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Heru Susetyo

Faculty of Law, Universitas Indonesia, hsusetyo@gmail.com

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HUMAN RIGHTS REGIME BETWEEN UNIVERSALITY AND CULTURAL RELATIVISM: THE ASIAN AND INDONESIAN EXPERIENCE

Heru Susetyo*

* Faculty of Law, Universitas Indonesia
Correspondence : hsusetyo@gmail.com

Abstract

Universal Declaration of Human Rights 1948 come with the idea that human rights are all universal. Vienna Declaration and Programme of Action 1993 strengthen the universalism of human rights by claiming that and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms. And here is the problem. Indonesia is a member of the United Nations. Indonesia adopted UDHR 1948 and made it as the primary source of National Human Rights Provision (Law No. 39/ 1949). However, in practice, there are a lot of challenges in implementing universal human rights in Indonesia. Cultural relativism exists. This paper, therefore, will explore the complexity of Human Rights regime in Indonesia among various cultural relativism surrounding it by using legal and normative approach. The research found that international human rights law in Indonesia can not be implemented in the same manner as applied in the Western world. Instead, it needs to consider local and regional values, as well.

Keywords: *human; rights; universalism; cultural relativism. Indonesia*

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I. INTRODUCTION

The issues and discourses of human rights have attracted people and becoming an international concern for world society for years, particularly since World War II. The United Nations (UN) has also established Universal Declaration of Human Rights (UDHR) on 10 December 1948 and a couple of international human rights law instruments aimed to be international minimum standards of conduct for all participating governments, particularly the members of the UN. Instead of U.N. Mechanism, human rights have also been established by many states by exercising their regional as well as domestic/ national mechanisms.

To date, Asia is the only region (continent) in the world which does

not have human rights regional mechanism. Not to mention Australia, since Australia is a single continent that consists of only a country. Three other regions (the Americas, Europe, and Africa) have established regional covenants for the protection of human rights with supporting machinery in the form of multilateral Commissions and Courts. Asia is the last major region to remain without an international human rights enforcement mechanism.

On the other hand, Asia has been well-known for centuries as ‘a safe haven’ for past human rights violations. The past abuses could be committed either by individuals, groups or even state/ government officials.¹ Middle Eastern countries are famous for their neglecting attitudes to recognize some civil and political rights of their people. China, North Korea, and Myanmar did have long stories of state violence committed to their people. Indonesia, Philippine, Malaysia, Singapore, and Cambodia, on the other hand, have a different kind of violations, where the individual or a group of people (oligarchy) may commit human rights abuse to other groups in the name of political stability, national unity, and so forth.

Japan, for instance, drew public attention by partially amended The Japanese Penal Code in 1947. The most significant amendments were those abolishing the crime of adultery and crimes against the imperial household. Articles 200 and 2005, however, which provided more substantial penalties for killing one’s lineal ascendants remained unchanged. This law gave rise to several constitutional cases that drew public attention because they questioned the validity of the traditional

¹ State responsibility arises whenever a state fails to comply with applicable human rights or humanitarian law, whether by abusing individuals through domestic law or action, or, in some cases, even by failing to provide a remedy for a victim or refusing to prosecute a culprit. International law has recognized group civil responsibility (or tort liability) for abuses, in particular for organized non-state actors such as guerilla or secessionist movements. International law has also accepted determinations by individual states to impose individual civil responsibility for human rights abuses through civil liability under domestic law (See Steven Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law Beyond the Nuremberg Legacy*, 2nd Ed. (Oxford University Press: 2001), pg. 15.

concept of filial piety.²

In 1950, the Supreme Court in *Japan v Yamato* upheld Article 205 paragraph 2 which provided that a person who inflicts bodily injury upon the offender's or the offender's spouse lineal ascendants shall be punished by imprisonment at forced labor for life or for a term of not less than three years, while the punishment for killing an unrelated person is imprisonment with labour for a fixed term of not less than two years.³

