

Malaysian Perspective on Human Rights

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ABSTRACT

The international law has developed and recognised minimum international standards on human rights. It is however important to consider how they actually affect the lives of the human beings in question. Hence, protection under international law includes the issue of States taking the action necessary to implement the law at the domestic level. However, is there any legal obligation for Malaysia to implement international standards? This article will address the issue of whether the Malaysian government could argue that there is nothing to compel the State to comply with the minimum international standards on human rights, argument of which is rooted to its perspective on human rights. This article will demonstrate the Malaysian government's perspective on human rights that involves the rejection of universal human rights as a Western concept, and the adoption of Asian values. The Malaysian government has also argued that international standards of human rights are not applicable to Malaysia because of the over-emphasis on the rights of the individual as opposed to the rights of the community. International standards of human rights, for example the Universal Declaration on Human Rights, also give greater priority to civil and political human rights, and are thus alien to Malaysian traditions and cultures. Thus, rights and freedoms of individual in Malaysia will be protected or violated because of what exists or what is lacking within the State and not because of what is said or done within international law and international institutions. An international regime on the nature of human rights can offer no more than guiding principles concerning the protection of individual in Malaysia

Keywords: *human rights, Western concept, Asian values, individual rights.*

ABSTRAK

Undang-undang antarabangsa telah mengiktiraf standard minimum terhadap perlindungan hak asasi manusia. Walaubagaimanapun, adalah penting untuk memastikan setakat mana standard ini memainkan peranan melindungi masyarakat dalam sesebuah negara. Maka, perlindungan hak asasi manusia melibatkan isu bagaimana sesebuah negara mengambil langkah sewajarnya bagi menguatkuasakan standard tersebut dip peringkat domestik. Adakah Malaysia mempunyai tanggungjawab undang-undang untuk berbuat demikian? Artikel ini akan menjawab isu samada kerajaan Malaysia boleh menghujahkan bahawa tiada yang dapat memaksa negara untuk mematuhi

standard tersebut, hujahan yang berpaksikan perspektif negara terhadap perlindungan hak asasi manusia. Artikel ini akan membincangkan mengenai perspektif tersebut yang mencerminkan penolakan terhadap kesejagatan sebagai konsep barat dan penerimaan "Asian Values". Perspektif ini juga akan mencerminkan pendirian kerajaan bahawa standard antarabangsa adalah tidak relevan di Malaysia kerana penekanannya terhadap hak individu berbanding hak komuniti. Standard antarabangsa yang terdapat dalam UDHR contohnya juga memberi penekanan terhadap hak sivil dan politik yang mana adalah asing bagi tradisi dan kebudayaan di negara ini. Oleh itu hak asasi masyarakat Malaysia adalah bergantung kepada faktor-faktor dalaman dan bukannya apa yang diputuskan atau dibuat diperingkat antarabangsa. Regim undang-undang antarabangsa mengenai hak asasi manusia hanya menjadi panduan kepada perlindungan hak asasi di Malaysia.

Kata kunci: hak asasi manusia, konsep Barat, "Asian values", hak individu.

INTRODUCTION

The international law has developed and recognised the minimum international standards on human rights¹. It is however important to consider how they actually affect the lives of the human beings in question. Hence, protection of human rights under international law includes the issue of states taking the action necessary to implement the law at the domestic level. However, is there any legal obligation for Malaysia to implement international standards? This question arises because the Indigenous Peoples' Declaration² for example, in which such international standards for indigenous peoples are contained, is categorized as soft law, and arguably does not create legal obligations for Malaysia under international law. Furthermore, since Malaysia is not a state party to ILO 169³, the ICCPR⁴ and the ICESCR⁵, it is not bound to comply with them⁶.

¹ There are nearly one hundred international treaties, declarations and protocols on human rights issues. Shad Saleem Faruqi, Conference SUHAKAM, "Human Rights, International Law and Municipal Courts" 24 October 2009.

² Declaration on the Rights of Indigenous Peoples 2007.

³ International Labour Organization's Convention No. 169 of 1989 - The Indigenous and Tribal Peoples in Independent Countries.

⁴ International Covenant on Civil and Political Rights 1976.

⁵ International Covenant on Economic Social and Cultural Rights 1976.

⁶ Except those rights that have been recognized as customs or *jus cogens*.

This article will address the issue of whether the Malaysian government⁷ could argue that, as far as these instruments are concerned, (ILO 169, ICCPR, ICESCR, the Indigenous Peoples' Declaration) there is nothing to compel the state to comply with the minimum international standards on human rights in general and the indigenous peoples' rights. This article will further discuss the Malaysian government's perspective on the concept of human rights. With regard to sovereignty, this article will also analyse the legal standing of the Malaysian government's view, that the issue of the protection of indigenous peoples' rights, or any other human rights in general, is a domestic issue within its exclusive control. This article will demonstrate how Malaysia due to its existing human rights perspective, has refused to assume any legal obligations, under either treaties or customary international law, to observe international standards.

