicators, and insufficiently targets social development goals, which, at least in the spheres of healthcare and education, are currently upgraded less efficiently than in the authoritarian period. Importance of preserving "human security" with regard to basic income capabilities is strongly emphasised by those experts, like Mary Robinson, who perceive social and economic rights as inseparable from human development and successful protection of first-generation freedoms (Robinson, 2006, pp. 325-326). Simultaneously, impoverished students are often structurally bullied, particularly in cases when their parents cannot afford to pay for uniforms or school supplies, what leads to their exclusion. Asked why he dropped out of school, an 11-year-old boy responded: "I often feel embarrassed. When I didn't wear shoes, the teacher pointed to my feet, and said, 'This is not the way to come to school.'" (Human Development Report, 2010, p.39-61)

Thailand

Thailand is one of the best examples confirming the fact that free election procedures do not guarantee Western-style democratic rule of law. In literature one can find descriptions of Thai political and legal system as "half-democratic" or "half-authoritarian", which was in fact clearly and explicitly depicted by the permanent creeping political crises that have been taking place in Thailand for over a decade and in fact have led to the authoritarian freeze in emergence of a more stable Thai democracy in 2014. It is significant to mention here that since 1997, when the first democratic constitution was enacted, consulted with civil society groups, approved in referendum and designed in order to serve people and not the authoritarian regime, Thai democracy has become

endowed with a comprehensive set of democratic institutions. These included the Constitutional Tribunal, administrative courts, the Ombudsman, National Human Rights Commission and National Anticorruption Commission. All these, along with gradually improving implementation of civil and political rights, were expected to guarantee the functioning of the "checks and balances system".

The new Constitution enacted in 2007 by the junta authorities led by Surayud Chulanont, actually maintained provisions guaranteeing individual rights and freedoms. However, focusing on the differences between the two Constitutions it seems clear that the 2007 one does not intend to foster any landmark democratic improvements in this regard. Nominally, it focuses on preventing the concentration of power by the executive and by one dominant party as well as strengthens independent institutions like the Electoral Commission, the National Anticorruption Commission and the National Human Rights Commission. For the last one, the new Constitution broadens it competences, making it entitled to bring cases before common and administrative courts and the Constitutional Tribunal, what would position it for greater power within the system than the Indonesian Komnas HAM.

Thailand, however, is a state where the judiciary is neatly connected with the conservative and anti-democratic parts of the political and business elites, a part of a triangle with the political royalists (the so-called 'yellow shirts') and the army that is not estranged toward reverting to autocracy. The 2007 Constitution strengthened its status and role in selecting candidates to the institutions mentioned above as well as directly influences electoral processes and the composition of the parliament. In fact, the solutions mentioned above are very typical of past Thai political systems with their strong reliance on military elites and civilian officials (judges) more than on democratically elected politicians, the former being hardly coup-averse. The officials did largely support the forceful removal of populist PM Thaksin Shinawatra and his party "Tai Rak Tai" ("Thai Love Thai") from power in 2006, even though immediately after the coup the junta imposed martial law, repealed the Constitution, dismissed members of the parliament, postponed the forthcoming election, prohibited any political protests or politically involved activities as well as arrested members of the government. It is not also a surprise that freedom of speech was significantly constrained and media were censored – in fact it was forbidden to criticise the coup and its leaders, in press, media, radio and the Internet. Newsrooms of leading newspapers and TV stations were occupied by the military.

In 2007, parliamentary election took place and Thaksin's former party regained power, now transformed into People's Power Party, supported by so called "red shirts", which were mainly citizens of rural, relatively impoverished areas, dwelling in northern and north-eastern parts of the country. Nonetheless, state elite-supported "yellow shirts" launched street protests demanding government dissolution while the judiciary supporting them acted toward delegitimising the PPP rule. Eventually, in 2008 PDA, in league with the courts, succeeded in bringing the PPP rule to collapse by what could be called internal 'lawfare' i.e. selective and particular use of the laws of the state for political benefit, what points to the tension between democratic accountability and Thai approach to the rule of law. When Abhisit Vejjajiva took power in the wake of PPP demise it was the "red shirts" this time who challenged his legitimacy through street protests. Those, however, were considered unlawful and suppressed by the army, and resulted in several dozens of casualties. They were followed by punitive actions of the new government, i.a. imposing special administrative detention for up to 30 days.

The military cup of 2006 was performed under the pretence of democratic recovery and restoration of uncorrupted government in Thailand, and in 2007 it was restored in a form that did not distort the ability of the majority-supported party to win elections. However, the following silent "judicial coup" of 2008 confirmed the pattern of extra-constitutional changes of the government as well as the Thai reality in which the institutions associated with rule of law and protection of human rights, like the Constitutional Court, can act against the democratic mandate of the executive. In Thailand, it has produced a vicious circle of instability between half-democratic and half-authoritarian procedures that may be identified as a specific system of "checks and balances", which, however hardly, fits the pattern that Montesquieu had in his mind as it revolves around a low equilibrium, poor quality of both democratic institutions and human rights standards. In fact, even the removal of PPP from power in 2008 did not prevent the return of a "red shirts" government after 2011 elections, headed by Thaksin's sister, Yingluck Shinawatra.

By 2013 the crisis was back, with the new incarnation of the "yellow shirts" led by Suthep Thaugsuban blocking Bangkok again, proving the preference for mob politics instead of electoral democracy on the part the Bangkok elites, unwilling to respect the democratic choice of rural majority. A new escalation of political unrest took place "with mostly urban, whistleblowing crowd who proudly saw themselves as 'corruption police'." (Michael, "The Diplomat", 2015). They resorted to the boycott of February 2014 snap elections in an effort to delegitimise the democratic process, a move later

corroborated by Constitutional Court, which in May 2014 also ruled for removing Yingluck and part of her cabinet from office on dubious legal grounds. The same month junta led by gen. Prayut replaced what was left of the elected government, completing an anti-democratic backlash. Into 2015, the autocratic turn appears more profound than in the wake of the 2006, rolling back democratic institutions and civic rights that have been the accomplishment of post-1992 Thailand. It is unclear yet whether this is another Thai back and forth between democracy and authoritarianism or a more permanent turn toward the later.

The Philippines

The fundamental value of current Filipino democracy is rejection of all possible forms of authoritarian governance. During the rule of Ferdinand Marcos (1972-1986), first generation rights were suppressed in the name of economic development, however, it was poverty and economic crises that brought about the peaceful People's Power revolution in mid-80s, which launched a third wave of democratisation in East Asia – Tiananmen students invoked its example during protests in 1989. Worth mentioning here is that strong attachment to democratic liberties in the Philippines originates from the national struggle against Spanish colonial rule (till 1898) and consecutive American occupation in the first half of the 20th century. The Filipino democracy re-established in 1986 was a return to a democratic regime which was first enacted back in 1946 as a presidential republic characterised by freedom of press and regular democratic elections (Guerrero, Tusalem, 2008, pp. 61-63). Even though the 1987 Constitution has not effectively contradicted influences of oligarchic political elites and businessmen as well as the military establishment (Eldridge, 2002, p. 50) and clergy, there still exists a strong societal conviction that only democratic norms and procedures are capable of restraining wilfulness and impunity of those privileged groups (Pangalangan, 2006, pp. 353-355).

The Filipino Constitution of 1987 is the only one in East Asia to recognise unquestionable priority of civil and political rights and is popularly called the "human rights constitution" as it contains a strong 'Bill of Rights' and establishes a national human rights commission. Filipino experts claim that "Asian Values" as a political project are artificial and untrue. Worth mentioning in this context is that during Lee Kwan Yew's visit in the Philippines he advised Fidel Ramos, the Filipino president at that time (1992-1998), on "disciplining" the socio-political life in order to boost economic development.

Ramos, however, stressed the importance of democracy for the development of the state and refused to "flirt with authoritarianism" like Singapore (Bruun, Jacobsen, 2000, p. 83). As for the integration with the IHR regime, the Philippines have not only acceded to all basic treaties in this matter, but also have reified most of its OPTs (Kosmala-Kozłowska, 2013, p. 361). What is more, the Filipino Constitution is the only one in East Asia to include a provision making ratified IHR laws self-executing, which means that they are directly applicable within Filipino legal system and may be used by its citizens as legal grounds to claim their rights and freedoms in local courts (Pangalangan, 2006, pp. 347-348).

Regarding the imperfections of Filipino democracy that have revealed themselves in the period between the end of 80s and the first decade of the 21st century, it is vital to recall a story of the Maguindanao massacre which happened in 2008, and along with it the significant growth in number of extrajudicial executions between 2000-2010 as they put into question the international image of Manila as a beacon of liberal governance in the region. It is worth mentioning that contrary to Malaysian or Thai courts the Filipino ones are less politicised, Filipinos are more eager to get involved in litigation against authorities and have more trust in capacity and fairness of the judiciary. On the other hand, some local political struggles that result in serious violations of the legal system and in human rights violations are insufficiently punished, revealing weaknesses in Filipino rule of law.

Investigating the socio-cultural roots of the above problem it is useful to observe that despite the strong devotion towards liberal democracy the Filipino are representative of a specific morality that prioritises family (in a broad sense and in a particularly exclusivist manner) and results in opposition towards subordination of the familist interest to the interest of local or national community. The approach is stretched in between semi-individualist and semi-familist attitude which, Rawlsian morality notwithstanding[2], does perceive human rights as inherent and inalienable from a person regardless of demands of a broader social interest (Pangalangan, 2006, p. 347). The phenomenon is at least partially responsible for some social, political and legal disorders and perversions of social and legal order in the Philippines.

As mentioned before, since the end of 80s the Philippines had enjoyed the image of the state most friendly in East Asia for first-generation human rights. The status,

[2] According to John Rawls (also his predecessors, namely Immanuel Kant and Thomas Aquinas) inherent and inalienable dignity derives from Judaeo-Christian concept of a unique soul which distinguishes human beings from other creatures.

however, was significantly tarnished during the presidential tenure of Gloria Macapagal Arroyo (2001-2010) due to the rapid intensification of extrajudicial executions i.e. politicised killings in which public figures deny involvement. Arroyo herself, having the image of a zealous Catholic and caring for the support of clergy still influential in the country, delegalised death penalty during her tenure (it was first abolished in 1987 and then reinstated in 1994), even in cases of most heinous crimes. At the same time, Arroyo administration dismissed all charges of involvement in alleged executions carried out by the army or by the members of private militia on public interest activists like journalists, reporters, members of HR NGOs or representatives of indigenous communities, peasants that fight for their land ownership rights or political opponents. The last category refers not only to communists or other groups that may pose a threat for the central authorities, but also to those who legally challenge local oligarchies.

In his report concerning the Philippines, Philip Alston, Special Rapporteur on extrajudicial, summary or arbitrary executions, that many cases of extrajudicial killing took place in the context or under the pretext of some long-term internal military conflicts that on one side involve central and local authorities, and on the other separatists from the southern parts of the country, including the communist New People's Army and Moro Islamic Liberation Front. According to one of respected Filipino NGOs, KARAPATAN, between 2001-2007 about 830 people were extrajudicially killed in the Philippines (Inter Press Service, *Short Shift for Human Rights in Southeast Asia*, 2007). Still, as confirmed by Alston and others, the most disturbing fact is the impunity of perpetrators.

The problem of impunity refers also to the one of most alarming contemporary cases of politically inspired murder in the Philippines – manslaughter of journalists, political supporters and family members of Esmael Mangudadatu that took place in 2009 in Maguindanao. About 60 people were found dead (including many women) in the attack against the convoy carrying people that were expected to support registration of Mangudadatu as a candidate running for the post of the local governor. More than a half of the group were journalists. From among about 200 suspects (most of them policemen, soldiers and members of a private paramilitary group) only 1/3 of them were arrested (BBC News/ Asia Pacific, *Anniversary of Philippines massacre*, 2010). The motive of the crime likely was the protection of political influence of the Ampatuan clan that for generations has ruled in the province. Even more interesting is that the Ampatuan family was politically connected to the Arroyo administration and had supported her candidature for the presidential office.

Making the case public in Filipino media mobilised administrations of president Arroyo and, since 2010, of the new president Aquino to establish the so-called Melo Commission to investigate the case; the members of the local police were exchanged for new ones, not connected with the Ampatuan clan. Still, most of the alleged perpetrators have not even been apprehended, and those among them who are politically influential and who likely ordered and managed the crime, are yet to face the investigation and judicial proceedings. Participation of journalists (and women) in the convoy had been expected to prevent any violence targeted against supporters of Mangudadatu candidacy to the office. The Maguindanao massacre did serious damage to the Philippines as a democracy preserving freedom of media – in fact during Arroyo's term in office above 100 journalists were killed for political reasons even though Maguindanao was the biggest single case (BBC News, Asia Pacific, *Philippine journalists in the line of fire*, 2010).

Confucian democracies – Japan, Taiwan, South Korea, Hong Kong

Japan, Taiwan, South Korea and Hong Kong are among states most significantly influenced by Confucian cultural heritage, which at the same time represent the highest levels of economic development and modernisation in East Asia. At the same time they possess the most liberalised socio-political and legal systems in the region, as measured by the numbers of ratified HR treaties and established essential democratic institutions like constitutional courts and national human rights commissions. Actually, the only state in the region that does not share their relative political openness despite having a developed economy is Singapore.

It is worth mentioning that developmental processes of newly industrialised economies (NIEs) were significantly inspired and sponsored by post-war Japan. Though first generation rights were not at the centre of Japanese developmental model for the region during the Cold War, responsible and efficient government was, what created conditions for much better fulfilment of second- and third-generation rights in largely then-authoritarian conditions. Contrary to the "Asian Values" narrative, however, Japan was not fundamentally opposed to first-generation rights, having them embedded in its own post-war constitution of 1947 (Chapter III), merely not prioritising them via international cooperation, implicitly assuming that democratic and human rights standards may emerge autonomously in time, on sound socio-economic foundations. In fact, in South Korea and Taiwan at the very least this is what has occurred. Therefore, generations of

human rights in the group of Confucian democracies are not perceived in opposition to one another or in inviolable hierarchy, more as in a developmental sequence.

Interestingly, contemporary Confucian democracies, unlike Confucian autocracies and ASEAN democracies, provide their citizens with relatively high standards of police and judicial procedures. Personal integrity rights are commonly and officially recognised as significant, however, especially in states of emergency, freedom of conscience, speech, expression and assembly (including liberty of worship and political liberties) are restrained, especially in case of individuals suspect of anti-state activities (i.a. dissent, subversion or espionage) and once state security and social order are endangered: e.g. National Security Act in South Korea or maximum security prisons for convicts on a death row in Japan.

Analysing Confucian democracies comparatively Albert Chen asks whether they have successfully developed rejecting their Confucian heritage or rather adjusting it to meet demands of modern societies, including basic human rights standards (Chen, 2006, p. 497). The author of this article claims that Japan, Taiwan, South Korea and HK have made some vivid pro-liberal systemic choices, both authentic and mimetic. Thus, even though they represent the highest democratic standards in East Asia, some traditional illiberal Confucian features lurk under the cover of the Lockean idea of a liberal state.

At a first glance and in official rhetoric Japan may seem to represent a prosperous model of a Western liberal democracy in East Asia. Observed with due attention, however, it shows to be a particular case of a political and normative tradition, strongly rooted in specifically Japanese as well as Confucian meta-values. It seems reasonable to analyse political life in Japan on two parallel and interconnected levels: the official constitutional dimension, strongly patterned after Western solutions and the obscured mechanisms of the state and society, usually unexposed to foreign observes.

It may be theorised that behind the veil of procedural aspects of Japanese democracy one may identify features of a Confucian quasi-authoritarian welfare state, with a *de facto* one-party political system (Liberal-Democratic Party was not in power for only about four years out of last sixty). What is more, for a long time a prominent role was played in the Japanese political system by shadowy councils of ex-PMs, functioning largely outside the mechanisms of democratic accountability, the recommendations of which were sought and general observed by an incumbent PM. In this regard, an excellent Japanese sociologist Yoshio Sugimoto enumerated a set of traits characterising the socio-political system in Japan (Yoshio, 2014). One may observe that, firstly, it benefits

from small groups of people monitoring each other and mutually regulating behaviours (by informing bosses, superiors, principals) in accordance with required norms and standards in the spirit of competition e.g. local police officers participate in daily routine of so called "communities of trust"; police records are constantly updated in order to provide information about whereabouts of people (including children) which proves particularly useful in preventing disappearances of citizens. With the exception of the biggest cities, where the system of social control is weaker, local communities and neighbourhoods are a prime source of information about any anomalies, irregularities or inappropriateness regarding their cohabitants. Such societal surveillance is mostly being perceived as meeting citizen's obligations. In theory, this particular sort of control is a tool used by emergency officers in cases of natural disaster, but is in fact used for many purposes, including fight against crime (Katzenstein, 1996, p. 21).

Secondly, codes of conduct include ambiguous provisions in order to provide the authorities with a capacity of broad interpretation. Such solutions seem to be emblematic for the entire East Asia – similar attitude may be identified in case of regional documents of the emerging ASEAN human rights regime. (Kosmala-Kozłowska, 2013). Thirdly, attributes of power are visible and commonly exhibited within a hierarchised structure of a vertically organised society. The dominant tools of Confucian-style democratic systems are predominantly incentives, but the "policy of the stick" is not uncommon in Japan and is particularly applied to some specific groups of people perceived as outsiders and in general those of relatively inferior social position (e.g. prisoners on a death row, but also descendants of *burakumin*, some foreigners and half-Japanese, as well as native Koreans or Ainu). Similarly, in Taiwan, despite a very high level of police and judicial standards, there exist simplified detention procedures regarding homeless, mentally ill and juveniles. Interestingly, not only in Vietnam, but also in Japan (and in South Korea till 2008), there exist mobility control systems, which limit the freedom of movement capacity within public administration structures. They are similar to Chinese *hukou* household registration procedures according to which people need to possess proper ID cards, including residence or temporary living permission. As for the Confucian-style "policy of the carrot", soft measures to fight against crime are also popular and quite inventive – e.g. installing lanterns producing blue light in order to mitigate violence in one of Japanese cities with high crime records (*Japan links use of blue streetlights to drop in crime, suicide prevention*, "Chicago Tribune", 2008).

Finally, there is a high level of ritualisation of daily life, including the use of different kinds of directives indicating a proper and moral kind of behaviour, which is strongly

rooted in people's minds and shapes their behaviours (Nisbett, 2003). Beginning from childhood, the Japanese participate in educational programs that are aimed at programming given moral values, ideas and are supposed to regulate behaviours in a specifically detailed way.

For example, the identity of a Japanese can be conceptualised as composed of three layers of individual „self": 1. "interactive" (built through social relations/under pressure): 2. Interior („hidden", very personal) and 3. "boundless", considered „empty", deprived of ego, „pure" because of lack of selfish motives, manifested through sacrifice for the sake of others or some cause (Gawlikowski, 1998, pp. 16-17 & Sugiyama, 2004, pp. 20-28). *Tsukaiwake*, „situational ethics" may be indicated as another example. For the cultures appreciating harmony and complementary values, conduct in relations with others should be such that bilateral relationship could become a source of universal norms; greater flexibility, adjustment of behaviour to the situation is natural, so the Japanese change their opinions dynamically, also in the sphere of values (Nishiyama, 2000, pp. 7-8). In accord with Japanese tradition what is good is not singular, but a harmonious adjustment to the elements valued most in any given moment.

Finally, it is useful to remember about *giri*, explained as „the proper way all should follow"; „action taken on your own, but to justify oneself in the world" (Davies, Ikeno, 2002, pp. 95-102). A Japanese, when speaking about reasons of an action or thinking about a problem their country faces, often resorts to the category of obligations, i.e. a debt which has to be repaid in accord with its magnitude. „*Giri* to the world" is comparable to fulfilling the terms of a contract; „payment of commitments" is a necessity to repay the obligation, return the loyalty or kindness created by relationships with others. As for the „*giri* to one's name", the obligation to take care of impeccable social appearance; demands of etiquette related to maintaining a „proper place" in social hierarchy, accepting pain with stoicism and defence of one's social appearance in work environment. While the roots of giri may be traced to the codes of the warrior class, today there are elements of it in public awareness, and in foreign policy (Benedict, 2003, pp. 128-165).

To sum up, analyses referring to socio-political and normative patterns in Japan that to an extent can be related to other democratised "Confucian-based" societies should take two types of phenomena into consideration: official rules, staying in accordance with publicly recognised norms being a kind of façade exhibited to strangers, staying in accordance with traditional ritualised norms of behaviour (in Japanese: *tatemae* – adherence to official rules; *omote* – decent reality; *soto* – external opinions, behaviour etc.) as

well as real, hidden intentions, covered from strangers –"white devils", *gaijin* or *laowai* etc. (Japanese: *honne* – following feelings and desires; *ura* – hidden and publically not acceptable reality; *uchi* – internal beliefs, opinions, intentions presented within the entrusted group of people) (Alston, Takei, 2005, pp. 19-20).

Apart from Japan, South Korea and Taiwan are perceived as two of the most liberal democratic systems in East Asia. Both Seoul and Taipei, having experienced a colonial period, beginning in the 60s passed through a period of dynamic economic growth while retaining an authoritarian state. Both started to democratise no sooner than at the turn of the 80s and the 90s. The following claims for political liberties were directly deriving from the economic success that had significantly improved the well-being of their citizens, allowing for the emergence of a middle class, including business people, who demanded change. Confucian (and more broadly – East Asian) political culture, historical illiberal experiences, contemporary unstable geopolitical circumstances and external threats to their existence might be pointing to realisation that full democratisation is hardly possible in either. However, their approach to democracy and human rights is significantly different than that of the PRC or Singapore. In both we can actually observe a pluralisation of the political scene and genuine party, coalition and electoral politics, allowing for government rotation. As for the relation between state security protection measures and human-centered security, unlike in South Korea and similarly to Hong Kong, there is advanced accountability of police and judicial procedures in Taiwan, but much lesser protection of civil liberties like freedom of speech and association (of political and religious character) than e.g. in Japan.

In the end of the 80s, a pro-democratic Taiwan's president, Jiang Jingguo (Chiang Ching-kuo), terminated its martial law (in force since 1946). In consequence, pluralisation of the political scene was allowed and draconian penalties for anti-governmental activities and political protests were removed in 1987. In the end of the 80s, censorship was eased and establishment of new newspapers was encouraged – effectively, their number increased from 31 to 274 in the years 1988-1993. In 1988, the right of association and liberty of peaceful demonstrations were legally confirmed and 6 thousand of political prisoners were released from prisons; since 1995 there has been none of them in the Taiwanese penitentiary system (Neary, 2002, p. 115).

First direct elections to the Legislative Council took place in Taiwan in 1992 and were recognised by experts as the most democratic electoral process in the history of the Chinese society. In the aftermath of the first direct presidential elections in 1996, Kelvin Y.L. Tan assumed that if only Taiwan was left alone it would most probably have

further liberalised and would have become the first fully democratic society in Chinese history (Tan, 1999, pp. 277-280). In fact, a significant part of influential business elites in Taiwan has strong political preferences for independence from the mainland and provide financial support to the Democratic Progressive Party – DPP (Wong, 2005, p. 50). In consequence, in 2000, its candidate, Chen Shui-bian, won the presidential election and the monopolistic rule by Kuomintang (KMT) was broken. The first decade of the 21st century was the period of further liberal democratisation which led to the return of KMT to political power in 2008.

The contemporary problem of Taiwanese democracy is not any more the incorporation of democratic ideas, laws and institutions, but rather putting into practice the applied norms and obligations of a democratic state (Lin, 2006, pp. 298-299). Some experts appreciate activity of the Council of Grand Justices (Taiwanese Constitutional Tribunal) in the field of human rights implementation and involving civil society in the process. Interestingly, the Tribunal rarely uses provisions of IHR treaties and often issues verdicts which are contradictory with their established interpretation (based mainly on American and German judicature). One of the reasons for this unpredictable, yet at the same time creative legal practice, is that since 1971 Taipei is not a UN member state and thus is not a state-party of the UN Human Rights Regime (Lin, 2006, pp. 314-315). Differently from Hongkongers or Singaporeans, the Taiwanese eagerly make use of individual petitions to the Council of Grand Justices in case of human rights claims. It produced a dynamic development of the Tribunal's judicature regarding protection of civil liberties and personal integrity rights. Effectively, Taiwan's legal order guarantees high standard of police and judicial procedures: e.g. extrajudicial killings or arbitrary detention procedures are illegal and have not been registered in recent years in Taiwan. The Prosecutor's Office is not legitimised to decide about arresting suspects, searching or confiscation of personal property without a court warrant; courts are obliged to meet demands of high litigation standards, including confronting testimonies of witnesses and informing the accused of their constitutional rights. Curiously, testimony of the accused person is still not perceived as of equal value when compared with testimonies of other witnesses (Lin, 2006, pp. 304-306)

It is justified to assume that South Korea has made a gigantic progress in the field of human rights protection – as a matter of fact, one of the most impressive in East Asia. Till the end of the 80s, the idea of human rights was perceived by the state as subversive and working as human rights lawyer was recognised as dissent. Similarly, membership in *Minbyun* (South Korean social organisation of progressive lawyers) was

the reason for surveillance and persecution of state officials. Seoul was identified at that time as hostile to civil and political rights, which were sacrificed in the name of economic development by the ruling junta, even more so due to permanent insecurity problem with North Korea.

This is the reason why the National Security Act (NSL) has survived the democratisation process and still remains valid (Cho, 1997, p. 125), even though is not used as commonly as before (Amnesty International, 2012, p. 14). Still, administrative detention may be still used in accordance with the NSL and with regard to citizens participating in organisations hostile toward the state (art. 3), propagating or supporting their activities and/or possessing documents indicating such activity (art. 7), or failing to inform the relevant authorities about similar activities of other people (art. 10). In case of article 3 leaders of anti-governmental organisations may be sentenced to life imprisonment or even death penalty (despite the fact that South Korea is a death penalty retentionist state, last execution took place in 1997). For offences included in articles 7 (recognised in literature as particularly controversial) and 10 (perceived as making room for abuses) a couple of years in prison are envisaged (Kosmala-Kozłowska, 2013, p. 328). Even though legally banned, torture has been recorded in South Korea, particularly in connection with the procedures of administrative detention.

E.g. in 2002 a suspect died during interrogation. The investigation showed that he had been arrested without a warrant, however, the functionaries considered the decease as an „accident during work". Worth highlighting here is that conditions of interrogation procedures favour abuse: e.g. investigation is not based primarily on evidence, special interrogation rooms are in prosecutor offices. Moreover, constitutionally, South Korea is still a „democracy in struggle" in the meaning that it needs active defence against the enemies of the system, therefore, „special" treatment is prescribed with regard to suspects accused of subversion.

Regardless of the above imperfections and challenges, South Korean democracy is one of the most mature democratic systems, based on liberal institutions protecting rights of its citizens as well as well-grounded in aware and dynamic civil society. Seoul has ratified all the basic IHR treaties, including many OPTs. The essence of its democratic character, however, is based in pluralisation of political scene and participation of former dissidents in contemporary state elites, as well as establishing well-functioning pro-human rights national bodies, namely the Constitutional Tribunal and the Human Rights Commission. In consequence, initiatives (including the establishment of the

Presidential Commission in 1999) aiming at investigating cases of forced disappearances and extrajudicial executions conducted by state agencies during the authoritarian period as well as targeting at rehabilitation and compensation for the victims of political persecution during martial law period (1980) were taken.

In post-war period, when Hong Kong (HK) was under colonial British rule, 1st and 2nd HR generations were respected much better in the state-city than in South Korea, Taiwan, Singapore or Malaysia. Since 1984 HK has formally accepted British common law as the base of its legal system. In theory it was expected to guarantee civil liberties, in practice, however, it was impossible for democracy to flourish during the British colonial period and the constitution did not restrain the legislative from adopting anti-human rights laws. First of all, the statutory law was enacted exclusively in English and the government was legitimised to use draconian measures in order to restrain freedom of speech, association and assembly, plus citizens were not equal before the law. International HR treaties ratified by the UK, even if relating to HK, neither could have been directly effective in HK's legal system (court could not decide on the base of its provisions), nor HK's citizens have used the procedure of individual complaint (e.g. provided by ICCPR or CAT).

Still, Hongkongers did not openly complain at that time, as the only alternative for the crown colony was incorporation to the communist mainland. In the effect of the Chinese-British Joint Declaration of 1984, which stipulated the return of HK to the mainland in 1997, the Special Administrative Region was expected to maintain the Western style of governance or even further develop its democratic nature – i.a. it safeguarded the adherence of the local authorities to ICCPR and ICESCR and their incorporation to the local law. Moreover, the HK Bill of Rights Ordinance (so called the "small constitution"), adopted in 1991, was intended to protect HR in the transformation period, and, what is particularly worth mentioning, it established legal oversight related to compatibility of HR legislation with the constitution. Also after reunification with China the city-state still has not constituted a full-fledged democracy. The adopted formula was called "one country, two systems" – Deng Xiaoping initially planned to use it toward Taiwan in the process of planned reunification. The electoral system without free, direct and common election may be regarded as its greatest weakness. On the other hand the rule of law, procedural transparency, freedom of speech, association and assembly (in general civil liberties, including personal integrity rights and police and judicial procedures) are guaranteed on a much higher level than in the PRC.

Friendly authoritarianisms – Singapore and Malaysia

Even though both Singapore and Malaysia have developed some of the most extensive legal systems in East Asia, both of them have never constituted a state based on the "rule of law", not only due to the lack of such tradition (Fukuyama, 2012, p. 19 & 23), but also by a conscious choice of the draconian "rule by law" models of governance created by Mahathir bin Mohamad and Lee Kwan Yew, who were legitimising their regimes by invoking "Asian Values". Both states provide their societies with relatively high standards of living, which, however, simultaneously suffer from significant social inequalities. In both cases social and economic rights are recognised as ideologically superior to civic and political rights that are practically limited due to alleged necessities of cultural-religious specificity as well as requirements of state security, social harmony, public order and dynamic growth.

Singapore

According to Francis Fukuyama the Singaporean political system is notable for two basic reasons – it has achieved most spectacular economic development in East Asia and does not justify its authoritarian form by demands of dynamic growth, but rather claims that its "half-democratic" and "half-authoritarian" regime is paramount over liberal democracy (Fukuyama, 1992, pp. 134 & 241). The fabric of the Singaporean society is multicultural, with significant majority of Chinese (about 75 per cent). Even though the Singaporean constitution did not establish any official state religion, nor privileges for any particular ethnic group, the catalogue of Confucian values has been officially recognised as suitable for social development in the "White Paper on Shared Values" (1991). Even though Singaporeans enjoy greater religious freedom than Malaysians, the 1990 act on maintaining religious harmony restrains political involvement of religious groups. Moreover, public order, internal security (like in Malaysia), and particularly the so-called "religious-ethnic harmony" secured by Associations Incorporation Act (1985) take precedence over freedom of faith (Thio, 2006, p. 166). Due to its Confucian heritage, a kind of enlightened authoritarianism, rather than a human rights protection culture has developed in Singapore (Fukuyama, 2012, p. 5). Singapore lacks legally conscious, active civil society and a social capacity for initiating litigation by victims of human rights abuses. The Supreme Court confirmed the utilitarian character of individual rights that are subordinated to collective interest and dependent on government's

decisions (Thio, 2006, p. 162). Thus, a wide range of cases nominally subject to litigation are rarely heard in court.

Faith in righteousness and fairness of state authorities is based on the idea of *junzi* – moral, noble and fair statesmen (Cua, 2003, pp. 329-335) as well as on making use of informal conciliatory resolution of legal disputes (e.g. relying on advisory and mediatory role of politicians and trade unions). The latter is more popular than taking advantage of the rule of law procedures, which are perceived as ineffective in defending citizen's rights. Interestingly, however, members of political establishment are, nevertheless, willing to use litigation procedures in order to sue "uncomfortable" journalists or opposition activists (Thio, 2006, pp. 167-168). Among significant restrictions to first-generation rights, a high level of interference in private sphere of citizens' life is included as the common practice in Singapore. Freedom of speech is restrained due to public morality requirements – the media are not allowed to publish materials containing pornographic contents or propagating violence and use of drugs. Moreover, the prohibition of satellite dishes is directed against the model of Western journalism, condemned by Singaporean authorities (Brunn, Jacobsen, 2000, p. 149). The right to vote and private property rights as well as prohibition of torture are not contained in an austere catalogue of civil and political rights guaranteed by the Singaporean Constitution. The "death row phenomenon" and the "death row syndrome" as well as caning are being prescribed also as punishment for petty offences like interruption of social order, also those committed by juveniles below the age of eighteen (Kosmala-Kozłowska, 2013, p. 340-341).

Thus, in practice due to security reasons, Singapore's penal law severely violates IHR treaties regarding individual freedoms and personal integrity rights. It is worth mentioning here that the city-state is reluctant to integrate with the universal human rights regime not because it rejects its existence but because it recognises it as inferior to is internal legal order. Moreover, the Singaporean executive refuses to be scrutinised by any monitoring institutions, of internal or international character (e.g. UN IHR treaty bodies like ICCPR Committee, CAT Sub-Committee or National Human Rights Commission, Ombudsman or other). It has ratified (along with Malaysia) the least number of IHR treaties in East Asia (with the exception of CRC, CRC OPT, Geneva Conventions (1949), excluded all other OPTs and terminated its accession to fundamental conventions of the International Labour Organisation (Kosmala-Kozłowska, 2013, pp. 400-403).

Severe restrictions of personal liberties are compensated with the highest living standards in East Asia and best social security packages (i.a. in the healthcare sector) by the state to its citizens. Responding to accusations by UN agencies and international human rights organisations about the highest per capita rate of executions, Singaporean authorities indicate the benefits of using harsh penitentiary procedure, namely elimination of organised crime and drug trafficking. Comparatively, Thai government under Thaksin Shinawatra launched a 'war on drugs' and a major outcome of this policy was arbitrary killings (in the first three months of the campaign there were c. 2800 extrajudicial killings). Similarly, former Indonesian president, Susilo Bambang Yudhoyono, strongly supported executions for drug trafficking and rarely granted pardon to convicts on a death row. His successor Joko Widodo continues the approach. (Sulaiman,"The Conversation", 2014).

Malaysia

Similarly to the Singaporean model of governance, the dominant position of executive over legislative and judicature within the system may also be identified in Malaysia, on the basis of national constitutional provisions, supplemented by a variety of security laws and emergency measures (Eldridge, 2002, p. 93). Until the constitutional crises happened in 1998, when the head and two other judges of the Supreme Court were dismissed, Malaysian courts had been recognised as trustworthy and independent. While the Malaysian constitution provides citizens with a package of civil and political rights, including the right to fair trial, judicature is subordinated in practice to the will of political authorities. At the same time, Malaysian courts tend to stay clear of some uncomfortable cases, especially those regarding state security measures applied against some opponents of the regime or in case of charges against opposition politicians, accused of violating public morality demands, e.g. Anwar Ibrahim, repeatedly accused for the crime of sodomy (Lee, 2006, p. 195).

Since 1957, the ruling National Front (Barisan National) has used legislation severely limiting first-generation rights for political reasons, including article 150 of the Constitution (in case of threat to national security, public order and economic stability) that provide for the state of emergency to be announced by the King in cooperation with the government. Still, the Internal Security Act (ISA – revoked by Najib Razak in 2012), enacted in 1960, has proved to be the most controversial and widely criticised from among emergency measures. It provided for a 6-day arrest without judicial supervision

for suspicion of subversive activity. The procedure was not supervised by the judicature, which boosted the risk of torture during interrogation procedures. Administrative detention has been also legitimised in state decrees on violations of public order and criminal activities, EPOPCO (1969) as well as in legislation concerning extraordinary precautions to prevent the use of narcotics – DDSPMA (1985). Some other Malaysian laws restrain freedom of speech (e.g. the "Sedition Act" from 1948, supplemented by the emergency ordinance in 1970; "Printed Press and Publications Act" from 1983, amended in 1988) and Malaysian censorship belongs to the strictest in the world. Amendment to the subversive activity laws makes it illegal to touch on in public debate such issues as: questioning citizenship of non-Malays; national language and status of other non-Malay languages; special privileges of Malay majority; government's sovereignty (Lee, 2006, p. 198).

With regard to the role of Islam as dominant religion of Malay majority, article 3 of the constitution recognises it as a state religion, but article 11 safeguards religious freedoms, along with the right to practicing other cults. Thus, Malaysia may be categorised as a semi-secular or a semi-religious state, where constraints on religious liberties refer in particular to Muslims. Within the principle of judicial dualism, secular courts make decisions in criminal cases, whereas Islamic courts (e.g. bill on the jurisdiction of Sharia courts from 1963) decide in civil code cases and some other delinquencies. In theory, the jurisdiction based on hudud penitentiary system refers exclusively to Muslims, in practice it regards as such most of Malaysian citizens as according to article 160 of the constitution only a Muslim may be granted Malay citizenship. What is more, in 1999 the Supreme Court decided that sharia courts will make judgments in cases of apostasy also with regard to Malay people who converted to Islam and afterwards decided to leave the religion (Lee, 2006, p. 197).