Pakistan, on the other hand, having a problem of honour killing, as a living culture in some parts of its community. Every year hundreds of women are known to die as a result of honour killings. Many more cases go unreported, and almost all go unpunished. Women in Pakistan live in fear. They face death by shooting, burning or killing with axes if they are deemed to have brought shame on the family. They are killed for supposed 'illicit' relationships, for marrying men of their choice, for divorcing abusive husbands. They are even murdered by their kin if they are raped as they are thereby deemed to have brought shame on their family. The truth of the suspicion does not matter -- merely the allegation is enough to bring dishonour on the family and therefore justifies the slaying.⁴

The lives of millions of women in Pakistan are circumscribed by traditions which enforce extreme seclusion and submission to men. Male relatives virtually own them and punish infringements of their proprietary control with violence. For the most part, women bear traditional male control over every aspect of their bodies, speech and behaviour with stoicism, as part of their fate, but exposure to media, the work of women's groups and a higher degree of mobility have seen the beginnings of women's rights awareness seep into the secluded world of

² See Tanaka, H. "*Legal Equality Among Family Members in Japan – The Impact of The Japanese Constitution of 1946 on the Traditional Family System* (1980) 53 Southern California Law Review 634 – 28 in Merryl Dean, *Japanese Legal System*, 2nd ed., London: Cavendish Publishing, 2002 at . 536.

³ See *Id.*, at 537.

⁴ See Amnesty International report on honour killing at <http://web.amnesty.org/library/Index/engASA330181999>. See also the honour killing cases in <http://www.saxakali.com/southasia/honor.htm> and <http://www.peacewomen.org/news/Pakistan/April04/honorkilling.html>

women. But if women begin to assert their rights, however tentatively, the response is harsh and immediate: the curve of honour killings has risen parallel to the rise in awareness of rights.⁵

The Pakistan example mentioned above shows us that in Asia, human rights violations are committed not only by the state (vertically) but also by and among the people (horizontally). Ethnic and religious conflicts in Indonesia which occurred from 1996 to 2000 are another example of human rights violations committed by people which took out a significant number of lives and left a long-lasting hostility behind.⁶

Unfortunately, least of past human rights violations were able to be brought to justice nor to be held accountable by national governments. The problem is somewhat complicated since the offences were committed by the head of the state or by the state apparatus themselves. In this sense, to some extent, the notion of Asian Human Rights Regional Mechanism, whether in the form of Convention, Commission, or even a Regional Court, is always relevant. Some people do expect that the regional mechanism is one good alternative to end injustice and promotes human rights in Asia.

II. PROBLEM IDENTIFICATION

Asia is the largest continent in the world. It is also the most populated region. China, India, and Indonesia, the three most populated countries in the world, belong to Asia. Asia is also the birthplace of a thousand religions and beliefs that gradually created –so-called- world civilization. People believe that Asia is the primary resource of world civilization. From Asia, human culture then spread out to the entire world.

Famous for its diversity of races, ethnicities, colours, languages, cultures and values render the discourse of human rights in Asia is always exciting, not to mention a little bit controversial. When it

⁵ See Id

⁶ See Heru Susetyo, *Applicability of Common Article 3 to Geneva Convention to Internal and Horizontal Conflict in Indonesia*, Jurnal Keadilan November 2003. See also The World Bank Notes on *Local Conflict in Indonesia: Incidence and Patterns* No. 19 July 2004 accessible at http://siteresources.worldbank.org/INTCPR/214578-1111751313696/20480305/DN19_Web.pdf

comes to human rights, people tend to question the origin and concepts of human rights. Some of them believe that human rights are merely coming from western cultures which put individual rights higher than group rights. That Asia, itself, has its values of human rights which, to some degree, are slightly different from those in the west.

Indonesia is not different from other countries in Asia. As the most populated Muslim country in the world and famous for its cultural diversities, cultural relativism has worked in Indonesia. The main problem is how Indonesia manage to implement the idea of universal human rights while at the same time also accommodate cultural relativism.

III.HUMAN RIGHTS: BETWEEN UN SYSTEM AND REGIONAL SYSTEM

The United Nation (hereinafter the 'UN') Charter 1945 established human rights as a matter of international concern. The UN set forth these rights in the International Bill of Human Rights and began the process of codifying human rights.