REJECTION OF UNIVERSALISM AND ADOPTION OF ASIAN VALUES

In Malaysia, the Federal Constitution does not refer to the words "human rights", but guarantees "fundamental liberties" as enshrined in Part II.⁸ The essence and the concept of human rights can be said to be incorporated in the Federal Constitution by the Proclamation of Independence declared by the first Prime Minister, Tunku Abdul Rahman on Independence Day.⁹ It says, "... the nation shall be founded upon the principle of liberty and justice and ever seeking the welfare and happiness of the people..."¹⁰ However, the context of the human rights guarantees in Malaysia has two main features. It is the rejection of universal human rights¹¹ because of their Western values and the adoption of Asian values,¹² which appear to have their origins in the Confucian tradition.¹³

⁷ "Malaysian government" here refers to the government under the leadership of Dr Mahathir, Abdullah Badawi and Najib Tun Razak. Malaysian human rights ideology was deeply entrenched during Dr Mahathir's 22 years rule and the next Prime Minister Abdullah Badawi has chosen to keep many of his predecessor's rules. Human rights policy and ideology has undergone no major changes under Abdullah Badawi's government. For purposes of this article, I view that it is too early to analyse the position under the existing Prime Minister Najib Tun Razak as he has not yet completed one term of his tenureship.

⁸ The list of "human rights provision" in Shad Saleem Faruqi 2009.

⁹ 31 August 1957.

¹⁰ Speech at the Proclamation of Independence quoted in T.S. Jewa, *Public International Law: A Malaysian Perspective*, Pacifica Publications, 1996 vol. 1, iiiv.

¹¹ For debate on Cornell University Press, universalism, see J. Donnelly, *Universal Human Rights in Theory and Practice*, 2nd Ed., 2003 ch. 5; and J. Donnelly, The relative universality of human rights", (2007) 29 *Human Rights Quarterly*, 281-306.

¹² Castellino, Joshua and Redondo, Elvira Dominguez, *Minority Rights in Asia – A Comparative Legal Analysis*, Oxford University Press, 2006, p 18-9.

¹³ Peerenboom, Randall, 'Beyond universalism and realism: the revolving debates about "values" in Asia' (2003) 14(1) *IJCLR*, 1-86, p 74-82. Some Western scholars have viewed that Asiatic values are concrete tendencies or beliefs affecting Asian people's behavior originated by a Confucian cultural factor.

The Malaysian government, especially under the leadership of Dr Mahathir,¹⁴ viewed the conflict, between Western and Asian values, under international law, as a conflict between universal human rights and domestic sovereignty.¹⁵ This conflict often arose, when international legal instruments sought to impose human rights norms on local cultures. To the government, human rights are a new form of colonialism with the potential to destroy the inherent diversity of cultures and move global society towards cultural homogenization.¹⁶ While it remains difficult to arrive at consensus on the substantive contents of Asian values, Malaysian perspective on human rights (the contents and approach) is claimed to be similar to that of many other Asian countries,¹⁷ reflective of Asian values¹⁸ that are culturally acceptable to Malaysia.

In March 1993, when Asian heads of governments met in Bangkok, to prepare for the UN World Conference on Human Rights in Vienna, they reached consensus in the form of the Bangkok Declaration.¹⁹ The Bangkok Declaration recognized human rights as universal, but insisted that they be considered bearing in mind, “the significance of national and regional particularities and various historical, cultural and religious backgrounds”²⁰. Analysis of this instrument suggests that there is no direct denial of the universality of human rights. Nevertheless, the Asian values debate is seen as a threat to universalism and the Bangkok Declaration’s assertion on the particularities of human rights indicates that, “the universality of human rights is at stake”²¹. Because of

¹⁴ From 1981 to 2003.

¹⁵ M.B. Likosky, Cultural Imperialism in the Context of Transnational Commercial Collaboration in M.B. Likosky (Ed.), *Transnational Legal Processes*, Butterworths/LexisNexis, 2002, p 228.

¹⁶ H.J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals*, 2nd Ed. Oxford University Press, 2002, p 367.

¹⁷ Kausikan, Bilahari, ‘An East Asian approach to human rights’ (1995-96) 2(2) *Buffalo Journal of International Law*, p. 263. See Castellino, Joshua and Redondo, Elvira Dominguez, *Minority Rights in Asia – A Comparative Legal Analysis*, Oxford University Press, 2006, p 18-9, for “Mahathir Model” of Asian values.

¹⁸ J. Chan, The Asian Challenge to Universal Human Rights: A Philosophical Approach in J.T.H. Tang (Ed.), *Human Rights and International Relations in the Asia-Pacific Region: Competing Perspectives, International Discord, and the Way Ahead*, London, New York Printer, 1995, 25-37.

¹⁹ Report of Regional Meeting for Asia of the World Conference on Human Rights, Bangkok, 29 Mar – 2 Apr 1993, UN Doc A/COFN.157/ASRM/8, A/CONF.157/PC/59.

²⁰ Bangkok Declaration, 1993, cl. 8. See also Barnds, William, Human Rights and US Policy Towards Asia in J.T.H. Tang (Ed.), *Human Rights and International Relations in the Asia-Pacific Region: Competing Perspectives, International Discord, and the Way Ahead*, p 78.