Respect for constitutional rights of Malays is strongly dependent on political context and derives from more or less radical character of the political option dominating in a particular Malay state – the more radically religious the sultanate is, the stricter are the sharia law regulations. The dominant political party within the ruling Barisan Nasional, UMNO (United Malays National Organization) is largely a guarantor of the state secularity. To the contrary, its strongest opponent on the matter of secularism, the Pan-Malaysian Islamic Party (PAS), that usually receives around one tenth of nation-wide ballot, has firmly stood for islamisation of Malaysia since its founding in 1951. Both parties support special social status of Muslim Malay majority, but the difference is that were PAS ever to take power, it would most probably impose further restrictions on

Malaysian minorities. The penitentiary system based on hudud was launched in Kelantan (1990) and Terengganu (1999) after PAS gained power in those two states (Kershav, 2008, p. 465). For members of Muslim community hudud envisions stoning for adultery and apostasy, and additionally crucifixion for mugging the death. Theft is punished with amputation (first theft – right hand; second theft – left foot).

As for equality before the law, art. 153 of the Constitution recognizes Bumiputera ("sons of the soil") as the privileged social group and Bahasa Malaysia is recognised as the official language. In addition, quotas for participation in education and business are also regulated by the Constitution – 55 percent of local university places for Bumiputera; 35 percent for Chinese; 10 percent for Indians. The system is criticised mainly because non-Muslim students may not take advantage of vacancies being unused by Muslim students. Indigenous Malays are also privileged in business and trade. Most controversial regulation refers to so-called "new economic policy", known also as "sons-of-the-soil policy" initially aiming at absolute poverty eradication (1990) for all Malaysians as well as reducing and subsequently eliminating identification of race by economic function and geographical location. The policy called for assertive improvement of economic status and quality of life for all Malaysians through access to land, physical capital, training and public facilities. In practice the "new economic policy" gives preference to companies of Bumiputera (especially those having connections with UMNO) granting them licenses to build highways, schools and other public facilities and at the same time discriminating non-Bumiputera entrepreneurs.

East Asian Illiberal State Revisited

Regarding the tradition of illiberal-style State in East Asia, Tu Weiming in his article "A Confucian Perspective on the Rise of Industrial East Asia" claims that in East Asian socio-political systems, authoritarian and democratic alike, governments are perceived as responsible for the security and prestige of the nation, but also to a significant extent for the well-being, moral integrity and sustainable development of their societies. The latter traits are particularly visible when compared to Western liberal democracies. It is safe to say that East Asian politicians, leaders and governments are expected to act not only as technocrats but also as moral beacons, actively engaged in "educating" their citizens by interfering in citizens` privacy. Thus, it may be assumed that within the so-called East Asian Model, the state participates in shaping the morality of its citizens. The idea refers to the concept of "humanity" as created

within the state community and derives from the conviction that personality of a person is not inherent (given) and is being created via self-improvement in the web of social interrelation and in accordance with social norms, popular among collectivistic societies (Hofstede, 2010, Chapter 4).

To corroborate the above claim it is enough to check normative systems and constitutions as well as regional IHR documents to detect that responsibility of a person as a moral participant in the society is accentuated not only in totalitarian North Korea, authoritarian China, soft authoritarian/illiberal democratic states like Singapore or Malaysia, but also in ASEAN democracies like e.g. Indonesia. The two latest examples confirm the convergence between Neo-Confucian and Muslim heritage in the discussed matter. The phenomenon of political authoritarianism along with its negative consequences of rigid hierarchy and paternalism as well as more or less positive phenomena like sense of collective responsibility of citizens, to a different extent, features not only in authoritarian China or illiberal Singapore, but also in democracies of the region. This root cause of this invariability despite different forms of government lies in culturally embedded citizen`s mentality and social expectations towards the state.

There are couple of elements that typically define political and legal systems of an East Asian state:

1. Relatively strong and intrusive influence of a state in managing social, economic and moral progress;
2. Processes to establish effective rule of law are a challenge as "human rights" are perceived more as people's entitlements derived from ritualised obligations that produce privileges rather than as inalienable and inherent;
3. There has rarely been a clear separation of state and religious institutions, so the state is expected to be involved in defining public ethics and it intends to exercise its control over religious organisations;
4. Political model based on the rule of separation of powers and the system of checks and balances has not been authentically implemented in the region – the executive is still the dominant force, rarely effectively checked; independence and integrity of courts, even if nominally accepted, is very faulty in practice;
5. There is an expectation of high moral quality of authorities as trustworthy leaders of society, thus politicians may be discredited when proved guilty of moral offences related to their extra-marital or sexual conduct; e.g. in Japan prime minister Uno

Sosuke resigned when publically shamed by his mistress' confessions, while in Malaysia accusations of sodomy against opposition leader Anwar Ibrahim have been consistently weighed as a political weapon ever since 1999;

6. Politics engage people not on regular basis, but rather occasionally, when it refers to very practical matters. Speaking about "human rights" is being perceived as specifically private and even intimate thing, well-being perceived as a priority and political aspirations are commonly sacrificed for the sake of stable economic growth – a kind of "lesser evil" approach.

The tendencies outlined above are by no means absolute, and in each state in East Asia they can be observed to operate to different extents. Such perspective should not blur differences between relatively well-functioning democracies and authoritarianisms of the region, but rather point out that on some systemic features they are not poles apart. In fact, it is this commonality that allows arguing that the present of one state can be the future of another. Revolutions like Filipino People's Power notwithstanding, politics in East Asia can become transformative in case of polities featuring high and sustainable levels of development. In case of Hong Kong and Taiwan rioting of 2014-2015, the citizens, predominantly young adults, were not a hermetic group of dissidents and were no longer preoccupied exclusively with economic activities. Their demand for having impact on state governance and aspiration to politically participate was to an extent coupled by demands for protection of the security of individuals against the interests of the state. It could indicate a turn toward seeking a more wholesome personal and communal well-being rather than being satisfied with the GDP-based one.

Therefore, with the rise of GDP per capita, there may emerge a set of mid- and long-term challenges for China that are tied to increasing demands from the growing middle class developing aspirations for rights. With extreme poverty increasingly tackled, other problems like income disparities or ecological devastation are coming to the fore and become the focus of middle class aspirations, to which some political demands can easily be cases of HK's "umbrella movement" and Taiwan's "sunflower movement" prove that at certain level of development and in conductive circumstances nominally Confucian Chinese societies not only enjoy their civic rights, but are determined to fight in order to protect their democratic liberties, so far prohibited in the PRC proper. However, when considering democratisation scenarios in socio-political transformation in PRC, it is worth to balance the Taiwanese story with the Singaporean path, which proves that in the particular East Asian structural, systemic and cultural sets of circumstances, electoral system guarantees neither pluralisation of political scene in accordance with

the Western patterns, nor does it necessarily cause an awakening of Western-like civil society in the form of mass movements aimed at confronting the government on reform or ousting it.

Beyond: Human Rights in the West as a Comparator for East Asia

Because of the rise of transnational threats and challenges in the contemporary world, the demise of the state as the actor of IR has been often postulated in the post-Cold War era, and notions of absolutising state sovereignty increasingly anachronistic and untenable. Different kinds of non-governmental actors entered the international scene and involved themselves in activities having influence on individual and group rights, in both, positive and negative ways. It is still the state, however, that remains the prime entity to deliver agency on human rights in both realist (Krasner, 1993) and liberal (Moravcsik, 2000) perspectives. Even when analysing developments in the field of IHR via the perspective of non-statist constructivism which appreciates engagement of civil society groups and NGOs in human rights protection, in particular acting through so-called transnational advocacy networks by pressing and monitoring governments, politicians, business actors, and promoting norms and initiatives by building awareness of individuals and societies, popularising fresh ideas, etc. it is still the state and its practices who is the prime target of such agency (Keck, Sikkink, 1998). Also from legal and more broadly normative perspective states can be still considered central to human rights developments as they negotiate, sign, ratify and implement IHR treaties; create human rights regimes, form and participate in their instruments and follow their national interests when dealing with human rights issues in their international exchanges.

An important question in the above context is whether human rights may become the reason of international engagements of a state, and if so, can there be a real commitment to human rights issues in foreign policies. To what purpose some states decide to pursue human rights diplomacies? Different IR analytical paradigms would give divergent answers to the question. For realists including human-centred approach within state's diplomacy is potentially detrimental to national security, except from using of human rights slogans as yet another way to pursue strategic interests (Chatterjee, 2011, p. 340). To the contrary, from the perspective of liberal internationalists human security goals are worth pursuing in foreign policy agendas as they serve achieving human rights progress worldwide, but also are in the best interest of state' security and peaceful IR

(Dorn, 2003, pp. 16-23). It can be hypothesised that the first approach is more characteristic of great powers like the PRC, Russia or even the US as well as illiberal states, like most of East Asian regimes, whereas the second attitude is featured by mostly liberal democratic middle and/or regional powers like Canada, Australia, European Union or Japan.

The two selected cases, namely the US and Canada, represent these two respective groups. Both are Pacific states deeply involved in the matters of East Asia and potentially influential in human rights developments in the region. A look at their human rights policies is thus meant to demonstrate two things. In case of the US, it is to put the East Asian record on human rights in perspective, for glorification of the US as a human rights beacon is as much exaggerated as vilifying East Asian states for human rights transgressions. The US has a record of many decades of political dominance in the region and the fact that it still has not affected the course of East Asian democratic and human rights reforms much, post-war refurbishment of Japan notwithstanding, may testify to the inefficacy, disingenuity or simply insincerity of its high-handed human rights diplomacy. As it would be too easy to forsake any notion of transformative human rights diplomacy based solely on the US example, the Canadian record is concurrently presented to demonstrate the path to accomplishment a state with less power but clearer idea on and commitment to human rights may follow. It is in fact the Canadian human security concept that has won the acclaim of both contributors to and recipients of assistance promoting human rights in East Asia, thus it is useful to study its origins, logic and mechanisms. With the West as an inescapable comparator of human rights record to any other place in the world, it is very important to get the juxtaposition of East and West right.

The United States

One may assume that, since the end of the World War 2, promotion and protection of civil and political rights has become one of most important elements of American identity worldwide, and beginning with the 70s of the 20th century it became an integral part of Washington's foreign policy (Forsythe, 2006, pp. 21-22). In order to understand the American approach to human rights within its international political agendas, it is essential to identify the exceptionalism of American liberal democracy as a key feature determining Washington's diplomacy in this field. All differences among consecutive American administrations in the post-cold war era notwithstanding, a strong conviction

of acting as the international "beacon of liberty" and a global promoter of Western values may be seen as their basic point of convergence (Mertus, 2008, pp., 38 & 84-86). Even though representatives of American executive usually stress the moral dimension of American diplomacy – e.g. G.H.W. Bush spoke about the "new moral order" shaped i.a. by IHR laws, and Bill Clinton declared that enlarging the global community of democratic states is one of key pillars of his foreign policy agenda, it is safe to conclude in accordance with both liberal and realist analytical approaches that American human rights ideas are most effectively implemented when not colliding with its political, economic and strategic interests.

Furthermore, due to the so-called "post-Vietnam syndrome" and particularly after the operation in Somalia in the mid-90s, Washington has been reluctant to involve its soldiers on the ground during foreign military operations, particularly when mandated or commanded by another party. (Forsythe, 2006, p. 6). Thus, in the 21st century, Americans more eagerly fight for the protection of human rights using air strikes, not exclusively against military targets, causing many civilian casualties. The classified recording of a series of air-to-ground attacks conducted in 2007 by a team of two US AH-64 Apache helicopters in Baghdad was firstly revealed in 2010 by Julian Assange. It provoked a worldwide discussion on the legality and morality of American attacks causing deaths of civilians in the fight against terrorism. When in 2013 Edward Snowden disclosed thousands of classified documents uncovering the existence of global surveillance programs run by the National Security Agency and delivered them to several media outlets, this in turn caused debates over mass governmental oversight of their citizens and the required democratic balance between national security and information privacy. The above cases are consecutive cracks on the American image as the protector of first generation rights. It was during the presidency of George W Bush when 'shock and awe' campaigns in Iraq and Afghanistan, which were not only conducted in manners questionable from humanitarian perspectives, but also precipitated common use of torture in Guantanamo Bay or Abu Ghraib detention centres.

Analysing American integration with IHR regime, one may assume that Washington represents a two-level approach (two parallel tracks of involvement) – declarations and participation. Acting in the first role (active player) the US takes a role of a judge of international morality and is strongly engaged in drafting and issuing international human rights treaties; on the other hand Washington reluctantly ratifies them and in fact has not ratified some most basic of them. Thus, one may describe this dualistic ap-

proach as simultaneously constructive (influencing development of IHR laws and instruments) and destructive (putting into question the legitimacy of IHR treaties; undermining authority of HR laws and institutions) at the same time. When initial IHR documents were being created after World War 2, the US insisted on including in them the provisions taken from the American Constitution, the Bill of Rights and rules originating in the American lifestyle. (Wessner, 2006, p. 255-260)

Moreover, even though the emerging human rights system was relatively close to US liberal philosophies, the US governments, mindful of the opposition the Senate could mount against ratifications, were usually very reluctant in attempts to bind the US by international legal commitments in general and their human rights part in particular. It did not stop them from encouraging and demanding such ratifications from other states, however. In fact, just after the end of the World War 2 the US government supported declaratory norms of the IHR (as a sort of common law) but did not encourage establishing legally binding obligations in the field – UDHR was expected to be a set of aspirations lacking even the status of political commitments or diplomatic obligations. Consequently, the US was not in hurry to ratify ICCPR (it occurred in mid-90s, three decades after signing and two decades after ICCPR came into force), it has not acceded to any of ICCPR OPTs – the first of them would give American citizens a legitimate right to make the government legally responsible for violating provisions of ICCPR; second OPT would provide for unmitigated prohibition of death penalty. The US has also ratified neither CEDAW nor CRC (once Somalia and South Sudan ratified it in 2015, the US remains the only UN member which hasn't). In American abstention from CEDAW and CRC, the most serious obstacles seems to be concerns of conservative Republicans in the Senate and parental rights groups which perceive CEDAW and CRC as endangering traditional family values as well as interfering privacy and autonomy of American families as well as wish to avoid lawsuits against the government based on the conventions (*Why won't America ratify the UN convention on children's rights*, 2013, "The Economist"). The following provisions are perceived as most detrimental: right to abortion as an individual choice of a woman, guaranteeing each child identical access to equal level and type of education as well as prohibition of lifelong sentences for juveniles. (Panditaratne, 2006, p. 100).

Apart from conventions guaranteeing civil and political rights, the US has not ratified ICESCR, nor any other treaties covering second-generation human rights as such. Whereas the US governments are reluctant towards IHR treaties regarding first-generation rights in order to defend the "best possible" practice of protection of individual

rights and freedoms by American law (Forsythe, 2006, pp. 11 & 41), the second generation is put into question from ideological reasons – according to the official rhetoric by American authorities (most strongly Republican administrations) as well as American from legislative branches at federal and state levels economic, social and cultural rights such as: right to education, medical care, housing or nutrition are perceived more as consumer rights than human rights per se, and so citizens should not be able to demand them to be provided by the authorities. Some authors speak about American "hostile legal culture" (Wronka, 1998, p. 263) towards second and third generations of human rights. The problem is vivid when one observes private vs. public medical care model struggles between Republicans and Democrats taking place in American public sphere on the so-called Obamacare. Public medical care had been provided by neither American Constitution nor by state laws. It was the Obama administration that initiated the transformation on the matter by working toward establishing common medical care law as subsidiary option parallel to the commercial healthcare packages (Whitehouse.gov, Health Care Reform in Action, 2010). Patient Protection and Affordable Care Act passed through the Congress in 2010, but after that the Republicans initiated the legal battle in order to invalidate the bill. Prosecutor General of Virginia and his counterparts from 11 other states branded the bill as unconstitutional (Otto, Buckley, 2011, p. 533). Furthermore, with regard to group rights, only Washington voted against the Declaration on the Rights to Development in 1986 (Hamelink, 1995, p. 60) as well as the 1998 General Assembly's declaration confirming it as an integral part of IHR catalogue.

In addition to ICCPR mentioned above, the US has ratified CAT and CERD in 1994. Simultaneously, however, Washington attached the so-called RUDs (reservations, understandings, declarations) to its ratification documents of those three treaties so as to make them coherent with American legal order. As for ICCPR, RUDs made it possible to maintain the American law allowing executions of juvenile convicts (below 18). Regarding CAT, interpretation of "crucial, inhuman or degrading treatment or punishment" was being narrowed down, adjusting it to contents of Amendments No 5, 8 and 14 to the American Constitution. Interestingly, accompanied by other anti-terrorist special laws and procedures, the narrowed interpretation of "torture" makes possible to politically and legally justify waterboarding practices as interrogation procedures used in special American detention centres towards prisoners recognised as hostile combatants suspect of terrorism. As far as CERD is concerned, American RUDs provide for a wide array of expressive activities regarding freedom of speech and association as guaranteed in accordance with the American law. Finally, it is worth mentioning that

one of most serious restrains on American accessions to IHR treaties is that they are not self-executing, which means that they may not be directly used in the state's legal system and firstly need to be introduced via proper bills in order to make it possible for American citizens to claim respective rights in state courts (Panditaratne, 2006, p. 87).

Canada

Canadian diplomacy on human rights is sometimes presented as derivative of the American approach, however, it has promoted some worthwhile specific concepts and institutional solutions that in many instances are not being consistent with Washington's or even, more broadly speaking, Western approach in this matter. I think that both Canadian involvement in development, proliferation and institutionalisation of human security agenda as well as its engagement in the process to establish the International Criminal Court and safeguard operation of the institution may serve as best examples (Kosmala-Kozłowska, 2013, p. 247).

Observing fluctuations of Canadian foreign policy at international forums it is possible to notice its contrasting aspects. On the one hand, Ottawa shapes its international image of an ethically sensitive soft power, eagerly engaging in strengthening and developing the international HR system. On the other, depending on particular priorities represented by a given administration as well as fluctuating international conditions and influences, it acts in a characteristically pragmatic, middle-power-like manner, in accordance with its national interest necessities. Thus, one may put into question the authenticity of the Canadian involvement and vigorous promotion in "human security" idea when juxtaposed with the realities of Ottawa's ties with trade and strategic partners (Smith, 2001, p. 80). Most of the time, however, Ottawa internationally accentuates its determination to serve as a kind of a "Good Samaritan" providing its assistance to the countries in need of international support of each kind – in terms of peacekeeping, good governance, developmental aid and cooperation, building institutions, legal support and training etc. So regardless of imperfections, it is not only that Canada is more vocal than other Western liberal democracies about human rights priorities, but it really acts in favour of improvements in human security and quality of life in underdeveloped and failing states. It does, however, protect its middle-power interests (more vigorously than its human rights goals) in bilateral relations with important economic partners like e.g. China.

In the intention of its architects there are two basic structural tracks of the Canadian foreign policy on human rights. A Canadian Foreign Ministry officer put it in the following words: "In order to achieve developments the two interdependent elements must coexist: political will and resources for action. Thus, foreign policy sector provides for incentives and sanctions, whereas CIDA (Canadian International Development Agency) supplies it with means to be used when working on-the-ground in a particular country" (Brysk, 2009, p. 82). What connects the two separate tracks of the Canadian diplomacy on HR is the fact that – in rhetoric and in action – Canada recognises the inseparable co-dependence of human rights and developmental assistance, which is particularly visible when analysing its "human security" approach (Dorn, 2003, p. 15).

Worth stressing is the broad interpretation of Ottawa's "human security" agenda, which equally focuses on the two elements: "freedom from fear" component (containing peacebuilding and peacekeeping activities like: involvement in humanitarian intervention policies with the focus on protection of civilians and on the condition of having the recognition of the Security Council; state building, good governance and rule of law development initiatives; civilian-oriented disarmament, particularly focused on restricting the use of landmines) and "freedom from want" component (including developmental assistance and cooperation; supporting particularly vulnerable groups of people: severely impoverished communities; children; women; refugees). It seems emblematic that Ottawa features itself as a humanistic middle power making individual-rights-centred approach a "banner" of its foreign policy and characteristic feature differentiating and appreciating it against the backdrop of the American great power's approach (more realist and state-centric). It was specifically true at the turn of the 20th and 21st centuries when the head of Canadian diplomacy at that time, Lloyd Axworthy, intended to make the human security approach the trademark of his diplomacy (Axworthy, 2008, pp. 229-249). He invoked in this matter his predecessor Pierre Trudeau, who recognised ameliorating of world developmental inequalities and increasing well-being of vulnerable communities as the preferred goals of global politics (Barratt, 2006, p. 122). In fact, Axworthy achieved prestigious international recognition in this regard. In 2004 the former Secretary General of the UN Kofi Annan was quoted as saying: "The world needs more of Canada" when referring to Ottawa`s involvement in the field of human security issues (Brysk, 2009, p. 66).

Since the very beginning of the UN`s existence Ottawa has actively participated in developments of its human rights normative and institutional structure. A Canadian

scholar, John Humphrey, was the author of the first project of the Universal Declaration of Human Rights and afterwards for two decades (1946-1966) he worked as the chief of the UN Human Rights Centre. Canada joined the UN Human Rights Commission (UNHRC; since 2006 Human Rights Council) in 1963 and its representative, Yvonne Beaulne, actively promoted transferring regulations of international HR law onto the state level across the globe, following the Canadian example by initiating the practice of consulting with national non-governmental sector before UNHRC sessions as well as by encouraging state authorities to introduce international laws to their national normative systems. During international human rights conference in 1993, Ottawa acted as the leader of Western states. Moreover, Canadian minister of foreign affairs, Flora McDonald, from the very beginning co-sponsored and actively supported the idea to create the Office of the UN High Commissioner for Human Rights (Brysk, 2009, p. 68).

When Canada gained a seat on the U.N. Security Council for years 1999-2000, Ottawa's representatives used the first rotating Presidency to promote the protection of civilians via a series of presentations and reports that led the Council to adopt Resolutions 1265 and 1296 on "humanitarian intervention". Significant hallmarks of the process were Canada's invitations for the ICRC and UNICEF to address the Security Council as well as coordination with the like-minded Dutch to continue the Canadian-sponsored report during the Netherlands' Presidency. Canada has been a member of the Friends of United Nations Reform, and it was Canada's proposal that the new UNHRC be constituted with some sort of peer review mechanism. As a matter of fact, the Universal Periodic Review (UPR) was created in 2006 as a procedure based on partnership relations, dialogical character and trust-building as the background for cooperation (Kosmala-Kozłowska, 2013, pp. 187-188). Canada has been an innovator in expanding the UN process to take on new issues and expand the agenda of human rights promotion in the areas of accountability, protection of civilians, and the role of civil society. Canada's support for the protection of civilians in wartime bridged from human rights to international humanitarian law, from disarmament to human security, and intensified activities of international treaty-making in this matter (Axworthy, 2008, pp. 233-244).

Since 1997, along with Norway and Japan, Canada supported, hosted and actively participated in the landmark "Ottawa Process", a series of international negotiations concerning prohibition and elimination of landmines. Earlier, since the beginning of the 90s, it actively assisted NGOs supporting the issue. To a large extent it was thanks to Canadian political pressure that the Mine Ban Treaty, i.e. Convention on

the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, came into force in 1999 as Ottawa led the ratification campaign. Moreover, for a good start, Canada channelled $70 million for elimination of disposed land mine installations and afterwards institutionalised the initiative launching the Canada Landmine Foundation (Brysk, 2008, p. 70).

In a similar, yet much more limited fashion, Canada took an active role in promoting the United Nations Treaty on Small Arms Reduction. Canada supported meetings before and after the 2001 UN Conference on the issue, pushed for NGO participation in the UN Conference, and funded the 1998 International NGO Consultation on Small Arms Action initiative (Canadian Centre for Foreign Policy Development, 1998). Canada has also funded programs for small arms reduction or exchange in Albania (via NATO), Moldova (OSCE), and Niger (UNDP). Canada drafted and promoted a new international norm, namely the "Responsibility to Protect" (R2P) via developing in practice the idea of people-centred disarmament and meeting the growing demand for humanitarian intervention, often including Canadian peacekeepers, in the late 90s. Firstly, Canada provided the Secretariat and funding for the International Commission on Intervention and State Sovereignty. This effected in issuing the 2001 Report on State Sovereignty, which was adopted by the Secretary-General of the United Nations and influenced the U.N. Security Council Resolutions and debates on the issue of humanitarian intervention. This way, the institutionalisation process of human security was embedded in the UN. Finally, due to Canadian support, in 2006 the Security Council adopted the landmark resolution titled: "Protection of Civilians in Armed Conflicts."

One of the most spectacular elements of Canadian human rights diplomacy was supporting the idea, financing, institutionalising and operationalising the International Criminal Court (ICC) as one of the most crucial institutional human rights innovations in the post-Cold War period, which added permanent foundation, international jurisdiction and individual accountability to the international HR law regulations. The fact that the first-in-history permanent international tribunal to prosecute individual human rights criminals for genocide, crimes against humanity, war crimes and prospectively also crime of aggression was established in spite of the strong opposition of the US, joined in this by other great world powers: China, Russia and India was an important step in pursuing counter-hegemonic, human-centred normative narratives and confirming possibility to form political coalitions in the contemporary IR in favour of institutionalising them against the will of the great. (Kosmala-Kozłowska, 2013, p. 251-252)

The conference establishing the ICC was headed by a Canadian, Philip Kirsch, who later became the first President of the Court.

From the very beginning, Ottawa chaired the like-minded group of states campaigning for the Tribunal and Foreign Minister Axworthy was lobbying his political peers and sponsoring merit-based seminars (Knight A., 2001). Interestingly, Ottawa financed a trust fund for poor countries to attend the Rome Conference constituting ICC. Due to U.S. opposition in the matter, Canada initially took the role of a "helpful fixer" (using its charm offensive attempted to persuade Washington to the idea). Once realising American firm opposition, if not hostility towards the project, Ottawa served as the catalyst of "soft power" persuasion targeted to override the hegemon's intentions. Canadian legal team was sent to the final 2001 New York meeting to analyse and defend against the American objections to the ICC's juridical framework. Simultaneously, Ottawa negotiated behind the scenes with Washington its withdrawal from active anti-ICC campaign. In the meantime, Canadian Ambassador Paul Heinbecker mobilised an unusual open session of the UN Security Council to debate the issue of ICC. Effectively, 60 out of 63 participants supported Canada's position in favour of the Tribunal, laying the solid ground for the successful majority approval and ratification of the Rome Statute in 1998. Canada has continued the ICC campaign with assistance programs to partner countries in order to adopt model implementation legislation, and financially supported collecting evidence of gross human rights violations for the court, e.g. contributed $500,000 for the case of investigating human rights violations in Sudan. (Brysk, 2009, p. 69)

The Canadian state has founded, financed, and promoted both Canadian-based and international human rights NGOs (Smillie I., 1999, pp. 75-76), working in cooperation on specific programs and in multilateral institutions. In 1998, Canada commissioned a study to enhance NGO participation in the United Nations. At the global level, Canada has been a major funder of half a dozen key human rights NGOs, e.g. the International Center for Transitional Justice, IDEA (the fifteen-nation democracy promotion consortium headquartered in Sweden), Human Rights Internet and the Coalition to Stop Child Soldiers. In addition, some Canadian organisations have made major contributions to global human rights monitoring, education, and implementation.

The Canadian flagship organisation, the International Centre for Human Rights and Democratic Development, known also as "Rights and Democracy" (R&D) was created in 1988 by the Parliament as an autonomous state-funded institution with a mandate to promote global human rights and advise the Canadian government, which was the

solution modelled somewhat on similar bodies in the Netherlands and in Nordic states. Strong civil society figures with backgrounds in law or diplomacy are being appointed to work as R&D presidents. The organisation has a large budget by NGO standards of about $5 million per year, temporarily increased by the Canadian government in recognition of its success and increasing demands. R&D keeps a significant level of independence from state authorities but does lobby the government, like when visiting House or Senate Committees about once a month for discussions on human rights issues or by sending advocacy memos directly to the Prime Minister. Furthermore, R&D suggests agendas of Department of Foreign Affairs, Trade and Development (DFAIT), especially in preparation for Canada's annual participation in the United Nations Human Rights Commission. It was R&D that drafted Canada's position on reforming that Commission to a Human Rights Council. The organisation also acts more traditionally, putting into practice government's overseas human rights goals.

Particularly in the field of developing civil society capacities worldwide it is worth mentioning the Canadian Human Rights Foundation (CHRF), which since the 90s of 20th century has been providing education and training to thousands of human rights defenders around the world. Around 130 participants from 60 countries come to Canada each year in order to take three-week human rights courses, taking part in seminars in Southeast Asian migrant workers' rights, Central Asian teacher training with women's NGOs and the UN's Special Rapporteur on Violence Against Women, training for Indonesia's National Human Rights Action Plan with that country's Ministry of Justice. Significantly, about 85% of the participants come from developing country NGOs. (Brysk, 2008, pp. 71-73).

As early as in the 1999 speech to the G-8 by then-Foreign Minister Lloyd Axworthy, rallying for intervention in Kosovo, Canada argued that: "In states that have failed due to the oppression of a dictator or the actions of a warlord, there must be a new test of accountability, and that new test is human security. The new norm exists – now the United Nations and other international organisations must rise to the challenge of enhancing and enforcing that norm." (Hubert, Bonser, 2001, p. 113). Although the implications and shape of "human security" are still debated, developments such as the establishment of a United Nations Office of Civilian and Humanitarian Affairs suggest that it has become an important reference point for international society. Lloyd Axworthy commented once that some political analysts considered Canada "a regional power without a region" and he added that first of all Canada is the "human security power",

and uses its niche human security diplomacy to "punch above its weight" (Brysk, 2009, p. 66).

To sum up, the two above case studies, the US and Canada, not only serve as suitable comparators for East Asian attitudes towards the idea and practice of human rights, but they also *per se* constitute the study of contrasting Western approaches to the issue. Both, Ottawa and Washington acknowledge the Lockian perspective on the origins and nature of human dignity and share the conviction about universal character of human rights. They significantly differ, however, as for contents of international human rights and ways of its implementation within their socio-political and normative systems and in their diplomacies. Even though the two Western, liberal democratic powers are actively involved in international human rights promotion and protection, as outlined above, they pursue completely different policies and emphasise various priorities in this matter. National security vs. "human security" approaches, represented by the US and Canada, respectively, have been well-grounded in distinct visions of international politics: realist and state-centric (Washington) on one hand; liberal internationalist and human-centred – on the other (Ottawa).

Summary

The whole work on this edited volume fits a broader research agenda that has been accompanying me for several years now. I am of the opinion that normative convergences and divergences in and between East Asia and the West are not sufficiently problematised and comparatively studied. The years when the West could impose its norms on democracy and human rights on East Asian states are practically over, and we are now in the era of a dire need of an intercultural dialogue and prospectively – hopefully – a compromise on the most fundamental norms governing political regimes and their treatment of human beings. This will not happen, if scholarship reinforce both the Western self-righteousness and the East Asian uncompromising exceptionalism. Therefore, the effort undertaken by the students in this volume is both commendable and meaningful. May it be an inspiration for the readers to reconsider the salience of discussing mutual normative influences of East Asia and the West, one another's 'beyonds'.

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Abstract

The article constitutes a merit-based introduction to the book. The author explores the problem of East Asian approach to democracy and human rights against the backdrop of liberal norms of international human rights regime and challenges of the realist reality of contemporary international affairs. Firstly, the analysis presents the very emergence of human rights as an internationalised concept in the specific historical moment of post-war Western normative hegemony, and yet mediated by pluralistic understandings later lost in the flurry of liberal orthodoxy. Secondly, the Western approach to human rights is explored, not as the universal one, but as very specific and particular, typical of the Western experience. In the third section the issue of democracy and human rights along with the current normative landscape in the field are being discussed, against the backdrop of their wider evolving international context and the perils of the application of these principles in accord with Western design. Then, the author juxtaposes East Asian experiences with democracy and human rights with the above presented internationalised Western package of standards in the field. What is next, in order to sophisticate the research agenda East Asia was unbundled and engaged in presenting dominant features, conditions, trends and specificities of categories of states of the region in regard to quality of democratic institutions and human rights standards. Those categories can be roughly described as ASEAN democracies, Confucian democracies and friendly authoritarianisms, though those descriptors are mostly functional and other ones can be no less legitimate, like half-democracies for Malaysia and Singapore. Drawing conclusions from the comparative overview of the above polities, the sketch of shared features of East Asian illiberal model of the state are outlined. And finally, the above is given a juxtaposition in a brief overview of human rights policies and stances in two arguably model Western states which share the Asia-Pacific space with East Asia – the US and Canada. The former demonstrates caveats of US approach, the latter – convergence of some if not all Canadian policies with how progress on human rights is preferably pursued in East Asia.

Key words, *Democracy, human rights, East Asia, the West, Confucian democracies, friendly authoritarianisms, ASEAN democracies, human rights diplomacies*

Monika Zając

Human Rights and Social Responsibility of Transnational Corporations – the Case Study of East Asia

Since the formation of the Westphalian System[1] that gave the basis for modern understanding of diplomacy, the only subjects of international relations had been states which were given the right to independence and sovereign equality (Sutor, 2010, p. 24). Such approach was present during the following centuries. This situation began to change with the emergence of different actors on the international stage, however, the Vienna Convention on Diplomatic Relations from 1961 confirmed that diplomacy was the domain of bilateral relations between sovereign states equipped with territory, population and the right to express their interest outside their borders[2].

This approach to IR has determined a dominant conviction, mirrored by classical theories, that the fundamental actors of the international scene are states and thus the main tool of contact with other states were permanent foreign missions (embassies, consulates etc.). The 20th century was however the time of growing significance of multilateral relations, especially within important international organisations. One of the first examples of such cooperation was the League of Nations that was founded after the World War I. However, it did not serve its purpose, as its existence did not prevent the outbreak of World War II.

In 1945, it was replaced by the United Nations, which, without doubt, can be called the most powerful tool of contemporary multilateral diplomacy. After the end of the Cold War, understood as the clash between ideologies, the threat of another conflict involving most of international actors or the danger of a nuclear war was no longer the main factor creating trajectory of global politics. Therefore, new actors – even though not yet recognised by international law as equal partners to the states[3] – took

[1] Founded by the Peace of Westphalia treaties that had ended the Thirty Year's War in 1648.
[2] See also later UN conventions regulating diplomatic relations with and between international organisations e.g.: Vienna Convention on the Law of Treaties (1969) or Vienna Convention on the Law of Treaties between States an International Organisations (1986).
[3] However appreciated, inter alia in the context of international human rights, by non-statist social constructivist positions.

prominence. Thus, such subjects of IR like international organisations, non-governmental organisations (NGOs) or, relatively new in terms of global politics, transnational corporations (TNCs) began to play their roles in creating the international reality.

The author of this article focuses on social responsibility of TNCs with a special emphasis on the issue of human rights. As it has already been mentioned, transnational corporations were not perceived for a long time as actors having a meaningful influence on social reality. At the same time, as David P. Forsythe indicates, the turn of 20th and 21st century brought a new view on this issue. He sees this process as a result of increasing power of non-profit human rights groups, public opinion and consumer organisations that have impact on public authorities, who, according to Forsythe, should "adopt regulations ensuring that business practices contribute to, rather than contradict, the internationally recognised human rights" (Forsythe, 2006, p. 191).

Before going deeper into details of this specific subject, I would like to refer to the factors that made TNCs global actors. Contemporary appreciation of transnational corporations in global politics, originates from the assumption that most factors changing the international situation may be derived from global political economy. This "forces of change", according to Susan Strange, are for example internationalisation of production and outsourcing of manufacturing industry to developing countries, which is caused by the technological change (Strange, 1992, p. 2).

Yet, it is not only technology that is changing; also people's awareness is developing as well. On the above statement Susan Strange founds her thesis, according to which the factors mentioned earlier, along with increased capital mobility, result in "demand for democratic government and economic flexibility that is impossible in command economy" (Strange, 1992, p.191). According to the scholar, it is the international capital and economic reality that pushes people to change political regimes. Within such an approach, transnational corporations can be perceived not as a threat to, broadly speaking, the interest of the people, but can act in favour of their rights.

Moreover, Strange indicates the three main factors that were responsible for facilitating transnational expansion of corporations outside their home states: the need for alternative markets (correlated with the development of technology), liberalisation of international finance as well as easier, faster and cheaper trans-border transport (Strange, 1992). Such changes have helped developing countries to expand their economies, nevertheless, it is the "human factor", which Susan Strange underestimates, and which has been emphasised by Forsythe, whose theses have been more specifically analysed below.

What is important in perceiving the expansion of transnational corporations, is the effect that rapid industrialisation has had on the societies of developing countries over past decades. The western style capitalism, contrary to how the conservatives and neoliberals prefer to perceive it, is not necessarily the best solution and is not always the key component of establishing a wealthy, well-functioning society. George Soros moves even further in his critique, according to his vision, it is capitalism itself, which is a threat to an open society (Soros, 1997).