The most significant human rights document produced by the UN is the Universal Declaration of Human Rights 10 December 1948. It is conceived as a common standard of achievement for all peoples and all nations. It states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community. The declaration consists of 30 articles setting forth the civil and political, and economic, social, and cultural rights to which all persons are entitled, without discrimination.⁷

Following the adoption of the Universal Declaration of Human Rights in 1948, the UN Commission on Human Rights drafted the International Bill of Human Rights, which contains the Covenant on Economic, Social, and Cultural Rights, the Covenant on Civil and Political Rights, and an Optional Protocol to the Civil and Political Covenant. The International Bill of Human Rights comprises the

⁷ See excerpts from the International Bill of Rights, Fact Sheet No. 2 UN Centre for Human Rights at People Decade for Human Rights Education (PDHRE), *Passport to Dignity*, 2001, at 508.

most authoritative and comprehensive prescription of human rights obligations that government undertake in joining the U.N.⁸

The history of human rights covenants began during the post-World War II period with the adoption of the Universal Declaration of Human Rights (UDHR) by the United Nations General Assembly. During the cold war period, the General Assembly followed the UDHR by partitioning human rights into two distinct categories: civil and political rights, enumerated in the International Covenant on Civil and Political Rights (ICCPR) and economic social and cultural rights outlined in the International Covenant on Economic, Social, and Cultural Rights. Three regions (the Americas, Europe, and Africa) have established regional covenants for the protection of human rights with supporting machinery in the form of multilateral Commissions and/ or Courts. Asia is the last major region to remain without an international human rights enforcement mechanism.⁹

Vienna Declaration and Program of Action 1993¹⁰ Mentioned that the promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular, the purpose of international cooperation. In the framework of these purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community. It later claimed that all human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

⁸ See David Weissbrodt, et al., *International Human Rights Law Policy and Process* (Cincinnati: Anderson Publishing, 2001), pg 256.

⁹ See Seth R. Harris, *infra*.

¹⁰ See Vienna Declaration and Programme of Action 1993 at <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>

IV. DISCUSSION: CHALLENGING THE UNIVERSALISM

In May 1998 the Asian Human Rights Commission, with support of several non-governmental organizations (NGOs), created the Asian Human Rights Charter Draft. The Charter embodies universally applicable rights that arise from an 'Asian' perspective and incorporates many of the rights supported by most Asian states under various other treaties.¹¹

Although the Charter represents a significant step towards recognizing human rights for the traditionally oppressed group and individuals in Asia, the Charter will not be the final product for the protection of human rights in Asia. Yet, up to present, this charter is called only as 'People's Charter', since it was made by the people, and none of the states in Asian Continent has initiated to draft such charter.¹²

Many Asian states are suspicious of any expansion of human rights beyond those traditionally recognized; the charter will be undoubtedly being unacceptable to them. This does not, however, negate the Charter's value as a tool to evoke change in the position of many Asian governments that refuse to yield to 'Western' principles of human rights law.¹³

The current Charter extends beyond the principles recognized in other Conventions in an attempt to raise the international standard. Rights for oppressed groups such as the elderly, the differently-abled, rights of peasant and working-class group, indigenous peoples and minorities, prisoners, individuals who have HIV/ AIDS, as well as the right to democratic government constitute rights not traditionally recognized by most Asian governments. Asian states view this expansion of human rights as a threat to state self-interest and sovereignty. Accordingly, this perceived threat creates an obstacle to human rights recognition in

¹¹ See Asian Human Rights Charter Draft (accessible at <http://is7pacific.net.hk/~ahrchk/ahrdraftpart2.html>)

¹² See <https://www.humanrights.com/what-are-human-rights/international-human-rights-law/international-human-rights-law-end.html#targetText=The%20Asian%20Human%20Rights%20Charter,has%20been%20issued%20to%20date>.