²¹ Peerenboom, ‘Beyond universalism and realism: the revolving debates about “values” in Asia’, p 15.

the particularities, Malaysia, as many other Asian states, prefers to deal with human rights within its own domestic jurisdiction, resisting international monitoring²² and refusing to become state party to most international human rights treaties.²³

The main critique of the claim of universality is that universal human rights are an insidious method by dominant Western powers, to gain indirect control and influence over the politics and economies of Asian states.²⁴ Dr Mahathir regarded Western powers as engaging in what he called, "economic colonialism"²⁵, which, according to Dr Mahathir, is much more insidious than other forms of colonialism, and which have left many developing countries even more dependent on the western powers than when they were colonies.²⁶ Dr Mahathir drew this analogy when he said that conditions placed upon International Monetary Fund bailouts to developing countries, during the East Asian currency crisis, were equivalent to economic colonialism.²⁷ In another specific context,²⁸ against USA allegations that Malaysia's political system is anti-democratic and that the country does not respect universal human rights, Dr Mahathir replied that a reversion to colonization was the USA's motivation, as a means to weaken, manipulate and control the country.²⁹

²² J.T.H. Tang, Towards an Alternative Approach to International Human Rights Protection in the Asia-Pacific Region in J.T.H. Tang (Ed.), *Human Rights and International Relations in the Asia-Pacific Region: Competing Perspectives, International Discord, and the Way Ahead*, 1995, London, New York Printer, p 186.

²³ However, refusal to become state party to human rights treaties is not a breach of international law. For Asian participation in the treaty-based and charter-based system see, Castellino 2006 p 29-42. Malaysia is a state party to the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child.

²⁴ O. Bruun and M. Jacobsen (Eds.), *Human Rights and Asian Values: Contesting National Identities and Cultural Representations in Asia*, 2000, Richmond, p 4.

²⁵ A. Sen, Human Rights and Asian Values, Sixteenth Morgenthau Memorial Lecture on Ethics and Foreign Policy, 1997, p 10-1.

²⁶ Speech by Dr. Mahathir in Likosky, 2002, p. 228. See also, J. Victor Morais, *Mahathir: A Profile in Courage*, Eastern Universities Press (M) Sdn. Bhd., 1982, p 46.

²⁷ Likosky, 2002, p 228.

²⁸ 'Malaysian are Enraged' Straits Times Interactive, 18 November 1998. Dr Mahathir was alleged that he had arranged the conspiracy resulting in Anwar Ibrahim's arrest in 1998 and was responsible for the beating Anwar Ibrahim received when he was in police custody. On 4 August 2008, Anwar Ibrahim was charged again with sodomy and the US government has raised its concerns on the rule of law in Malaysia and said that they hoped the investigation into the sodomy claims was not used as a political tool to silence Anwar. In response, the Malaysian Foreign Affairs Minister has said, "We, just like the United States also have our own systems and procedures. The position of Kuala Lumpur in the rule of law is unquestionable". See, 'Rais: Rule of Law in Malaysia is unquestionable' New Straits Times, 19 July 2008.

²⁹ Agence France Press, quoted in Likosky, 2002, p 222.

In 1994, Dr Mahathir presented the opening address at an international conference, "Rethinking Human Rights" by arguing that the powerful countries of Europe and North America are cultural imperialists who claim the right to impose their system of government, their free market and their concept of human rights on every country.³⁰ Dr Mahathir was apparently attempting to defend the rights of sovereignty³¹ against those human rights advocates whom he claimed have no respect for independence or territorial integrity in their enthusiasm to uphold their human rights principles.³² Because Malaysia's political system and human rights practices reflect culturally specific Asian values, an intervention by the Western powers amounts to a violation of domestic sovereignty and an expression of cultural imperialism.³³

Kausikan suggests that the diversity of cultural traditions, political structures, and levels of development, has made it difficult, if not impossible, to define a single distinctive and coherent human rights regime that can encompass the vast region of East and Southeast Asia. For example, while most of other Asian states deny existence of indigenous population in their states,³⁴ Malaysia at least recognises that the Orang Asli are an indigenous people,³⁵ indicating that there is something distinctive in Malaysian social and political order. Kausikan further acknowledges Asian diversity as an empirical fact. However, he claims that this fact cannot be cited as a justification of the gross violation of human rights as, "no one claims torture as part of his cultural heritage"³⁶. With regard to Western countries, it is difficult for Asian governments to believe that economic considerations are not, to a certain degree, influenced by the Western attitude towards human rights issues.³⁷ Kausikan views that the temptation and the pressure on the Western countries to link economic concerns with human rights will certainly increase if economic demands persist, however, he is not saying that the Western countries are insincere in their commitment to human rights.³⁸

³⁰ Xinhau News Agency, quoted in Likosky, 2002, p 228.

³¹ J. Donnelly, 'State Sovereignty and Human Rights', unpublished paper, accessible at <http://mysite.du.edu/~jdonnell/papers.htm>. Last visited 30/03/08.

³² Likosky, 2002, p 228.

³³ Likosky, p 222.

³⁴ China argued that the concept of indigenous peoples is associated with "colonialism and aggression by foreign nations or powers, which result in the dispossession and isolation of these populations", thus, in China, there is no indigenous peoples but minorities. The same argument was brought forward by India and Bangladesh. See, UN Doc. E/CN.4/1995/WG.15/2, p 8, paras 4 and 8 (China).

³⁵ Aboriginal Peoples Act 1954, s. 3(1).

³⁶ Kausikan, 1995-96, p 147.

³⁷ Kausikan, Bilahari, 'Asia's different standard' (1993) 92 *Foreign Policy* 24, quoted in H.J. Steiner and P. Alston, 2000, p 539. See also, Castellino, 2006, p 16.

³⁸ Kausikan, 'Asia's Different Standard'.