Obviously, to a large extent, the perception of particular economic systems or actions depends on one's political views, yet, it is hard to disagree that unregulated capitalism influences the poorest and the weakest in a negative way, while providing benefits to those in power instead, particularly when accompanied by such pathologies as: corruption, deep income disparities, extreme poverty, social exclusion or violations of personal integrity rights, justified with the need for economic of development and security of the state. And that is why such postulates as the need for efficient legal control over TNCs and their cooperation with states and international organisation appeared.

As already indicated, transnational corporations are nowadays particularly important players on the international scene. In such case, they need to be perceived as subjects of international public law. It is however worth mentioning, that, as Francoix Rigaux emphasises, "transnational corporations are neither subjects nor quasi-subjects of international law. (...) Transnational corporations – whether public or private – are legal agents subject to the jurisdiction of states, and are affected by the rules of international law only when these are mediated by a state legal order" (Rigaux, 1991).

Over the years, significant rules regarding this issue have been adopted. In 1976, the Organisation for Economic Co-operation and Development (OECD) created a document called "Guidelines for Multinational Enterprises", adopted in 1977 by the International Labour Organisation – ILO (van Genughten, 2000). The latter organisation is especially important from the point of view of both global economy and human rights, as it is the first one, whose main mission is to "promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues" (International Labour Organization, 1996-2014). ILO is responsible for creating conventions regulating these issues. However, as Willem J. M. van Genugten emphasises, such regulations as are not binding in terms of international law, and are only based on voluntary will of their parties (van Genugten, 2000, p. 74). Nonetheless, as the author also indicates, what is important in this case, is that, especially regarding

ILO, among all the parties involved in creating such an agreement (governments, organisations of employees and employers), there are also TNCs themselves, willing to self-regulate.

What is also worth mentioning, apart from special regulations concerning the rights of employers etc., there are also some basic and fundamental documents that have influence on the situation of TNCs. The most basic example of such soft international law affecting the TNCs is the Universal Declaration of Human Rights, which is, as we can read in its preamble, a common standard that must be respected not only by all peoples and nations, but also every individual and organ of society (United Nations, 1948). This means that the spectrum of those whom this document addresses is broad enough to include such non-state actors as TNCs. Assuming so, one can observe that actually most of the conventions adopted by the General Assembly are somehow connected with the activity of transnational corporations within the area of human rights; to enlist at least few of them: International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, Convention on the Rights of the Child or International Convention on the Protection of the Rights of All Migrant Workers and their Families.

In 1999, the United Nations Conference on Trade and Development (UNCTAD) published a paper called explicitly: "The Social Responsibility of Transnational Corporations"[4]. In the preface to this document, the Secretary-General of this organisation explains the reason why it was created. According to him, the issue of necessity for transnational corporations' responsibility towards societies is a topic already discussed, yet not uncontroversial. Apart from that, he also links this sphere to the phenomenon of globalisation and the fact, that even though it is a process that cannot be stopped, there are still differences between societies that affect their interests and manners in which they should be secured (United Nations Conference on Trade and Development, 1999).

This statement is especially important for the purpose of this essay, as later its author indicates how do TNCs act in terms of their social responsibility in a particular region of the world, which is East Asia. In the UNCTAD's report the definition of this term is as follows: "Corporate social responsibility concerns how business relate to, and impact upon, a society's needs and goals" (Ibid.). It also assumes, that it is not only the obligation

[4] See: *The Social Responsibility of Transnational Corporations*, United Nations, New York and Geneva, 1999, http://unctad.org/en/Docs/poiteiitm21_en.pdf.

for the TNCs to implement the regulations of individual states and international agreements, but also to support the development of a stable and just global society, as it has already been agreed, that such condition acts in favour of international enterprises, for which simple maximisation of shareholder value is no longer the main and only goal.

But it is not only important to understand the meaning of social responsibility of the TNCs to explore and assess the global situation in the field; it is also of key importance to be aware of what social responsibility is not. The authors of the UNCTAD's paper caution about mistaking this phenomenon with philanthropy or simple compliance with the law. Especially the latter issue is an interesting matter. One should not forget, that observing the regulations (may these be internal corporate ones or legal norms enacted by states) is an essential minimum enabling the corporations to function, yet, there are still certain ethical rules that can be expected, even though not legally binding. And this leads us to the question why certain moral standards, recognised in national, regional and universal documents on human rights, are not commonly implemented into national legal systems, but often depend on such particular circumstances as: the corporations' good will, financial assessment of their given situation or the expected impact on the company image?

According to the author of this article, the answer to the above question is a specifically complex one. UNCTAD points out that most issues regarding social responsibility of the TNCs is based on a "social contract" between the corporation and society that allows to extend the legal obligations of the firm to the societal expectations concerning for example their cultural rules. Relatively strong adaptability to specific local circumstances and diverse socio-cultural patterns appears to be a clear advantage of such kind of operational model. At the same time, efficiency of this particular approach depends on cooperation capacity between the given corporation and society as well as on good will of both parties. Moreover, one should not forget that no transnational corporation is a homogeneous body; the interests of its shareholders or managers may differ, and are also more or less interrelated with some specific interests of workers, suppliers or subcontractors.

The step further towards increasing the social responsibility of TNCs, somewhere in between a social agreement and legal regulations, are "soft law" alternatives, meaning that government would be able to introduce codes of corporate conduct; the main advantage of such solution is that it does not require intergovernmental cooperation leading to consensus and creation of legally binding rules (which is a time-consuming and complicated procedure). Such approach appears to be especially suitable in terms of key

points of international regulations concerning TNCs and human rights enlisted by David P. Forsythe; these points are: the weakness of current international law in regulating the social effects of international business, the growing importance of consumer and other social movements (related to the power of communications media) and the facilitative actions of some states in regard of this issue (Forsythe, 2006, p. 201).

Regarding the social movements, there are many organisations, whose mission is to protect the rights of consumers. One of the examples may be the Consumers Union, which is "an expert, independent, non-profit organisation, whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves" (Consumers Union, 2014). This organisation was founded and based in the USA. But there are also movements that operate globally, such as the Consumers International. It associates over 250 member organisations in 120 countries. Its main goal is "building a powerful international consumer movement to help protect and empower consumers everywhere" (Consumers International, 2014). In case of TNCs, one should not forget about SOMO – "an independent, not-for-profit research and network organisation working on social, ecological and economic issues related to sustainable development" (SOMO, 2014). For over 40 years it has been focusing on investigating multinational corporations and analysing their actions in terms of their social and environmental influence.

As already indicated, transnational corporations often do not have to be accountable for their actions to neither governments nor international organisations. Even though this situation appears to be changing, and in many cases certain TNCs are willing to cooperate with different bodies more actively than others, the maximisation of profit is still the main goal and the main objective on which all actions of the TNCs (also in the sphere of human rights) depend. But there is a group of social opinion-makers whose voice is crucial for the existence of every huge enterprise the income of which depends on the sale of its products; this group is called customers, and customers both create as are influenced by the phenomenon called "public opinion"[5].

Therefore, the TNCs are focused on creation of their positive image; this reason may actually be the one with strongest influence on their interest in respecting the rights of their workers, not devastating the environment and simply avoiding to become associated with any violations of law. These are also postulates of alterglobalist

[5] Public opinion: „An aggregate of the individual views, attitudes, and beliefs about a particular topic, expressed by a significant proportion of a community", See: W. Phillips Davison, *Public opinion*, Encyclopedia Britannica, http://www.britannica.com/EBchecked/topic/482436/public-opinion.

movements, for whom one of the main objectives is to protect so called "Third World" countries that appear as powerless in the conflict between their interest and the interests of the TNCs. Alterglobalists demand, inter alia, that the new global politics enables the developing countries to exist in the international markets on equal rights, annulment of their debts and fair commercial exchange with mandatory TNC reports proving that they do not violate the rights of their employees and do not use child labour (Krytyka Polityczna, 2014). It is visible that their postulates are concurrent to those of the defenders of human rights.

In this regard, a very interesting phenomenon is the emergence of the so called "aspirational consumers" (Miller, 2014). This is how actively consuming, but also socially and environmentally responsible buyers are called. They tend to choose and trust only the brands that are known for their actions aimed at protecting human rights and following environmental norms. But what is even more interesting, whereas aspirationals can be found across nations, they are especially significantly represented in the emerging markets of Asia: 51 percent of Chinese and 58 percent of Indians can be categorised as "aspirationals" (Miller, 2014). To compare, in Germany it is only 23 percent, in France – 24 percent. Basing on the above information one may conclude, that those who live in the developing world and are rich enough to consume goods in the "Western" meaning of this word, at the same time appear to be more motivated to do it a proper manner.

Along with the progressing industrialisation around the world and expansion of large companies on foreign markets, more and more transnational corporations have come into being. These companies seek new ways to maximise their incomes, reduce the costs of production to the possible minimum. New factories required not only a comfortable piece of land on which they could be built, but also a cost-effective labour to work for them. In the Western world, raising awareness of the importance of workers' rights for democratic societies accompanied by international regulations in this sphere, increased the popularity and broadened the scope of actions of labour unions[6].

Moreover, ecologic regulations demanded from all kinds of producers to reduce the amount of pollution they emitted[7]. All these laws and regulations that became a certain routine for Western lawmakers, public opinion and responsible business representatives, have significantly increased the costs of production for large enterprises. And since, as

[6] To check examples of such regulations, see: ILO conventions, http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm.
[7] See more: United Nations Environment Programme, http://www.unep.org/.

David P. Forsythe indicates, "the most fundamental *raison d'etre* of the TNC is precisely economic self-interest, not to be a human rights actor" (Forsythe, 2006, p. 197), a number of global companies choose to follow the most profitable and least ethical manners in their business practices. That is why they started to move their production to different parts of the world, which devote less attention to human or environmental factors.

One of the regions, to where the developed world's production had moved, is East Asia. Highly populous states, still developing (low or middle income), with significant numbers of impoverished people (living below the World Bank`s poverty line; often lacking the rule of law tradition), deprived of regulations regarding the rights of employees, uncomfortable from the perspective of great capital entrepreneurship, states which do not pay significant attention to environmental damages and have a completely different vision of rights and duties of their citizens, were obviously great partners for many transnational corporations that no longer needed to "worry" about many factors. As we now move to the specific subject of this article, namely the social responsibility of transnational corporations in East Asia, the author would like to focus for a moment on the reasons why are human rights in this region perceived differently than in the West, and point out some cultural, socio-political and ideological reasons for that. A particularly interesting example of using culture as an excuse for not implementing basic human rights in terms of cooperation between a state and a transnational corporation was mentioned by David P. Forsythe. He described the situation that took place in 1998 in Indonesia, when the authoritarian government led by Suharto used its interpretation of the so called "Asian values" in order to refrain from introducing any international regulations, arguing that "authoritarian Asian states had found a model of successful economics that did not require broad political participation, independent labour unions, and other manifestations of internationally recognised human rights" (Forsythe, 2006, p. 200).

Such attitude of the government was not, however, accepted by the society and led to social movements which resulted in significant political changes, therefore, the new government's policy towards human rights was already different. This situation illustrates the Forsythe's thesis, that there must be a countervailing power to the practices of the TNCs (if not a state, then human rights organisations or movements), as, according to him, the natural way of acting for TNCs is to ignore the necessity of human rights and social consequences of their policies (Forsythe, 2006, p. 199).

The Suharto's reference to "Asian values" is not pointless however. The human rights rhetoric of Western governments happens to be perceived by East Asians as using

"double standards" and politics of "imperialism" or "neo-colonialism". One should also not forget, that when the universal human rights standards were being created, such as the Universal Declaration of Human Rights, the dominating approach was the Western one, to the detriment of other, non-Western religious, philosophical or legal systems (Kosmala-Kozłowska, 2013, p. 62). In this context, Malcolm H. Field refers to the example of Japan. After being defeated in the World War II, Japan ceased to be a sovereign state, as it was occupied by the USA. Thus, it means that Japan did not have any real influence on the international scene at the time when the present HR system was being constructed. Nevertheless, despite its weak position, Japan was emphasising the need of respect for values anchored in its tradition; the government stated: "the centrality of the family needs to take precedence over the individual, rights have to be linked to duties, elimination of ascriptive-based social relationships results in anarchy, and rights cannot be considered absolute when there exists a threat to public welfare" (Field, 2009). Until the 1970's, Japan did not ratify any significant agreements in the sphere of HR, which was strongly criticised as using cultural relativism to slow down the democratisation process.

It is quite a frequent opinion of the critics of unification of human rights standards that domination of perceiving human rights from the angle of Western approaches[8] is a symptom of "imperialism" and that different cultures should have, if not must have, a right to not be bothered when their representatives act according to their own values, even if they are contradictory to what Westerners perceive as moral and socially acceptable. So what does the term "Asian values" mean and what does it imply[9]?

According to Marta Kosmala-Kozłowska, the main source of differences in perception of human rights between Westerners and Asians are the philosophical systems, in which these cultures were rooted. Even though the "Golden rule" (assuming, in simplified terms, that people should treat others the same as they would like to be treated) is present in almost every philosophical or religious system, it is not always interpreted in the same way; whereas in the Western culture people are perceived as equal to each other, e.g. in case of the Confucian civilisation, the differences between people are natural and refer to the hierarchical structure of both family and society (Kosmala-Kozłowska, 2013, pp. 109-110). Nevertheless, such differences go much deeper.

[8] They determine actions of some UN institutions, diplomacies of governments as well as non-governmental organisations.

[9] It is important to differentiate between "Asian Values" understood as a socio-technical construct and a political ideology promoted mainly by Singapore and Malaysia in 1990's and "Asian values" understood as a group of characteristic ethical values and meta-values (derived i.a. from Confucianism, Buddhism, Taoism and Islam).

Kosmala-Kozłowska introduces four sets of contradictory values of both Western and East Asian cultures; these are: 1.equality and omnipresent hierarchy, 2.order based on the dictates of God and the lack of idea of a perfect and absolutely good God, 3.social independence and superiority of family, 4.individualistic conception of a person and collective understanding of a human (Kosmala-Kozłowska, 2013, p. 111)[10]. In such broad perspective, it becomes clearer, why the modern conception of human rights, which is definitely more West-oriented, is not unambiguously supported by East Asian normative traditions and socio-political regimes, and therefore more difficult to implement.

However, it does not mean that these differences cannot be overcome; in East Asia there are countries, which, when compared with the majority of illiberal regimes in the region, have successfully adapted human rights and have even become even their advocates. A good example of such country is Japan, which, since the 1990s, began to intensify its actions in the sphere of human rights as well as developmental aid directed towards poorer countries of the region (Kosmala-Kozłowska, 2013, p. 311).

Also such "Asian tigers" as Taiwan or South Korea used their economic development (to a certain extent dependent on opening their economies to TNCs) to evolve into being liberal and social democracies (Forsythe, 2006, p. 199). On the other pole there are countries that are unwilling to ratify significant international conventions or do not pay attention to the cases of breaking law in terms of human rights (e.g. Malaysia, Singapore, Burma).

But what if the TNCs undertake to influence a state's policy on human or worker's rights? What if they do not accept the democratic changes and are desperate to maintain the conditions in which they have been operating as they had before? In general, Westerners tend to assume that large enterprises act in favour of the same principles as do the states, and that they fulfil their legal obligations even if these are not exactly in their interest. But that is not always the case, neither it was in the past. David P. Forsythe enlists at least few of such cases; he refers to the actions of United Fruit, a corporation that cooperated with US government to overthrow politicians acting in favour of introducing labour rights in Guatemala and Chile in 1950s and 1970s (Forsythe 2006, p. 197). But this sort of actions are present also nowadays; as Lesley Gill indicates, such large corporation like Coca-Cola "has a long history of being virulently antiunion company" (Blanding, 2006). In 2004, 179 cases of major human rights violations against Coke workers were documented, as well as violent paramilitary actions directed towards employees, possibly planned by company's managers (Ibid.). This information referred to

[10] Translation from Polish by the author of this essay.

exposed scandalous events that happened in the bottling plant in Colombia, where union members where being murdered or blackmailed by paramilitary organisations over the years, simply for demanding their rights. But going back to the case of East Asia, unfair practices of TNCs were happening also in this region. Probably the most recognisable case was the one of Nike. The corporation withdrew their production from South Korea and Taiwan, when the workers there gained new rights and were no longer as cheap as in other parts of region, for example in Indonesia, China and Vietnam (Global Exchange, 2014).

During first two years of Nike's presence in Vietnam, many complaints were being heard from their workers; there were cases of physical and sexual abuse, as well as of bad working conditions. This example is, however, especially interesting, as the corporation was being criticised for actions of their suppliers and subcontractors, that – as the official line of defence said – they did not have any influence on. With the pressure of both workers' organisations as well as public opinion that was threatening to boycott their products, Nike started to increase the wages and improve working conditions. However, the question remains unanswered – to what extent are TNCs responsible for the rights of workers manufacturing their products in particular, if they are not legally their employees but the employees of the subcontractors?

In 2011 it turned out that conditions in which employees of Apple's factories in China work are far from being acceptable. Workers were forced to be available much longer than it was permitted by regulations, were deprived of any holidays and accommodated in overcrowded dormitories. The investigation which purpose was to check the working conditions of these people was initiated after seven young employees committed suicide apparently due to overstrain and hard living conditions. In the press release, Apple stated that it was "committed to ensuring the highest standards of social responsibility" throughout their supply base. However, as Ghetin Chamberlain from "The Observer" argues claiming that: "While Apple says it expects high standards from suppliers, its own audit reports suggest that many fall short. The latest figures show Foxconn's Chinese factories are not alone in working staff beyond the legal limits, with fewer than one in three supplier factories obeying the rules on working hours" (Chamberlain, 2014).

A very drastic proof of the lack of TNCs control over foreign suppliers was revealed in June 2014. According to the investigators, shrimps that were available in most popular chains of supermarkets in Great Britain and USA – like Walmart, Carrefour, Costco and Tesco – were being produced with the use of slave labour. Men – coming mostly

from Thailand, Burma and Cambodia – were being held on a fish boats near Thailand for years, against their will, working with no remuneration and in terrible sanitary conditions. Those who managed to escape were telling horrible stories about tortures, executions and intoxicating slaves with drugs to make them work day and night (Hodal, Kelly, Lawrence, 2014).

Representatives of those chains in which shrimps produced with the use of slave labour were available admitted, that they were checking how their suppliers operate, but in that case they were not inquisitive enough. As for the reaction of government, even though Thai officials reassured public opinion that fighting slavery is their national priority, "The Guardian" quotes human rights activists, who believe that: "Thailand's seafood-export industry would probably collapse without slavery. (...) there is little incentive for the Thai government to act and have called for consumers and international retailers to demand action"(Ibid.).

Generally speaking, Asian governments, with divergent intensity and efficiency however, do take actions to improve situation of workers. But still, it is only a "drop in the ocean" of problems of vital concern regarding needed improvement of working conditions and required preservation of human rights in this region. This is particularly true in cases of mass economic migration of East Asians looking for better life conditions. In 2010, Human Rights Watch indicated that particularly: "(…) migrant domestic workers risk a range of abuses. Common complaints include unpaid wages, excessive working hours with no time for rest, and heavy debt burdens from exorbitant recruitment fees. Isolation in private homes and forced confinement in the workplace contribute to psychological, physical, and sexual violence, forced labour, and trafficking" (Forsythe, 2006, p. 198).

On the other hand, one may say, that TNCs, even if violating human rights, create jobs for poor people, who would not be able to support their families without them. What is better – a bad job or no job? Human rights organisations strongly oppose such attitude, as they are not against TNCs presence in developing countries. They simply want to make people (and governments, firms, etc.) aware of the fact, that there is such thing as social responsibility of large enterprises, who can change the reality of simple people not only for worse, but also for better. We can only imagine how strong the power of their influence can be.

Professor Debora Spar – quoted by David P. Forsythe – indicates, that there are cases of exporting human rights, especially by these TNCs which are consumer products firms, manufacturing firms and information firms (Ibid.). The reasons of their

actions are still connected with maximising their income, but the fact, that their sales depend on individual consumers makes them more cautious about their positive image. However, some TNCs care not only about cheap, but also good labour force, where education and stability of democratic rule in society is not perceived as a threat to TNCs interest, yet may act in their favour. TNCs may also have significant political power, which happened for example during the rule of highly repressive military government in Burma, when many foreign firms decided to withdraw their production from this country, as this government was internationally condemned (Ibid.).

As may be observed, the cooperation and peaceful coexistence between human rights organisations, well prospering transnational corporations, governments of host countries and simple employees is possible. Introducing regulations securing fair conditions of work and respect for environment serve the interest of all, as TNCs avoid boycotts and may count on better qualified labour force, governments act in favour of international agreements on human rights, which would help them to build a position of a modern, democratic state, and workers can in such conditions improve their economic situation, as well as overall level of life. Such attitude would be helpful especially in the East Asian region, which has strong economic potential, but where human rights violations still take place and conditions of life and work are still not applying to those internationally considered as fair and equal.

Conclusion

There is a constant dispute between those who – in terms of theory of international relations – consider themselves as realists, and those who present more liberal or idealistic point of view. This first group often perceive fight for human rights represented by international organisations or workers' unions as unnecessary interference in the sphere of economy and interference in internal affairs of sovereign states, which is illegitimate in accordance with international law and may make damage to state`s security and socio-political stability. Realists also undermine the real influence of actions taken by human rights defenders on situation of ordinary people.

The author of this article strongly opposes such attitude as it claims that improvement of working conditions in developing countries is a long process that needs to involve all sorts of state and non-state actors. Simultaneously, those who consume are in possession of a great power – power of choice (also by refusing to buy some human rights "unfriendly" goods). Also those who vote have the legitimacy and capacity to

more or less effectively control governments. With both of these attributes – choice and control – societies can put TNCs as well as governments under pressure. And symptoms of such actions may be observed worldwide (in particular in case of Western, highly developed, democratic societies), however with not yet satisfying intensity in East Asia.

According to the author of this article, East Asia, despite its cultural specificities, is the region where TNCs can successfully operate with the benefit for their finances, but also can positively influence social changes. Improving conditions in which people work, increasing wages and normalising time of work do not have to endanger neither future income of TNCs, nor the economic development of countries in this region or their "Asian values". And that is why such term as social responsibility of transnational corporations should not be considered as a surplus value, but a necessary condition of well-functioning enterprise.

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Abstract

With the increasing role of non-state actors on the international arena, IR has faced significant changes and a set of new challenges. Not only international organisations and NGOs, but also transnational corporations have gained impact on many political, economic and social issues. The purpose of this essay is to present the dilemmas concerning legal regulations as well as positive and negative effects of the activity of transnational corporations, with a special emphasis on ethical problems they deal with. The author of this article has chosen a dominant case study of East Asia to depict different human rights standards dominating in this region and in the West. The main goal of this paper is to analyse the problem of social responsibility of transnational corporations, as well as their attitudes towards the protection of human rights in developing states.

Key words: *transnational corporations, human rights, Asia*

Weronika Składanek

ASEAN's Non-interference Rule – historical and political background and application

Introduction

The issue of non-interference in the internal affairs of states has been one of the cardinal rules upon which Association of Southeast Asian nations was founded. Its impact on the Southeast Asian regional project is a subject of debate. Thus, the purpose of this analysis is to provide at least partial answers to some of the following questions. Why has the principle of non-interference become a specific feature of the ASEAN? What are the origins of the Southeast Asian non-interventionism? Are all the member states of ASEAN equally devoted to the rule? Have there been any exceptions from the rule and under what circumstances? Does non-interventionism strengthen or undermine further integration within the ASEAN? And finally how does the rule of non-interference in internal affairs affect human security of the citizens of Southeast Asian states and human rights issues within the regional integration process?

Aiming at an in-depth understanding of the principle of non-interference in Southeast Asia, the article discusses sources and purposes of its evolution as well as interaction with other elements (values and goals; including the "ASEAN Way") of ASEAN's organisational culture. It is worth mentioning here, that in case of ASEAN, one can speak about "Asian values" as a group of certain values and meta-value characteristics for the region (with their origins in: religions, customs, cultures and socio-politico-legal traditions of the states located in the region). "Asian Values", as a political doctrine, constitute only a part of it, the one most actively promoted and used as a justification for illiberal political systems in particular by governments of Malaysia and Singapore. These, in turn, still need to be distinguished from the "ASEAN values", which are acceptable principles adopted by the organisation in its documents. That is why the article analyses certain specific international and regional legal regulations on the issue (including "hard" and "soft" laws) and their application. Moreover, what is explored, is the influence of the non-interference

principle on the evolution of HR regime within ASEAN. Eventually, the article presents particular case studies concerning the implementation of the principle in ASEAN member states.

Motives and history of the regional integration

ASEAN (Association of Southeast Asia Nations) was brought to life 8th on August 1967 (Bangkok, Thailand) with the signatures by the Foreign Ministers of Indonesia, Malaysia, Philippines, Singapore and Thailand under the so called Bangkok Declaration. (ASEAN, *The ASEAN Declaration*) This short document, consisting of only five articles, introduced seven "aims and purposes":

- Economic growth, social progress and cultural development;
- Regional peace and stability;
- Economic, social, cultural, technical, scientific and administrative collaboration;
- Mutual assistance in training and research;
- Collaboration in agriculture and industry, trade, transportation and communications, and the improvement of the standards of living;
- Promotion of Southeast Asian studies; and
- Cooperation with regional and international organisations (Severino, 2008, p. 1-2).

Reading only these points, we can assume that initially ASEAN was supposed to be a mainly socio-economic organisation. Indeed, such are the official purposes, presented in declarations and ASEAN agreements. However, if we take a look at the political situation in the world and the international relations within this specific region at that time, we will discover a broader significance of ASEAN, which comprises also security and sovereignty of its member states.

The political situation at that time was particularly complicated, there were many "young" countries which, just few years back, had gained independence after decades of having been colonies (except for Thailand, which, nevertheless, still gained a new type of sovereignty). On the one hand, in the region one could observe the so-called "vacuum of power", as Western colonial powers after World War II had departed from Southeast Asia (SEA), on the other – the SEA countries experienced the Cold War overlaying their regional dynamics that divided the political ground between the communist and the non-communist camp (Acharya, 2001, p. 4-5).

Further obstacles to international relations in the region were posed by numerous conflicts, including: the religious (Christians and Muslims in the Philippines), ethnic

(Malays and Chinese in Malaysia) and territorial ones (between Malaysia and the Philippines over Sabah), taking place inside countries as well as between them. Moreover, one needs to take into consideration numerous divergences between these countries regarding ethnicity, culture, religion and, furthermore, the ubiquitous influence of the Chinese minority (thus the threat of intervention by Beijing) (Severino, 2008, p. 5).

Similarly, the conflict in Vietnam, threatening the stability of the entire region, did not appear to bode well for the new organisation. However, despite all these adverse circumstances and even maybe, to a certain extent, as their consequence, the foundation of ASEAN was possible.

ASEAN was not the first organisation is the SEA region, as earlier MAPHILINDO (1963-1967) had been created, which had consisted of Malaysia, the Philippines and Indonesia. The other one was the Association of Southeast Asia (ASA, 1961-1967) between Malaysia, the Philippines and Thailand. However, both of them had rather narrow goals and limited scope of activity; their existence ended with the establishment of ASEAN (Beeson, 2009, p.18-19). For each of the founding members it was certain that only cooperation between them, to preserve unity and to develop their own standards, will enable the project called ASEAN to survive on the international scene. It was supposed to be both a forum of collaboration within the organisation and a strong platform to respond to threats and unstable political situation outside (Severino, 2008, p. 2). "The founding Bangkok Declaration of 1967 called upon the Southeast Asian states to 'ensure their stability and security from external interference in any form or manifestation'" (Acharya, 2001, p. 57).

After years of adaptation, learning and stabilising the internal situation in each state, 1976 saw the first summit of the ASEAN member state leaders on Bali, during which the Treaty of Amity and Cooperation was signed, presenting the key principles of ASEAN:

- Respect for independence, sovereignty, equality, territorial integrity and national identity of all nations;
- Freedom from external interference, subversion or coercion;
- Non-interference in the internal affairs of one another;
- Peaceful settlement of disputes;
- Renunciation of the threat or use of force; and
- Effective cooperation among themselves(Severino, 2008, p. 7).

The above standards, that are in line with the international law, including the UN Charter, and significantly emphasise the rule of non-interference in internal affairs, have

become the basis for all subsequent actions of ASEAN and the foundation for the positions adapted by its members.

The rules concerning peaceful settlement of disputes and non-use of force were present also in the Bangkok Declaration, outlined as promotion of "regional peace and stability through abiding respect for justice and the rule of the law in the relationship among countries in the region and adherence to the principles of the United Nations Charter" (Acharya, 2001, p. 48). These principles were repeated in the Kuala Lumpur Declaration (1971). They were an expression of will of all the ASEAN founders to avoid both international as well as internal conflicts like in the situation of growing crisis in Sabah (Malaysia-Philippines), multiple internal tensions, difficulties in the region (Vietnam, Cambodia) and the Indonesian idea of "*konfrontasi*"[1] in relationship with Malaysia (Australian Government Department of Veterans' Affairs, *Causes and general …).*

For these reasons, the abovementioned rules were particularly important from the point of view of small countries, such as Singapore (later also Brunei), surrounded by its large neighbour, Malaysia, with a completely different ethnicity and culture. The final shelving of the Sabah conflict can certainly be considered a fruit of these principles (Acharya, 2001, p. 48-51).

Regional autonomy or the rule of 'regional solutions to regional problems' was especially important during the Cold War, when Western and Eastern powers treated SEA as their war field, particularly, as various ASEAN countries were allied with different powers (Thailand and the Philippines with the U.S., Malaysia and Singapore with Britain). Corroborating this rule, there was also a proposal to create the Zone of Peace, Freedom and Neutrality (ZOPFAN) in Southeast Asia (advocated by Malaysia), yet it never came to be truly implemented (Acharya, 2001, p. 51-56).

Another important determinant of cooperation within ASEAN is the principle of lack of any military pacts in bilateral agreements between the members of the association. There were concerns that such military cooperation could be treated as a challenge,

[1] *Konfrontasi* was a conflict between Indonesia and Malaysia that took place on the island of Borneo; the Malayan PM (supported by the British) expected North Borneo to become a part of the New Federation of Malaysia, which was to come into being in 1963, whereas the Indonesian President, Sukarno, opposed the idea and intended to incorporate North Borneo into Indonesia. For this reason Indonesia supported the 1962 coup d'état in the sultanate of Brunei (N. Borneo), which was shortly suppressed by the British. Soon after that, Indonesia announced that its relations with Malaysia will be based on *konfrontasi*, i.e. on violence, yet without declaring a war. The war in Borneo lasted until 1965/6, when the power of Sukarno was overthrown by a coup and the new president Suharto did not continue this policy. The treaty between Indonesia and Malaysia was signed in Bangkok in August 1966.

given the tense situation in the region (Acharya, 2001, p. 61-62). Prime Minister of Malaysia, Hussein Onn, stated (1976):

> "It is obvious that the ASEAN members do not wish to change the character of ASEAN from a socio-economic organisation into a security alliance as this would only create misunderstanding in the region and undermine the positive achievements of ASEAN in promoting peace and stability through co-operation in the socio-economic and related fields" (Acharya, 2001, p. 61).

It could seem impossible that despite all the divergences enumerated above, as well as already mentioned difficulties related to the internal and external situation of the region, SEA countries have undertaken and further develop an efficient cooperation with each other. Since its creation in 1967, ASEAN has continued to grow. In 1984, the Sultanate of Brunei became a member of ASEAN, while between 1995 and 1999, Vietnam, Laos, Cambodia and, most controversially of all, Burma (or Myanmar) joined the organisation (Beeson, 2009, p. 23).

Even though at first glance ASEAN appears to be an international organisation based mostly on economic and political cooperation, which lacks deeper socio-cultural roots, comparable to the EU model, it should be stressed that ASEAN is an extraordinary organisation that, on the basis of shared regional values and meta-values ("Asian values"), has developed unique rules ("the ASEAN Way") specifically characterising this particular example of regional integration. Simultaneously, it should be said that the EU has developed much deeper cooperation processes and a more elaborate administration of the organisation. This can be exemplified by numerous administrative and political institutions (Council of the European Union, European Council, European Commission) or direct elections to the European Parliament. The ASEAN principles, mentioned before, were the fruit of the unstable situation in the region at that time, but they have remained largely unchanged to this day. Nonetheless, the rule of non-interference has undergone a different process. Its evolution will be discussed in the following part of the present paper.

The Rule of non-interference

The ASEAN Declaration (Bangkok Declaration; Bangkok, 8 August 1967) states as follows: "Considering that the countries of Southeast Asia share primary responsibility for strengthening the economic and social stability of the region and ensuring their peaceful

[sic] and progressive national development, and that they are determined to **ensure their stability and security from external interference in any form or manifestation** in order to preserve their national identities in accordance with the ideals and aspirations of their peoples"[2] (ASEAN, *The Asean Declaration*).

The policy of non-interference is one of the cornerstones of international relations and a rule that dates back at least to the emergence of the concept of the sovereignty of nations, commonly attributed to the Peace of Westphalia of 1648. "Without the principle of non-interference in the internal affairs of nations, the entire inter-state system would collapse" (Severino, 2009, p. 22).

Certainly it is not the idea formed exclusively within ASEAN, yet only here it took such a particular form, becoming one of the basic principles of the organisation, not only at the political level ("the ASEAN way"), but also in its cultural dimension, referring to the organisational culture, operational procedures and normative regulations within the organisation ("Asian values"). As for Southeast Asia, initially it was particularly important to dismiss the aspirations of former colonisers to intervene in the internal affairs of sovereign ASEAN countries (Severino, 2009, p. 22-23).

The rule has been confirmed already in 1955 in SEA during the Bandung Asian-African Conference, resulting in numerous underlying principles of international cooperation in the region. Afterwards, it has been reiterated in every major document of ASEAN: Bangkok Declaration (1967), Kuala Lumpur Declaration (1971), Treaty of Amity and Cooperation (1976) (Acharya, 2001, p. 57).

Another reason why this principle was cited as the basis for the existence of ASEAN, was the unstable situation in the region, which has already been indicated in this article. The founding countries feared occurrence of conflicts or military interventions within the region. Thus, they established the regional organisation based on the rule of non-interference and aiming at prevention of ethnic, religious and political conflicts among its member states. In fact, the regional collage of political systems (democracy, communism, authoritarian rule), religions (Buddhism, Islam, Christianity), ethnic groups and national minorities (the dominance of the Chinese diaspora) could very easily become a cause of conflict. The official state borders did not overlap in any way with the ranges of different religions and cultures. Mutual fear of potential interventions was so strong that the principle of non-intervention was clearly emphasised at every opportunity. In the words of Amitav Acharya (2001, p. 57-58): "As new political entities with 'weak' state structures (e.g. lack of a close congruence between ethnic

[2] Emphasis by the author of this article.

groups and territorial boundaries) and an equally problematic lack of strong regime legitimacy, the primary sources of threat to the national security of the ASEAN states were not external, but internal".

What is more, the rule of non-interference has reached beyond ASEAN and was applicable also in case of states that had not yet joined the organisation. The principle of non-interference was a reason for ASEAN's refusal to address the genocidal acts of the Pol Pot regime during 1975-1978 (Cambodia was not a member of ASEAN at that time). It was also the reason for the condemnation of the Vietnamese invasion of Cambodia (1978), as an example of violation of the non-intervention principle and sovereignty of the country (even though the Cambodian regime of the Khmer Rouge was committing a genocide) (Acharya, 2001, p. 59).

Of course, not only a direct military attack is considered a violation of the principle of non-intervention. This rule also applies to:

- refraining from criticising the actions of a member government towards its own people (even if human rights are violated);
- criticising the actions of states, which were deemed to have breached the non-interference principle (e. g. Vietnam, 1978);
- rejecting support to any rebel group seeking to destabilise or overthrow the government of a neighbouring state (Malaysian and Filipino support for opposing Muslim groups in Mindanao and Sabah);
- providing political support and material assistance to member states in their campaign against subversive and destabilising activities (Acharya, 2001, p. 58).

The above-mentioned cases seem to be a common-sense approach to intervention in the internal affairs of a state. However, the SEA states and especially the ASEAN Member States' interpretation of this principle has gone much further. There was, for example, no open criticism of military coups in Thailand, martial law in the Philippines, Indonesian actions in East Timor, or the use of detention without trial in Malaysia and Singapore (Funston, 2000, p. 2-3).

Often, even criticism expressed by journalists and reporters in the media concerning such events resulted in an official apology by the Heads of State.[3] Such attitude has, on the one hand, strengthened ASEAN internally, creating the image of an organisation,

[3] When the Malaysian TV screened a CNN report showing graphic scenes of the 1991 Dili massacre in East Timor, Prime Minister Dr. Mahathir sent his Information Minister to Jakarta as a personal envoy to extend apologies.

in which "no-one washes dirty linen in public". Still, on the other hand, a lot of problems are swept under the carpet, which builds a sense of tension in international relations between the states concerned.