¹³ See Seth R. Harris, *Asian Human Rights; Forming a Regional Covenant*, Asian-Pacific Law & Policy Journal (2000) accessible at <http://www.hawaii.edu/aplpj>

Asia.¹⁴

One of the significant innovation of the Charter is its inclusion of a right to democracy, which is “a first for a regional human rights treaty.” The addition of such a right hinders Asian states acceptance of the Charter. Because of the diversity of national governments across Asia, Many Asian states regard democratic rule as inappropriate and inapplicable when used outside the structure of Western democracies. Although some states have adopted constitutions and even parliamentary democracies, many non-democratic Asian states, including Bhutan, China, Burma, and some Middle Eastern States, show disdain towards attempts at democratization outside government-initiated methods of liberalization.¹⁵

A. CONCEPT OF STATE SOVEREIGNTY

The atrocities that have occurred over the past fifty years in Asia have caused states and scholars to rethink the idea of state sovereignty. Despite this re-evaluation, recognition and enforcement of rights remain dependent on acceptance by sovereign states. Countries perceive any covenant that affords individual rights as an encroachment upon the sovereign power of the state. Therefore, state sovereignty represents one of the main barriers to the recognition of rights for individuals and groups. Asian countries attempt to elude the growing international consensus through various defences using the word ‘Asian Values’.

B. THE UNIVERSALITY OF HUMAN RIGHTS VS ‘ASIAN VALUES’

It is said that there are two mainstreams of human rights teaching. The natural law and the positivist school. The natural law approach begins with the assumption that there are natural laws. Both theological and metaphysical, which confer certain particular rights upon individual human beings. These rights find their authority either in a divine will or in specified metaphysical absolutes. The positivist approach assumes that the most critical measure of human rights is to be found in the official enactment of a system of law sustained by organized community

¹⁴ See Seth R. Harris, *supra*.

¹⁵ See *id* at 8.

coercion.¹⁶

Despite contesting the notion of natural and positivist, people and government in Asia prefer to challenge the statement that ‘human rights are universal’. In World Conference on Human Rights in Vienna 1993, many developing nations contested the notion of universal human rights. While some agreed that reasons such as freedom from slavery, freedom of thought and freedom of religion might be more or less absolute, they argued that it did not follow that all human rights were equally non-derogable. On the contrary, they claimed that political rights, for example, often relative and more dependent on history, social, or cultural values or stage of development.¹⁷

Regarding ‘Asian Values’, subscribers to ‘Asian Values’ debate argued that human rights attached too much importance to individual rights as opposed to the community or societal rights and responsibilities. They are also challenged Western leaders for applying double standards. They criticized the aggression committed by US and its alliances in Iraq and Afghanistan and the increasing use of sanctions as a means of enforcing human rights because not only did they violate principles of non intervention and state sovereignty as protected by international law, but, often causing more harm than good, affronted the very idea of human rights.¹⁸

Simon C. Tay put Singapore as one good example of a country that put Asian values as a justification in human rights matters. Singapore has faced Western critics over issues such as the caning of Michael Fay, a youth from the United States, judicial proceedings for contempt of court against a foreign academic and an international newspaper, and social controls such as a ban on chewing gum. In these confrontations, Singapore’s representatives have not been apologetic but have, instead, sought to justify their actions by reference to another way of life, an Asian culture.¹⁹

¹⁶ See David Weissbrodt, *supra*, at 231.

¹⁷ See Heu Yee Leung, *ASEAN and Human Rights: the prospect of implementing a regional mechanism for the promotion and protection of human rights in Southeast Asia*, page 3.

¹⁸ See *Id.*

¹⁹ See Simon C. Tay, *infra*, at 746.

The argument from Singapore and some other Asian government is that, while many human rights are now accepted as universal aspirations. Their form, priority and scope of applicability will vary. Asian societies, it is said, place the community in preference to the individual and proceed by ‘consensus, not conflict. The authority and dominance of state leaders are not suspect and limited but trusted and enhanced. Asian approaches to human rights, it is argued, emphasize economic and social rights and are legitimated by the continued enjoyment of stability and good economic progress, which is what Asians value. This ‘Asian’ view of human rights had come into greater prominence since the run-up to the World Convention of Human Rights in Vienna 1993 when Asian government representatives came together to issue the Final Declaration of the Regional Meeting for Asia of the World Conference for Human Rights. The argument highlights culture – whether explicitly or implicitly. Human Rights and democracy in Asia differ, these representatives say, because its culture differs.²⁰