On the approach to human rights, the Malaysian government has also argued that international standards of human rights are not applicable to Malaysia because of two main factors.³⁹ Firstly, there is an over-emphasis on the rights of the individual as opposed to the rights of the community. Excessive individual freedom, according to the Malaysian government, leads to a decay in moral values and weakens nations, leading to the rise of new forms of racism and xenophobia, manifested in violence.⁴⁰ Secondly, international standards of human rights, for example the UDHR⁴¹, also give greater priority to civil and political human rights than economic rights, and are thus alien to Malaysian traditions and cultures.⁴² Anti-colonialism, the struggle for national independence and nation-building, has dominated Malaysian human rights perspective. Social, cultural, and developmental rights have all been given greater significance by Malaysia.⁴³ To a certain extent, civil and political rights are luxuries in a nation striving to develop its economy and national identity and stability.⁴⁴ Although Malaysia regards all human rights as indivisible and independent, it has stressed that the right to development is a fundamental and inalienable right and realization of civil and political rights is impossible without enjoyment of economic, social and cultural rights.⁴⁵

Despite the government's perspective on human rights, there is a demand⁴⁶ for the Malaysian government to observe international standards in promoting human rights. With regards to the human rights and fundamental freedoms of indigenous peoples, Malaysian delegations at the Seventh Meeting of the Conference of Parties to the Biodiversity Convention⁴⁷ made a strong stand against the demand for the government's observance of its international obligations to indigenous peoples. The issue was in respect of Article 8(j) of

³⁹ Statement by Abdullah Badawi in J.T.H. Tang, *Towards an Alternative Approach to International Human Rights Protection in the Asia-Pacific Region* in J.T.H. Tang (Ed.), 1995, p 234.

⁴⁰ Statement by Abdullah Badawi in J.T.H. Tang, *Towards an Alternative Approach to International Human Rights Protection in the Asia-Pacific Region* in J.T.H. Tang (Ed.), 1995, p 234.

⁴¹ Universal Declaration of Human Rights 1948.

⁴² Bakar, A Zubaidah, 'UN Review Necessary, says Dr M: Malaysia May Submit Proposal to Look into Universal Declaration on Human Rights' *New Straits Times*, 28 July 1997; and Mahzan H. Badrul, 'Asean, China Back Review on UN Human Right Charter; Strong Reaction to Objections of US and European Union' *New Straits Times*, 31 July 1997.

⁴³ Statement by Abdullah Badawi in J.T.H Tang, (Ed.), 1995.

⁴⁴ V.G. Kulkarni, Murray Hiebert and S. Jaysankaran, 'Malaysia: tough talk – Premier Mahathir thrives on no-nonsense policies' *Far Eastern Economic Review*, 24 October 1996, p 23-27.

⁴⁵ Statement by Abdullah Badawi in J.T.H Tang, (Ed.), 1995.

⁴⁶ 'Struggling to Retain Traditional Way of Life', *New Sunday Times*, 22 February 2004, p. 2.

⁴⁷ Convention on Biological Diversity 1992.

the Convention.⁴⁸ The Malaysian delegations were adamant that the terms, “to respect, preserve and maintain knowledge, innovation, practices of indigenous and local communities” in Article 8(j) be subject to national laws, rather than change the text to make the clause subject to international laws. They argued that because there were no international laws in existence on the matter of indigenous knowledge, it would be useless to obligate the government to them.⁴⁹ This is also a matter of state sovereignty: the state has a right to choose what it wishes to be bound by within the territories over which it has exclusive control.⁵⁰ They further argued that international law could be subject to the North’s (West’s) biased rules such as those under the World Trade Organization which would ultimately be detrimental to indigenous peoples.⁵¹

ASIAN VALUES, ECONOMIC DEVELOPMENT AND AUTHORITARIAN GOVERNMENT

The concept of Asian values and its linkage to authoritarian government as a condition for economic growth in Asia have made the expression suspicious for some.⁵² In Malaysia, the requirement of political stability in order to achieve successful economic growth is often cited in order to legitimize government action that includes the invoking and use of emergency laws like the Internal Security Act 1960.⁵³ Under this legislation, preventive detention is legitimized in addition to the existing restriction on freedom of expression⁵⁴ and assembly.⁵⁵ These safeguards are required in order for the nation to maintain public order and political stability. Thus, Malaysia emphasizes stability and enforced social

⁴⁸ Article 8(j) provides, “Each Contracting Party shall, as far as possible and as appropriate: Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices”.

⁴⁹ ‘Struggling to Retain Traditional Way of Life’, *New Sunday Times*, 22 February 2004, p 2.

⁵⁰ Biodiversity Convention, Arts. 3 and 15 (1).

⁵¹ ‘Struggling to Retain Traditional Way of Life’, *New Sunday Times*, 22 February 2004, p 2.

⁵² W.M.T. Barry, *Asian Values and Human Rights: A Confucian Communitarian Perspective*, Harvard University Press, 2000, p 2-5.

⁵³ Malaysian Act No. 82.

⁵⁴ Sedition Act 1948, Malaysian Act No. 15.