Along with the process of integration within ASEAN and the appearance of some political and economic crises, the rule of non-interference started to be reinvented. In 1997, Anwar Ibrahim (Deputy Prime Minister of Malaysia), proposed a new approach to this principle, describing it as "**constructive intervention**". The concept was based on the following assumptions: assistance to reinforce electoral processes in new ASEAN members, increased support for legal and administrative reforms, development of human capital, and strengthening the rule of law. These assumptions did not constitute attempts to undermine the principle, however, they have been interpreted by many as such. This concept has not been adopted, though the idea remained valid, as the economic crisis deepened (Funston, 2000, p. 11).

The question concerning the revision of the principle of non-intervention has been raised again by Thai Foreign Minister Surin Pitsuwan in 1998. He argued that it is "time that ASEAN's cherished principle of non-interference is modified to allow ASEAN to play a constructive role in preventing or resolving domestic issues with regional implications" (Funston, 2000, p. 11). He also suggested "constructive intervention" as a solution to ASEAN's problems, yet, to make it more acceptable to other leaders during the Ministerial Meeting in Manila, he renamed it as "**flexible engagement**" (Wu, 2000, p. 11). Under this concept lies the desire to build a regional society, in which the participants would have both rights and responsibilities. He indicated that many internal affairs have an impact on other countries and often on the entire region of SEA and the relations within it. Despite such rational arguments, only the Philippines supported this idea, while Burma publicly criticised it (Wu, 2000, p. 11-12).

Despite the reluctance of some SEA countries concerning the reinterpretation of the principle of non-interference, they are all aware that it will be necessary. The level of interconnections between the economies of these countries and their societies, which nowadays are becoming more aware, are forcing the authorities to abandon their passivity in this area. That is why, in the ASEAN Charter, signed during the 13th ASEAN summit in Singapore in November 2007, we might find the notion of "**enhanced interaction**". It is interpreted as limited to diplomatic pressure and aid with the consent of the state in question. It is a step forward, nevertheless, issues such as human rights are still considered to be internal ones and not subject to this rule (Berglund, 2007, p. 32).

Yet, some significant signs of a change have appeared in the recent years. Burma proves to be a good example, as a country which has, along with Cambodia, for many years strongly opposed any revision of the rule of non-interference and thus slowed down the evolution of any human rights agenda within ASEAN. It was for the first time during the "saffron revolution" in Myanmar (2007) when ASEAN worked out a common declaration addressing HR atrocities committed by the regime. Additionally, in case of relation between Myanmar and ASEAN, one may speak of a certain positive influence on Burma due to its socialisation within the organisation. It may be claimed that the current process of political transformation (even though still imperfect and at a very initial stage) is an effect of a complex set of determinants, including the process of Burma`s consecutive integration within ASEAN and its participation in common rules, norms and obligations (Berglund, 2007, p. 38-40).

When observing IR in Southeast Asia, one can see a strong devotion to the principle of non-interference on the one hand and, at the same time, it's different, unilateral interpretations on the other. It possesses certain advantages, such as stabilising the political situation and the common position in international relations (e.g. it ensures a common position on major international issues and provides a sense of unity of the organisation in the eyes of international opinion). However, its most significant drawback is an overly zealous interpretation of the non-interference rule, thus, even if a government makes mistakes or violates human rights (which was particularly true till the end of 20th century), the ASEAN countries hardly comment on it and rarely criticise such activities (e.g. no reaction to the events in Cambodia under the Pol Pot regime). In the author's opinion, this can be deeply rooted in the concept of "losing face", and not just in political correctness. There has been a change in looking at non-intervention after the experience of the economic crisis in the 1990s. When the feeling of abandonment by the West, adverse WTO solutions, combined with the need to find specific tools to deal with regional problems, the awareness of both – interdependence and globalisation has increased within the group of ASEAN states. They started discussing the interpretation of the rule of non-interference rule and possible adjustments to it in response to emerging needs of the evolving organisation.

Asian Values and the ASEAN Way

One could ask the question why the rule of non-interference is so deeply rooted and difficult to change in SEA. As it was said before, it is not an exclusively Asian notion. It

is commonly known in the theory of international relations and has been one of the core principles of the Westphalian world order. Then, why it is perceived as one of the distinctive features of ASEAN? In the opinion of many researchers (Acharya, Funston, Kosmala-Kozłowska), it is present there due to two reasons. The first of them is called the "Asian values", a specific substrate of philosophical, normative and socio-political concept interlinked with the principle of non-interference, adopted particularly well in ASEAN. The second is the "the ASEAN Way", constituted in the practice of ASEAN in a form of a set of meta-values and directly supporting its implementation.

Asian Values

Close cooperation between the states of the SEA region is not only based on a cold calculation of a political and economic alliance set to maintain security. The basis for such a long and, despite numerous obstacles, successful collaboration lies in the shared values. In this region, one may observe the coexistence of many religions and ethical systems that do not exclude one another, where the cults often coexist (e.g. Christianity, Animism and Shamanism in Vietnam, Islam, Animism and Hinduism in Indonesia) (Kosmala-Kozłowska, 2013).

Then, one should also add to it the Confucian notion of the middle path, a lack of need to reject one of the two theses conflicting with each other, a strong need for social harmony based on hierarchy and respect. These and many other reasons underlie the creation of the idea of *Asian Values* (*AV*), proposed to clearly distinguish the societies of the SEA countries from, for example, the societies and values of Europe, or, more broadly speaking, the Western values. The best proof for this sense of unity and belonging to a single, broadly understood culture, is the ASEAN motto: "One Vision, One Identity, One Community". The official motto of the ASEAN founding member, Indonesia, is: "Unity in diversity", which also appears to have a symbolic significance here, as it indicates that despite all differences in its multicultural society, simultaneously, there exists a deep feeling of unity.

Mahathir Bin Muhammad and Lee Kwan Yew, popularisers of this concept listed the following "Asian Values":

- **Social harmony**, consultations and consensus over confrontation and restraint in making divergent opinions public (e.g. Internal Security Acts in Singapore and Malaysia);

- **Welfare and socio-economic rights** over civic and political rights (e.g. land acquisition in Singapore; Constitution not enshrining the right of property);
- **Collective rights of the community** over individual freedoms (e.g. violations of the freedom of religion by/under the "Maintenance of Religious Harmony Act" in Singapore, due to which the Jehovah's Witnesses and the Unification Church were banned, because of "causing feelings of enmity, hatred, ill-will or hostility between different religious groups" (Maintenance…);
- **Loyalty and respect for the authority** in all its forms over independent actions by self-sufficient individuals (e.g. the Public Order Act, which among other provisions, limits the freedom of assembly in Singapore, but also similar laws in Hong Kong or Japan);
- **Collectivism and communitarianism** over individualism and liberalism;
- **One-party/great man rule** over political pluralism (e.g. the rule of the Communist Party of Vietnam since 1976, the government of Lee Kuan Yew in power for three decades in Singapore);
- **„Friendly authoritarianism" or non-liberal, Asian-style democracy** instead of the Western model of liberal democracy (e.g. Singapore with its "rule by law" legal order) (Kosmala-Kozłowska, 2013).

One may see, therefore, that what was called *values*, is essentially a set of operating principles for the society and the state. From the European point of view, a *value* is considered to belong to the sphere of human rights or freedoms, or, as Geert Hofstede expressed it, "unconscious emotions" (See: Hofstede & Hofstede, 2005).

As different approaches to the issue of *value*s prove how much we differ, thus also the organisations that we create are different. Yet different does not mean better or worse, only not the same, thus, we should learn to use each other's experiences. One flows from the other, how we understand the "value", results from the fact in what *values* we were raised. If it was a sense of community, hierarchy and respect, the *AV* will be best example of how we understand this term ("values"). **Harmony** in the system of international organisation is associated with a lack of public criticism towards each other. The principle of non-interference, represents also **respect** for different political systems (one-party/ great man rule, „friendly authoritarianism" or non-liberal, Asian-style democracy), or **loyalty** to our allies.

The ASEAN Way

The doctrines of non-interference, non-intervention and pacific settlement of disputes are features not only of ASEAN, but also of other international organisations, while the "ASEAN Way" is a term, as the name itself indicates, typical for this particular organisation. "The ASEAN Way is a term favoured by ASEAN's leaders themselves to describe the process of intra-mural interaction and to distinguish it from other, especially Western, multilateral settings" (Acharya, 2001, p. 63).

It is a term that refers to numerous concepts and ideas, loosely connected, while in itself it offers no single official definition. Ideas underlying the term are many, yet the most characteristic are two concepts that describe the process of consultation and decision-making in ASEAN: ***musjawarah***, meaning "consultation," and ***mufakat***, "consensus" both from the Indonesian language. "The application of the ASEAN way has two strategic goals. The first is to not allow bilateral disputes between ASEAN states to disrupt wider regional stability and the functioning of ASEAN itself. The second is to not let bilateral issues between ASEAN states and non-ASEAN states negatively affect intra-ASEAN relations" (Weatherbee, 2009, p. 128).

Musjawarah in practice is a process of compulsory and informal consultation that takes place before every decision is made by ASEAN. This is the time to confront views on informal forums which allows each participant to "save face", all positions are respected and no one is ignored. The usual process of consultation is performed at the lower levels of diplomacy, therefore, when it comes to high-level meetings all of the issues have already been explained. Thanks to this process, each of the members of ASEAN is sure that none of the decisions will be made behind his back (Kosmala-Kozłowska, 2013).

Whereas *mufakat* means that all decisions must be made in accordance with the rule of consensus. In practice, this means that all members must agree to undertake a decision, thus, prior consultations (*musjawarah*) are necessary for this purpose. If differences of opinion are unsurmountable and achieving satisfactory compromise appears impossible, all countries express publicly their solidarity in the matter without specifying their approach in detail, therefore, no precedent, potentially dangerous for the member states, is created (Kosmala-Kozłowska, 2013).

As mentioned earlier, the term *ASEAN Way* should not be limited solely to the issue of *musjawarah* and *mufakat*. This is a much broader term covering all ASEAN specific modes of operation, diplomacy and the principles of non-intervention, which is based

on the observance of the ASEAN Way. In the words of Singapore's Foreign Minister S. Jayakumar, "the ASEAN Way stresses informality, organisation minimalism, inclusiveness, intensive consultations leading to consensus and peaceful resolution of disputes" (Acharya, 2001, p. 63).

Therefore, the ASEAN Way and the rule of non-intervention, together with the principles of peaceful settlement of disputes and regional solutions to regional problems form, the basis for order that was created in SEA in 1967. However, one cannot state that since ASEAN came into being, the region of SEA has enjoyed idyllic times. As history shows, the principle of non-intervention has been repeatedly put to the test. To better understand the seriousness of the often tense relationship, a few examples of various applications of the principle of non-interference are cited as follows.

Applications

Some practical situations in which the rule of non-intervention has proved effective, have already been mentioned, therefore, a few of them will be discussed more thoroughly. These examples prove that this rule is applicable in international relations in the region of SEA to a high and specific dimension, particularly from the European point of view. I would like at this point to only describe these situations and do not judge them for now.

Democratic Kampuchea

This is an example when the principle was used against a country that was not a member of ASEAN at that time (although the situation was affected by obvious plans to include all countries in the region in the organisation). As mentioned earlier, ASEAN refrained from responding to events that took place in Cambodia under the Khmer Rouge regime (1975-1978) (Acharya, 2001, p. 59). They enjoyed the support of the prince, the rightful ruler of the country, who was at that time completely removed from power and stayed under house arrest. During this time, Red Khmers introduced their bloody regime based on communism and nationalism, forced labour and mass purges of the so-called "new people" (old intelligentsia, the urban population, military, and each recognised for being a former member of the elite). During the time of their official government and earlier guerrilla, over 25% of the population of Cambodia was killed or died from starvation. Despite such blatant violations of human rights, ASEAN did not respond.

Consequently, after the Paris Peace Accords, Cambodia paved its way to be ASEAN guest from 1993 to 1995, after that ASEAN observer from 1995 to 1996, and finally full member on April 30, 1999. After the democratic changes and elections held in 1993 in Cambodia, ASEAN wanted it to become one of its members to maintain peace in the region. Since 1999 Cambodian membership in the organisation has had positive impact on its political and economic developments. It also positively affected Cambodia's external relations with its neighbours as it was indicated in 2008 in case of the border conflict with Thailand over Preah Vihear. Even though the lack of consensus made the relationship between the two countries hostile (Law Teacher, *ASEAN and History*…), ASEAN mediation prevented military conflict at that time[4].

As presented on the example of Cambodia, ASEAN reactions can be interpreted both in a positive and negative way. On one hand, a lack of involvement in the internal affairs of the member-state may be observed, even when it comes to explicit human rights violations on a massive scale. Simultaneously, on the other hand, any military invasions are condemned and the principle of non-interference is still guarding peaceful, even though not perfectly harmonious, relations between ASEAN countries.

Vietnam (1978)

Just as in the quoted example of the Democratic Kampuchea, Vietnam was not a member of ASEAN at the time when the latter strongly condemned the invasion of Vietcong forces in the Cambodian territory (1978/9). This intervention was associated with the violation by Vietnam of the principle of Cambodian sovereignty. The occupation of Cambodia by Vietnamese forces lasted nearly all the 1980's. Despite the fact that as a result of this intervention the murderous regime of the Khmer Rouge was overthrown, ASEAN condemned the action. "ASEAN, flexing the diplomatic muscle of its political solidarity, opposed it on the ground that changing another country's regime by force was unacceptable" (Severino, 2009, p. 18). The situation was not only a violation of the principle of non-intervention, but also a complex international situation. There was fear of increasing the Soviet influence in the region, shared also by China and the U.S., as well as the impact of threatening the stability of neighbouring countries, especially Thailand, in which the refugees from Cambodia arrived (Severino, 2009, p. 18).

[4] There was an exacerbation of the conflict in 2011, including exchange of fire. About 10 people were killed as a result. The crisis ended with a truce, but no peace treaty was signed between the parties of the conflict.

During the invasion in 1979, the presence of Vietnamese forces in Cambodia met with a clear reaction from ASEAN. Firstly, a motion was submitted to the UN Security Council, as the relevant international political body, expected to take appropriate steps (ASEAN was not a military organisation, and, moreover, neither Cambodia nor Vietnam were its members at the time). Then, a precise declaration was issued during a meeting of foreign ministers of ASEAN countries. The document demanded an immediate withdrawal of Vietnamese forces from Cambodia. As declared by ASEAN member states, the violent aggression was unlawful and broke all the appropriate rules of international law, even if the intervention had stopped the terrors of the Khmer Rouge regime (in fact it had not). Because the conflict posed also a direct threat to Thailand, whose borders were often crossed by Vietnamese forces, the ASEAN states expressed their full support for Bangkok concerning protection of its borders.

To weaken the actions performed by Vietnam, ASEAN supported also the Khmer Rouge forces. The occupation of Cambodia lasted until 1989, after China invaded Vietnam in 1979 (it was held without the approval of ASEAN, which opposes the use of force by the PRC in SEA). It is important to highlight the fact that, in this particular case, the position of ASEAN was not homogeneous; Thailand supported the hard line on the issue of conflict solution together with the PRC, while countries such as Malaysia and Indonesia intended to look for other, peaceful and conciliatory solutions (Weatherbee, 2009, p. 80-85).

The example presented above demonstrates that the principle of non-interference is particularly important to ASEAN, so that its violation would always trigger an immediate response. It also shows that there have been some significant exceptions from both the "ASEAN Way" of decision making and the rule of non-interference within the group of ASEAN states (e.g. when Thailand, which was directly threatened by the actions of Vietnam, decided to take harder measures than those consensually recommended by the organisation).

Myanmar / Burma

The access of this country to ASEAN provoked outrage of the world public opinion and for years blocked the diplomatic relations with the EU and the U.S. Myanmar later called Burma, remained, during most of its independent existence, under the rule of a military junta. Dramatic economic situation, massive violations of human rights, drug trafficking, the spread of HIV / AIDS and endless waves of migrants were among the

many problems faced by this country and its neighbours. Despite bloody suppression of protests in 1988 and 2007, as well as repression of the democratic opposition (led by Aung San Suu Kyi) on July 21, 2008, Myanmar ratified the Charter of the Association of Southeast Asian Nations (it is important to note that by that time human rights and democracy have been already embraced in the Charter). The ASEAN members explained that such a solution is the best for Burma and thanks to it the country will find itself in an environment conducive to economic growth, which will in turn lead to improving respect for human rights as well (Arendshorst, 2009).

Diplomatic efforts by ASEAN to promote the dialogue between the democratic opposition and the State Law and Order Restoration Council (SLORC), as well as actions aimed at observance of human rights are worth mentioning here. Some leaders of the ASEAN states sought a meeting with Aung San Suu Kyi when she was placed under house arrest. The Philippine President, Fidel Ramos, requested such a possibility in 1997 and was denied, nonetheless, the Foreign Minister, Domingo Siazon, enjoyed this privilege instead. Since 1997, also the new Thai government began to intensively insist on guaranteeing respect for human rights in Myanmar (Wu, 2000, p. 6-7).

Despite the fact that ASEAN has never decided to directly intervene in the internal affairs of Burma (not to create any precedent of breaking the rule of non-interference), Burma's accession to the organisation has had an indirect impact on its internal political system. The processes of democratic transformation that can be observed today are to an extent a result of ASEAN's inclusive approach towards Myanmar, as it decided not to engage in isolating Myanmar and, in a contrary manner, allowed the country to join and socialise with the community of SEA countries. Simultaneously, the change of ASEAN's approach toward the authorities of Myanmar during the "saffron revolution" appears to have a particular importance in the above-mentioned context. It was the first time when the violent suppression of demonstrations and human rights violations met with such a strong response of the organisation (Berglund, 2007, p. 38-40).

Conclusions

Even though the rule of non-interference is not unique for ASEAN, it still represents one of the core specificities of the sub-regional international relations (including its basic elements characterised by the so called "ASEAN Way"). On one hand, it has become to be the basis for successful cooperation and confidence-building, particularly in the early years of existence of the organisation. Then, still present internal tensions and

instability of the ASEAN member states, as well as continuous conflicts could have resulted in the collapse of the idea of the organisation. However, thanks to the principle of non-interference and the common standards of conduct based on consultation and compromise, there has been no international long-running conflict within ASEAN since 1967[5]. This long period of peaceful coexistence among ASEAN states has created the basis for stable economic systems that (more or less) efficiently contribute to the improvement of living conditions for their citizens.

At the same time, numerous turbulences (political and economic), as well as the increasing level of involvement in economies and people's political awareness, raised questions concerning the reinterpretation of the rule of non-interference. There appeared numerous proposals to relax the rule of non-intervention (e.g. a constructive intervention or flexible engagement), however, the strong sense of endangered sovereignty made ASEAN states yet unready for its implementation.

When it comes to answering the research question posed at the beginning of this article, whether this rule accelerates or slows down the process of integration and development within ASEAN, the answer is not clear. On the one hand, it offers a sense of stability and security, especially from the perspective of small countries. On the other, it often becomes the cause of lack of response towards negative actions performed by governments and human rights violations. From the point of view of the West, the common use of the rule within ASEAN is in accordance with the law, it fails, however, to be ethically or morally justified, especially in cases of blatant human rights violations. The point of view of the SEA countries, still strongly supportive for the rule of non-interference and based on the "ASEAN Way", appears to be highly utilitarian, as none of these countries intend to create a precedent that could possibly turn against themselves in the future. However, as mentioned before in this article, there have appeared certain signs proving that this kind of approach is slowly changing, since the issues related with human rights started to gain more attention on the ASEAN forum and, in the opinion of the author, such positive changes should not pass unnoticed. Particularly, in a couple of recent years, official ASEAN documents and declarations have more often included slogans on human rights protection, promotion of democracy as well as economic development focused on the improvement of people's life standards within the ASEAN member states. Along with these changes, the non-intervention approach appears to become gradually more flexible, in both dimensions: political rhetoric and diplomatic practice.

[5] With exception of the Thailand-Cambodia conflict mentioned above in this article.

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Abstract

The present paper is dedicated to the importance of the non-intervention principle within ASEAN and the step-by-step evolution of its interpretation by ASEAN member states. The author describes the ongoing changes in the perception of the rule of non-interference in internal affairs, which has originated from protection of the state sovereignty and security in the post-colonial era. The author of this article pays particular attention to the latter aspect and refers to case studies concerning various interpretations of the discussed principle by ASEAN member states. At the same time, the paper focuses on certain emerging symptoms of inclusion, within the organisation, of a set of identical principles and values in a group of traditional (political and economic) priorities of the regional integration process, including the institutionalisation of basic elements of a regional human rights regime.

Key words: *ASEAN, the rule of non-interference, ASEAN Way, Asian values, human rights*

Anton Ruliou

Sinocentrism and Democracy – Mutual Influences

Preface

The relationship between the Chinese philosophical and socio-political thought on one hand and the liberal concept of democracy on the other has never been easy. While Western technological modernisation has slowly become accepted by all layers of the Chinese society and plays an important role, little progress has been achieved in making mainland China more democratic and more transparent. During most of its history, China had been a particularly self-centered and traditional society, which later would become known as Sinocentrism. In the historical context, a notion which can be defined by the ancient Chinese worldview portraying China as the Middle Kingdom and all other countries as, to some extent, barbarians. Until the two Opium Wars, which proved that the Chinese civilisation was technologically far behind the Westerners, this idea has dominated the Chinese worldview. Nowadays, Sinocentrism is often used as a buzzword related to the rise of China, which has recently moved from being simply a developing state to a global power, whose wishes and goals often contradict the Western ones. Most vividly, the extent to which the concept of democracy was changed in China can be seen in the works of Sun Yat-sen, which still maintain a significant status in the contemporary Republic of China (Taiwan).

The term "democracy" first appeared in the Chinese language in the late 19th century. This fact is credited to an exiled Chinese writer Liang Qichao, who, having been expelled to Japan after a protest for increased popular participation, translated the works on political thought by certain crucial Western authors (such as Hobbes, Rousseau, Locke, Hume, and Bentham). Liang favored a gradual reform to a constitutional monarchy at the time. Later, in 1905, "democracy" became a part of Sun Yat-sen's Three Principles of the People, along with "nationalism" and "welfare" (Sun, 1924). The interest in democracy can be attributed to the general desire of the Chinese intelligentsia to use Western technology and way of life in order to save China from Western imperialism.

The anti-imperialist May Fourth Movement used "Mr. Democracy", just as well as "Mr. Science", as a part of the platform of their movement to adopt Western ideals in the fight against foreign influence. Mao's revolutionaries used "people's democratic relationship" in order to describe the political order they were aspiring to. However, in both cases, the exact strict Western meaning of democracy was changed to match the political needs of those using it. People's rights, republicanism, and constitutional government were terms discussed with a greater intensity primarily as means to combat the slavish passivity of Chinese citizens. The Western concept of democracy at all times, with the exception of Taiwan starting from the 1980s, was proclaimed as being alien to the Chinese culture.

Before accessing the manner in which Chinese Sinocentrism shaped the relationship between China and the concept of "democracy", it would be useful to refer to the peculiar history of thought in China. It is important to underline that almost all philosophical schools during the Chinese history were a product of China proper, and even if such schools were imported from foreign countries, their ideas had to adapt to the Chinese worldview, and most importantly to Confucianism, which dominated the Chinese public life for a period of time ranging from before Christ to the very end of the last Chinese dynasty of emperors in the beginning of the 20th century.

The Chinese political thought was developed under a long-term influence of various philosophical and political tendencies. During the period of Hundred Schools of Thought, there were multiple schools of thought who served numerous warlord-like rulers in need of advice on methods of governance, war, and diplomacy. Multiple factions of military leaders fought each other for dominance in China, what quite surprisingly provided a significant boost to philosophical thinking. In the end, Confucianism came to dominate the political system of China, yet other schools of thought definitely left their impact on the further development of the Chinese civilisation even despite the infamous "Burning of books and burying of scholars", ordered by the winning Qin Dynasty against all schools of thought except Legalism.

Legalism, which came to dominate the political scene of China during the rule of the aforementioned dynasty, was a peculiar philosophy. Its proponents emphasised strict obedience of the laws. A strictly utilitarian philosophy, Legalism claimed that all laws should be public, and that the position of the ruler makes him legitimate. The laws, of course, came from the emperor. The ruler was also to use secrets and special tactics to stay in power and to prevent other contenders from overthrowing him. This made some scholars compare Legalism with the writings of Machiavelli (Chang, 2011, p. 45). The

state was supreme to the individual, who could only gain personal freedom, if this would reinforce the ruler. During the rule of the Qin Dynasty all other philosophical schools were suppressed. Using pure Legalism, this dynasty managed to rule for just 15 years before a series of rebellions dethroned it. Nevertheless, despite the official abandonment of Legalism, it influenced numerous Chinese emperors afterwards.

After the end of the brutal Qin regime, a new Han Dynasty opted for a milder Confucian ideal of ethical kingship. Since that time and up to the twentieth century, the political life of China has been dominated by Confucian ideals. Nevertheless, there was another prominent doctrine, Taoism, whose priests and astrologers were able to hold discussions with Confucians. Its proponents, just as the proponents of Buddhism and other philosophical doctrines existing in China, nevertheless, had to conform to Confucian ideals as Confucianism always was the first among equals.

Despite dominating the Chinese thought for a long period of time, Confucianism was attacked a number of times since its adoption by the Han Dynasty. Most noticeably that happened during the late Qing dynasty, when the Taiping Rebellion and the May Fourth Movement both attacked Confucianism as the main reason for Chinese backwardness in comparison to the Western powers and Japan. But the most ferocious criticism came from the Communist Party after its victory in 1949[1]. Confucius was proclaimed a "reactionary enemy", and his name was used to attack the political enemies of the Party. Mao himself was on the front page of a revolutionary newspaper proclaiming the desecration of the tomb of Confucius – it is worth mentioning that the Communist Party of China nowadays takes the opposite stance on Confucius (Bell, 2010, pp. 18-27).

Based on Confucianism, but also on the other teachings, China itself has developed a peculiar model of relations with the outside world. For the Chinese their own civilisation was the center of the world surrounded by barbarians. However, this world was divided into "layers" of barbarians, with the closest layer being the countries under certain Chinese influence which were regarded as "inner barbarians" and the latter being the countries outside of the Chinese sphere of influence, which were named "uncivilized lands". No country could have had an Emperor – this was a sole prerogative of China, whose Emperor had the so-called Mandate from Heaven (tianming). The neighbouring countries were viewed as vassals.

[1] Since around 2006, the Confucian thought is praised, if not glorified by Chinese leaders; see e.g. recent Xi Jinping's rhetoric: Moses, 2014. See also: Chen, 2007.

Sinocentrism is hard to understand without understanding Confucianism, which, despite its universalistic nature, is an inseparable part of the history of the Chinese civilisation. Confucianism is not a religion, but rather a strictly utilitarian set of views almost neglecting the spiritual matters. Andre Bøje Forsby singles out four most important features of Confucianism. First of all, since all human beings are teachable and improvable through personal and societal endeavour, the individual should be adapted to the roles and institutions of the society. Second, Confucianism pays attention to the well-being of the collective unit, starting with a paternalistic family, finishing with a state, which itself is organised as a paternalistic family. Third, Confucianism emphasises social harmony and order at every level of the society. The harmony is not only attained with everybody knowing their place in the system, but also by an informed knowledge of the ruler. In such a manner, the Chinese state is an inseparable part of the Confucian philosophy. Finally, as mentioned above, Confucianism is a philosophical system, which applies universally. In practice, that meant that any state could become affiliated with China, if they adopted the main tenets of Confucianism (Forsby, 2011).

It was and it is normal for people to define themselves as Buddhist-Confucians or Christian-Confucians in China. Confucianism does not attack the metaphysical, it only concentrates on down-to-earth matters. However, the adherents of any religion have to stick to Confucian norms in their everyday lives. In fact, Confucianism tolerated (other) religions even in imperial China, but privileging civil order over religious beliefs. As can be seen later, both Chinese and American foundations of life are based in the civic rather than in the supernatural, which is an important notion from the perspective of the topic of this essay.

In such a manner, there appears a contradiction between the Chinese acceptance of new ideas, compatible with Confucianism, and Sinocentrism, which proclaimed that nothing really worthy could come from the outsiders - the barbarians. All of the philosophical systems which have existed in China during its imperial history (with a notable exception of Buddhism) were developed by the Chinese within China. But even Buddhism had to be reworked as something derived from the Chinese culture – in the early ages of Buddhism in China a legend was developed, which stated that Laozi, the founder of Taoism, went to India where he became the teacher of Buddha. Buddhism, in such a manner, became portrayed as a derivation of Taoism, Chinese in nature (Torchinov, 2000).

The Chinese self-centered worldview projected itself on the Chinese model of international relations. According to it, the Chinese emperor controlled the whole world,

of "all under heaven" (tianxia). The leaders of those countries which the Chinese emperor did not control directly were believed to have their power derived from him. The leaders of all foreign countries could only establish trade relations with China, if they acknowledged the superiority of the emperor by personally offering him tribute. The ruler or the ruler's emissary were sometimes obliged to perform a quite degrading ritual of "kowtow" – which consisted of three kneelings and nine bows in front of the Chinese emperor. The state was then acknowledged by the Chinese as the vassal state, and the trade, benefitting the new vassal state, could begin. The act was even performed by the Dutch ambassador to the country.

The Chinese were defeated and conquered by the "barbaric" tribes not once in their history. Most noticeably, it happened when Mongols and then Manchus defeated the Chinese kingdoms existing at those times. However, due to the lack of culture similar in scope to the Chinese one, both invaders, instead of imposing their culture on the Chinese, chose to sinicise, i.e. to adopt Chinese culture. This, as well as the Chinese isolation from the other great powers in the world up to a certain period of time, gave the Chinese civilisation the essential characteristic of its own – its continuity and longevity (Forsby, 2011).

In such a manner, historically, China is a self-centered civilisation with a peculiar, "self-confident" manner of looking at the world both in terms of international relations and in terms of systems of beliefs. As a part of this, there is also an obvious conflict between Sinocentrism and the concept of liberal democracy. The proponents of the so-called "Asian Values" like to underline that liberal democracy is a Western concept (which it is), which is being imposed on Asia against its traditions. The government of the People's Republic of China has been a more or less vocal proponent of this position. Han-centrism, common to China at all times, certainly reinforces this.

However, this is not entirely true. First of all, there are three examples of culturally Confucian entities with a certain degree of liberal democracy while ethnically Chinese – Macau, Hong Kong, and Taiwan. Second, certain characteristics of Confucianism overlap with those of a working democracy. As Francis Fukuyama argues, the Chinese civilisation was the first one to develop the state in the Weberian sense of the term – one based on impersonal recruitment, meritocratic bureaucracy, and uniform administration – and certainly Confucianism was crucial to it (Fukuyama, 2012, p. 15). All of these properties of the state are important prerequisites for a modern liberal democracy. There are also certain parallels between the mindset of the Founding Fathers – the creators of the American democratic system of governance, and Confucianism.

Thomas Jefferson and the like were heavily influenced by Deism – a Christian movement that sought to fight the atrocities committed in the name of God by questioning personal religious revelations. Freedom of religion based on the separation of the Church and state, a basic pillar of the American democracy, was developed out of this movement. In other words, the adherence to the US Constitution, not the adherence to certain religious beliefs, made a person a citizen, contrary to the absolute majority of the existing states at the time (Chang, 2011, p. 45).

Whether Confucianism is a religion or not is disputable. Unlike many other philosophical doctrines, Confucianism focuses on the mundane rather than on the supernatural. The only term which is used in Confucianism related to the supernatural is simply "The Heaven". In fact, in classical Confucianism there exists contempt for the speculation on the metaphysical. There is a dialogue between Confucius and his student:

> Zilu asked how to serve the spirits and gods. The Master said: "You are not yet able to serve men, how could you serve the spirits?"
> Zilu said: "May I ask you about death?" The Master said: "You do not yet know life, how could you know death?"
> (*The Analects of Confucius*, p. 73).

As it has been stated earlier, Confucianism tolerates (other) religions, if the believer adheres to Confucian social norms. From that fact it can be derived that both the ancient Chinese civilisation and the United States of America (as the oldest democracy on the planet) give strict preference to the civic rather than to the supernatural. Freedom of religion, an important right in any liberal democracy, is, in fact, accordant with the pillars of Confucianism.

However, some obstacles to democratisation coming from the Chinese history exist as well. For example, China has never developed a rule of law (Fukuyama, 2011, pp. 23, 42). The legal codes of all of the Chinese dynasties were always projections of the will of the emperor. As a consequence, traditionally, the power was never accountable. In Europe, the monarch often faced opposition from the nobility, bourgeoisie, independent citizens, or organised peasants. In China, no class ready to demand rights had ever formed. Such social actors simply never emerged, and this fact is explained by Francis Fukuyama as a result of the precocious consolidation of the Chinese state (Fukuyama, 2012, p. 15).

People's Republic of China (PRC) is often criticised by the West for a lack of democracy in practice. Before understanding this criticism, it is important to remember

what the West sees as democracy nowadays. Democracy, as understood in Western liberal societies, is a political system which allows citizens of the state to choose their government by voting freely and fairly in universal elections. Democracy provides citizens with an equal opportunity to control their governments. Citizens elect their representatives to the institutions which have real power and whose decisions cannot be turned down by the appointees. Democracy also means a democratic culture with freedom of speech and freedom of religion included. The usual response of the government of PRC is that either the Western-type democracy contradicts the culture or tradition of the Chinese people or that the Chinese society is not ready for it yet (Loh, 2004, pp. 69-70).

At the same time as we have seen above there are at least three culturally Chinese entities which adopted democracy more or less successfully. Those are two ex-colonies of the European states – Macau and Hong Kong, and Taiwan, or the Republic of China, as it is still officially named. In case of the latter, as a state still claiming to be the "real" China, though much smaller in terms of size and influence than PRC, it certainly faces questions about the possible unification with mainland China. In an interview from 2010, the president of the country has publicly stated that peaceful re-unification with China is impossible without the democratisation of the latter.

One of the clearest examples of the merger between originally Chinese ideas and the concept of democracy is constitutionalism of Sun Yat-sen. It might be useful to take a look at the blend of democracy and Chinese philosophy proposed by Sun Yat-sen in his "Three Principles of the People". His works were influential in the public life of mainland China up to the Communist takeover in 1949, and are still valued in Taiwan nowadays, since Sun's party, Kuomintang, continues to play a major role on the island. It is worth mentioning that Sun's ideas never came to life, since Taiwan started to democratise only in mid-1980s, long after his death. Nevertheless, Sun's ideas represent a first serious attempt to blend the Chinese tradition and the Western social model in order to adapt the concept of democracy to the Chinese political reality.

Sun Yat-sen was a Chinese who studied to learn about the West at an early age. He became so fascinated with the West that he baptised into Christianity in his 20s. Despite that fact, Sun was persuaded that the political transformation of China could only happen if the Western ideas were modified sufficiently in order to be able to function in China. His political ideas were groundbreaking at the time, since he proposed to destroy "the Mandate of Heaven", the classical solution of the Chinese emperors to the problem of their legitimacy. He proposed to overthrow the position of the emperor and

the removal of the whole traditional system of the Chinese state existing from before Christ.

Sun's works proposed a new constitutional order for China, mixing some of the characteristics of both Western and Eastern political philosophies in the process. Certain Chinese scholars named Sun's writing an Oriental theory of constitutionalism created with some Western influence, thus again replicating the traditional Chinese need for sinicising foreign philosophies (as it happened before with Buddhism). Indeed, in his theory, Sun tried to propose a solution for some of the problems of the liberal democracy existing at the time, and by and large still existing nowadays. Confucianism influenced his propositions. The content of Sun's ideas, in coherence with the Chinese philosophy, was directly applicable to politics.

It is worth mentioning that Sun Yat-sen viewed his ideas as a means to catch up with the West with a purpose of not becoming the West but emancipating from the West. Sun indeed used many of the democratic concepts such as the separation of powers into judicial, legislative, and executive; he also discussed republicanism, regional autonomy, and party politics. But his real intentions were far from establishing a liberal democracy in China. Rather, he used Western terminology in order to tackle the problems of the Chinese model. The concepts which were introduced to Chinese changed their meaning.

Sun was one of the first thinkers in China to stress the importance of constitution, which he compared to a machine balancing the concepts which contradict each other in the Chinese culture – liberty and governance (Chiyeung, 2008, pp. 12-14). He also introduced to the Chinese political philosophy the concept of rule of law, previously unknown to it. He observed that the rule of law is fundamental to the survival of democratic politics, and that it is essential to prohibit bandits, protect human rights, and resolve conflicts. Sun's comparison of the constitution with a machine was important in order to explain to context-centered Chinese its importance. However, whether this metaphor was successful in doing so remains an open question.

Sun's constitution received the name of "Five-Power Constitution". The branches of power, typical to all liberal democracies (Legislative, Judicial, and Executive) were complemented with original two branches of power (Examination and Control), whose purpose according to Sun's writings was to overcome the shortcomings of western democracies (Sun, 1981, p. 113). The elections and the appointment of the bureaucrats by the executive was not enough for selecting the best individuals. The system needed a standardised system of exams in order to choose the best officials. In such

a manner, the old system of imperial examinations, which existed in China exclusively for almost 1300 years, found its way through the adoption of democracy according to Sun's writings.