This cultural argument is problematic. Critics will say the Asian view tends to generalizations and stereotypes of what is “Asian”. It underestimates both the historical ruptures of colonization and the present forces of global interaction. It privileges culture and leave us in a quandary if there are elements in that culture that we find unacceptable on more universal grounds. Moreover, while some may respect these emerging concept as signalling a growing self-awareness and self-confidence in Asia, others suspect that the cultural argument is a pretext to excuse continuing transgressions by repressive governments.²¹

C. RELIGIOUS VALUES AND CULTURAL RELATIVITY

The next problem is the relation between religion and human rights. For instance, in the Muslim Middle East, there has been an intense but mixed response to the ideals of human rights. Formulations of human rights have often been made in Islamic terms, suggesting that Islam is a critical factor affecting Muslim’s receptivity to human rights concept.

Rusjdi Ali Muhammad, an Indonesian scholar, stated that the discourse on human rights in the Islamic perspective should be based

²⁰ See *Id.*, at 747.

²¹ See *Id.*

on the relation between human and their creator (Allah SWT). Man and woman do have duties and obligations before their creator. Therefore, the discourse of human rights in the Islamic perspective should put human obligations (to their creator) first before claiming their own rights.²²

Ann Elizabeth Mayer indicated that in their writings on the relationship between Islamic and international law, Muslims have espoused a wide range of opinions on rights –from the assertion that international human rights are fully compatible with Islam to the claim that international human rights are products of alien, Western culture and represent values that are repugnant to Islam. In between these extremes, one finds compromise positions that in effect, maintain that Islam accepts many but not all aspects of international human rights or that it endorses human rights with individual reservations and qualifications. Muslims who oppose international human rights and demand their replacement by Islamic law has not to date conceived of Islam affording more extensive protection for human rights than are provided by international law. The literature arguing Muslims may have human rights, but only according to Islamic principles, provides the theoretical rationales for many recent government policies that have been harmful to rights.²³

Cultural relativists endorse the idea that all values and principles are culture-bound and that there are no universal standards by which cultures may be judged. Similarly, they deny the legitimacy of using alien values to judge culture and reject using ideas taken from Western culture to judge the institution of non-western cultures. They also tend to oppose the idea that human rights norm is universal. To impose on Third World Societies norm taken from the UDHR involves, according to this perspective, ‘moral chauvinism and ethnocentric bias.’²⁴

On the other hand, Ratner and Abrams take notice that some non-western countries may have different views on individual criminal

²² See Rusjdi Ali Muhammad, *Hak Asasi Manusia dalam Perspektif Syariat Islam* (Banda Aceh: Ar Raniry Press, 2004), page 167 – 170.

²³ See Ann Elizabeth Mayer, *Islam and Human Rights Tradition and Politic* (Boulder: Westview Press, 1999) page 1 – 2.

²⁴ See Id, at 8.

liability, especially for state-sponsored offences. For example, Eastern cultures have unique normative outlooks on criminal law, whether on the sources of norms, means of compliance, or sanctions. Cultural resistance to the application of these 'Western' norms may be entrenched, and any invocation of them must be sensitive to concerns that foreigners are imposing their values on these states. In one notable example, when the UN Human Rights Commissions voted to set up a commission of inquiry to investigate atrocities in East Timor following its 1999 referendum on independence, all Asian states on the Commission opposed or abstained on the resolution.²⁵

D. INDONESIAN EXPERIENCES

Indonesia, like Singapore, is one good example for explaining why the regional human rights mechanism has never been established until now. Indonesia as a fourth most populated country in the world which is also considered as the country with the largest Muslim population in the world, country with thousands languages, ethnicities, and cultures does have a complex and particular condition that renders the discourse of human rights may vary from its original source.

Indonesian government enacted the Human Rights Act in 1999 and the Human Rights Court Act in 2000, respectively. It has also amended the Indonesian constitution and inserted ten articles related to human rights in 2000. Furthermore, in 2005, Indonesia finally ratified two international covenant considered as International Bill of Human Rights, namely International Covenant on Civil and Political Rights and International Covenant on Economic, Social, and Cultural Rights 1966.