⁵⁵ Public Order (Prevention) Act 1958, Malaysian Act No. 296.

cohesion as an important aspect of the fundamental core of Asian values.⁵⁶ This position is similar to what Ghai describes as the Asian approach on human rights as inclusive of strong authoritarian government, with less emphasis on individual rights, and more on the rights of the community.⁵⁷

There is however little evidence that authoritarian governance and the suppression of political and civil rights are beneficial in encouraging economic development.⁵⁸ The significance of economic development as a legitimate concern is now being used as a justification to deny some human rights.⁵⁹ In most cases, development policies become a “source” of human rights violations when indigenous peoples are forced to leave their land for development projects, or deprived of their means of livelihood.⁶⁰

Further, the government’s approach to human rights in order to achieve economic development does not necessarily guarantee an equitable distribution of the benefits of such growth. The Malaysian government, and other Asian governments, may point to the right to development⁶¹ which is also an inalienable human right held by all citizens, however, how the right to development of other people within the state needs to be balanced against the rights of the Orang Asli at least needs to be acknowledged.⁶² In general, the standards of education and health have improved in Malaysia over the last few decades, together with an overall reduction in income inequality and an increase in per capita income.⁶³ However, in the context of indigenous peoples, evidence shows

⁵⁶ Mendes (Undated) accessible at http://www.cdp-hrc.uottawa.ca/eng/publication/centro/asian_values.php. Last visited 04/08/08.

⁵⁷ Y. Ghai, ‘Human Rights and Governancce: The Asia Debate’ (1994) 15 *Australian Yearbook of International Law* 1, p 5-18.

⁵⁸ Peccenboom, 2003, 45-7.

⁵⁹ Y. Ghai, Asian Perspectives on Human Rights in J.T.H Tang (Ed.), p 54-67.

⁶⁰ For “revolution” or judicial recognition of the Orang Asli’s land rights in Malaysia see, *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors* (1997) 3 MLJ 23; *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors*(1998) 2 MLJ 158; and *Sagong Bin Tasi and Ors v Kerajaan Negeri Selangor and Ors* (2002) 2 MLJ 591.

⁶¹ The Declaration on the Right to Development states that “the right to development is an inalincable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised”.

⁶² Kingsbury, Benedict, ‘Indigenous Peoples in International Law: a Constructivist approach to the Asian Controversy’ (July 1998) 92(3) *American Journal of International Law*, p 414-457. See also S.R. Chowdhury (Ed.), *The Right to Development in International Law*, Netherlands, Martinus Nijhoff, 1992.

⁶³ K.S. Jomo, *Growth and Structural Change in the Malaysian Economy*, Macmillan and St. Martin’s Press, 1990, p. 221; and J.H. Drabble, *An Economic History of Malaysia c. 1800-1990*, Macmillan and St Martin’s Press, 2000, ch 13. See also, Castellino, 2006, p 179.

that unequal income distribution, especially between the Malay indigenous and non-Malay indigenous have made the Orang Asli in Peninsular Malaysia the most marginalized peoples in Malaysia.⁶⁴ Sir Han Singer has developed a “redistribution of the fruits of growth” theory. Singer is of the view that redistributing growth would mean adding to the incomes and assets of the poor without having to take away from anyone else. That is, the income of the poorest must increase more rapidly than it would by growth and trickle-down alone.⁶⁵ However, successful application of this theory in the context of the Orang Asli is yet to be seen.

The study on the Orang Asli’s right to land and natural resources demonstrated that the legal protections in place are inadequate. For instance, the state’s legislature has refused to recognize the Orang Asli’s right to their traditional land and the law merely granted them right of occupation so that they can be removed from their land without their free, prior and informed consent.⁶⁶ Despite the legal inadequacy, the Malaysian judiciary in the case of Sagong Tasi has demonstrated its willingness to decide in favor of the Orang Asli by adopting liberal interpretations of the law and by applying common law principles with regard to land rights.⁶⁷

However, the fact remains that the issues decided upon were about compensation for alienated land and the Malaysian courts did not specifically address the rights of the Orang Asli to their land. It is clear from the discussion that the courts were willing to ensure that compensation for land taken is adequate⁶⁸ but there are no positive indications of a willingness to recognize the rights of the Orang Asli in their customary and traditional manner in the form of the right to land that include their rights not to be removed forcibly or without their free, prior and informed consents.⁶⁹ Since land and the Orang Asli

⁶⁴ For example, in 1993, 80.08% Orang Asli are poor (poverty line RM485) and 49.09% are hard-core poor (less than RM170). In other words, as per capita GNP rises, inequality in the distribution of income also rises, a state of affairs which is found in many developing countries. See Bhala, Raj, *Trade, Development, and Social Justice*, Carolina Academic Press, 2003, p 62.

⁶⁵ Raffor, Kunibert, Sir Hans Singer, *Advocating a Fair Distribution of Fruits of Progress* in K.S. Jomo, *Development Economics*, 2005, p 210.

⁶⁶ Aboriginal Peoples Act 1954, s. 6. The Act specifically provides for the creation of special areas exclusively for the aboriginal peoples of Malaya, either as an aboriginal area or an aboriginal reserve by notification in the gazette by the state authority. S. 8 provides that the state authority may grant rights of occupancy of any land not being alienated for any purpose within any aboriginal area or aboriginal reserve to any aborigine.

⁶⁷ *Sagong Bin Tasi and Ors v Kerajaan Negeri Selangor and Ors* (2002) 2 MLJ 591. See also *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* (1998) 2 MLJ 158.