In theory, the population of the country should have elected the president and their representatives to the Legislative Council. The president would then form the Executive Council. The heads of all other councils would then be appointed by the president with the consent of the Legislative Council. In such a manner, in theory the role of the population should have been similar to that of the electorate in liberal democracies. However, in practice, all three councils with names identical to the European ones (Legislative, Judicial, and Executive) should have been run as three departments under one organisation (the government). The independence of the branches of power, a crucial element of the liberal democracy, was not planned by Sun.

The role of the Control Council (or the Supervision Council, as it has been translated in some sources) would have been to check misconduct and misbehaviour in all other councils. Moreover, the Control Council also had the powers to impeach. This was done in order to prevent the hegemony of the Legislative, which Sun saw as dangerous for the functioning of the state.

Sun intended to separate the political power and the administrative power. Political power largely referred to the ability of citizens to control the government through four powers of election, recall, referendum and initiation of laws. The administrative power of the government should have been exercised through the Five Councils. Broadly speaking, Sun's writings established a dichotomy of "quan" (people's rights) and "neng" (governmental capacity) (Ibidem, p. 99).

There was another important state entity in Sun's model – the National Assembly. According to Sun's works, this political body should have stood above the Five Councils with the purpose of controlling them and amending the Constitution if needed. And this is where Sun's fear of liberal democracy shows up – with the exception of a few local areas the four powers of the people (election, recall, referendum, and initiation of laws) were all to be exercised by the delegates of the National Assembly, who should have been examined previously by the Examination Council.

The constitutionalism of Sun includes many strictly Chinese concepts. For example, one of the principles proclaimed in his works is "public justice in the whole world" (tianxia weigong), which originated in the writings of Confucius (Ip, 2008, p. 7). Sun also stressed the importance of maintaining the old Chinese concept of loyalty ("chung"), which applied earlier to the emperor, in the new republic. However, the

individual should have now been loyal to 400,000,000 Chinese instead of the emperor – and being loyal to such a number of people was proclaimed to be "much more glorious" (Sun, 1981, p. 46). This was, of course, an attempt to find the way to hearts and minds of the Chinese, who had no experience of any other type of power except for imperial in the history of their state.

It has to be noted that Sun's ideas about the reworking of the Chinese state had only certain common features with the concept of liberal democracy. The position of the population in his model is compared by Eric Chiyeung Ip to the position of a ceremonial head of the state, such as a constitutional monarch (Ip, 2008, p. 9). Instead of transferring power to the representatives of the people, it was more of an attempt to substitute "the Mandate of Heaven" with "the Mandate of the People". By no means had that meant campaigning, creation of grassroots organisations, or civil society. The people in his model were passive, and were governed by enlightened elites. Sun compared the ability of the collective population to govern with the infamously incapable Chinese emperor Liu Chan, while the new republican government was compared by him to Zhuge Liang, a genius military strategist and a chancellor of the state of Shu Han during the Three Kingdoms period.

In such a manner, historically, the blend of Sinocentrism and democracy produced peculiar results. By no means can it be said that democracy is impossible in the Chinese-speaking world, since, starting from mid-1980s, there is a Chinese-speaking democracy (Taiwan). The willingness of mainland China to democratise is another story. The increasing number of local rebellions shows that changes would have to be introduced sooner or later. Until that time Sinocentrism and the uniqueness of the Chinese culture will serve as an excuse for not conducting democratic reforms. But even after the hypothetical start of these reforms the peculiarity of the Chinese language may be used to assign different meanings to the Western political dialect, as it is shown in the example of the Chinese constitutionalism designed by Sun Yat-sen.

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Abstract

The purpose of this research is to show interrelation between the traditional Chinese worldview and the concept of democracy within the Chinese civilisation. This has been achieved by discussing the history of the concept of democracy in the Chinese political thought, underlining the fact that almost all philosophical schools in China during its history were the product of China proper. The study analyses the importance of Confucianism in the adoption of foreign philosophical concepts, while stressing the historical opposition of the Chinese towards everything 'barbarian', i.e. coming from the outside of China. The research focuses specifically on the analysis of Sun Yat-sen's constitutionalism, which represents a peculiar case of mutual influences between the traditional Chinese political thought and the western concept of democracy. This example shows that the concept of democracy is not completely alien to the Chinese culture contrary to the claims of the Chinese officials.

Key words: *China, democracy, Confucianism, Sinocentrism*

Aleksandra Wieliczko

The policy of Myanmar towards the Rohingya people: Implications for the process of democratic transition in the country

"There is nothing more dangerous than history used as a defence,
or history used for preaching;
history used as a tool is no longer history".
Marcel Trudel (quoted in Sawyer, 2010, p. 308)

The Buddhist Kingdom of Mrauk-U, during its most fortunate times, stretched from the shores of the Ganges river to the western extents of the Ayeyarwaddy River. In 17th century its sovereign rule embraced the culturally diversified communities, where Buddhists, Hindus, Muslims and Christians could not only coexist in the heterogeneous neighbourhood, but also benefit from each other's accomplishments. The mintage of trilingual coins in Arakanese, Kufic and Bengali aimed at obtaining legitimacy over the majority of Islamic Bengalis in the population of the realm, meanwhile boosting the profits from the flourishing port and land commerce, including slave trade. The multidimensional influences of the outstanding Sultanate of Bengal visibly and firmly dominated in the ruling style of Arakanese kings as well as blanket characteristics of their lands. According to Col. Ba Shin, "Arakan was virtually ruled by Muslims from 1430 to 1531" (Ba Shin, 1961, quoted in Alam, 2011, p. 3). Moreover, in the map featured in The Times' Complete History of the World, which presented the cultural and religious divisions in Southeast Asia in 1500, the Arakan region was illustrated as an Islamic State (Overy, 2010, p. 148, cited in Islam, 2011, p. 8).

The monarchs, though Buddhists, visioned themselves as Sultans and implemented the Mughal manner of governing, preserving the Muslim titles and wearing Persian-inspired clothes. Moreover, Muslims were willingly employed by the royal administration, usually in the prominent posts, and comprised the backbone of the army. Consequently, they contributed significantly to the spread of the Islamic culture in Arakan, while living in harmony with distinct ethnicities. Nowadays, those golden days remain merely a history.

The present region of Arakan is officially named Rakhine state, located in the western coast of the Republic of the Union of Myanmar[1], divided into four districts with the capital in Sittwe. Similarly to the whole country, its population, amounting to 3,83 million, is particularly diverse with numerous ethnic and religious minorities[2]. Nevertheless, the Arakanese history and the specific geographical features of this land have resulted in a demonstrable prevalence of two major populations[3]. The Buddhist Rakhine group is officially estimated to be 59,7% and mostly occupies the southern part of the province[4]. The second group, generally described as Islam adherents, is essentially settled in northern districts neighbouring with Bangladesh, the areas of Buthidaung and Maungdaw Townships across the Naaf River, amounting to nearly 36% (Alam, 2011, p. 2)[5]. While in the entire, 58 million Buddhist-dominated population of Burma the Muslim minority totals 15%, the figures for the Rakhine state appear striking, as among the 14 provinces of Myanmar it concentrates a half of the country's followers of Islam.

The predominant majority of Arakanese Muslims define themselves as Rohingyas[6], emphasising their self-awareness of their religious, cultural and civilisational distinctiveness. On the other hand, during half a century under the military dictatorship, the term 'Rohingya' remained a taboo among the governmental circles and the ongoing political change has not brought any significant change yet regarding this matter. The 1974 Emergency Immigration Act and the following 1982 Citizenship Act deprived the Rohingyas of Burmese citizenship, declaring them 'non-national', thence restricting their basic rights or bereaving them thereof. Experiencing the longstanding, multifaceted discrimination, the Rohingyas are listed by the United Nations among the most persecuted minorities in the world. Moreover, their status has resulted in the most complex and

[1] The term 'Burmans' is commonly used to identify the ethnic Burmese people, while 'Burmese' is applied to define all nationalities living in the present Myanmar.

[2] The last military dictatorship officially recognised altogether 135 ethnic groups as Burmese nationals, which was curtailed from 144 accepted by the first post-independence government. The country's majority of Burmans is followed by other seven major minorities (Shans, Karens, Arakans/Rakhines (Buddhist Arakanese), Kachins, Chins, Kayas and Mons (Islam, 2012).

[3] In the Arakan State, the Arakan Buddhists, the so called Rakhines are the majority, but the rest of recognised ethnic minorities includes Kamein, Kwe Myi, Daingnet, Maramagyi, Mro and Thet. Rohingyas remain officially non-existent (Amnesty International *Myanmar*, 2004).

[4] It cannot be ignored that Rakhine Buddhists also experience discriminatory treatment from the central government.

[5] Due to insufficient data available, it is commonly assumed that nowadays approximately one million Rohingyas reside in Myanmar and around 1,3 million in other countries of the region (Leider, 2012b, p. 18).

[6] Other Muslims living in the state of Arakan, recognised by the government, include Kamans, who are indigenous to Myanmar and Rakhine Muslims, described as descendants of mixed marriages with Rakhine Buddhists.

tense dispute amidst the serious ethnic problems Burma has been seen at least since the colonial times.

This paper analyses the premise of ethnical distinctiveness of the Rohingya people as well as circumstances in which the statelessness of the Rohingya emerged. Further, it discusses particular elements of the present Naypyithaw's policy towards this Muslim minority, thus the impediments deriving from injustice and intolerance it is confronted with. Finally, the outlook of Myanmar's prospective path towards democracy in the light of the scrutinised unsettled conflict will be examined in order to highlight the importance of the problem, the comprehensive solution to which should be in the best interest of the whole international community. Although the thorough analysis of the Rohingya problem is not feasible because of the limited scope of this essay, the reader should be aware of its high complexity, as it engages at least three parties within Myanmar (the Rohingyas, the Rakhine Buddhists and the central authorities), remaining hostile towards each other, apart from foreign actors involved, which affects the bilateral relations with the neighbours of the country.

The etymology of the term 'Rohingya' is arguable. While some scholars discern its origin in the 8th century CE in the Arab word 'Raham', meaning 'mercy' or 'sympathy'[7], others indicate the Arakanese epithet for the declining Mrauk-U, Mrohaung, later shortened to Rohaung, as the source of naming inhabitants of this region 'Rohingyas'. Mohammed Chowdhury claims that "the term Roang / Rohang / Roshang is the corrupt form of the old name of Mrohaung, the capital of Arakan. Later on, the inhabitants of Rohang or Roshang have been referred to as Roshangee or Rohingya" (Chowdhury, 2006, p. 12).

On the other hand, the historian Jacques P. Leider evidences the presence of the term already in the pre-colonial times by invoking Francis Buchanan-Hamilton's 1799 article on the Burman Empire languages. The Scottish physician, who served in the Bengal Medical Service from 1794 to 1815, described one of the dialects undoubtedly rooted in the Hindi group of languages, spoken by the "Mohammedans, who have long

[7] This theory is supported by Khalilur Rahman, who refers to a legend of certain Arabs, whose ships had wrecked on the shores of Arakan and they asked the inhabitants for help and mercy by saying Raham, Raham, Raham. Later on, it evolved from Raham to Rhohang and the adherents of Islam became gradually called Rohingyas (Rahman quoted in Chowdhury, 2006, p. 10). Nonetheless, the Khalikur's theory was contested by Jahiruddin Ahmed and Nazir Ahmed, who evidenced that they had "met a few hundreds of Muslims along the sea-shore near Akyab, known as 'Thambu Kya' Muslims meaning ship wrecked Muslims […] This Thambu Kya Muslims do not claim to be Ruhaingyas nor are they known by others as such. Had Ruhingyas been derived from the Arabic word 'Raham', these 'Thambu kyas' would have been the first group to be known as Ruhaingyas" (Ahmed and Ahmed, n.d., quoted in Chowdhury, 2006, p. 11).

settled in Arakan, and who call themselves Rooinga, or natives of Arakan" (Buchanan-Hamilton, 1799, quoted in Leider, 2012a, p. 8). Nevertheless, under the British rule the comparable designation went unrecorded in the administrative sources, as most Muslims were then classified as Chittagongians or Mahomedans. The need for an explicitly political, more than ethnic self-identification began to emerge in the early 20th century, simultaneously with, and partly in response to, the awakening of Burman nationalism.

Therefore, after Burma had gained independence in 1948, the term 'Rohingya' started to circulate more resolutely, firstly among few Arakanese Muslims from Maungdaw and Buthidaung, and then spreading dynamically in the aftermath of the 1970s and 1990s refugee crises. As Jacques Leider notices: "a careful delineation of the term Rohingya reveals that while the term has a lineage of several centuries, the way it is used today by some members of the Muslim community in Rakhaing State to refer to themselves is of fairly recent origin." (Leider, 2012a, p. 8). Although it is still contested and not utterly accepted, even amongst the members of the their own community[8], the term has become internationally acknowledged.

The puzzle of the Rohingya origins is broadly disputed and remains the core of the discord with the authorities of Myanmar as well as the Rakhine people. The government asserts that the self-definition and self-identification of the Rohingyas are exaggerated and factually false, considering them illegal immigrants from Bangladesh who arrived to Burma mostly in the 1960s in the aftermath of civil unrest in the contemporary East Pakistan. On the contrary, intellectual leaders of the community aim to prove not only the longstanding Muslim habitation in this region, but also to accentuate the significant role they played in Arakanese history, demonstrating even the Muslim cultural superiority over the Eastern barbarian civilisations. In spite of numerous and various, sometimes mutually exclusive, concepts concerning the ancestry of the Rohingyas, the common knowledge about the presence of Muslims already in the pre-colonial times is rarely contested among scholars.

Arakan has naturally emerged as a borderline between Buddhist and Muslim-Hindu Asia, in the midst of the Indo-Aryan and Mongoloid races. Since the independent kingdom was conquered by Myanmar in the late 18th century, in the consecutive decades its population was alternately displaced or encouraged to reside. Unsurprisingly, the contemporary problems of modern Burma stem from the period of colonisation. The British incorporated the Rakhine region in 1824, while the Burman army was struggling

[8] The term may be regarded by some members of the community as highly politicised or the fear of repressions discourages them from open self-determination.

to thrust the Arakanese Muslims to the west into the British Raj zone. However, the principle of 'divide and rule', also applied to the so-called 'Further India', favoured minorities and promoted migrations, hence contributed to the return of Muslims and to the increase of Burman nationalism, which consequently deepened the interethnic hostilities. The very popular slogan of the 1930s was "Burma for Burmans" and originated from the Burman national movement, the so-called DoBamar Asiayone (We Burman Society), of which one of the prominent members was Aung San (see: Zaw, 2009, p. 109-110).

The significant Bengali immigration from Chittagong to the Rakhine region additionally boosted the demographic revolution at the turn of the 19th century[9], which led to the displacement of Rakhine Buddhist towards the south and piqued their malevolence against the Muslim communities. Furthermore, the tensions were further intensified as a result of the Japanese invasion of the Arakan state in 1942, as the Rakhines along with the Burmese national movement sided with the Japanese, and the rest of non-Burman ethnicities supported the British. The Rakhine region remained the front line until the end of the Second World War, which led to the consolidation of divisions and the continuing isolation of Muslim areas in a liberating, extremely multiethnic country. Between 1942-1945, the Mayu area remained under the administration of the Muslim Peace Committee. In 1945, while taking power from the President of the Muslim Peace Committee, the British promised to create a "Muslim National Area" within the lands of North Arakan (see: Siddiqui, 2005).

As aforementioned, with the emergence of independent Burma, the Rohingya intellectuals commenced to precisely distinguish the community they represented from other ethnicities in order to justify the actual existence and distinctness of their developed and solidified ethnic identity with the long-standing historical roots in the Arakan region, even though in the following years various, often contradictory explanations of the Rohingya origins have been derived; most commonly Moors, Arabs and Persians are considered to be their fundamental ancestors (Piper, 1993).

Imtiaz Ahmed emphasises the existence of two basic theories regarding the origin of the Rohingyas: one of them suggests that "the Rohingyas are descendents of Moorish, Arab and Persian traders, including Moghul, Turk, Pathani and Bengali soldiers and migrants, who arrived between the 9th and 15th centuries, married local women and settled in the region", while the second indicates that "the Muslim population of the

[9] For instance, as Imtiaz Ahmed observes, the population of the Maungdaw Township increased from 18,000 in 1831 to about 100,000 in 1911 (Ahmed, 2009, p. 3)

Rakhine State consists mostly of Bengali migrants from the erstwhile East Pakistan and now Bangladesh, with some Indians coming during the British period" (Ahmed, 2009, p. 2). Nevertheless, there is a broad disagreement concerning the question of Bengali roots (compare: Siddiqui, 2011).

Having resided over the centuries in a certainly diverse and changeable geopolitical environment, they have developed unique traditions and culture as well as a specific language, stemming from Chittagongian, which is a Bengali dialect mixed of Arabic and Urdu (Amnesty International, 2004). This linguistic affiliation to the Indo-Aryan people of India and Bangladesh additionally differentiates them from the majority of Sino-Tibetan languages spoken in Myanmar. The Rohingyas are Sunni Muslims with elements of Sufi worship, as the majority of Muslim population in Bangladesh.

The growing self-conviction of a separate identity of the Rohingyas laid the foundations for their political movement and in 1946 the North Arakan Muslim League was founded in Akyab. With the beginning of the decolonisation process, the ambitions of its leaders were high as the sequence of events in the late 1940s was still unclear. In 1947, the Mujahideen insurgency started in the Arakan region with an aim of detaching the so-called Mayu frontier territory from the western part of Burma and afterwards associating it with the neighbouring East Pakistan. At the time of Burma's declaration of independence, the Rohingyas managed to create their own army and approached Muhammad Ali Jinnah (the 'Father of Pakistan'), "asking him to incorporate Northern Arakan into East Pakistan" (Smith, 1991, quoted in Ahmed, 2004, p. 1).

The guerilla principally aimed at the Arakanese Buddhist properties and the north part of Rakhine rapidly yielded to the Mujahideen control, which confined the power of the Burman Armed Forces (Tatmadaw) only to Akyab city. Less radical approaches, which developed in the 1950s, demanded autonomy for Arakan governed directly by the central authorities of the country, as Muslims were afraid of being dominated by the Rakhine Buddhists. As a matter of fact, this early period of Burman independence was the only time when the Rohingya request for recognition as a separate ethnic identity was acknowledged by the democratic governments of 1948-1962.

In 1951, the Resident of Burma Registration Act of 1949 was implemented, and National Registration Cards (NRC) were issued to the population. The Rohingya in North Rakhine received NRCs as well. In 1954, Prime Minister U Nu said that the majority of Maungda and Buthidaung' dwellers are of Arakan origin and are Rohingya Muslims. In 1959 Prime Minister U Ba Sue confirmed that the Rohingya is a race like all others in Burma and should enjoy equal status and rights (quoted in Nay, 2012).

Moreover, the escalating pressure from the arising Muslim organisations such as the Rohingya Jamiyat al Ulama, the Rohingya Youth and Students' Associations, disposed the Union in 1961 to establish the Mayu Frontier Administration. The entity did not provide the Muslims with autonomy and through encompassing the provinces of Maungdaw, Buthidaung and the western part of Rathedaung under the military administration, its purpose was to put an earlier end to the revolt, especially to the Mujahideen uprising. Nevertheless, the settlement received a moderate acceptance among Rohingya leaders[10], and with their ongoing lobbying, the U Nu government released a draft in early 1962 for Arakan statehood with an exclusion of the Mayu district. With the law and order situation improving, which was partly to the credit of the "Mayu Ray" police comprised of recruits from local Rohingyas, the outlook for the autonomy seemed promising for the Muslim community.

Incontrovertibly, from the historical perspective, the early newly independent, extremely multi-ethnic Burma appeared to display a moderately conciliatory orientation towards the emerging self-awareness among the groups within its society. The political landscape changed with the military *coup d'etat* of General Ne Win in March 1962 and the situation of Rohingyas inevitably deteriorated. Not only the plan for separating the Mayu area from the Arakan state was ignored, but also the Mayu Frontier Administration was dissolved in 1964 and the whole district was transferred under the Arakanese administration. The new regime initiated the policy of denial regarding the existence of the Rohingya ethnicity, which demarcated the beginning of cycles of political repression, social unrest and migration. An immediate constraint of civic rights, outlawing of all parties except the Burma Socialist Programme Party (BSPP), nationalisation of banks and business enterprises, as well as imposition of movement restriction on Muslims and buddhisation of Arakanese administration – all those manoeuvres directly and acutely affected the Rohingya minority. In 1964, each and every Rohingya organisation was outlawed and soon the Muslim militancy re-emerged, such as the Rohingya Independent Force (RIF) led by Jafar Habib, which posed a motive for the central authorities to expand their military presence in the region.

Following the 1971 Indo-Pakistani war and the independence of Bangladesh, illegal immigration of Bengalis into Arakan provoked the Myanmar dictatorship to introduce

[10] Rohingya language programme was broadcasted three times a week among other indigenous programmes of Burma Broadcasting Service from May 1961 to October 1965. Each year in February Rohingya representatives were invited for the celebration of the Union Day and the Rohingya feast and cultural shows were included (Shah, 2013).

the Emergency Immigration Act to prevent people arriving from India, China or Bangladesh (D'Costa, 2012). According to the new rule, all citizens were demanded to carry identity cards, which enabled the regime to select groups deserving to obtain full citizenship rights at its own discretion.

Practically, the act officially excluded undesirable communities from the recognition as Burmese nationals. The Rohingya were not regarded as legitimate inhabitants, as they received "Foreign Registration Cards", which caused the flight of several thousand Muslims to Bangladesh. However, it was the Operation Nagamin (Dragon King), the national census which focused on checking identification cards and taking severe actions against illegal foreigners, initiated in 1977-1978 and lasting over a decade, that forced the exodus of over 250,000 people (Leider, 2012b, p. 14) who settled as refugees predominantly in Bangladesh. The Burmese officials alleged that those emigrating to Bangladesh were "illegal Bengali immigrants who had crossed into Burma as a part of a general expansion of the Bengali population in this region" and denied responsibility by stating that violence was initiated by 'armed bands of Bengalis', 'rampaging Bengali mobs' and 'wild Muslim extremists'" (Pugh, 2013, p. 14). When afterwards many Rohingyas decided or were ordered by the repatriation program led by the United Nations High Commissioner for Refugees (UNHCR) to return to the Rakine state, the government decided to introduce the Citizenship Law in 1982.

At the outset, Myanmar authorities attempted to avoid taking responsibility for the refugees, however, they were effectively pressured by the international community. In July 1978, a bilateral agreement was signed between Myanmar and Bangladesh and on its grounds approximately 200,000 refugees were repatriated. According to Human Rights Watch/Asia reports, around 30,000 Rohingya refugees diffused locally into the Bangladeshi society and the rest emigrated to the Middle East. Nevertheless, it was estimated by UNHCR that about 40,000 of them died in refugee camps (see: Yunus, 1994, pp. 77-78 and Human Rights Watch/Asia, 1996, pp. 14-22).

The legislation replaced the previous citizenship order created after decolonisation and still remains the core of structural ethnic discrimination in Myanmar. The system is based on the colour-coded classification, lawfully categorising the population into three categories. Dwellers possessing pink-coloured National Scrutiny Card[11] are recognised as genuine citizens, blue documents are intended for the so-called associate

[11] The name of the "National Registration Card" was officially changed by the 1982 Citizenship Law to National Scrutiny Card (NSC).

citizens, while green ones for those who are naturalised citizens. White version is separately issued for foreigners. Some Rohingyas from the Maungdaw and Buthidaung Townships received Temporary Registration Cards (TRCs), which were ostentatiously called 'white cards' to demonstrate objection by the Rohingyas (see: The Stateless Rohingya , 2014). None of these ranks is available for most Rohingyas, as, according to the prerequisites of the authorities, they are not only unrecognised as descendants of the settlers residing in the area before 1823, but also denied acknowledgement as one of the distinct, identified by the government, ethnic minorities.

To receive the 'associate citizen' status, a dweller has to both be eligible to and prove a successful application for citizenship under the previous 1948 Union Citizenship Right (which was in force for two years, 1948-1950). Likewise, access to the 'naturalized citizenship' is available only for those who inhabited Burma under or before the 1948 legislation and have been naturalised after its abolishment. Nonetheless, with all three classes, the authorities have the right to refuse granting citizenship, even if the criteria are met (see: Lewa, 2009, p. 11).

What is more, the additional vague requirements of possessing a good character and a sound mind are evidently subjective criteria, which always permit a selective application of the rules by the authorities.

The main consequence of this policy is the actual legal statelessness of the Rohingya people, which entails general lawlessness and numerous constraints. Since the identification certificates are crucial for everyday activities within the country, it is a natural instrument for discrimination and oppression on the ethnic basis. The owners are expected to carry their cards at all times, as the card number "has to be given when buying or selling anything, staying overnight with friends or relatives outside your own council area, applying for any civil service and professional post and other daily activities" (The Stateless Rohingya, 2014). In response to the dictatorship's policy, radical Rohingyas unified and undertook the recruitment of Muslims residing in the area of the Bangladesh-Myanmar border. In the early 1980s, the Rohingya Solidarity Organization (RSO) was established. It swiftly gained acclaim and became the most combative group, conducting guerilla warfare against the Burman military and aimed at seizing control over the Rakhine state.

There is evidence that some members of the group had undergone military training in Afghan facilities in the early 1990s. The supporting groups included the Jamaat-e-Islami in Bangladesh and Pakistan, the LeT and Jaish-e-Mohammed (JeM) of Pakistan,

Harkat-ul-Jihad al-Islami and Jamaat-e-Mujahideen of Bangladesh, Gulbuddin Hekmatyar's Hizb-e-Islami in Afghanistan, Hizb-ul-Mujahideen (HM) in Jammu and Kashmir, and Angkatan Belia Islam sa-Malaysia (ABIM) – the Islamic Youth Organisation of Malaysia. The later accusations of Rohingya radicals' connections with Al-Qaeda and the general danger posed by Muslim insurgents were used as excuses for a continuing engagement of Tatmadaw in Rakhine state (Lintner, 2002). Therefore, the 1980s and early 1990s were marked by Rohingya extremism or even actions perceived as terrorist.

After the 1988 coup d'etat, the State Law and Order Restoration Council (SLORC)[12] seized the power and, from 1989 onwards, the new government began issuing the colour-coded National Scrutiny Card introduced by the 1982 Citizenship Law. In the later annulled 1990 general elections, the majority of Rohingyas backed and campaigned for the National League for Democracy (NLD), which focused on termination of the SLORC rule[13], and the main Rohingya political faction, National Democratic Party for Human Rights (NDPHR) officially won four parliamentary seats. Forthwith, SLORC decided to eliminate its opponents and intensify actions against selected ethnic minorities, though concentrating on the Rohingyas. Shortly, the presence of Tatmadaw in Northwestern Arakan was greatly expanded and the so-called Nay-Sat Kut-kwey Ye (NaSaKa), a border security force, was established in 1992. NaSaKa comprises members of the police forces, Military Intelligence, the internal security or riot police (known as Lon Htein), customs officials, and the Immigration and Manpower Department's officials. As evidenced in the report by Irish Centre for Human Rights, it is the major perpetrator of offenses against the Rohingya people in the North Arakan State (Irish Centre for Human Rights, 2010).

On the one hand, the Rohingyas were forced to become engaged in road construction works and on the other hand, the authorities initiated the settlement of Buddhist Arakans into Buthidaung and Maungdaw regions. As a result, the confrontations between the ethnicities erupted and in 1991 the military government decided to launch an operation code-named Pyi Thaya (Operation Clean and Beautiful Nation). As Chris

[12] Later on, in 1997, SLORC was abolished and reconstituted as the State Peace and Development Council (SPDC).

[13] The 1982 Citizenship Act was effectively implemented after the 1990 elections and part of the Rohingyas were still able to candidate and vote in 1990, using their Temporary Registration Cards, issued for some Rohingyas in Maungdaw and Buthidaung by the previous military government. From 1994 onwards, they were again allowed to purchase the TRCs, though for a payment insuperable for most inhabitants.

Leva observes, by 1991, "the government needed a scapegoat, a distraction or a common enemy to unite a populace disillusioned and angry at the regime's failure to implement the election results. They chose the Rohingyas." (Lewa, 2001). In fact, the action consisted of arbitrary arrests, land confiscations, forceful displacement, destruction of possessions and mosques, rapes and murders. Consequently, over 270,000 refugees emigrated to Bangladesh (Lewa, 2001).

UNHCR engaged again in the reconciliation endeavour and after April 1992, when the Governments of Burma and Bangladesh agreed upon the Memorandum of Understanding (MOU) regarding the conditions for the repatriation plan, the process of returns slowly began. Although approximately 200,000 of people resettled in the Mayu region within the next five years, the repatriation was extensively criticised for inadequate results and confirmed cases of compulsory deportations. The organisation Doctors without Borders, which has been involved in providing the assistance to the refugees since 1992, conducted a survey among the refugees in 1995, revealing that 63% of them did not wish to return to Burma and 65% were not aware of their right to deny repatriation (see: Medecins Sans Frontieres-Holland, 2002, p. 23). Moreover, despite the appointed terms of the MOU signed between UNHCR and the Government of Burma, concerning, inter alia, the issuing of appropriate identification documents to the returnees, as well as providing the freedom of movement, the situation of Rohingyas did not improve.

According to the MOU, agreed between UNHCR and Myanmar's SLORC, signed in November 1993, the authorities of the country obliged themselves, inter alia, to allow returnees to arrive at the places of their origin, to distribute identification documents and provide them with equal rights and freedoms (see: Abrar, 1995). Notwithstanding, the situation of Rohingyas did not change after their return and as Kei Nemoto evidences, "the Rohingyas have been treated as special foreigners who are just allowed to stay in the limited space as un-welcomed guests by the military government. National Registration Certificates have not been issued to them yet. They are not allowed to move from the townships of Maungdaw and Buthidaung, unless they pay a large deposit […] the settlement of Buddhist Arakanese into the Mayu region has still continued through government sponsorship" (Nemoto, 2005, p. 7). Regarding the government's policy towards the UNHCR repatriation process, Tin Maung Maung Than and Moe Thuzar conclude that „Burma/Myanmar's stance on both occasions was to accept the refugees and displaced persons back on the basis of these persons' ability to prove their residency status" (Than and Thuzar, 2012, p. 2).

In the following years, the influence of radical Rohingya groups decreased, as the main focus of the political movement was put on self-determination, repatriation of refugees and nonviolent cohabitation with the Buddhists. Demands for separate North Arakan as an independent or autonomous Islamic state became rare. Nonetheless, the State Peace and Development Council (SPDC) renamed from SLORC in 1997, intentionally supported the United States' "Global War on Terror" to justify its incessant militarisation of the North Rakhine state and oppressive policy towards the Muslim minorities. As aforementioned, the ongoing restrictions faced by the Rohingya people have fundamentally derived from the 1982 Citizenship Law, which denies them the right to obtain citizenship. Severe constraints on freedom of movement confine the people to the area of their villages. The willingness to travel imposes applying for a costly travel pass and struggling with consecutive administrative levels. It has dramatically limited the access to markets, job opportunities, healthcare, as well as higher education. What is more important, the Rohingyas experience particular obstacles to obtain elementary education, which is also the result of their widespread poverty and a common incapacity to speak the Burmese language. As claimed by the report from Refugees International, the literacy rates in Rohingya refugee camps in Bangladesh have been measured at 12% (Refugees International, 2006). Moreover, lacking the citizenship, they cannot be employed as teachers.

Land confiscation and deliberate burmanisation, effectively enforced by the establishment of 'model villages' ('Natala villages') for new Buddhist settlers, Buddhist sacred architecture or new military facilities, usually involve forced deracination and displacement. As a matter of fact, the construction of the 'Natala villages' relies primarily on forced labour by the Rohingyas, who are additionally obliged to provide funds as well as supply rations, electric power generators, building materials and kine for new inhabitants. Essentially, forced labour is a continuingly well-grounded practice with the involvement of children, even in the age of 9-10, eagerly utilised by the NaSaKa, the Army or police, and, in spite of signing the Memorandum of Understanding with the International Labour Organisation in March 2012, which calls for the eradication of forced labour by 2015, international observers have not observed any significant progress in this field (The Arakan Project, 2012).

With regard to restrictions on marriage and children, which are intended to constrain the inter-ethnic 'blood mixing' and suppressing the Muslims population growth, they are eminently detrimental to the Rohingya cultural and religious traditions. Required by

law to apply for permission to marry, they are not only confronted with a long awaiting for a verdict but also pressed to pay high bribes.

Women are obliged to be at least 18, and men 24 to marry, and from 2005, when the prerequisites were tightened, it is required for the bridegroom and guardians to be shaven neatly and to provide the authorities with three guardian signatories, certificates of good health, recommendation letters from a religious organisation and from the village chairman as well as the declaration of dowry (see: ALTSEAN BURMA, 2006).

Polygamy, common among Muslims, is forbidden, and widows are obliged to wait at least 3 years before remarrying. Furthermore, each household is ordered to declare a family list and all changes, such as births or deaths, need to be declared to the authorities for a fee. The 'two-child policy', stemming from a regulation adopted in 2005 in a country with a restrictive abortion law, is particularly acute for women, contributing to unsafe illegal abortions, abandoning or giving the children away and sometimes emigration of the family (The Arakan Project, 2008, p. 4). Nowadays, around 40,000 Rohingya youngsters are considered to remain unregistered (Integrated Regional Information Networks, 2012).

Restrictions towards the Rohingya minority, imposed by the authorities of Myanmar on exercise of fundamental freedoms, are multi-dimensional and, apart from the abovementioned ones, also include arbitrary or informal taxation (for instance, the so-called 'paddy taxes') and extortions, food shortages caused by governmental control of rice production and trade, religious and cultural marginalisation, persecution of political leaders, arbitrary arrests, tortures, extrajudicial homicides, rapes and sexual violence. The policy of discrimination, exclusion and brutality implemented for over five decades has been severely affecting the Rohingya people and eroded the mutual perception and treatment between all Burman minorities, leading to the exacerbation of inter-communal tension. Years will pass before the situation might change and the respect and understanding within the whole population rebuilt.

Since Myanmar began its alleged path towards political liberalisation with the 2008 constitutional referendum, it appears that the classic definition of democracy, understood as majority rule with respect for minority rights, has not been genuinely acknowledged by the authorities. Likewise, concerning the provisions on human rights enlisted in the UN Charter, the Universal Declaration of Human Rights as well as the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), have all been ratified by Myanmar. To this day, the situation of Rohingyas and, most importantly, the attitude of

the main political player in the country towards them has remained practically unchanged.

The policy of denying the Rohingya people the right to self-identification as a separate ethnicity contradicts the fundamental values of democracy and human rights. During the 2012 unrest in the state of Arakan, which rapidly expanded from communal violence into coordinated and systematic reciprocal attacks between the Rohingya Muslims and the Rakhine Buddhists, president Thein Sein considered resettling all the Rohingyas into other countries or refugee camps as the "only solution" to "the issue". While more than 150,000 Rohingyas were displaced and forced to stay in overcrowded IDP (internally displaced persons) camps only as a result of the events from June and October 2012 (Human Rights Watch Annual Report 2013, 2013, p. 30), the following year, the president was controversially honoured with the International Crisis Group's top award 'In Pursuit of Peace'. In 2014, it is estimated that over 230,000 IDPs remain displaced in the area of the UNHCR operations in south-east Myanmar (see: The UN Refugee Agency, 2014).

What is more, the already dramatic situation of the Rohingyas deteriorated with the government's decision to expel Medecins Sans Frontieres (MSF, Doctors Without Borders) from the state of Rakhine in early March 2014, bereaving 750,000 people, also Buddhist Rakhines, of virtually any healthcare (Galache, 2014). Parallelly, Myanmar's nationwide census in 2014, conducted for the first time in thirty years by the Ministry of Immigration and Population with the support from the United Nations Population Fund (UNFPA), excluded the Rohingya population from the count, confirming the government's lack of any intention to recognise them as fully-fledged citizens in the foreseeable future. Myanmar's Minister of Immigration and Population U Khin Ye, announcing the preliminary results of the census on August 30, said during the press conference: "They are holding household cards stating that they are Bengali, even though they self-identified themselves to be Rohingya, which is not allowed, so we did not accept that and instead classified them as 'unidentified" (quoted in Heijmans, 2014).

Still, not only politicians deriving directly from the previous military government refuse to accept the Rohingyas as their fellow, officially recognised citizens, but also the members of the most popular oppositional National League for Democracy (NLD) do not support the idea openly. Regarding the 2012 clashes, the NLD leader, Aung Sang Suu Kyi, faced widespread criticism over her silence on the Rohingya problem in Myanmar and consistent reluctance to use their name publicly. This worldwide recognised icon of human rights, acclaimed as "the voice of the people", is also an experienced

political fighter, presently focused on the 2015 presidential elections, and, unwilling to lose the backing of the Burman majority, she avoids radical statements and tries to "balance ideals and aspirations", while still participating in the political process. And, according to the author of this article, the irony of the ongoing socio-political changes in Myanmar is that the country's praised opening to the variety of the outer world disguises its internal problem to accept its own diversity.