The human rights articles enshrined in Indonesian amended constitution and Indonesian Act No. 39 are the same with those enshrined in Universal Declaration of Human Rights 1948, International Covenant on Civil and Political Rights 1966, and International Covenant on Economic, Social, and Cultural Rights 1966. However, things are sharply different when they come to the implementation of such rights.

Indonesian governments, as well as the people, sometimes have a

²⁵ See Steven Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law Beyond the Nuremberg Legacy*, 2nd Ed. (Oxford University Press: 2001), pg. 24-25.

different way of implementing human rights. Contributed enormously by three and half centuries of colonization and imperialism, more than thirty years under dictatorship, poverty and a large number of unemployment, render the discourse –not to mention the implementation- of human rights is not as exciting as other things are done. Some people say that we accept human rights as long as compatible with our religious and social values. Other perceived that human rights are merely coming from western culture. Among human rights areas which gain many controversies are freedom of religion, freedom of marriage, sexual orientation, and abortion.

Some rights in Indonesia present the complexity of the application of universal human rights in Indonesia; as follows: right to live, freedom of religion/ freedom of conscience, right to marriage, right of sexual orientation, and some of the personal rights but in Indonesia considered as public domain.

Even though the Law on Human Rights No. 39/ 1999 has adopted most of human rights values and principles enshrined at UDHR 1948, however, there is some conflict of laws as follows:

Article 4 The right to life, the right to not to be tortured, the right to freedom of the individual, to freedom of thought and conscience, the right not to be enslaved, the right to be acknowledged as an individual before the law, and the right not to be prosecuted retroactively under the law are human rights that cannot be diminished under any circumstances whatsoever.

Up to the present, Indonesia still recognizes death penalty and sentenced to death the offender, particularly in five offences: premeditated murder, drug offences, terrorism, genocide/ crime against humanity, and corruption, The provision of the death penalty are available at Criminal Code as well as at special laws.

Article 10 (1) Everyone has the right to marry legally, to found a family, and to bear children. (2) Marriage shall be entered into only with the free and full consent of the intending spouses, under prevailing legislation.

Problems with this article are with Law on Marriage No. 1/ 1974 (has just amended this September 2019). The marriage law explicitly

mentions that the legality of marriage comes from (any) religious law. Therefore, in Muslim Marriage, as an example, it is almost impossible if the married couple comes from a different religious background. Furthermore, same-sex marriage is impossible. Law on Marriage No. 1/ 1974 stipulates that marriage is between man and woman, not between a same-sex couple.

In Aceh province, the sexual intercourse between the homosexual couple (gay, lesbian or bisexual couple) is considered a crime. The local regulation (Qanun) No. 6/ 2014 punishes such acts with caning or imprisonment.

Article 20 (1) No one shall be held in slavery or servitude. (2) Slavery, the slave trade and servitude shall be prohibited in all their forms.

Currently, there are no jobs formally constituted as slavery job in Indonesia. However, there are some practices considered as modern slavery, for instance: domestic workers/ maid and child labour. They are mostly underpaid and work without any work contract, without precise working hours and certain job division.

Article 22 (1) Everyone has the right to freedom to choose his religion and to worship according to the teachings of his faith and beliefs. (2) The state guarantees everyone the freedom to choose and practice his religion and to worship according to his religion and beliefs.

In Indonesia, apostasy is not a crime. However, in practice, people are most uncomfortable to hear other people's religious conversion, then make it a public issue. Moreover, Indonesia still applies the Law No. 1/ 1965 on Religious Blasphemy.

Article 55 Every child has the right to practice his religion and to think and express himself as befits his intellectual capacity and age under the guidance of a parent or guardian.

The same provision is also explicitly mentioned at The Law on Children Protection 2002. However, this provision is also problematic. Many parents believe that they have parents' rights and duties. For example, Indonesian Muslim parents will not easily surrender their children to choose any religion. Inasmuch, according to Islamic

teaching, apostasy is a crime before God (Allah SWT).