⁶⁸ *Sagong Bin Tasi and Ors v Kerajaan Negeri Selangor and Ors* (2002) 2 MLJ 591. See also *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* (1998) 2 MLJ 158.

⁶⁹ Indigenous Peoples’ Declaration, Art. 26; and ILO 169, Art. 14(2).

are inextricably linked, land may tantamount to the "life support" for the Orang Asli. Taking their land without their free, prior and informed consent will not only depriving their rights to property under Article 13, but also their rights to livelihood that is also equivalent to rights to life.⁷⁰

The true objective behind the Asian governments' reason for justifying the circumvention of human rights, suggesting that it is primarily to protect and enrich only small political-economic elites through state capitalism.⁷¹ These political-economic elites who normally use state-owned enterprise as their "vehicles" are far more likely to be engaged in commercial extraction than in carrying out the public duties entrusted to them. Thus, there is similarity between Asian values as discussed earlier and the practice of state capitalism through the argument that the state always has a desire to maintain its control and sovereignty over national resources. Arguably, in some ways these represent Asian values of non-interference as opposed to Asian values which seem to have considerable respect for human rights. In the light of this, it can be argued that the economic argument for ignoring human rights is outdated and fatuous and that the cultural relativity argument is merely a convenient cover for the government's self-seeking aspirations.⁷² The power relationship between the state and the people in majority Asian countries is overwhelmingly in favor of the state while the state is avoiding confronting the responsibility of widespread human rights abuses.⁷³

The argument about domestic sovereignty by the Malaysian government and other Asian governments is in fact founded on international law principles. The UN Charter⁷⁴ set forth the principle of state sovereignty and equality among member states and established the domestic sovereignty of states over their internal affairs and the principle of non-interference in internal affairs.⁷⁵ In

⁷⁰ *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors*, (1997) 3 MLJ 23. See also, G.S. Nijar, 'The Bakun Dam Case: A Critique' (1997) 3 MLJ cccxix, p ccxlii.

⁷¹ See also Y. Dezalay and B. Garth, 'Law, Lawyers and Social capital: "Rule of Law" Versus Relational Capitalism' (1997) *Social and Legal Studies* 6(1): 109-141.

⁷² Sim Kwang Yang, 'Democracy in Malaysia' in KEHMA-S Report, (The European Committee for Human Rights in Malaysia and Singapore) and the Rainbow Group, European Parliament, The Rule of Law and Human Rights in Malaysia and Singapore – A Report of the Conference held at the European Parliament (1989), 39-43; E. Jaudel, 'Assessment of the State of Human Rights in Malaysia and Singapore from an International Perspective' in KEHMA-S Report 1992, p 23-29; and Anwar Ibrahim (20 December 1988) and 'Trial by Ordeal' (May/June 1999) 28(188), Index on Censorship 143.

⁷³ Humana, Charles, Human Rights Rating in the Asia-Pacific Region 1991 in *World Human Rights Guide*, 3rd Ed., Oxford University Press, 1992. Malaysia for example was rated as "below average" in terms of human rights realization.

⁷⁴ Charter of the United Nations.

⁷⁵ UN Charter, Arts. 2(1), (4) and (7).

1948, the UN General Assembly adopted the UDHR based on the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family as the foundation of freedom, justice, and peace in the world.⁷⁶ These rights, while dependent for protection on co-operative enforcement by nation states, were to be recognized with no distinction to be made over which nation state a person belongs.⁷⁷ The two goals, sovereign absolutism (under the UN Charter), and individually held and universally recognized human rights (under the UDHR) have in practice often been difficult to reconcile. In 1960, the UN adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples⁷⁸ where sovereign absolutism and respect for human rights co-existed. The Declaration provides:

All states shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.⁷⁹

Arguably, human rights are universal conceptually because the rights of humans do not depend on an individual's nationality and so the protection of these rights cannot be limited to the jurisdiction of any one state. Thus, the concept of universal human rights is inherently non-Western and consequently accords no privileges to Westerners.⁸⁰ While the concepts of human rights are universal, the application of these rights within each society and culture will vary. This position is acknowledged in the Vienna Declaration⁸¹ where the significance of different cultural backgrounds is to be borne in mind, for instance, by the international human rights supervisory bodies when they apply the relevant treaty.⁸² However, caution is needed so that too much weight is not given to the arguments of states seeking to assert their own authoritarian rule and to avoid their obligations⁸³ to protect human rights.⁸⁴ Ghai explains:

⁷⁶ UDHR, preamble.

⁷⁷ UDHR, Art. 2, para 2.

⁷⁸ UN Res. 1514 of 14 December 1960.

⁷⁹ UN Res. 1514 of 14 December 1960, Art. 7.

⁸⁰ Freeman, Michael, Human Rights: Asia and the West in J.T.H. Tang (Ed.), *Human Rights and International Relations in the Asia-Pacific Region: Competing Perspectives, International Discord, and the Way Ahead*, p.17.

⁸¹ Vienna Declaration and Program of Action of the UN World Conference on Human Rights, 32 ILM 1661 (1993).

⁸² Vienna Declaration and Program of Action of the UN World Conference on Human Rights, 5.

⁸³ "Obligations" may include non-legal obligations. However, states will only have legal obligations under treaty upon entering into any human rights treaties.

⁸⁴ M. Dixon and R. McCorquodale, *Cases and Materials on International Law*, 4th Ed., Oxford University Press, 2003, p 188.