In 1947, an agreement was reached between the Burmese government under Aung San and the Shan, Kachin and Chin peoples introducing several foundational regulations for federating with Burma with the principle of unity in diversity, the aim of which was to lay the grounds for the constitution of the newly emerging country. Although its premise has never been realised, multiple and conflicting interpretations have arisen around this accord, creating the perception of the desirable New Panglong Agreement as a healing solution to the multi-ethnicity problem. And the 1947 Agreement ignored numerous claims by different ethnicities, just to mention that broadly defined Arakanese concerns were almost completely unaddressed. (See more: Walton, 2008, pp. 889-910).

While the elusive spirit of the Panglong Agreement remains vivid, nationalism and islamophobia are not brand new phenomena, which have arisen simultaneously with the recent ostensible departure from the military dictatorship and partial emergence of free media. Already after the decolonisation the first civilian government of U Nu expelled the Burma Muslim Congress and established Buddhism as the state religion. Nowadays, Muslims are imaged as a threat to the shrinking population of adherents to Buddhism and any kind of interactions with them is discouraged and socially disapproved.

This affects also officially recognised Muslim ethnicities, such as Kaman, who suffer discrimination and ill-treatment as an outcome of commonly present loathing and growing popularity of nationalistic groups. The leader of the "Buddhist 969" movement, a racist monk Ashin Wirathau, often accused of inspiring and provoking persecution of Muslims through his speeches, was featured in the cover story of the Time magazine as "The Face of Buddhist Terror" on 20 June 2013 (Beech, 2013). The issue was officially banned in Myanmar, as the officials claimed it damages the image of Buddhism. Consequently, a thorough analysis of the country's internal divisions concerning the problem provides explanation for Suu Kyi's stance on the Rohingya minority as partly the requirement of the political game she is involved in and partly the outcome of socio-cultural and political heritage, which has shaped her.

In October 2013, Aung San Suu Kyi said in the BBC Radio 4 "Today" programme: "Yes, Muslims have been targeted, but also Buddhists have been subjected to violence.

But there's fear on both sides and this is what is leading to all these troubles and we would like the world to understand: that the reaction of the Buddhists is also based on fear […] You, I think, will accept that there's a perception that Muslim power, global Muslim power, is very great and certainly that is the perception in many parts of the world and in our country too" (quoted in Blair, 2013).

Notwithstanding, such relatively limited recognition of the concept of human rights by this Peace Nobel Prize laureate arouses astonishment and disappointment, questioning hopes placed in Daw Suu as the saviour of the country. As the U.S. Ambassador in Myanmar Derek Mitchell highlights, the challenges for the Burmese potentially democratic future are complex and deeper than conventionally acknowledged, due to "the deep-seated intolerance that seemed to be within the society writ large. [...] that's where the deep disappointment came. And it creates a division between them [democratic opposition] and us to a degree" (quoted in Barta, 2012).

Particularly in the light of 2014 Myanmar's ASEAN Chairmanship, assumed for the first time, since the organisation was created in 1967, and thus sensed as the country's re-entry to the international community, the treatment of the Rohingyas was believed to contest its readiness to meet the preconditions of legitimate and equality-based democracy, rooted in the idea of human dignity. This, as already pointed out, has been also perceived as an opportunity for global actors to devote their energy and resources in order to influence the policy of Burmese officials, as well as a test for their own perception of the universality concept of human rights. Unfortunately, when confronting the above expectations with hard reality, the naivety of the abovementioned hopes seems to be uncovered. Although the persecution of Muslim minorities certainly affects intra-ASEAN relations, as refugees have been seeking asylum predominantly in Southeast Asian states, such as Thailand, Malaysia or Indonesia, the prioritised ASEAN's policy of non-interference in domestic affairs of its members as well as internal controversies in particular countries regarding the matter of human rights have diminished the significance of the Rohingya problem.

Moreover, it is worth mentioning here that the international community, promptly appreciating the transition to a nominally civilian government and the introduction of significant reforms, has decided to cooperate with ex-military personnel, recognising its responsibility in encouraging further political and legal changes. The engagement of President Obama's first term administration played a crucial role in supporting the pace to found a new democracy in the backyard of China; however, particularly in the context of the recently continued violence and ethnic cleansing in Myanmar, a justified question

may be raised, whether such policy has been not missing a broader picture. The author claims that it is not exclusively the Western perspective, which assumes impossibility of efficient democracy building processes without universally acknowledged respect for human rights values. In case of contemporary Myanmar, we observe a picture of escalating hatred fuelled by state-sponsored severe discrimination, already known in the history from the Nazi Holocaust or Rwanda in early 1990s, deliberately leading to the extermination of targeted minority from the country's population. Rohingya are endangered by genocide and the world again hardly notices the crimes, respecting the "golden" principle of non-intervention that still dominates in the practice of contemporary IR.

To conclude, the long standing persecution of the Rohingya people by the Burmese regimes derives partly from historical events, but predominantly from the nationalist prejudices of the subsequent military rulers, though usually deliberately applied with an appropriate official justification of their activities. Over the years, antipathy or enmity against this Muslim minority has become strongly embedded, especially among the Burmans and the Arakanese Rakhines. As a result, both communities rewrite the history in one's favour, trying to present the only genuine, irrefutable historical truth and, therefore, to justify their rightful residency in the region. The recurring inter-ethnic clashes undermine the stability of the state and will not allow for a legitimate and profound fulfilment of its democratic transition. The multicultural society, enjoying equally the basic freedoms and sharing the respect and tolerance, should be perceived as a huge potential driving the flourishing development of the country. For now, everyone loses.

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Abstract

For half a century of the modern Myanmar's military dictatorship, the term 'Rohingya', referring to the Muslim minority settled predominantly in the northern districts neighbouring with Bangladesh, remained a taboo in the official narration of the state. In the country of enormous ethnic diversity, containing officially 135 major ethnic groups, the Rohingya remain an unrecognised and dehumanised population, struggling as well with the label of statelessness abroad. The recent reforms have additionally unlocked the society's loathing towards the adherents of Islam, which might undermine the prospects for Myanmar's reliable and peaceful departure from the militarised and centralised system of power. This paper analyses the historical and cultural background of the one of the most persecuted minorities in the world. The author attempts to examine the governmental policy towards the Rohingya in the light of the ongoing political transformation.

Key words: *Rohingya, Myanmar, minority, Muslim, democratisation*

Ibrahim Aktas

Uighur Separatism and Human Rights: A Contextual Analysis

Introduction

In this article, the author intends to explain the relationship between the human rights situation in what is commonly known as Xinjiang Uighur Autonomous Region (XUAR) of the People's Republic of China (the PRC) and the pro-independence activities of its Uighur inhabitants undertaken with the purpose of restoring East Turkestan. The Uighurs are currently effectively deprived of significant capacities to assert self-determination, mostly because of the asymmetry of power between them and the Chinese state. Nevertheless, the tension between their aspirations on the one hand, and policies aiming at thwarting them, undertaken by the Beijing government, on the other, they are locked in a vicious circle of disobedience and repression, which result in violence and violations of human rights.

The contemporary situation of Uighur pro-independence activists within the PRC in the realm of human rights is not easy to analyse comprehensively. One factor behind it is that Chinese censorship blocks independent reporting on the situation in XUAR. Moreover, during the preparations to write this article the author tried to interview Uighur immigrants in Turkey. They were unwilling to provide extended accounts on the issues covered by this article, nor to make their names public, fearing repression against their families in East Turkestan and if they would be allowed to join them again. Still, there are enough facts available via independent reporting to diagnose the general trends in human rights conditions of the Uighur minority in the PRC.

Historical context

The history of Uighurs in Turkestan is particularly long (reaching as far back as the second millennium BC) and turbulent, fraught with conflicts between the Han Chinese and the Uighur Turks, among others (Drompp, 2005, p. 103). The term 'Turkestan'

itself is Iranian in origin and simply means the "Land of the Turkic Peoples". Historically, it denoted a geographical space, now usually referred to as Central Asia, that belonged to various empires across the ages. In the second half of the 19th century the western areas of Turkestan were conquered by the Tsarist Russia and, after an unsuccessful struggle for independence, were in 1924 incorporated into the Soviet Union, within which they were divided into separate republics of Uzbekistan, Kazakhstan, Kyrgyzstan, Turkmenistan and Tajikistan. Those emerged as independent states with the breakup of the USSR in 1991. The eastern part of Turkestan, however, had been conquered by Qing China a century earlier, in 1755, effectively sealing the division of Turkestan into East and West, as the eastern portion remains a part of the Chinese state today (Glaberson, Williams, 2009).

Before the 18th century, China had occupied East Turkestan several times yet those occupations were relatively short (Alptekin, 1999, p. 91). After the Qing annexation the East Turkestani state emerged only twice and briefly. The First East Turkestan Republic (ETR) was established in 1933 and effectively overthrown a year later (Forbes 1986, p. 148). The Second Republic of East Turkestan was founded in 1944 and dismantled in 1949, following an occupation by the People's Liberation Army (PLA) of the newly established PRC. In the latter case, the Uighur statehood relied on Soviet support. In both cases, however, the ETR controlled only fractions of the contemporary XUAR: Kashgar in the first case and the north part of the region, Dzungaria, around Ghulja, in the second.

Geopolitical context

East Turkestan historically, socio-culturally and geographically is closely connected with Central Asia, being its north-easternmost part, but politically and economically it is contemporarily strongly tied to the PRC. It is favourably placed astride important geopolitical lines of Asia, most notably connected with the Chinese idea of resurrecting the Silk Road which is supposed to link the PRC with the Middle East and the West via Central Asia. It is also adjacent or close to politically volatile, restive or destabilised areas like Tibet Autonomous Region, Fergana Valley, Afghanistan and Kashmir, what makes it yet another part of a complex regional security conundrum, in which powers like the PRC, Russia, the US, India, Pakistan and Iran are heavily involved and where their interests often clash.

East Turkestan's internal security dynamics is, therefore, often overlaid by wider Asian power politics, which causes human rights issues there to be extremely politicised. It also sheds light on Chinese reasons for social, economic and political exploitation and repression of the area in the spheres of education, health, religious practice, economic life, freedom of expression as well as violations of human rights. The reverse relationship is also true: because of its geographical location, East Turkestan has emerged as one of the conflict zones of potentially global significance. Both Moscow, through the cooperation with China within the Shanghai Cooperation Organisation on combating extremism and terrorism, and Washington, in the realities of the Afghan quagmire and the global "war on terror", have indirectly taken position over East Turkestani issues.

The matter is further complicated by the rich endowment of East Turkestan in natural resources. It possesses rich deposits of coal, oil, natural gas and uranium, as well as rear earths, gold and copper, among others (Niu, Chen, 2004, pp. 70-71). Half of the Chinese yearly yield of cotton (c. 3.2 million tonnes) comes from Xinjiang (Xinhuanet, 2012). Chinese authorities are, therefore, committed to exert full control over these abundant resources of the region, and the income obtained from East Turkestan is one of the reasons of their strategic preferences. This, in turn, determines their policy of strict population control in the region and prevention of its self-determination by various drastic measures.

XUAR is one of the six autonomous regions of China, whose administrative solutions allegedly meant to accommodate the specificity of its hinterlands. The PRC usually explains its national policy as protecting democracy and human rights without affecting the country's own historical and national characteristics. In this context, three representative policies are applied. These influence different ethnic groups, promoting their drift towards the developed culture and protecting the basic interests of the Chinese people. Thus, the policies towards the autonomous regions actually aim at acculturating them to the so-called developed Chinese culture under the pretext of stability and in fact protect the interests of Han majority. As a result, demands for and expressions of political rights of minorities are associated by the Chinese authorities with separatism and are quickly labelled as acts of terrorism, providing an excuse for their brutal suppression (Karaca, 2008, p. 237).

Socio-economic context

According to the population census from 2004, there were c. 19.4 million people living in East Turkestan. Today, this number is estimated at around 25 million. (There is not

enough data related to the ethnicity of the XUAR population. An estimation, cited by Anthony Howell and Cindy Fan, is presented in Table 1.) The Han may be the most populous ethnicity in East Turkestan right now. This has already happened in some places like the capital city of XUAR, Urumqi, where roughly two-thirds of the total 2 million population are Han Chinese. According to western media news, Chinese authorities has been aiming at a similar outcome in Kashgar, the historical and cultural centre of the region, by massive confiscations of property for new commercial and residential areas to be settled by Han Chinese. This can be perceived as a new sign of China intensifying the demographic assimilation of Uighurs and other Turkic ethnicities of East Turkestan. (BBC – Xinjiang Profile 2014; World Uighur Congress).

Table 1. Demographic profile of Xinjiang from 1945 to 2008

	1945	1982	1996	2008
Total Population	3.600.000	13.100.000	16.800.000	21.300.000
Han (percent)	6.2	40.3	41.1	39.2
Uighur	82.7	45.7	50.6	46.1
Hui	2.8	4.3	4.9	4.5
Kazakh	1.1	6.9	8.0	7.1
Other	7.2	2.8	2.8	3.1

Source: Howell, Fan (2011), Migration and Inequality in Xinjiang

Some policies sponsored by the authorities against the Uighur population in XUAR meant to alter the province's ethnic composition could even be considered genocidal in the light of the Convention on the Prevention and Punishment of the Crime of Genocide, particularly in the area of controlling Uighur births. The minorities have supposedly been exempt from one-child policy under the 2001 Law on Population and Birth Planning, yet, its article 18 has ultimately allowed the provincial and local authorities to determine concrete measures of 'family planning'. Those had been particularly harsh before the law was enacted. According to the testimonies gathered by Amnesty International, women whose pregnancies exceeded approved quotas were forcefully quarantined in unhealthy and primitive conditions and subjected to abortions even in their final months of pregnancy, which usually ended in their deaths. Babies in excess of those quotas found to be born in secret were allegedly killed in

hospitals. Disregarding reproductive policies has been subject to official punishment. (Amnesty International, 1996).

The extent to which Chinese government has directly supported westward transmigrations of Han Chinese into XUAR is a subject of debate. After the annexation of the ETR, Chinese authorities encouraged settlement of the Han in Xinjiang by tax exemptions and support for the establishment of farming (Holubnychy, 1960, p. 84). However, the *hukou* system of household registration of inhabitants introduced in the 1950s institutionally limited the capacity of the Chinese population to migrate between provinces. It is unquestionable, however, that they have intensified in the era of Chinese rapid growth since 1970s, Xinjiang being almost as popular a destination as cities on the eastern coast. The government of China has undertaken serious investments in creation of industrial enterprises, factories and agricultural projects for the sake of development of the economic capacities of XUAR.

These trends have reshaped the ethnic structure of the region and contributed to sectarian tensions even more so, as Han economic migrants into Xinjiang without the *hukou* privileges had more incentives to challenge the socio-economic position of the Uighurs. With Han officials and entrepreneurs often siding with their ethnic brethren, the Uighurs have been losing the rivalry for access to jobs, houses and farming lands, though more decisively in urban than in rural areas. It is the Han Chinese who now fill both public and private urban economic sector in XUAR (Wu, Xi, 2013, pp. 9-10). Despite the constitutional provisions (Article 33 of the 1982 Constitution of the PRC envisions the right to work) and official claims by the central government of support for ethnic minorities, the economic inequality between the Han and the Uighur has been exacerbated by the rapid economic development of the province.

The Uighur disadvantage extends to the disparities in education. Being mostly a rural population, the Turks in Xinjiang have been deprived of schooling infrastructure or sufficient professional support as compared to mostly urban Han. This discrimination affects the students' chances to access higher level education throughout their career. For example, in Xinjiang University, the only university in East Turkestan, Han Chinese outnumber the Uighur four to one. Curriculum of the lessons in the school is essentially Chinese, without due regard to the Turkic-Islamic identity of the Uighurs, which contributes to the acculturation of Uighur elites. Support for teaching Uighur language ends at the level of elementary education (Gladney, 1999, p. 78).

Separatism vs. Human Rights

The contexts outlined above can lead to a claim that the relationship between the Beijing government and Han Chinese on the one hand and the East Turkestani Uighurs on the other is that of an internal colonialism. Framing this as a subaltern problem allows us to see the economic inequality, alteration of the demographic structure, religious oppression, population and birth control, restrictions in education, use of language and healthcare as well as suppression of human rights and notions of self-determination not to mention the exploitation of natural resources and the use of the territory for nuclear testing as a Chinese effort to sustain dependence by degrading the overall autonomous capacity of the Uighur population to assert themselves politically and economically. This is coupled by the delegitimisation of the East Turkestani Uighur identity through historical revisionism meant to result in cultural assimilation, in part by nurturing official narrative that Xinjiang has always been an integral part of China, despite the clear falsity of such claim.

Still, there are important obstacles for the PRC to make such assertions reality. Even though the region is featured by religious diversity, inhabited by people of such denominations like Muslim, Lamaic and other Buddhist, Taoist, shamanist and Christian, Islam remains one of its major defining cultural features. It is accepted in the article 36 of the constitution of the PRC that every citizen has freedom of religion and belief. It is also stated in the article 18 of Law of the People's Republic of China on Regional National Autonomy enacted in 1984 that authorities of national autonomous regions guarantee freedom of confession for every citizen regardless of ethnicity. Policies and administrative decisions on both central and provincial levels, however, often contradict the legal protection. Chinese officials often see religion as a factor that reflects national and religious identity of ethnic groups and describe it as a danger that threatens the security of governmental control. Ethnic groups, particularly the Uighur, are thus effectively prohibited from public expressions of their national, religious and cultural feelings.

The above reflects the ideological foundations of the PRC. Back in the Mao era, religious practice was prohibited in general and particularly vilified during the Cultural Revolution. Although since the Deng era the societal role of religion has been on the rise, the policy of oppression and violence toward more open forms of freedom of religious expression have been sustained, framed as a struggle against separatism, terrorism and extremism. According to the regulations by the State Council adopted in

1994, the authority over religious matters can in no way be entrusted to foreign nationals, and joining them in religious practices is forbidden. For instance, in July 2014, during the Ramadan, government employees and students were banned from ritual fasting (Today's Zaman, 2014).

Endangering the security of the state is a paramount offence in penal law of China. According to article 1 of the State Security Law "this law is formulated in accordance with the Constitution of the People's Republic of China for the purpose of safeguarding State security, protecting the State power of the people's democratic dictatorship and the socialist system, and ensuring the smooth progress of reform, opening-up, and the socialist modernization drive." (State Security Law of the People's Republic of China). However, what can be treated as such an offence remains vague. A lot of Uighurs have been arrested on charges of acting against state security, but the arrests have had unclear legal grounding and could be considered arbitrary. The other charges often presented against Uighur activists are that of separatism, leaking secret state information and undermining the power of the state. In that context, a derogatory word 'splittism' is often used in official Chinese documents, speeches and press releases. In a report published by Amnesty International in 1999 it was asserted that in its policies toward Uighurs, the Chinese authorities resorted to arrests, executions and tortures in order to dismantle separatist Islamic groups in the western side of East Turkestan (Amnesty International, 1999).

According to the report of the U.S Congressional-Executive Commission on China published in 2008, the number of people that stand trial under charges of endangering state security (ESS) in XUAR remained high (Congressional-Executive Commission on China 2008, p. 4). Dui Hua, a human rights association, which calculated a proportion of trials for ESS in XUAR to those in the whole PRC, concluded that circa half of them in the years 2008-2010 were conducted in XUAR, which represents just 2% of population of the PRC, against the Uighur population (Dui Hua, duihua.org). On the 16 January 2011, Chinese press announced that there were 376 people judged in relation to ESS in Xinjiang in 2010, but Dui Hua assessed that the number may in fact have been as high as over a thousand defendants, with most of them convicted (World Uighur Congress 2011, pp. 10-11).

In addition to repression, though not as its substitute, as early as in the 1980s, the Chinese government committed itself to stem the Uighur separatism in East Turkestan by ensuring the stability of the region via economic development measures. This was facilitated by geopolitical concerns related to potential Soviet interference in XUAR and

growing interest of foreign petrol companies to benefit from the region's potential thanks to Chinese policies of opening up to the world economy under Deng Xiaoping. This provided a strong incentive for the central government to attempt to mollify Uighur resistance by adopting developmental policies toward XUAR (Harris 1993, p. 123).

However, it would be wrong to consider East Turkestan an isolated case within the PRC as far as human rights violations are concerned. They are a reflection of a wider Chinese policy towards the idea of human rights and its relation to the issues of national security. They are not dissimilar to the policies toward Tibetans or Han political dissidents and human rights/civil society activists, even though overall they seem to constitute a more severe case of them. Chinese policy of preventing 'splittism' is a universal principle for the state authorities. Coupled with the power asymmetry within XUAR, the perspective for Uighurs to assert self-determination is rather bleak. There are greater chances that the overall human rights condition of the Uighurs will keep improving in consonance with general Chinese reforms in the sphere of rule of law and human rights, which have been progressing at varied paces since the positive re-evaluation of the idea of human rights in the PRC in 1990s.

While in the above context it would seem more plausible for the Uighur to continue struggle for their rights within the structures of the Chinese state, the vicious circle of disproportionate state oppression and violent resistance has remained largely unbroken, and there are signs that long-term Chinese policies toward XUAR aimed at stability might be falling apart as sections of Uighur pro-independence movement have taken the fight with the Chinese regime outside Xinjiang via terrorist attacks.

On October 28th 2013, Chinese authorities faced the first major terrorist attack in the recent history, on the Tian'anmen Square in Beijing. According to Chinese police officers, it was a suicide attack via a car crash, with its three passengers and two passers-by dying in result of the explosion. East Turkestan Islamic Movement (ETIM) claimed responsibility for the attack. (Reuters – Lim, Blanchard, 2013). It was followed by an organised knife attack at Kunming Railway Station, in which 29 victims and 4 perpetrators were dead and 140 other people injured (The Washington Post – Wan, 2014).

Until recently, events branded as Uighur terrorist attacks by Chinese state media had been limited to XUAR, with up to two serious incidents of this kind yearly between 2007 and 2012, in such municipalities like Urumqi, Hotan or Kashgar. The high point of violence of this period was the Urumqi riots of 2009, in which 179 people died and 1721 were injured. They were precipitated by an incident which occurred on June 26th between Uighur and Han co-workers in factory in Shaoguan, Guangdong. Allegedly, the

majority of victims of the wave of violence were Uighurs (Xinhua – Yan at al., 2009). Notwithstanding the brutality of police forces quelling the riots and conducting following persecutions, the 2009 Urumqi upheaval was more a case of sectarian violence between the Uighur and the Han populations of the province, with the authorities attempting to end the conflict experiencing hostility from both sides. It signified the fact that permissive transmigration has led to a situation in Xinjiang in which abandonment of the state terror may not be sufficient to resolve the issue of political violence in the province, and Chinese authorities fail to have a proper solution for mounting violent Uighur extremism that has spread to other parts of China. The intensification of repression in response to societal calls for anti-terrorist crackdown is doubtful to become an efficient way to reduce the impact of ETIM.

In the 21st century, the struggle has moved to the cyberspace. Even though the Internet can have a negative impact on the sustainability of authoritarian regimes because of its capacity for enabling mass mobilisation, as was in the case of the Arab Spring, Chinese authorities had preventively introduced stringent controls on information flows. Web activities of individuals suspected of supporting Uighur independence are generally under surveillance. Those controls extend to more traditional channels of communication like telephone and mail. In addition to repressive functions, controls also prevent communication with abroad. Coupled with the fact that foreign journalists are generally not allowed to enter East Turkestan, it becomes relatively difficult to obtain accurate information on East Turkestan that does not originate from Chinese state sources. (Amnesty International, 2014) Those sources, however, are supposed to confront the Uighur narrative with the state propaganda aimed at delegitimising Uighur pursuits, often by positioning them as external subversion. For instance, World Uighur Congress, the chief peaceful pro-independence Uighur organisation led by Rebiya Kadeer, was accused by Chinese state media to have links to ETIM and to have provoked the 2009 Urumqi riots (Xinhua – Yan at al., 2009).

Summary

The article showcases how human rights are an important factor in ensuring peace and stability in the modern era. In case of East Turkestan, disregard for rights and aspirations of the Uighur has led to a security predicament of extremism and terrorism. Not unprecedentedly, the forceful assimilation policies toward the Uighur have contributed to the rise of instability in both China and the adjacent volatile Central Asian region,

the latter already fraught with political extremism tied to fundamentalist interpretations of Islam. In a sense, charges of externally supported subversion often weighed against the Uighur by Chinese state media can become true precisely because of the repressive policies up to date. At the same time, blaming the Islamic identity of the Uighur as the root cause of restiveness of the region has been particularly convenient for state officials in the era of global war on terror and an excuse for the propaganda to blame all Uighurs and condemn their political activism for the terrorist attacks of the few.

I argue that respect for fundamental human rights of the Uighur population by the Chinese state, meaning both the annulment of repressive policies and affirmative activities for the benefit of the Uighur as a minority, to what the PRC has nominally committed itself, could be a viable if gradual way out of humanitarian and security quandary that has emerged in XUAR. The state would have to adopt and adhere to provisions on preserving Uighur language in education in schools at all levels, on removing limitations on religious practices, in observance of rites like Ramadan and in building mosques and other sanctuaries, on improving opportunities for the Uighur in access to education and employment, also in provincial authorities, on engaging more actively in socio-economic policies that would reduce sectarian tensions between the Han and the Uighur in XUAR. If the Turkic population of China is empowered in ways outlined above, this will most likely result in a decline of their support for extremism and in their greater association with the Chinese state. Conversely, there have been similar cases in human history when increasingly repressive and genocidal policies have resulted in massive eruption of counter-violence.

The fact that the PRC has risen to be one of the major powers in contemporary world is a challenge for both the external actors and China itself in relation to Xinjiang. The change in human rights conditions is increasingly difficult to be precipitated by the engagement of human rights NGOs and human rights-orientated states, since Chinese power has made it impervious to external critique and able to back its autonomous policies and positions with political, economic and technical capabilities. What they can certainly do, in addition to a constructive engagement for the improvement of human rights conditions in the PRC, is targeting Western corporate entities whose the involvement in Xinjiang exacerbates its socio-economic problems. On the other hand, it is the current form of Chinese state that is being challenged by the Uighur issue, exposing not only the inappropriate and inefficient approach to pacifying XUAR, but also its structural flaws and imbalances that have appeared in the course of China's rise. The lack of respect for human rights in East Turkestan is tied to all-China policies in this

regard and relatively slow progress in realisation of human rights agenda. Censorship, use of torture, lack of observance of proper court procedures, restrictions on religious practices, perversions of the *hukou* system and growing socio-economic inequalities to name just a few are problems hardly unique for Xinjiang. Their resolution is thus conditioned on a wider structural adjustment of the PRC as a whole.

Even if it is a naiveté to think that the Chinese state may shed its authoritarian form and respective practices anytime soon, it is not to expect that progress on concrete issues can be achieved. Socio-economic reforms which touch upon human rights issues envisaged during the Third Plenum of the 18th Congress of the Chinese Communist Party, or increasing declarative appreciation of the principle of rule of law by Chinese elites may seem promising in this regard. Still, with organisations like ETIM gathering momentum and operational boldness, Beijing may not have all the time in the world to change its course toward the Uighur.

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Abstract

The article explores historical, geopolitical and socio-economic contexts and practice of interdependence between Uighur separatism in East Turkestan, officially named Xinjiang Uighur Autonomous Region (XUAR), and the human rights record in policies of the People's Republic of China. It exemplifies how Chinese geopolitical, economic and state security concerns and fears of separatism have caused in repressive and assimilationist policies toward the Uighurs and identifies other problems, which have resulted in the deterioration of living conditions of the Uighur minority and their position in social relations with Han Chinese within XUAR. In the author's opinion, the emergence and radicalisation of Uighur terrorist organisations, as well as the mounting social upheaval in XUAR are the contemporary consequences of such policies of the past and only the recognition of the autonomy of the East Turks in China the situation may improve.

Keywords: *Uighur, human rights, XUAR, PRC, separatism*

Adriana Pignuolo

The use of torture in China, Singapore and Indonesia – A comparative perspective

Preface

According to the UN Convention against Torture, adopted by the UN General Assembly in December 1984, torture is:

> "Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from inherent in or incidental to lawful sanctions" (UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987, Art. 1).

Torture involves a deliberate infliction of physical or mental pain without a legal cause. For most of history, torture has been used relatively commonly: civilisations such as the Egyptians, the Persians, the Greeks and the Romans have all made use of torture, which in some countries has even been considered an art. Also the Roman Catholic Church has been involved in the use of torture because of the Inquisition[1]. Therefore, the story of this cruel practice ranges from ancient times to the present.

[1] "Torture, which uses physical or moral violence to extract confessions, punish the guilty, frighten opponents, or satisfy hatred is contrary to respect for the person and for human dignity... In times past, cruel practices were commonly used by legitimate governments to maintain law and order, often without protest from the Pastors of the Church, who themselves adopted in their own tribunals the prescriptions of Roman law concerning torture". See Catechism of the Catholic Church, 1993.

Along with the modernisation of the state and its institutions as well as evolution of the idea of human rights and progress of the rule of law practices, penitentiary systems evolved and in many places in the world have become less cruel than in the past, especially in the so-called "civilised world", defined as a group of modern states that (at least formally) accept, ratify and more or less successfully implement basic HR treaties, like UN Convention Against Torture (CAT). But still even in case of highly developed Western liberal democracies like the US, certain horrible practices of torture are being used, not only in secrecy and especially when the security of the state is threatened, as in the case of the Guantanamo Bay.

Similarly, in Indonesia (one of the most democratic Southeast Asian states), where tortures are prohibited by law, some shocking cases of torture are being occasionally reported. One of such appealing cases has been registered, filmed and made public on the Internet in Spring 2010. The video showed acts perpetrated by security officers against two Papuan separatists who were subjected to violent beatings, burning of genitals and asphyxiation with a plastic bag (Asian Human Right Commission, *Indonesia: The neglected genocide*, 2013). The issue caused strong critical reactions of public opinion worldwide on the one hand, while on the other, Indonesian authorities explained the situation with the need to reform the Indonesian army.

Nonetheless, in cases of illiberal (or, even worse, totalitarian) states, the usage of torture is still more or less popular for the purpose of inflicting extreme pain aimed at extracting confessions, obtaining information and intimidating individuals, causing physical and psychological harm that can make them permanently disabled. Also in contemporary times some governments use torture to maintain their power, to impose particular political philosophy, as well as to eliminate political opposition. Even the most violent methods of social engineering and political control, the target of which is to achieve the goal of inducing fear in the masses, have prevailed in a number of contemporary states.

North Korea is one of the most extreme contemporary examples in this matter. Although the government has ratified some of the most important international human rights treaties and provided in its constitution for some proper rights protections, as a matter of fact it represses all forms of political opposition and independent organisations, using torture towards people arrested for such crimes. Detainees and convicts are routinely tortured by officials seeking confessions, bribes, and obedience (Human Rights Watch, *World Report 2014: North Korea*, 2014). Another state commonly using both more and less oppressive forms of torture in its penitentiary system, also for socio-

political and state security reasons is Singapore – even though it is categorised as illiberal democracy, legal system of the city-state makes use of such penalties as caning (for numerous offences) and recognises neither the "death row phenomenon" nor the "death row syndrome" or execution by hanging as cases of torture (Kosmala-Kozłowska, 2013, p. 340).

Along with the development of the international human rights laws and as a kind of the "never-again" heritage of the two world wars, since the middle of the last century torture has been generally considered wrong: the United Nations Convention against Torture does not allow any exception, even in circumstances such as war or the fight against terrorism.[2] In many modern democracies, torture is also prohibited by national laws. However, there are countries that have still failed to adjust their internal regulations to the international agreements, also due to the fact that sometimes the term "torture", included in international anti-torture treaties, is subject to misinterpretation or is interpreted in a broad sense. This is again the case of Singapore or Malaysia, where torture by common use of caning as punishment for small offences (including child offenders) is still broadly used. Both in certain Western and Eastern Asian countries, such as Italy, Germany or Thailand the use of torture is prohibited by law, but not penalised by any specific normative regulations. Italy is a unique case, because it is the only state in Europe, where the crime of torture does not even exist in its penal code (Amnesty International, *Annual Report 2013: Italy*, 2013).

As a matter of fact, torture is still widely practiced throughout the world. Amnesty International estimates that it is used by more than the three quarters of the world governments (Amnesty International, *Report 08: At a Glance*, 2008). In recent decades, the absolute wrongness of torture has begun to be reconsidered and questioned as a result of the repeated acts of terrorism and the spreading fear that terrorists could be able to gain access to weapons of mass destruction. In this context, some people claimed that torture, while wrong, should be permitted, if it was the only way to prevent a greater wrong. A situation, in which torture could potentially be applied to save lives is known as the "ticking bomb problem" (BBC, "The ticking bomb problem", 2014).

For example, public opinion all over the world has been strongly divided concerning Dick Cheney's position about the practice of waterboarding, used in American detention

[2] Art. 2, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture". This absolute ban on torture is highlighted in the International Covenant on Civil and Political Rights, which prohibits torture even in times of "a public emergency which threatens the life of the nation" (ICCPR, 1966: Art. 4).

centres during the "war against terrorism" after September 11th. The Vice President in the Bush administration justified the usage of this kind of interrogation claiming that it should not be considered torture, in particular when questioning hostile individuals suspect of terrorism.

On the other hand, human rights defenders strongly emphasise that torture is always wrong, and, therefore, can never be justified by any form of ethics derived from the "cost-benefit analysis". In fact, Article 5 of the UN Convention against Torture states that everyone has the right to humane treatment, supporting the idea that every person has the right to maintain his physical, mental and moral integrity. Thus, according to the author of this article, it may be concluded that simultaneously everyone has the right to be protected from such inhuman treatment like: beating, stretching, whipping, burning, electric shock, genital mutilation, sexual violence, crucifixions, attacks by animals, water immersion, injections, asphyxiation, food deprivation, psychological pressures. Thus taking into consideration all the sorts of torture enumerated above, it is possible to assume that freedom from torture is one of the few legal rights which can be awarded legitimacy to be universally recognised and torture ought to be prevented every time, everywhere, apart from any extraordinary circumstances.

In the above context, it is worth mentioning that nowadays tortures are on many occasions inflicted with methods that leave few physical signs on the victims' bodies. The practice appears to be a kind of a way around the normative regulations rejecting torture as an element of modern penal systems. For example, in Japan, prisoners on the death row are not perceived as citizens anymore or even ordinary kind of convicts and are thus refused their basic rights, placed in special kind of isolated detention centres waiting for execution, usually for a very long time and they are not informed in advance when the execution will take place. As a result, many of them suffer from the so called "death row syndrome" (Amnesty International, *Will this day be my last? – The death penalty in Japan*, 2006, p. 9), which itself has not been recognised by the Japanese normative system as a case of torture or other inhuman treatment or punishment according to the CAT. This ambiguous sort of torture is intended to ensure that victims are not able to provide physical evidence of their violations, and states can easily counteract the monitoring, trying to appear to act in accordance with international standards on human rights.

In a debate regarding the usage of torture as a state phenomenon, two polarised approaches to the concept of security can be found: "state security" on one hand and "human security" on the other. Each of the two perspectives supports a different set

of values and represents the opposite attitude to infringements of personal integrity rights of citizens, including the use of torture. According to the statist perspective, authorities may restrain civil and political rights of the citizens whenever security of the state, social order or, often, also economic development are endangered. The main goal is to maintain the centrality of the state power, to the detriment of individual life that can be sacrificed for the sake of the nation. On the contrary, from the non-statist, civil society-oriented and human security directed approach, the basic obligation of the state is to protect all human rights generations (1st, 2nd and 3rd) and personal security of individuals. since the state and its authorities have been created to serve people, not the opposite. In this perspective, governments are entrusted with the sanctity of human life and "sovereignty is responsibility" (Dorn, 2003).

In spite of some problematic resistance in particular from illiberal and authoritarian states, the phenomenon of torture continues to provoke strong opposition and denouncement by the world's public opinion as well as results in investigative activities taken by human rights activities from independent organisations such as Amnesty International who popularise knowledge about the cases of torture. Thus, one may assume that with the passage of time also at institutional levels (anti-torture activists pressing governments to issue appropriate regulations and to implement proper human rights protection procedures within penitentiary systems) certain important developments are being made to solve the problem in the long term through prevention, including international cooperation and agreements on the issue (including the establishment of international HR treaties). The coming into force of the Optional Protocol to the Convention against Torture has put an emphasis on prevention of the use of this inhuman practice through two levels: the international level, through the establishment of the United Nations Subcommittee on Prevention of Torture, and the national level, through the obligation for the signatory states to create national preventive mechanisms, through independent bodies with the task to monitor the places of detention and provide comments and recommendations to the state authorities (UN Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 2002).

In the author's opinion, it is worth mentioning in the above context that the emphasis on prevention represented a significant innovation in the United Nations system, if we consider that many other bodies of the United Nations are activated mainly in response to complaints. Simultaneously, it is worth observing that despite the fact that the obligation of visits by independent bodies should ensure that states comply with international

standards, there is still much to be done in order to improve state institutions and penitentiary procedures ensuring that individuals, particularly in certain areas of the world, are treated with dignity and respect.

Torture in China

In China, every year thousands of people lose their lives due to torture, while those who survive it continue to suffer from the long-term effects of trauma reported as the result of abuse. These abuses do not occur only behind closed doors: often during the course of their duties, public officials have resorted to torture in public, as a form of humiliation and a warning to others. (Amnesty International, *People's Republic of China. Torture – A Growing Scourge in China - Time for Action*, 2001, par. 1).

Frequently, different methods of torture are used to extract confessions and testimonies with victims left dying and in most cases unable to survive the first 24 hours of questioning. There have also been cases of torture to force the payment of taxes or fines imposed for administrative offenses: a practice so widespread that it has proved to be the major source of income for many police stations (Amnesty International, *People's Republic of China. Torture - A Growing Scourge in China - Time for Action*, 2001, par. 2.4). A lot of women accused of prostitution were tortured in order to obtain lists of their alleged customers (Amnesty International, *People's Republic of China. Torture – A Growing Scourge in China – Time for Action*, 2001, par. 2.5), while many others were tortured and forced to undergo abortions or sterilisations to comply with the family planning practices (Human Rights Watch, *World Report 2012: China*, 2012).

Another category particularly exposed to the crime of torture, in violation of the Article 3 of the Convention against Torture, includes those who are forced to compulsory repatriation, as in the case of numerous North Koreans who have fled to China, where they are labelled by the Chinese authorities as "economic migrants" and are, therefore, unwelcome in the country (Cohen, "China's forced repatriation of North Korean refugees incurs United Nations censure", 2014). The same treatment is often reserved for the Chinese citizens, who have fled to other countries and who are, in most cases, forced to repatriation without the use of formal extradition procedures (Amnesty International, *People's Republic of China: Briefing for the Committee against Torture in advance of their consideration of China's fourth periodic report*, 2008, p. 12).

Above all, China continues to achieve the highest number of deaths in prison, in police stations, and in structures of "re-education through labour" (RTL). The latter are

in particular a part of the system of punishment and detention, which has been active since 1950 and is going to be removed (Human Rights Watch, *China: Fully Abolish Re-education through Labour*, 2013). This system is dedicated to those who commit "minor" offenses and, therefore, are not properly considered "criminals". Under this system, the police can detain individuals up to a maximum of four years without any trial. In these structures, the use of torture, police violence, denial of food and medical care is so widespread as to alarm the United Nations, which defined these structures as centres of "mental torture" (UN Special Rapporteur on Torture on China, 2008).

Electric shock, prolonged periods of solitary confinement, beatings are sometimes followed by court proceedings, which, however, are followed by purely formal punishment (suspension, or disciplinary action), while, often, there has been carried out no investigation at all on these crimes. It is worth observing that Chinese law punishes torture and ill-treatment only in certain specific circumstances: many people acting in an official role are specifically excluded from prosecution for crimes of torture (Amnesty International, *People's Republic of China. Torture – A Growing Scourge in China – Time for Action*, 2001, par. 1).

On the other hand, in recent years, Chinese media have played an increasingly important role in supporting the growing debate on the abuse of power by the police, focusing the public opinion on cases of torture and ill-treatment, on the horrors of certain types of detention and finally on legal loopholes used by the authorities to escape punishment (Amnesty International, *People's Republic of China. Torture – A Growing Scourge in China – Time for Action,* 2001, par. 7.3). Simultaneously, it should be stressed that despite the constant warning by the Committee Against Torture, which urges Chinese authorities to provide accurate statistics on the use of this practice (China Society for Human Rights Studies, *Challenges and problems on Chinese work against torture,* 2008, par. 18), the number of victims remains a state secret. This means that China is constantly forced to face criticism concerning the country's internal situation in the field of human rights. United States and the EU lead the ranks of international actors that exert political pressure on China demanding improvement of human rights standards.

One aspect of foreign criticism has become perhaps the favourite weapon used by Chinese authorities at different international forums on human rights, namely challenging their universality. The main argument used by China is that the human rights situation in a given country can only be considered with due regard to the particular historical and national conditions of that country, and cannot instead be evaluated according to the models, standards and prejudices belonging to other countries or other cultures,

with clear reference to the supremacy of Western values in the current international regime of human rights. Many other Asian politicians and authors support the idea that the main contents of the UN declarations and conventions should be adapted to the Asian reality (Chin-Dahler, *Universal Human Rights, Cultural relativism and the Asian value debate*, 2010). They claim that Asia's historical and cultural heritage and characteristics are significantly different from those of the Western countries; therefore, UN resolutions should be applied in accordance with their own traditions. Similarly, the tenacious persistence of the practice of torture has been attributed to Chinese cultural traditions.

China, which is experiencing high rates of economic growth accompanied by a very rapid modernisation, however, continues to be a country that develops particularly slowly from the point of view of civil and political rights. Considered the huge size of the country, the People's Republic of China is, in numerical terms, the state in which the rights of individuals are violated to a great extent: the situation in the field of human rights is still severe, although somewhat better than in the past. The monitoring actions by the Committee Against Torture together with the information provided by NGOs still highlight the long-lasting impunity of perpetrators of torture, significant institutional shortcomings and the absolute absence of effective and transparent mechanisms of investigation (Committee Against Torture, *Concluding Observations of the Committee Against Torture, China*, 2008, par. 11). In 2011, the Chinese government declared it had fulfilled all tasks and targets (Human Rights Watch, *World Report 2012: China,* 2012), however, it has not allowed any inspector to enter the maximum- security prisons.

As a state signatory of the Convention, China is also obliged to ensure that "all acts of torture are considered offenses in its criminal law" including any "attempt to commit torture" or "act by any person which constitutes complicity or participation in torture" (UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987, Art. 4). However, the discussion on the implementation of the Treaty and how it should be implemented by domestic legislation is still a hot topic, therefore, while ratification solves the matter from the perspective of the Vienna Convention on treaties, it does not from the Chinese domestic one.

The penal code revision in 1997 has expanded the range of actions considered torture, including torture to force a confession (*Xingxun Bigong*), extorting a testimony by violence (*Baoli quzheng*) and maltreatment of prisoners (*nuedai beijianguanren*). However, there are still loopholes and contradictions that undermine its effectiveness: these crimes are actually applicable only to a limited number of officials in limited circumstances or locations. Simultaneously, the revision of 1997 had not included any explicit

rule that prohibits the use of confessions obtained through torture, although in the following years the Supreme People's Court has issued several verdicts in order to limit the use of this practice to extort confessions.

Although the Court has come to say that confessions obtained under torture cannot "become the basis for determining the case" or "the basis for a criminal charge", nor "the foundation of a conviction", other experts argue that a confession extracted by torture can also be legally 'recollected" (Chen Guoqing, 2000) for use as evidence at the trial, if the suspect agrees to repeat those claims.

One should also point out the fact that many anti-torture standards have been introduced in an attempt to regulate the behaviour of certain types of officials. For example, there appeared a positive news in May 2005, when the authorities in three regions of the country announced the launch of a project involving the obligation for the police to interrogate criminal suspects only in the presence of a video camera and lawyers, while in 2008 a further extension of the category of crimes related to torture took place. Nevertheless, this is still not enough to prohibit other acts of torture as defined in Article 1 of the Convention.

The studies carried out by NGOs such as Amnesty International suggest that the body of laws approved in order to eradicate this practice is not effectively applied at local levels (Amnesty International, *People's Republic of China: Briefing for the Committee against Torture in advance of their consideration of China's fourth periodic report,* 2008, art.2). In addition, the judicial system in China is characterised by a strong dependence on politics; therefore, the Chinese Communist Party is free to interfere, especially in cases deemed of political relevance.

To prove that torture has a political use, the latest report by the China Human Rights Lawyers Concern Group mentions the story of Liu Shihui, a lawyer for human rights, to whom the police broke his feet for having made reference to the Jasmine Revolution. In the conclusions, the authors of the text write:

> "The modernisation and economic growth in China have not improved the situation of a state ruled by a single party in an authoritarian manner. The violent repression against the Jasmine movement and the ruthless censorship reflect deterioration in the human rights. Nevertheless, the increasing pressure from the international community, the greater awareness of the population and the movement *weiquan*[3] have really put in doubt the status quo".

[3] It is a non-centralised group of lawyers and Chinese intellectuals active since 2000 in the protection of

Another example is the persecution of *Falun Gong*, (Falun Gong Human Rights Working Group, *China: Systematic Psychiatric Torture of Falun Gong Practitioners in Hospitals,* 2011) a movement that combines meditation exercises with a moral philosophy centred on the principles of tolerance, compassion and truth. The movement, active since 1992, has undergone a rapid expansion that has particularly alarmed the China Communist Party to the point of leading to the creation of a special agency in charge of suppressing the movement and of promoting a media campaign designed to actively involve the population in the repression of the movement. Several organisations have estimated that an especially large and undefined number of members of the movement were detained and tortured in the RTL centres, never passing by a court nor having the help of a lawyer (The Guardian, *Four Chinese rights lawyers allege torture by police,* 2014). The event aroused great concern of the international community, which has repeatedly called China expressing the need for this country to take appropriate measures for detention and treatment of detainees (Commission on Human Rights, *Sixty-second Session, Mission to China*, 2006).

Probably some progress has just been made. In November 2013, the Chinese People's Supreme Court said that "obtaining a confession through torture" is a practice "that should be removed from the national judicial system. Courts must be able to decide without the interference of local governments". The decision is included in the Court's new guidelines, decided and made public after four days from closed-door meeting. The text asserts: "There must be eliminated coercive interrogations to obtain a confession, as well as the use of cold, hunger, dehydration, excessive heat, fatigue, or other illegal methods to obtain confessions". The invitation, published on the Court's official website, is directed to the courts of all levels throughout the country. At the same time the text has also defined more severe rules for judgments involving the death sentence, which must be pronounced only after "adequate evidences" have been given (Xinhua, *Supreme court renews call to ban torture,* 2013).

However, one needs to observe that the reforms announced by the Supreme Court will not be put into practice without difficulties, in particular due to still widespread practice of torture in Chinese provinces, specifically because of internal security reasons (Tibet and Xinjiang may serve as examples in this regard) on one hand, and perversions of political governance and penitentiary system at the local level on the other (e.g. even though one-child policy has been significantly eased in 2013 by the decision of the

civil rights. For more information see: China Rights Forum, *Rights defense take frontline*, 2006.

central government, some local authorities are still supposed to make Chinese citizens keep childbirth quotas, including via coercive measures).

At the same time, with the new powers granted by the government of Hu Jintao to the Central Commission for Discipline Inspection, the abuses to obtain extra-judicial confessions have continued to increase. This body is the Party's arm, a sort of body above the law equipped with the power to detain, without the permission of a judge, any person suspected of violations of any kind. The system, known as *shuanggui* (Human Rights Journal, *Official Fear: Inside a Shuanggui Investigation Facility*, 2011), has "disciplined" a very large number of individuals (2300 only from January to June 2013), causing such damage that a very high number of suicides has been recorded. The *shuanggui* is also applied to overcome corruption, within the anti-corruption campaign launched by Xi Jinping. Independently from the state justice system, it allows the use of secret jails and torture. Party investigators bring suspects into detention centres without the obligation to inform their relatives. In such situations it is hardly possible to predicate whether this kind of detentions is legitimate or rather constitutes a means of political repression of dissidents.

The case of Zhou Wangyan, head of the Liling city land resources bureau, is an example of this system. He reported to the Associated Press (AP) that within the period of his detention and during interrogation procedures and due to political revenge he had his femur broken, was almost drowned, deprived of food and sleep. Other AP's sources are quoted as saying that since the launch of anti-corruption campaign around 90 percent of corruption cases related to party members has been treated through the *shuanggui* system and several thousand people are still secretly detained (AP, Organised Crime and Corruption Reporting Project, *China: Victims claim anti-corruption probe employs torture*, 2011).

In accordance with the latest report of Amnesty International on China (Amnesty International, *Annual Report: China*, 2013) justice remains inaccessible for many, while the Party continues to use the criminal justice system to stifle criticism, and suppress the activism of those who ask for respect and safeguard of the basic fundamental rights. Civil society has been especially active in the effort to denounce abuses, organised groups, though, as the aforementioned lawyers' movement, have been repeatedly threatened by the authorities, to the point of losing professional licenses (Human Rights in China, *Chinese Rights Defense Lawyers Under All-out Attack by the Authorities*, 2009). For some of them the accusation has been an "instigation to the subversion of the power of the state" (Amnesty International, *Hu Jia – silenced behind bars*, 2008) The places of

detention continue to be crowded with people arbitrarily deprived of their freedom, despite China's decision to abolish "re-education through labour", where the use of torture is still defined as a well-established method of correction.

To conclude, progress made by the Republic of China in the field of anti-torture law was insufficient to fulfil the serious gaps that are still present in the national criminal law, which still fails to consider outlawing all the acts defined as torture by Article 1 of the Convention, does not face the issue of criminal liability of public officials for acts of torture and does not ensure the proper course of investigation. The current picture presents an increasingly confident China in the international arena, in a world in which the balance of power is changing. The support which China enjoys from countries in the developing world, its growing economic power and the equally growing political influence, enable it to manage and cope more and more effectively with every international criticism concerning its internal situation with regard to human rights.

In recent years, observers have also revealed the emergence of a new awareness among the Western states of the special situation of China. Economic, political and philosophical reasons appear to increasingly prevent the adoption of a hostile and critical approach, in favour of an attitude based on cooperation and dialogue. The main challenge is perhaps to preserve and further enhance the usefulness and effectiveness of such exchanges. This implies a greater involvement of the West, a renewed effort to understand what is really specific in the Chinese conception of human rights and to understand how the concepts of the rule of law and civil society can find their application in China.

According to the author of this analysis, two different approaches towards the problem of torture in China and how to solve the problem can be identified. On one hand, the perspective of civil society activists, human rights defenders, human rights NGOs and for example such structures as the European Parliament, representing citizens of the European states and their opinions, emphasises the need of a greater courage to openly criticise the Chinese government when it tries to apply the "theory of human rights with Chinese characteristics" just to avoid and reject criticism of its human rights standards. The aim is mainly to exert pressure on Western and other democratic governments to intervene, not only in cases of serious human rights violations in China.

On the other hand, state leaders, diplomats, politicians and other state officials clearly support the idea that there is a wide range of priorities to proceed with, among which human rights are at best one of important issues. Thus, the best step to be taken

by Western democratic governments that are really interested in human rights improvements in China, among other activities, is to involve themselves in political and other sorts of diplomatic dialogues that after some time may "open door" for more merit-based technical cooperation. The general rule is that the Chinese Ministry of Foreign Affairs serves as a kind of a "goalkeeper" protecting Beijing from any international criticism or condemnation on international forums (Aften Posten, *26.07.2006: Human rights: China's dialogue partners have mixed views on exchanges*, 2011). The point is to achieve access and introduce cooperation with other Chinese governmental departments, as, for instance, the Ministry of Justice, in order to cooperate directly on some pro-human rights programs. In order to build such kind of technical cooperation with Chinese officials, a long-term cooperation and mutual trust is needed first (Kosmala-Kozłowska, 2013, pp. 418-419).

Some Western countries have already started to implement new communication channels on this matter, which turned out to successfully undertake this kind of cooperation projects with the PRC. This is for example the case of Australia, which signed an agreement on technical cooperation with Beijing through long term bilateral dialogue (Human Rights Watch*, Australia: Set Benchmarks for China Rights Dialogue*, 2014). As a consequence, a team of Australian experts has been able to cooperate with governmental agencies (including Ministry of Justice) other than the Ministry of Foreign Affairs for the improvement of sanitary and human security conditions in Chinese prisons and supporting implementation of anti-torture laws. (Kosmala-Kozłowska, 2013, p. 419)

Within a similar framework of bilateral dialogue, since 1997, Canada's human rights policy toward China has supported the idea that cooperation, rather than isolation, will have more results in bringing improvements in China's human rights situation (Department of Foreign Affairs and International Trade, *Assessment of the Canada-China Bilateral Human Rights Dialogue*, 2005). Canada succeeded to negotiate forms of cooperation that brought results inter alia in such improvements as: implementation of laws requiring to prove the suspect guilty thus popularising such judicial practice against the strongly rooted attitude that it is the defendant who needs to prove his innocence; progression of good governance procedures in Chinese prisons, organisation of trainings and monitoring of prison guards, as well as prevention of cases of torture through the establishment of procedures that counteract the common problem of impunity.

To sum up, according to the author of this article both perspectives presented above can be a particularly useful resource, if the aim is to make international and internal

public opinion more sensitive about the question of human rights in China. The improvement of human rights conditions can be achieved only with effective actions which prevent violations and grant at least basic respect for human life.

Torture in Singapore

In Singapore the use of torture is often an institutionally heartless practice. Even though intense pain is imposed in the presence of a physician, his sole role is to make sure that the victim remains conscious and feels the pain. It should be highlighted that neither the International Covenant on Civil and Political Rights declaring that no one can be a subjected to torture or cruel, inhuman or degrading treatment, nor the aforementioned CAT, according to which torture can in no case be justified (in fact Singapore has ratified none of them) are applicable in case of the city-state.

Indeed, unlike China, which, although reluctant, is moving towards the abolishment of the use of this practice and seems to conform to international principles of human rights, Singapore's government appears to be really proud of its reputation of a state that maintains order through the infliction of pain. In this country, the government is equipped with broad powers to restrict the rights of citizens and to inhibit the political opposition. In 2013, Singapore was ranked 149 out of 175 countries in terms of the degree of freedom by Reporters Without Borders (Reporters without Borders, *2013 World Press Freedom index: dashed hopes after Spring*, 2013).

As in the People's Republic of China, also in Singapore there is a legal act, the Internal Security Act (ISA), which permits to detain the suspects without any formal charge or appeal procedure. It is usually used to combat espionage, terrorism, organised crime and to control political opponents. The life of the latter has not been particularly easy, since the government imposed strict limitations on the freedom of speech and press, as well as on many other civil rights: for example, it is not possible to organise public meetings or demonstrations without a valid authorisation issued by the police.

Even the death penalty is a very common practice. In fact, it is mandatory for first-degree murders and for the possession of at least 15 grams of heroin, which, according to the state's criminal law is the equivalent to one of the most serious crimes, drugs trafficking. This policy, as explained by the Singapore government, helps maintain a low rate of drug abuse in the country. Yet, for sexual offenses, violence of all kinds, illegal drug use and vandalism, corporal punishment remains the most commonly used sanc-

tion. Among these, flogging is the most common form of legal punishment in Singapore and can be resorted to in several contexts: judicial, military, school, reformatory and domestic. Beating takes place in primary and secondary schools, and is applicable only on male students, who may be subjected to a maximum of six blows. The practice is seen as a solemn ceremony, studied in detail and designed to humiliate the boy. The Ministry of Education encourages schools to punish boys, for offenses ranging from smoking to bullying, from truancy to brawls: it depends on the seriousness of the offense, if the boy is to be flogged in the private office of the principal, in the classroom or on stage in front of the whole school. The practice usually takes place after a period of detention and before the suspension, the period in which, moreover, it is recommended for students receiving punishment to attend a certain number of psychosocial counselling.

To show how this kind of corporal punishment is rooted in the customs of this state, it has to be remembered that flogging by the kids' parents is a very common practice: in Singapore it is legal, though not particularly encouraged by the authorities that parents flog the hands of disobedient children of both sexes. It is legal to such point that whips for children, different from the judicial ones, are sold in shops selling items for houses. Legal to the point that, according to a survey made by the Sunday Times of Singapore in January 2009, 57 out of 100 parents surveyed answered that beating is an acceptable form of punishment and that they had tried it on their children. Another form of flogging in Singapore is one adopted in prison: a convict may be subjected to a maximum of twelve lashes for offenses committed within the detention facility. In this case, the detainee is subjected to a kind of internal process, in which he may hear the charges and try to defend himself before a committee that, since 2008, is no longer inside the prison facility, but external and independent. Corporal punishment possesses certain particular features in military contexts: in contrast to what happens in China, where tortures are applied only to civilians, in Singapore there are rules which regulate flogging within the armed forces, in case a person disobeys certain military rules.

Of course, as we are not talking about flogging civilians, military punishment is less severe, and tries not to leave permanent traces or to cause excessive bleeding. It is judicial caning that makes this Asian state so ill-famed all over the world: the perpetrators of criminal offenses are punished by the infliction of physical pain that is accompanied by a period of imprisonment. Flogging is always connected with detention and is never considered a punishment in itself. This combined form of punishment is reserved to male criminals under the age of fifty years, for a wide range of offenses against the

Criminal Code. For example, foreign workers who have not renewed their job contract for three months shall be sentenced to at least three months in prison, plus the mandatory caning of a minimum of three blows.

The government of Singapore explains the need for this type of punishment as the intention to lower the crime rate related with immigration and, especially, to discourage illegal immigration. Flogging is a deeply rooted practice; it was historically introduced in Singapore and Malaysia during the British colonial era. After the declaration of independence it was maintained in force and, in this period, it has become better arranged in the Criminal Code: the Code explains exactly in what cases one should proceed to flogging, indicating how many blows must be dealt according to the given crime, ensuring medical care after the corporal punishment and finally converting into additional days of detention the remaining floggings, which are not performed to the convicts for health reasons. The Code determines even the shape, size and liquid with which the whip is imbued depending on the severity of the committed crime.

The last report from Amnesty International is worrying: although Singapore has not ratified the Convention against Torture, flogging is certainly a practice in violation of Article 1 and is described as "cruel, inhuman and degrading treatment", as well as too strongly rooted in the customs of the state, which is reluctant to abolish the use of this practice, still obligatory for more than thirty types of crime. There is, however, some public pressure, which repeatedly asks for the rejection of this form of torture. It was related, in particular, with the case of an eighteen year old American boy, Michael P. Fay, who was sentenced in 1994 to flogging and imprisonment, charged with vandalism after having some cars smeared with paint.

The case aroused vivid international interest. At the time, the case resulted in a diplomatic crisis between Singapore and the United States of America and even the intervention of the contemporary President, Bill Clinton, who asked for clemency for the boy in a letter to the mayor of the city Ong Teng Cheong. Nonetheless, the perpetrator could not escape punishment, he only obtained a reduction in the number of blows from six to four.

Far from being abolished, the practice of caning seems to be used increasingly: statistics state that from 1990 to 2000 the cases of convicted criminals punished through physical violence doubled, with a great pride of the Singapore government which continues to declare that corporal punishment is the best way to establish order and discipline within the boundaries of the state.

Torture in Indonesia

Under the Suharto regime, torture was practiced by the Indonesian military force against the opponents of the government. Today in Indonesia torture is deeply rooted in the daily practices of law enforcement tasks. Unlike Singapore, the Indonesian government has ratified the Convention against Torture and other cruel, inhuman or degrading treatment in September 1998, but has not ratified the Optional Protocol.

In 1993, National Commission on Human Rights (*Komnas HAM*) was created with the power to investigate cases of human rights violation and whose work should be investigated by the Prosecutor, who has the legal obligation to deepen the investigation and prosecute. In addition to *Komnas HAM*, there is also the National Police Commission (*Kompolnas*), which holds jurisdiction to investigate public complaints. The commission enjoys a degree of independence so that it cooperates with Amnesty International and Human Rights Watch.

All these organisations, however, are not strong enough to limit torture: in Indonesia, as in the case of Singapore, the practice of torture is highly institutionalised. After the establishment of monitoring bodies, the Indonesian government failed to proceed with the development of internal rules that prohibit the use of torture, although Article 28 of the Indonesian Constitution states that "every person has the right not to be tortured and the right to be treated with dignity". The methods of torture, in fact, are used especially during the detention and interrogation of criminals, illustrated step by step in a secret dossier prepared by the Indonesian military, which considers it a great form of income, because, as well as in China, torture is a means to extort bribes.

Once again the victims of such practices are religious minorities, advocates of sexual and reproductive rights, political activists, but also married people found alone with persons of the opposite sex, gamblers and alcoholics. In addition, a high degree of corruption of justice can be found especially in the judiciary system, as well as harsh prison conditions, lack of adequate labour standards, strong limitations in the freedom of expression.

A typical feature is the tendency that victims do not denounce violence for fear of further punishment; this is caused by the lack of law on protection of witnesses. As a matter of fact, numerous cases documented by the Asian Human Rights Commission (AHRC), an NGO that has been monitoring human rights in Asia since 1984, reveal that there is a high price to be paid by the victims or by their relatives when a complaint is filed against state officials on the issue of torture. Thus, torture remains unpunished

or faces punishment not corresponding to the gravity of the offenses. Between 2005 and 2013, according to statistics from the AHRC, only seven cases of torture finished with passing a sentence, not longer, however, than one year imprisonment: the torturers' punishment is, therefore, still the exception to the rule, and although the CAT failed to provide indication of what should be the appropriate sentence for the crimes of torture, one year imprisonment is surely insufficient, as pointed out in 2005 by the Committee Against Torture in the case of Kepa Urra Guridi against Spain (Asian Human Rights Commission*, Criminal prosecution of seven torture cases in Indonesia,* 2014).

Although Amnesty International considers the situation in Indonesia still alarming, they show some confidence and appreciation about the progress made by the government in the last decade in promoting the rule of law with a series of legislative reforms to prevent and detect crime, as well as a number of internal regulations for police. In this manner, the Indonesian government had ensured somewhat stronger compliance with international standards of human rights and obtained a seat in the United Nations Human Rights Council and the chair of ASEAN in 2011. However, these positive symptoms appear to be of little use in order to improve the situation: violations performed by the police, followed too rarely by appropriate criminal investigations, still take place. In many cases, although the Article 52 of the Indonesian Penal Code states that crimes perpetrated by state agents in the exercise of their functions should be punished with sentences a third more severe than those committed by civilians, police officers receive instead moderate punishments because judges consider their service to the country as a mitigating circumstance rather than an aggravating factor. This is mainly because police officers have exclusive jurisdiction over criminal offenses and tend, obviously, to protect themselves, to the detriment of violating the victims. The prosecutors in charge of supervising state agents, moreover, work closely with the police but there is no effective legal mechanism to ensure the absence of corruption.

The criminal process is also particularly difficult. To perform a successful judgement one requires at least two of the following conditions to be met: circumstantial evidence, the testimony of at least two witnesses, the presence of documents, attorneys and experts willing to testify on behalf of the victim. In most cases, all requirements are very difficult to meet. (UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Mission to Indonesia*, 2008).

In 2013, the Indonesian House of Representatives engaged in the revision of Penal and Criminal Procedure Codes, including more safeguards for detainees and a better system of prevention and punishment for human rights violations, however, an effective

complaint mechanism for victims, as well as an adequate compensation by the state have not been implemented yet. United Nations define this mechanism as "restitution", a form of "re-establishment intended to rectify the situation of the victim before the violation", which is accompanied by the "compensation", a monetary amend for economic damages resulting from torture or other ill-treatments, and the "rehabilitation", medical and psychological assistance to victims (UN Committee against Torture, General Comment No. 3, 2013).

Obviously, the Indonesian law does not conform to the dictates of the Committee Against Torture, thus, the only difference between the compensation and restitution is "who" has to pay the victims, whether the state or the guilty. Moreover, if the victim intends to proceed with a civil lawsuit, he must bear the costs for registration and legal advice, and once again the execution of judgments is not fully assured. In Indonesia, for the victims of torture, the process is particularly long and complicated, while the definitions of restitution, compensation and rehabilitation do not comply with international standards, as they are not based on the rights of victims, who also do not possess an easy access to medical and psychological care.

Even in Indonesia, therefore, progress achieved by the authorities is not sufficient to ensure adequate protection of citizens against physical violence, which continues to be perpetrated against civilians.

Conclusions

Although for different reasons and not to the same extent, China, Singapore and Indonesia have raised major concerns of the international public opinion, particularly the Western democratic members of the international community. The use of torture is deeply rooted in these states. According to reports by international governmental and non-governmental actors, there are various types of obstacles on the way to eradicate this practice. The author of this article claims that the problem is most probably dependent on the fact that harsh penitentiary system procedures in the three states are often the result of two basic factors: the cultural heritage with specific forms of government developed in their socio-political evolution and state-building processes.

China, in particular, represents a crucial challenge, since, in spite of its huge economic growth, it has not succeeded to safeguard basic human rights of its citizens, which especially concerns civil and political rights. The authoritarian regime which rules the country is characterised by particular social, political and normative specificities

stemming from its millennial history (Fukuyama, 2012, pp. 15-16). Within this framework, contemporarily, different sorts of torture are being used by Chinese authorities to combat political dissidents. Torture is also applied towards governmental officers i.e. within the anti-corruption campaign launched by Xi Jinping in 2012.

Indonesia, a liberal democracy with Southeast Asian specificity, in spite of the constitutional ban on torture, still allows for such procedures within its penitentiary system, also in the process of investigations performed by police officers and, moreover, impunity of the perpetrators of torture remains one of the key sources of this dysfunction. Finally, in Singapore, an illiberal democracy, caning as a form of regular punishment is commonly used also against minor offenders (including children) in order to maintain public order and is accepted by a significant number of citizens, who do not even consider it a form of torture (or turn a blind eye on it), mainly because of their cultural background as well as relatively (in particular in comparison to other East Asian states) good living and internal security standards in the city-state.

For these reasons, independent monitoring bodies are still more or less strongly, but constantly concerned with the internal situation in the three states, in whose case even signing international agreements on prevention and eradication of torture, has failed to provide their citizens with adequate protection from the abuses committed by the state apparatus and its officials against civilians. On the contrary, there are still certain mechanisms, which justify and conceal the performers of acts of violence, and many times, as in the case of Singapore, these are encouraged by state apparatus.

According to the author of this article, within these three states, the case of Singapore is perhaps the most particular: whereas China and Indonesia (each to a different extent and maintaining their own socio-political and normative systems) attempt to avoid the international monitoring, concealing actions committed by police officers and announcing to the international community some official steps undertaken in order to effectively improve the domestic anti-torture implementation processes, Singapore continues to consider and justify the use of flogging and other sorts of harsh penitentiary measures as an indispensable method of establishing and maintaining public order. This part of the Asian state policy is so deep-rooted in its culture that even ordinary people consider it normal and practice it in their homes.

The efforts by the United Nations to protect victims of torture and the attempts to provide the worldwide civilian population with basic respect for human dignity, will not succeed, if national legal systems, even though formally compliant with international anti-torture agreements, still fail to implement regulations adjusting it to what is required

by the international standards. In the above context, the author of this article stresses that in spite of the fact that every nation has its own traditions and its own particular cultural heritage, and thus the Western democratic model cannot be simply extended to (or imposed on) the entire world, the Western democratic idea (and international laws based on it) of respect for human rights and their protection needs to become applicable worldwide (also in the Western states themselves) to protect individuals from brutal torture practices. And in some cases, e.g. in China, the problem derives more from political than humanitarian reasons, and particularly due to the discrepancy between the party and the government, where the Communist Party (especially at local levels) has still enough power to block the implementation of some significant anti-torture improvements introduced and at least formally appreciated by the central authorities. On the other hand, in the period of the last 30 years, in connection with the process of opening and reforming China, its authorities have recognised the need to tackle the problem and have made certain important steps forward to counteract the widespread practice of torture in the Chinese penitentiary system.

It is the author's conviction that the international community, including the media and the NGOs can play a decisive role in denouncing the abuses and monitoring the different situations in each state making the real change in human rights policies in non-democratic states possible even if achieved only by means of a progressive evolution towards more liberal politics. The author also believes that the support from civil society actors, such as NGOs, transnational human rights advocacy networks and diplomacy may really affect human rights politics. The relationship between these actors and governments is often confrontational because of the contrasting interests and roles they play, nonetheless, at the same time, they are mutually interdependent, as they need each other to implement human rights and democracy policies. With regard to NGOs and other representatives of transnational human rights advocacy networks (including UN diplomats representing international human rights), this relationship is characterised by two elements: on one hand, the NGOs need diplomacy to negotiate access to the territories of most authoritarian regimes; on the other hand, governmental agencies may not be able to deliver assistance on their own, especially in the most politically uncomfortable places. Moreover, human rights violations denounced by human rights activists, often have an emotional and condemnatory tone, which sometimes aggravates the problem rather than solves it, for this reason, a more studied and less passionate approach to each specific situation and their possible solutions would be more suitable instead. Both the punitive and the conciliatory roles are equally needed: especially acting

with such difficult partners as China, where the act of condemnation should be accompanied by a policy of appreciation for the gradual improvements made in human rights politics.

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Abstract

Starting from the definition of torture presented in article 1 of the United Nation Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the essay outlines a general overview about usage, diffusion and debate regarding torture, with special references to China, Singapore and Indonesia. Although such practices meet with international criticism and are combatted by several NGOs and other independent agencies, the last Amnesty International report presents a particularly worrying situation. In the analysis of the matter in three East Asian states, Singapore appears to be the most troubling case. While China and Indonesia have signed the Convention and for the last decade have provided for a partial reform of

their Penal Codes to conform them to international standards, Singapore continues to be proud of its methods of torture, considered the only way to maintain public order. It is the author's conviction that the next challenge is to continue the work performed by international organisations, which consists of monitoring and denouncing abuses, in order to force these states to adopt a new view of human rights.

Key words: *China, Singapore, Indonesia, torture, human rights*

Oksana Kurylo

The use of death penalty in China, Japan and Taiwan – A comparative perspective

Introduction

Capital punishment, also called the death penalty, is generally explained as "the execution of an offender sentenced to death after conviction by a court of law of a criminal offense" (Hood, *Encyclopaedia Britannica*, 2014). Since the ancient times, capital punishment was used against offenders and political criminals by almost all societies at a certain stage of development. With the progress made by the societies, views on this kind of sentence have changed and most of Western democracies (with the exception of the US), including all the EU countries, have abandoned it. And although such punishment is used in particularly serious cases, the definitions of a "serious crime" itself greatly differ between West and East Asia. Although such rigour against offenders is applied to a greater extent in China, also Taiwan and Japan belong to the group of retentionist states. At the same time, these two East Asian democracies have managed to reduce death penalty rates much more efficiently than authoritarian China. This article will present a comparative analysis of the death penalty usage in China, Japan and Taiwan, highlighting local specificities and taking note of changes in the procedure.

The history of the death penalty in Asia

The history of capital punishment started with the earliest human communities in order to protect certain social groups from neighbouring militant tribes. Cruel treatment of prisoners served as a warning to other potential enemies. The execution was held with ceremonial performances often turning into a spectacular event with carnival atmosphere attracting crowds (Brook, Bourgon, Blue, 2008, p. 203).

Since the ancient times, different ways of execution in China were applied, many of them very cruel. Criminals were burnt, torn apart, boiled, etc. The most painful punishment in medieval China was considered "death by 1000 cuts", luckily quite rare. After

the overthrow of the Manchu Qing Dynasty, these kinds of tortures were prohibited by the President of the Republic of China in March 2, 1912 (Brook, Bourgon, Blue, 2008, pp 9-43).

The history of death penalty in Japan started in the Asuka period lasting from the 6th century onwards. In the beginning of the Nara period, influenced by Buddhism, executions were less used, and thus, by the time Heian period started, they entirely stopped. Nevertheless, in the following Kamakura, Muromachi, Edo and early Meiji periods, capital punishment was used more extensively until the 1871 and 1873 Criminal code reforms that resulted with a reduction of the number of crimes condemned to death. Execution methods were also limited to beheading and hanging (Turkington, 2001, pp. 5-9, 17-33, 44-54).

Taiwan, unlike Japan, was not influenced much by its neighbour – China. For the first time the island was discovered by the Portuguese in the 16th century. Impressed by its beauty, they named it "Insula Formosa" - beautiful island. Only in 1683 the island became known by its actual name "Taiwan", which translated from Chinese means "Bay of high mountains", when the Qing dynasty gained control and extended its legal codes over the island. Then it became widely contrived that the island had been connected with China for over 1700 years and it was populated in 97% by the Chinese. The first punishment by death was mentioned in 1720, when the economic life of the island was focused on the extraction of camphor from camphor trees, which were particularly popular and rare. And thus, in the 18th century, the Chinese emperor created a monopoly on production and trade of camphor. The illegal felling of trees was punished by death. And so in 1720, over 200 offenders were executed[1]. Although nowadays death penalty is still used in all three countries, according to statistics, its scope and manner of use significantly differs, despite all of them being located in North-East Asia.

Death penalty worldwide

In the last 70 years, after the Second World War, the world has had a tendency to restrict the scope of death penalty or even to abolish it completely. Two-thirds of countries have abolished it already. Still, according to the international human rights organisation

[1] It should be also noted that between 1895 and 1945 Taiwan was a Japanese colony under modern Japanese legal codes and thus removed from the Chinese tradition for quite a time. The regime that followed was Chinese and authoritarian, but not Communist, which resulted in a divergence between legal solutions on death penalty applied in mainland China and Taiwan.

Amnesty International, in 2006, at least 1,591 juveniles were executed in 25 countries. During the following years the statistics did not change much. In 2007 – 1 252 executed; 2008 – 2 390 executed; in 2009 – 714 executed; the data presented for this year fail to include thousands of executions that took place in China, which once again refused to disclose this number. In 2010 – 856 executed; 2011 – 680 people executed, again, excluding China. These are only approximate numbers; the real figures are probably much higher, considering the lack of Chinese statistics and the fact that China is believed to be the leader in the use of death penalty.