... a uniform Asian perspective on human rights is that it is the perspective of a particular group, that of the ruling elites ... What unites these elites is their notion of governance and the expediency of their rule ... political systems they represent are not open or democratic, and their publicly expressed views on human rights are an emanation of these systems, of the need to justify authoritarianism and occasional repression... The pervasive use of draconian legislation like administrative detention, disestablishment of societies, press censorship, and sedition, belies claims to respect alternative views, promote a dialogue, and seek consensus ... ⁸⁵

Cassese argues that the adoption of authoritarian structures in domestic political systems, leads developing countries to look upon law in a manner different from that currently viewed in the West.⁸⁶ Law is not primarily a contractual undertaking endowed with binding force; rather it is a means of exercising social control that must give way to power whenever a superior state interest makes it imperative to disregard legal obligations. Law is one of the instruments for exercising authority.⁸⁷ To developing countries, international law is relevant to the extent that it protects governments from undue influence by other states, and is important in bringing about social change, with more equitable conditions, stimulating economic development.⁸⁸ State sovereignty thus becomes their strategy in international relations, to assert their authoritarian rule, and to avoid developing countries' obligations to protect human rights.

Despite of the earlier discussions on how Asian values are distinguishable from the Western values (non-Asian values), at least one similarity could be identified between the two in the context of indigenous peoples' rights towards lands and natural resources. This is with regard to states' attitudes towards the Indigenous Peoples' Declaration.⁸⁹ One of the reasons⁹⁰ for rejection of the Indigenous Peoples' Declaration by the USA, Canada, New Zealand, and Australia was that the Indigenous Peoples' Declaration expanded the free, prior and informed consent requirement too broadly. They were concerned that the broad scope may include requirements for the state to consult with indigenous peoples about every aspect of law that might affect them and could be tantamount to giving the indigenous peoples' group, "veto power against any legitimate

⁸⁵ Ghai, 1994, p 5-18.

⁸⁶ A. Cassese, *International Law in a Divided World*, Oxford University Press, 1990, p 119.

⁸⁷ A. Cassese, *International Law in a Divided World*.

⁸⁸ A. Cassese, 1990.

⁸⁹ Indigenous Peoples' Declaration is categorized as soft law, and arguably does not create legal obligations for any states (including Malaysia) under international law.

⁹⁰ Other reasons include, (i) right to self-determination; (ii) legal nature of the declaration; (iii) definition of indigenous peoples; and (iv) land right.

decisions of a democratic and representative government.”⁹¹ The basis of the claims of these states is the right of their elected legislative bodies to make the final decision over the use of resources within the states. Thus, there is a strong similarity between Western values and the Asian values, at least in this context when all these states uphold domestic sovereignty over universal human rights.

JUSTIFYING ADOPTION OF ASIAN VALUES

At the same time, the concept of Asian values in Malaysia ought not to be dismissed simply due to considerations of its tendency to be misused by the state. This is because there are legitimate differences in values at stake,⁹² for example in Islam, that are not merely ways of thinking about things, but are ways of living.⁹³ The right to religion for Muslims best illustrates this argument. Article 18 of the UDHR provides that everyone should have the right to freedom of thought, conscience and religion, including the right to change religion.⁹⁴ In Malaysia, the right to religion is provided in Article 11(1) of the Federal Constitution. Having reading Article 11, it appears that the notion of “apostasy” is not clearly provided for in the provisions.⁹⁵ Thus, to include the right to apostatise, as part of the right to religion for a Muslim under Article 11 is a matter of interpretation of Article 11 and whether Article 18 UDHR can be used to interpret Article 11 to provide for apostasy.

On this issue, the Malaysian court has pronounced that apostasy is not a profession of religion and thus should not be considered as part of the right to profess a religion under Article 11(1) and in pronouncing thus, the High Court in the case of *Daud bin Mamat*⁹⁶ did not refer to the UDHR for guidance.⁹⁷ Even if the High Court in this case were invited to apply Article 18 of the UDHR, I would reckon that it would be turned down because of the contradictions

⁹¹ GA Res. A/RES/61/295 (Australia, Canada, New Zealand and USA).

⁹² Peerenboom, Randall (Ed.), *Asian Discourses of Rule of Law*, Routledge, 2004, p x.

⁹³ Aziz, Shamrahayu, ‘Muslims’ Right to Freedom of Religion in Malaysia: Piercing Through the Confusion and Contradictions’ (2007) 7 *Malayan Law Journal* (A), p 126.

⁹⁴ However, Article 18 of the ICCPR does not explicitly provide for the right to change religion, though it prescribes the right to freedom of thought, conscience and religion.

⁹⁵ Federal Constitution, Article 11(1) provides, “every person has the right to profess and practise his religion...”

⁹⁶ *Daud bin Mamat and Others v Majlis Agama Islam* (2001) 2 MLJ 390.