Nevertheless, the situation worldwide is not as bad as the statistics show. According to the 8th Quinquennial Report of the UN General Secretary on capital punishment published in 2009, only 47 countries of 198 retain the death penalty. In 95 countries the death penalty has been prohibited for all kinds of crimes. 8 countries have abolished the death penalty for ordinary crimes and maintained it only for special cases, such as wartime crimes. In 46 states capital punishment has not been abolished, however, no one has been sentenced for the past 10 years and the number of abolitionist states is constantly growing (UN General Secretary, *The 8th Quinquennial Report: Capital punishment*, 2009).

China is considered to be the world leader in the number of executions. Amnesty International believes that this number would amount to thousands of people. Modern China also preserves the tradition of public executions and those sentenced to death are sometimes exposed for public viewing. Professor of China University of Political Science and Law Tong Zongjin says: "public executions were a very regular occurrence until the 1980" (Atsushi Okudera, *In China, public executions still a part of village life*, 2013). Then, when China still felt remnants of the Cultural Revolution of 1960-1970s, it maintained the tradition to expose suspects in open courts. However, in 1986 the Supreme Court of China imposed a ban on public executions. In 1990s, public executions disappeared from major cities like Beijing and Shanghai. In 1988, the Chinese government also ratified the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Confessions extracted by tortures were also prohibited by Chinese law.

In 2007, China expanded the authority of the Supreme Court to review all death sentences made by superior courts of provinces. This decision marked the introduction of measures, including elaboration of guidelines, which aimed to ensure better consistency in sentencing dispositions. This was considered a major legal reform in China and a part of a concerted effort by China throughout the 2000s to reduce the volume

of executions. According to the Chinese law, there are two types of death penalty: with immediate execution and with the execution suspended for two years. If a criminal co-operates with the investigators and repents for his/her deed, presents a good behaviour after the verdict, the death penalty may be replaced by a long term in prison.

Juxtaposed with the Chinese secret implementation of the capital punishment, the Japanese conviction rates are extremely high. They exceed 99% for all crimes (Ramseyer, Rasmussen, 2000, p. 3). There has been registered only one case over the last 50 years, in which the convict was sentenced unfairly. It appeared to be a 63-year-old man, who by then had been 17 years on a death row for the murder of a 4-year-old girl.

As for Taiwan, before 2000 it had a relatively high execution rate, when some strict laws were still in effect in the harsh political environment. However, after a number of controversial cases during the 1990s and thanks to the abolitionist attitude by some officials, the number of executions dropped significantly, with only three executions in 2005 and none between 2006 and 2009. Executions were resumed in 2010 after the early outbreak of strong activities in favour of capital punishment that year. For the time being, all three countries are retentionist.

Types of executions do not differ much, too. In Japan – hanging, in China and Taiwan – lethal injection and shooting. The last two methods are the only ones authorised by China's Criminal Procedure Law of 1996. Overall, there are 65 crimes for which people can be sentenced to death, including economic crimes such as corruption, bribes of especially large amounts, smuggling of cultural property, tax crimes, etc. Nevertheless, in February 2011, China introduced legislative amendments to the existing penal laws and that year's judicial reform excluded 13 of 65 crimes punishable by death.

On January 9th 2014, Taiwanese authorities announced the abolition of the death penalty for crimes such as taking hostages, armed robbery and several other serious crimes. Taiwan's Ministry of Justice commented on the decision to abolish the death penalty for certain crimes as another major step towards the complete abolition of the death penalty on the island. Over past 10 years 176 people were sentenced to death in Taiwan (Intl. Commission against the Death Penalty, *The death penalty and the most serious crimes*, 2013).

The number of individuals under the sentence of death in China is a state secret, and the Chinese government claims that those who would disclose a state secret can be brought to criminal responsibility, for that reason there is no valid statistics. However, according to Amnesty International, China imposed over 7003 death sentences in 2008. As for Japan, by October 2013, 157 people were sentenced to death and 132 of them

were executed. Taiwan, by the end of 2012, had over 120 sentenced to death, but only 6 were executed.

The categories of offenders that can be excluded from the capital punishment in China are as follows:

- individuals below the age of 18 at the time of crime,
- pregnant women,
- elderly (over the age of 75) (Cornell University Law School*, Death Penalty Worldwide,* 2013).

In Japan:

- individuals below the age of 18 at the time of crime,
- pregnant women,
- mentally retarded (Cornell University Law School, *Death Penalty Worldwide*, 2013)

In Taiwan:

- individuals below the age of 18,
- pregnant women,
- women with small children,
- mentally ill,
- elderly (over the age of 80) (Cornell University Law School*, Death Penalty Worldwide*, 2013).

As for the implementation of the death sentence, there are no actual facilities for death-sentenced criminals in China, unlike in Japan. For instance, in Beijing, prisoners are taken to the No. 1 Detention Centre to be executed. Those sentenced to death are sometimes killed immediately, without spending any additional time in prison. The same situation occurs in Taiwan, where the death-sentenced criminals are kept in detention centres, not even prison. The reason is that, traditionally, the sentenced were executed right after the trial, so there was no need to keep them in prison. Japan, however, maintains 7 special prisons for the death row, yet, their location is unknown. Prolonged waiting on death row is one of the features of the Japanese system. It is believed that during this period there may emerge some new facts concerning the murder and the convicts may theoretically prove their innocence. On average, the period from the moment of verdict to the execution lasts 5 years and 11 months (Hays, *Death penalty in Japan: Details of executions, death row and executed prisoners,* 2013). Conditions in those special Japanese prisons do not differ much from the standard ones. Prisoners are allowed to have visitors, who are either their relatives or lawyers. Their reading materials are controlled and

TV or radio is forbidden (Centre for Prisoners' Rights Japan, *Civil and Political Rights para. 43*, 2008).

The rights of those sentenced to death in Taiwan are generally the same as those of other inmates. Death-sentenced prisoners are kept in jails with two people per room. They have 30 minutes per day to go outside and exercise. The rest of the time they stay in their cells unless they have a visitor or other special reason. A visit is a maximum of 20 minutes long. Those on the death row might have restriction on visitors. They are not permitted to work. They receive three meals a day and can receive food from relatives. They are permitted to have a small TV, newspapers and books.

Death sentenced prisoners in China are not that "lucky" with conditions in prison. Abuses, torture, coerced prisoner's confessions, and forced prison labour are frequent. Death row prisoners are kept shackled and chained twenty-four hours a day, during meals, visits to the toilet, etc. (Nowak, 2006, p. 20). Sometimes they are not allowed to meet their attorneys. Conditions are often unequal, because of the corrupt system and every officer at the head can perform his own justice over prisoner. (Cornell University Law School, *Urgent Action: Chinese Man Faces Death Penalty*, 2012).

Despite the fact that all criminal defendants sentenced to death penalty in China are entitled to a court-appointed lawyer, whether or not they are impoverished, according to Amnesty International reports, 70% are unable to obtain a lawyers assistance (Amnesty International, *People's Republic of China: The Olympics countdown – failing to keep human rights promises*, 2006). The problem with lawyers occurs also in Taiwan, where counsels are appointed only at the first two stages of case review in the District Court and the High Court. While at the Supreme Court the defendant may only be assisted by a lawyer, if he or she can afford it. Nonetheless, in recent years the Legal Aid Foundation has begun to offer pro bono lawyers' help at the Supreme Court. In Japan all defendants are guaranteed to obtain a lawyer's assistance for all proceedings.

Suspects in China may effectively seek counsel only after their initial detention and interrogation, and although they may also seek counsel before formal charges are filed, the police often limits such access. Courts can reject the counsel chosen by the defendant and appoint an attorney according to their preference. The role of Chinese authorities in physical abuse, malicious prosecution of attorneys and other threats urge defence attorneys to refuse to participate in some capital cases. Reputable news sources have reported that defendants are sometimes denied access to their attorneys, evidence is withheld from defence lawyers and closed-door trials may be held. China's government interferes with effective representation, restricting the essential defence resources

in some cases. For certain defendants, it may be difficult to access quality legal representation committed to the client's best defence.

In Japan, the access of the defendants to legal counsel has been described as "insufficient." The defence counsel is sometimes unable to gain access to possibly exculpatory evidence, including exculpatory DNA evidence. Evidence is sometimes destroyed by the police after initial trials. The inability of the defence counsel to gain access to critical evidence has limited the effectiveness of legal representation. Presence of defence counsel is not mandatory during interrogations. While theoretically there is no limitation on meetings between the detained suspects and their lawyers, in practice such meetings will be delayed if they interrupt the investigation, for example if the suspect is in the middle of an interrogation or present at a crime-scene search. There is also no guarantee of the lawyer-client confidentiality, as prison officials may observe meetings held by death row inmates and their lawyers. Additionally, correspondence between death row inmates and the outside, including the defence counsel, is censored. The prosecutor is not required to state whether he is seeking the death penalty until the penultimate day of the trial, after all the evidence has been adduced and before the defence begins its closing statement. This severely limits the defence counsel's ability to properly represent his client. There are no legal provisions requiring an effective assistance of the counsel, and a recent report by the Death Penalty Project notes a worrying tendency to finalise death sentences despite inadequate legal representation (Latham & Watkins LPP, 2012, pp. 144-148).

In Taiwan, the quality of legal representation is especially poor, as might be anticipated given that a great many of the individuals under a final sentence of death are impoverished persons, who received the assistance of public defenders or appointed counsel. Most defendants facing the death penalty are assigned a local public defender or a lawyer who very often has no experience with death penalty cases and may even lack expertise in criminal law. There is no credential system for determining who is qualified enough to participate in a death penalty case. The Taiwan Alliance to End the Death Penalty is trying to improve this by offering training for lawyers. Many private law firms do not allow attorneys to take pro bono work (which is actually paid work through legal aid). This attorney's firm, however, did, and in his experience with "pro bono" and court-appointed work he found that only high-profile cases were likely to involve a co-counsel.

There is an argument that the death penalty lowers the crime rate. It assumes that potential criminals are aware of the severity of committing a crime and, anticipating

that they might be caught, will decide not to break the law due to certainty that if they are caught they will be sentenced to death, rather than to long prison term. This argument has many weaknesses. A lot of crimes are committed under the influence of the moment, alcohol or drug intoxication. This weakens the assertion that the perpetrator is aware of the potential range of punishment or the consequences of committing a crime. But the laws of some nations do not provide for any other punishment but the capital one despite certain circumstances. This provision excludes the possibility of taking into account extenuating factors such as the nature and circumstances of the crime, the life story of accused, his/her mental and social characteristics and the possibility of rehabilitation (Summers, Adler, *Capital Punishment Works*, 2007).

Since Chinese statistics concerning the death sentence are closed, numbers of those who were executed are unknown. However, after the creation of inspection, all decisions concerning the death penalty by the Supreme Court are controlled and so at the beginning of 2007 the number of death sentences was reduced by half. According to Dui Hua, before 2006 China executed about eight thousand people each year. Similar results were pointed by a state news agency Xinhua citing international human rights groups. Based on these data and considering that the number of executions was limited by half, The Dui Hua suggested that the current number is 4 thousand. At a recent conference devoted to the issue of capital punishment in China, which was held in collaboration with the UN Commissioner of Human Rights and the Ministry of Foreign Affairs of China, the authorities officially announced that the Supreme Court rejects the revision of about 10% of death sentences annually. Die Presse reports: "China has made significant progress in reducing the number of executions, but the number is still too high even though it continues to slowly decrease", said the head of the fund, John Kamm. However, the director of the Dui Hua called authorities to be more transparent, claiming that: "If government employees and the public will have full information about the death penalty in China, its elimination will be achieved much faster" (Die Presse, *В Китаї зменшилась кількість смертних вироків*, 2011).

The UN Committee on Human Rights stated that automatic and mandatory death verdict "constitutes an arbitrary deprivation of life in cases when death sentence is rendered without the possibility to take into account the defendant's personal circumstances or the circumstances of the particular crime" (United Nations, *Report of the Human Rights Committee*, 2004, p. 101). It also held that public executions are not compatible with human dignity. In resolution adopted by the UN Committee on Human Rights on 20 April 2005 it insists that all countries that retain the death penalty should

"ensure that performing death penalty executions shall not be carried out in public or in any other degrading form". This means that humiliation and exhibition of the defendant in public before his/her execution should be prohibited (Human Rights Committee, *Fifty-seventh session Comments on Nigeria*, 1996).

In December 2007, the General Assembly of the United Nations adopted the historical resolution calling for a moratorium on the use of the death penalty and supporting the United Nations commitment for abolition of this form of punishment. 104 States voted "for", 54 states – "against" and 29 countries abstained. In 2008 and 2010, the UNGA adopted respectively second and third resolutions and thus confirmed the call for a moratorium. And in 2008 and 2010 the number of those who voted "for" increased. Those who were "against" have decreased in number, resulting in at least 13 countries over the past three years who have changed their position and voted "for" or abstained.

Summary

The author of this article points out that governments in retentionist states often invoke the argument that death penalty is supported by public opinion, and thus it should not be abolished. However, the right to live is recognised in international law as the fundamental human right and thus it should depend neither on the will of political authorities, nor on the judgment by the public opinion. The author of the article stresses that it is also worth noticing that in the past death penalty used to have broad support from societies in countries that have already abolished it (including current members of the EU)[2]. Proponents of death penalty often defend this kind of punishment in the name of victims of the committed crime. They claim that victims of violent crime and their families have the right to see how justice prevails, condemning criminals to death. However, this argument not only contradicts the opinion of those victims, who often oppose the death penalty, but also perpetuates the myth that justice seeks retribution rather than prevention of a crime or rehabilitation of offenders and afterwards making it possible for them to properly function within the society, in accordance with existing laws. At the same time the author underlines that within the Western democratic societies capital punishment is most often preceded by prolonged trial procedures and because the focus

[2] For further reading see: Foucault M. 1995, *Discipline and Punish: The Birth of the Prison*, New York: Random House.

of such penitentiary systems is protection of individuals, the defendant is usually provided with the possibility of appeal, which on the other hand causes a situation, in which convicts remain on a death row for long periods of time.

On the other hand, as in the illiberal regimes like China, the death penalty may not only punish criminals, but also innocent people, serving political and state security goals. In such case, the issue of procedural transparency appears to be of essential importance, as in death penalty cases it can make probable mistakes or abuses less possible and boosts chances for justice at all stages. In the author's opinion, the lack of transparency harms human dignity of those sentenced to death (particularly in case of the so-called "prisoners of conscience"), many of whom still have the right to appeal in accordance with penitentiary procedures typical for democratic states and recognised in international human rights treaties. The secrecy of death penalty procedures contradicts the statement that death penalty is a legitimate act of government. Thus, transparency is a fundamental requirement and for this reason states that retain the death penalty and justify the existence of the death penalty with the argument of social support for the procedure need to provide the public with information on the state practice of capital punishment.

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Abstract

Analysing the statistics of registered cases of death penalty in China, Japan and Taiwan one may assume that even though these three countries all belong to the region of Northeast Asia, there are certain significant divergences in their approaches to capital punishment procedures. Simultaneously, penitentiary systems of the tree countries still demand significant improvements regarding the issue of death penalty, particularly when compared to western democracies; concerning not only the cruel verdict itself, but also some specific abuses and pathologies experienced by the convicts on a death row, as well as the way the execution is performed. The article

presents comparative information and data regarding the usage of death penalty in the Chinese authoritarian system and in two democracies, Japan and Taiwan. The author aims at identifying not only the dominant trends within the tree death penalty systems, but also potential premises and prospects for its future evolution.

Key words: *death penalty, crimes, criminal law, China, Japan, Taiwan*

Anastasiia Kovalyshyna

Indian and Chinese developmental paths and their socioeconomic consequences – A comparative perspective

Over the last three decades, the world has witnessed an outstanding example of Chinese economic boom, whereas the first decade of the 21st century has been recognised as "India's decade of development" (Bajpai & Sachs, 2011, p. 2). The two states have provided great examples in the modern history as both were able to reach dynamic economic growth, driven initially by labour-intensive, low-priced manufactured revolution in the Chinese case, and increasing progress in service production and high-technology development in the Indian one. Nowadays, India and China belong to the group of major players in the global market. The astonishing economic success in the first decade of the new millennium gave them the possibility to be included into the group of the 10 most developed economies in the world (United Nations Statistics Division, 2015). Hence the amount of traded goods carrying a "Made in China" label and IT services outsourced to India.

The author of this article is convinced that in order to investigate the specificities of the so-called "East Asian Miracle" (World Bank, 1993, p. 5), including the "Chinese Model" of development; and on the other hand to demonstrate and compare main features of the Indian economic performance, one needs to figure out significant differences in nature, determinants and structure of Indian and Chinese economic boom. One needs to make an effort to identify factors that stimulate and hinder the prosperity in the two states. The article features the influence of cultural, philosophical as well as socio-political structures of the two civilisations-states and how those hallmarks correlate with the well-being and social advancement opportunities for their citizens, including the accessibility to basic human rights and their correlates.

India, like China, hails from one of the oldest civilisations in the world, which had laid foundations to economic powerhouses throughout the better part of pre-modern and early modern history. As late as in the 18th century, the area of contemporary India provided roughly one-fourth of the world GDP, a share larger at that time than that of areas of today's China or Western Europe. The British conquest, however, precipitated a steady decline – by the time India became independent in mid-20th century, its GDP

had fallen to less than one-twentieth – roughly the same as China which fell from the level of one-third of the world GDP it had enjoyed in 1820s, before the First Opium War. (The Maddison-Project, 2013 version) Therefore, calling either a "newly emerging economy" in the 20th century is erroneous and reflects a Western bias, hence the problem should rather be framed: to what extent India and China have been able to rebuild their former positions in the world economy since their re-emergence as independent polities after periods of foreign colonialism and occupation, in 1947 and 1949, respectively. Over roughly the same period China has fared much better – while by Purchasing Power Parity (PPP) measuring in 2013 it constituted one-sixth of the world economy, a share very close to that of the US, India lagged behind at roughly one-fifteenth despite comparable Indian and Chinese demographic potentials (World Bank Data, 2014 version).

The Indian experience

Explaining the Indian underperformance relative to China may begin with the state's limited capacity to solve Indian socio-economic problems. The Indian democracy has developed relatively weak state institutions, both political and legal ones, as well as a low quality of the rule of law procedures, mired by widespread corruption (Fukuyama, 2014, pp. 82-84). Given Indian democratic principles, corruption may have been even more socially aggravating that the corresponding malaise in China, as the latter has enjoyed a "special culture of secrecy and censorship" (Lofthouse, 2014).

Even though Indian growth forecasts by IMF are rather optimistic (6.4% in 2015), it is still less than what is considered a low point for China (7.3% in 2015), a slowdown from double-digit growth for most of the last three decades for the latter (IMF 2014). The difference is adequately reflected by Human Development Index for 2014 – over the last year China has progressed in HDI ranking and is currently positioned at a relatively high level of human development (0.719, 91st place), while India has stagnated at a medium level (0.584, 135th place) (UNDP 2014). While the new Indian government of Narendra Modi, whose Bharatiya Janata Party replaced the previously politically entrenched Congress as the ruling party in 2014, has been claiming a more aggressive developmental agenda, it remains to be seen whether in such issues as gender and caste discrimination in access to various public goods like education or healthcare the situation will progressively improve.

The root causes of the developmental divergence between India and China may lie in the foundations of the modern Indian statehood. After the 14th of August 1947, when India gained its independence, the period of its transformation from the British colony to the democratic state has been turbulent. Grounded in the Mahatma Gandhi's heritage, the transformation was supposed to morph India into a democratic society based on certain principles which could be deemed liberal.

For instance, Mahatma Gandhi, one of founders of Indian democratic state, was quoted as saying: "No society can possibly be built upon a denial of individual freedom (…). The State is perfect and non-violent where the people are governed the least" (Riggenbach, 2014). However, his successor in effective Indian leadership, PM Jawaharlal Nehru, de-emphasised liberal principles in favour of building democratic socialism: "Liberty and democracy had no meaning without equality, and equality could not be established so long as the principal instruments of production were privately owned" (Das, 1961, p. 162).

It was Nehru's argument against Western capitalism and an argument for Indian democracy to take a socialist turn. Nehru contended: "I see no way of ending the poverty, unemployment, the degradation and the subjection of our people, except through socialism" (Das, Raina, 1993, p. 9). Nehru continued to justify socialism as the most effective way to remove disparities among the hierarchically structured fabric of Hindu society of castes. Numerous privileged business and political groups inherited from colonial period shared vested interest in segments of state budget "(…) so that neither reason nor moral consideration can override them." (Das, 1961, p. 148). Simultaneously, Nehru claimed: "I do not see why under socialism there should not be a great deal of freedom for the individual; indeed, far greater freedom than the present system gives. He can have freedom of conscience and mind, freedom of enterprise, even the possession of private property on a restricted scale. Above all, he will have the freedom that comes from economic security, which only small numbers possess today" (Das, 1961, p. 162).

In other words, the main aim of Nehru's idea of socio-politico-economic system was to solve the problem of divergent class interests through "the expansion of the productive capacity of the nation (…) and, at the same time absorbing all the labour power of the nation in some activities and preventing unemployment." This was intended to create conditions for "a progressive tendency towards equalisation" (Das, 1961, p. 163) and specifically overcome deep disparities in the use of resources and opportunities existing within the Indian society. Nehru believed that without democratic

socialism it would have been impossible to decrease the high level of poverty and exploitation of the downtrodden segments of the society like the "untouchables". Hence, Nehru tended to claim that all social strata should be influenced by a socialist approach. Nehru's economic doctrines, once inculcated, proved remarkably irresponsive to symptoms of their deficiencies. As Staley indicates, since the 1950s India has "lagged behind all its trade-embracing contemporaries". (Staley, 2006) Between 1950 and 1973, South Korea's economy grew five times faster and Japan's even 10 times faster than the Indian one. Indian economy grew at 2 percent yearly between 1973 and 1987 whereas China's growth rose to 8 percent in 1980. Facing relatively low figures of economic growth, Indian policy makers nevertheless refused to reject economic planning. During the Cold War Indian experts and politicians actually embraced so-called the "Hindu Rate of Growth" which, according to official figures, was (or was meant to be) at about 3 to 4 percent per year. (Staley, 2006)

Moreover, the focus on economic planning of the state, and simultaneous relative neglect of other spheres of people's activity in public policy, resulted in serious complications for domestic stability by exacerbating traditional caste, religious and ethnic divisions and highlighting disparities resulting from them. In the above context, the author of this article claims that the greatest mistake of Indian socialist democrats was their conviction about the ability to pass their message to the society, which was on the verge of dissolution. Moreover, despite Nehru's intentions to strengthen India's international economic position and at the same time remove all sorts of social inequalities at home, the main results of Nehru's program had the opposite effect, bringing about the economic isolation of India, accompanied by full governmental control over the private sector activities which produced new subsets of inequalities.

Summarising, the huge unwillingness to open the Indian market for foreign investment and provide its economy with full-scale export opportunities, accompanied by rough restrictions on private business activity along with a serious lack of much-needed improvement in social conditions in the republic, made India lag far behind its high-income counterparts in East Asia e.g.: Japan, South Korea or Taiwan, and eventually – the PRC.

In fact, the socialist period that was once perceived in India as a big stepping stone on the path to its economic development, has impoverished the Indian masses. The author of this article considers transformation of India into a "truly democratic country" possible only by building a sustainable competitive production base, predominantly export-oriented, which would limit the fiscal deficit of the Indian economy and increase

its productivity. Even after 1991, when India started to liberalise (mostly in a cautious manner), it was impossible for the Indian economy to gain dynamism after four decades of planned development and suppression of free market forces. According to Jong-Wha Lee, even now India still faces serious internal barriers in embarking on a "comprehensive plan to eliminate barriers to economic competitiveness, expanding employment opportunities in manufacturing, and improving workers' education and skills" (Lee, 2014). Moreover, Lee observes that insufficiencies in transport, communication, and energy infrastructure "are also seriously undermining India's productivity growth" (Lee, 2014).

The problem of the economic stagnation was also intertwined with the problem of vested interests of higher-caste groups and the way they treated members of lower classes. The caste issue was being addressed at the first stage of the implementation of Nehru's agenda in the 1950s. There appeared a discourse between two opposing narratives at that time. In the first one it was argued that caste system is the core feature of the Hindu society and hence it is indispensable to preserve it as otherwise: "This is going to harm, this is going to divide; this is going to finally create anarchy. This is going to take further all the bad wrong things that have slowly spread like poison, and there is no end to it" (Sidner, 2010).

In accordance with the second narrative, cancelling the caste system would expedite independence of India, accelerate the economy and social progress in general, as for most of citizens it was hardly possible to flourish once living in the society where "caste could determine where you live, your job, even who you could marry and where you are buried, among other things, and even has been used to brutally discriminate against people, especially those in lower castes" (Sidner, 2010). From the historical perspective it is important to understand that the Indian society has significantly differed from the feudal Europe "in terms of flexibility of social differentiation" (Mitra, 2011, p. 48).

As the caste system has always been the "spine" of the entire Hindu society, once the issue of India's "social fragmentation and economic backwardness" is tackled (Mitra, 2011, p. 49), the focus needs to be put on elimination of the "untouchable" segment of population. One needs to be aware of the fact that this vulnerable group is traditionally excluded from social interactions with the four varnas due to the "polluting nature" of their occupation as scavengers (Mitra, 2011, p. 49). The above is true, even despite the fact that article 15 of the Indian Constitution (1949) has formally secured social equality, proclaiming that "the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them". Furthermore,

as Subrate K. Mitra claims, it was a popular conviction represented by earlier generations of the Indian society that "unregulated diversity of religious beliefs impeded the functioning of the newly emerged Indian state and its economy". The fact that adherents to non-Hindu religions are regionally concentrated within the country, such as Sikhs in Punjab and Muslims in Kashmir, allegedly raises the threat of social instability (Mitra, 2011, p. 51).

Combined, it has certainly fuelled the sectarian politics in India and the resulting political gridlocks that have impeded decision-making on national development. In India, there has been no developmental consensus between the economic planners in the government, the political class as a whole and the wider society, despite the nominal predominance of the Congress in the national politics throughout the history of independent India. The democratic competition for insufficient public goods among the socio-political actors has hindered the formulation of cohesive industrial and trade policies at the national level that could have spurred development.

The tipping point has taken place in the early 1990s, at the time of the so-called "dire crisis" of post-Cold War economic landscape, when India's socialism, not unlike the USSR's, manifested its unsustainability. India was an ardent defender of the socialist economy long after the PRC (or Vietnam) had abandoned it to various extents in the 1970s and 1980s. In other words, since democratic socialism had originated in the 1950s, "aimed at poverty removal through capital accumulation, the economic rates continued to fall, but each setback was met with further strengthening of controls rather than an admission that the policy itself was defective" (Shekhar, 1995, p. 8). Moreover, "through its banking system and the Controller of Capital Issues, the government controlled all the long- and short-term credit in the country, hence it was this that accounted for nearly all the profits in the public sector" (Shekhar, 1995, p. 8). The urgent need for change in the economic policy has also been highlighted by the facts that "at the outset of the 1990s, Indian poverty rate was greater than 40%; 75% of its villages were without primary schools, health care, and electricity; over 90% of its residents were unable to find employment within the state" (Kripalani, 2005). Thus, the only way to save the stable economic position and maintain control over the Indian socio-economic predicament was "to address the accumulated follies of the past" (Shekhar, 1995, p. 9).

Such attempts were first made by P.V. Narasimha Rao, India's new Prime Minister in 1991, who declared an economic strategy founded on a significant devaluation of the rupee, reduction in controls over the private sector, simplification of the process of foreign joint venture activity, abolition of most of trade quotas, adoption of the General

Agreement on Tariffs and Trade (GATT) and thus sending a new political message that "we are open for business" to USA, London, Paris, Bonn, etc. The result was mixed, but nevertheless led to significant economic adjustments. For example, in 1993, "inflation was down to the lowest level in the past 25 years, stock indicators have also doubled and export has been rising despite civil disturbances (achieving a 22% increase in 1993-1994)" (Shekhar, 1995, p. 9). Therefore, the early 1990s mark the point of gradual departure from the once cherished ineffective model of development and an attempt to embrace a more liberal approach to economy.

The Chinese experience

It can be hypothesised that despite significant differences in culture and specificity of conduct of domestic policies, India and China have enough in common to be able to follow similar paths to higher economic development. Their post-independence economic policies were both grounded in a socialist programme. For the three decades since 1949, when Mao Zedong had declared foundation of the People's Republic of China at the Gate of Heavenly Peace in Beijing, China (and India) were suffering the consequences of adoption of the five-years-style planned economy. In fact, the major results of promulgating the agrarian reform law (1950) and the ensuing collectivisation, Three- and Five-anti Campaigns (1951-1952), the Great Leap Forward (1958-1961) and the Cultural Revolution (1966-1976) consisted of the creation of a highly centralised political system, imposing strict controls over people's private activity and causing chronic economic distortions in the growth of light and heavy industries and also in the agrarian sector. Thus, "Mao's economic setup had proved to be a handicap to both human initiative and material growth" (Lin, Chao, 1982, p. 1).

When we speak about the 'Chinese model' or try to find the explanation for the Chinese economic boom, we should take a look at the manner in which the economic system of communist China has been reformed since 1978. After decades of turmoil, the first important step was made at the Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party, at which *readjustment, reform, consolidation* and *improvement* were announced as the priorities for the Party and the panacea for economic malaises. In this case, *readjustment* meant "(…) remedying the disproportions among different areas of the economy, primarily among agriculture, light and heavy industry and also between the allocation of funds for production, construction and those for people's consumption" (Wei, Chao, 1982, p. 2). Deng Xiaoping's *Reforms* were

aimed at changing the system of economic management, both on a national level and within each enterprise. *Consolidation* referred to a reorganisation of state-controlled enterprises, while *improvement* was defined generally as attainment of a higher level of production, technology, and managerial skills. (Wei, Chao, 1982, p. 2) Subsequently, all these provisions have formed the basis for the Chinese pro-market policies, which were meant to be implemented alongside the significant changes in the social sphere like the standard of living as well as alongside a pragmatic foreign policy and the introduction of legal regulations for business. It gave China the possibility to accelerate its development at an unprecedented pace.

With this in mind, the main reason for China's astonishing economic growth was the absence of a "pure communist structure" in China. In other words, China managed to obtain substantial benefits early on, once it began to drift away from the mainstream of socialist developmental policies and started to run its own way of "modified communism". In contradistinction to the USSR, China managed "to replace a failing political ideology with a new economic legitimacy (…) where the bureaucrats not only reformed China's monstrously inefficient state-owned enterprises, but also introduced some meritocracy to appointments" (Lee, 2014). In short, the "abundant low-cost labour, high saving and investment rates, substantial market reforms, outward-oriented policies, and prudent macroeconomic management" ("The Economist", 2012) have created foundations for a double-digit growth. An unprecedented combination of market liberalisation with the retention of strict political control has made significant contributions to the Chinese economic development. Furthermore, large-scale capital investment (financed by domestic savings and foreign investment), strengthening of private activity and rapid productivity growth have also had an essential role in the success of China's development. By 2014, since the beginning of reforms China's economic growth has averaged 10% a year, what has led to 440 million Chinese to lift themselves out of poverty – "the biggest reduction of poverty in history" (Lee, 2014).

From that perspective, "India also has the advantage of being able to learn from China. China transformed its agrarian economy by building a strong, labour-intensive industrial base, shifting workers from agriculture to manufacturing and construction, and improving productivity across all sectors" (Lee, 2014). In comparison to India until the 1990s, China's readiness "to embark on a major program of economic reforms including the formation of the rural enterprises and private business, establishing free trade areas in an attempt to liberalise the foreign trade and investments, relaxing state control over certain prices, huge investments in industrial production and the education

of its workforce" (Hu & Khan, 1997, p. 1) made the difference. In other words, "new machinery, better technology and more foreign investment in infrastructure in addition to the development of much-wanted consumer products, earning important hard currency through foreign trade and paying the state taxes gave the Chinese national economy a flexibility and resiliency that it did not have before, and, consequently, have helped China to raise its output in such a short time" (Hu & Khan, 1997, p. 4-5).

While the above features of Chinese development could be broadly considered replicable in India, there is at least one that cannot – a specific relation between Confucianism and Communism. Despite the fact that both ideologies are starkly different on many grounds, they nevertheless "share various essential aspects that lend validity to the argument that Confucianism was to some extent a foundation for Communism or at the very least Confucius principles made the acceptance of Communism by Chinese citizens in the 20th century much easier to accept" (Ryan).

There are some strong arguments in favour of this statement. Confucianism was founded on the "idea of a perfect society, in which every citizen would accept the roles assigned to them and sacrifice their own individuality by devoting themselves to their responsibilities to others. At this ground, Communism stresses similar obligations to the authority of the state" (Ryan). Dissimilarity lies in that one has craved "to unify all of China together under one supreme authority structure for the good of all, while the Communism in China was established in order to improve the lifestyle of the workers in China and ultimately establish the eventual elimination of class structures" (Ryan), as Mao Zedong stated in his political program. The idea of serving the state by sacrificing individuality for the common good is also in close alignment with both Confucianism and Chinese Communism. These correlations have contributed to a strong base for the socialist economy, making it more natural and therefore more open for modifications without delegitimising the whole socialist project. In other words, Confucianism may be considered a harbouring force for retaining a socialist component in an economy opening up for market forces, thus producing a working hybrid.

The Chinese path, however, has imposed significant costs on the Chinese society. Tremendous socio-economic improvements notwithstanding, without mechanisms of democratic accountability progress in welfare and well-being has been uneven, particularly in securing individual (as opposed to collective) human rights and dealing with rising inequalities and environmental degradation. China has been developing without shedding its autocratic trappings like land seizures, forced evictions, abuses of power by corrupt cadres, police harassment, administrative detention, forcible commitment to

psychiatric facilities and house arrests, "re-education through labour", or imprisonment on charges of violating state security or public order. For instance, the government's erratic and punitive crackdowns on prostitution have often led to serious abuses, including physical and sexual violence, increased disease risk, and constrained access to justice (Human Rights Watch, 2013). Despite a constitutional guarantee of freedom of religion, the Chinese government restricts religious practices to state-approved institutions. Censorship in the PRC, while nuanced in its effective coverage, nevertheless significantly constrains social awareness, mobilisation and individual pursuits. While the Indian statehood is not liberal either, its democratic institutions do impose certain checks on power abuse, which are weak or non-existent in China.

Summary

A conclusion that can be drawn from the comparison between the Indian and Chinese developmental paths is that pro-market policies cautiously adjusted to national conditions contribute significantly to economic success, regardless of the political system – communism or democracy. Certainly the political system alone does not guarantee economic progress. In case of China and India, despite similarities in their fundamental potentials (like abundance of cheap labour force) it was the interplay of local post-colonial (hybrid) conditions and economic policies that has made the difference.

The easiest explanation would be that China discarded its socialist economy earlier than India. China has already set a virtuous cycle of external free trade agreements, legalisation and facilitation of investment flows, formation of robust private sector and modernisation of state-owned enterprises as well as engaging rural areas in development, in addition to significant attention paid to the expansion of domestic consumption. Still, the temporal difference is just over a decade – India has embraced pro-market reforms since the Rao government in the beginning of the 1990s, and we have yet to witness a break-neck growth of double-digits in India that China had been demonstrating until recently for most of the time since early 1980s. One can argue either that Indian reforms have not been deep enough or that there exist socio-cultural constraints – the lack of Confucian factor – in the Indian case. Whether Narendra Modi will become India's Deng in terms of reforms remains to be seen, but the way onward will likely need a model "with Indian characteristics" rather than a template borrowed from the West, Japan or China.

Regardless of the political system, ambitions and ideologies of leaders, if the elementary needs with regard to food, housing, education, health as well as a measure of freedom in social activity are not being progressively satisfied, the government may not be able to sustain economic transformation. Even if human rights can be de-prioritised during initial stages of economic overhaul, they can hardly be ignored once societies are transformed by growth. Despite differences in economic weight, both China and India both face a similar challenge: in addition to building great economies – to develop great societies.

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Abstract

As Republic of India and People's Republic of China share similarities in many aspects related to their preceding histories, their politico-economic gravity in Asia and the world as well as their demography, it behoves to look into why their developmental paths have been so different, with China having so far fared much better than India in this regard. The paper explores the problem from several angles. It examines the influence of Jawaharlal Nehru's socialist development priorities on the stagnation of Indian economy during the Cold War and claims similar effect of Mao Zedong's policies on China, while it marks Deng Xiaoping's And P.V. Narasimha Rao's reforms as departures from disadvantageous economic approaches. As the explanation focusing on temporal difference – just over a decade – between shedding old models and adopting pro-market reforms in both countries appears as insufficient given the depth of differences in relevant socio-economic indices, the author considers cultural explanation as relevant, pointing to the premium the Confucian culture awards to pro-market developmental agenda as values held by societies determine the quality of implementation of reforms. However, the Chinese society, less open of the two, is likely to suffer from limits of growth India might not experience in the future because of engendering democracy early on its developmental path.

Key words: *India, China, development, socio-economic transformation, human rights*

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