⁹⁷ For critique on this decision see, Thio, Li-Ann, Jurisdictional Imbroglia: Civil and Religious Courts, Turf Wars and Article 121(1A) of the Federal Constitution in A. Harding and H.P. Lee (Eds.), *Constitutional Landmarks in Malaysia: The First Fifty Years*, LexisNexis, 2007, p 215.

involved towards the teaching of Islam.⁹⁸ This has been demonstrated by Judge Faiza Tamby Chick in the case of *Lina Joy*.⁹⁹ In this case the Court has heard the argument that Article 18 UDHR can be used to interpret Article 11 to provide for apostasy but has rejected such argument.¹⁰⁰ On this issue, Donnelly takes the view that prohibition of apostasy has a deeply rooted doctrinal basis and therefore should be approached with a certain *prima facie* tolerance as it is a relatively isolated deviation from the international norm.¹⁰¹ The Malaysian court's attitude towards the UDHR can also be seen in the case of *Merdeka University*¹⁰² and *Mohamad Ezam*.¹⁰³

Many Muslim countries, in fact, do not favor the UDHR¹⁰⁴ and, on 5 August 1990, 45 foreign ministers of the Organization of the Islamic Conference adopted the Cairo Declaration on Human Rights in Islam¹⁰⁵ to serve as a guide for the Organization's member states in matters of human rights. All rights and freedoms stipulated in the Declaration are subject to the rulings of Islamic *Syariah* as the sole source of the Declaration.¹⁰⁶ Cairo Declaration upholds

⁹⁸ For the contradictions, see Aziz, 2007.

⁹⁹ *Lina Joy v Majlis Agama Islam Wilayah Persekutuan and Others* (2004) 2 MLJ 119.

¹⁰⁰ *Lina Joy v Majlis Agama Islam Wilayah Persekutuan and Others* (2004) 2 MLJ 119.

¹⁰¹ J. Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly*, p 281-306.

¹⁰² *Merdeka University Berhad v Government of Malaysia* (1981) 2 MLJ 356. It was decided by the High Court that the point taken by the plaintiff, that the reasons for the rejection of the petition are incompatible with Article 26 of the UDHR, did not arise in this case and in any event the pertinent provisions for consideration are those contained in national legislation. Judge Abdoocader ruled that the court's power to make declarations is confined to matters justiciable in the courts, limited to legal and equitable rights, and does not extend to moral, social and political matters. In this case, the UDHR has been ruled as a non-legally binding instrument in the Malaysian court. It is however noticeable that the High Court has failed to make any ruling on the legally binding effect of the right to education as customary international law on Malaysian judiciary.

¹⁰³ *Mohamad Ezam Bin Mohd Noor v Ketua Polis Negara & Other Appeals* (2002) 4 MLJ 449. Deciding in this case, Judge Norma Yaakob ruled that the status and weight to be given to the UDHR by Malaysian courts have not changed, and the UDHR's status remains as a resolution of the General Assembly of the UN, as do the other two UN documents. This is because they are not conventions, subject to the usual ratification and accession requirements for treaties. Because such principles are only declaratory in nature, they do not have the force of law and are not binding on member states.

¹⁰⁴ In contrast, the Yemeni government confirms in the Constitution its adherence to the UN Charter, the UDHR, the Charter of the Arab League, and the generally recognized dogma of international law, Constitution of the Republic of Yemen 1994, ch. 1, Art. 6.

¹⁰⁵ Produced as a result of the regional meeting for Islamic states set up pursuant to GA Res. 46/116 of 17 December 1991 and Res. 1991/30 of 5 March 1991.

¹⁰⁶ Cairo Declaration, Art. 24 accessible at <http://www.oic-oci.org/oicnew/>. Last visited 30/03/08.

freedom of religion when it provides "it is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism"¹⁰⁷. The rights to marriage are subject to religious law¹⁰⁸ and women are guaranteed equality with respect to dignity, and has her own rights to enjoy as well as duties to perform, and has her own civil entity and financial independence, and the right to retain her name and lineage.¹⁰⁹

CONCLUSION

Adoption of the rights listed under the international human rights instrument depends significantly upon the legislative implementation in the country. The Malaysian Federal Constitution does not impose on the national court cognisance of the international human rights laws in any of its provision. International law on human rights is not part of the law of the country and the Malaysian judiciary cannot assume parliament's power to make law. When Malaysia applies a dualist approach, there may be a gap between international standards and domestic legislation. International treaties, even when ratified, do not always and automatically become part of domestic law and are sometimes ignored by public officials, and are inapplicable in the courts.

Thus, individual rights and freedoms of the peoples in Malaysia will be protected or violated because of what exists or what is lacking within the state and not because of what is said or done within international law and international institutions. An international regime on the nature of human rights can offer no more than guiding principles concerning the protection of indigenous peoples. The details of these principles and their specific application in domestic settings need to be undertaken through the process of negotiation between the society and state. The ability of a state to effectively discharge its responsibilities in the area of human rights depends predominantly on the strength of its domestic institutions and its perspective on human rights.

This article has demonstrated the Malaysian government's perspective on human rights and international law. The Malaysian human rights perspective involves the rejection of universal human rights as a Western concept, and the adoption of Asian values. The Malaysian government has also argued that international standards of human rights are not applicable to Malaysia because

¹⁰⁷ Cairo Declaration, Art. 10.

¹⁰⁸ Cairo Declaration Art. 5.

¹⁰⁹ Cairo Declaration Art. 6.

of the over-emphasis on the rights of the individual as opposed to the rights of the community. International standards of human rights, for example the UDHR, also give greater priority to civil and political human rights, and are thus alien to Malaysian traditions and cultures. This article has also demonstrated that Malaysia relies heavily on the state's sovereign right in dealing with demands for its government to observe international standards in promoting human rights in general and those of the indigenous peoples, in our context.

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