Another controversy law that sparks public attention is Law No. 44/2008 on Pornography. The industry of pornography and prostitution are banned by this law. Some groups opposed to this law by saying that this law has profoundly interfered with people's privacy rights and criminalizing women. The supporter of the bill said that pornography should be banned for the sake of children protection, personal protection, and because it strictly violates religious teaching and considered as a 'sin.' On the other hand, the rejecters also said it would potentially victimize women and violate women's rights, violate civil liberties, particularly freedom of expression, cultural rights, and undermining pluralism in Indonesian society. Therefore, since both parties talk on behalf of human rights, which and whose human rights are they really talking about?

Article 70 In executing his rights and obligations, everyone shall observe the limitations set forth in the provisions in this Act, in order to ensure that the rights and freedoms of others are respected, and in the interests of justice, taking into account the moral, security, and public order considerations of a democratic society.

Article 73 The rights and freedoms governed by the provisions set forth in this Act may be limited only by and based on law, solely for the purposes of guaranteeing recognition and respect for the basic rights and freedoms of another person, fulfilling moral requirements, or in the public interest.

Those two provisions mentioned above clearly mentioned that some discretion in human rights fulfilment is justifies for specific reasons, namely: rights and freedom of others, interest of justice, moral security and public order.

E. ASIAN HUMAN RIGHTS MECHANISM

The Universal Declaration of Human Rights affirms the global nature of these rights. The acceptance by states of a right of oversight by international organizations over domestic human rights practices, the signature by non-Western states of numerous human rights and humanitarian law conventions, including the ICC Statute, and UN

attempts to expand these norms all testify to the idea that they no longer represent simply Western preferences. In the criminal arena, in particular, all states, including Asian countries, criminalize the most atrocious abuses against the human person, and near-universally accepted treaties single out certain offences such as genocide and war crimes.

Regionalism is sometimes put forward as an alternative to globalism, a superior substitute for the principle of universality. Emphasis is placed upon the bigness and heterogeneity of the wide world, and the conclusion is drawn that only within limited segments of the globe can we find the cultural foundations of common loyalties, the objective similarity of national problems, and the potential awareness of common interest which are necessary for the effective functioning of multilateral institutions. The world is too diverse and unwieldy, the distances – physical, economic, cultural, administrative, and psychological between peoples at opposite ends of the earth are too formidable to permit the development of a practical sense of common involvement and joint responsibility. Within a region, on the other hand, adoption of international solutions to a real problem can be intelligently carried out, and commitments by states to each other can be confined to manageable proportions and sanctioned by clearly evident bonds of mutuality.²⁶

There are four grounds needed to establish a regional mechanism, according to Inter-American Commission on Human Rights, they are: (1) the existence of geographic, historical, and cultural bonds among States of a particular regions (2) the fact that recommendation of a regional organization may meet with less resistance than those of a global body (3) the likelihood that publicity about human rights will be broader and more effective (4) the fact that there is less possibility of general, compromise formulae, which in global bodies are more likely to be based on considerations of political nature.²⁷

The Asian view of human rights came into greater prominence with the Bangkok Declaration. In Bangkok, Asian government representatives railed against the imposition of ‘incompatible values’ in the name of human rights. They did not wholly reject universal human rights, as others might argue. The Asian representatives reaffirmed their

²⁶ See Henry Steiner, *supra*, at 781.

²⁷ See *Id.*, at 783.

commitment to principles contained in the Universal Declaration of Human Rights. Moreover, the Asian approach argues that while human rights are universal norms, there must be an allowance for national and regional differences in priorities, emphasis, and specific form of practice in recognizing them.²⁸

In accordance with the notions above, applying a regional human rights mechanism in Asia is not impossible. Instead, Asia does have some grounds to establish a mechanism. The governments and NGO's have also drafted a charter of Asian Human Rights since 1998. Asia needs to strive to make this dream come true. In this sense, how to establish a regional mechanism in the heat of cultural and values diversity remain a challenging question.

IV. CONCLUSION

Universal human rights as enshrined at UDHR 1948 and subsequently strengthened by the 1993 Vienna Declaration and Programme of Action is a fundamental principle of human rights. The United Nations has actively supported it. Indonesia, as a member of the UN, is obliged to implement such policy in a fair and equal manner, at the same footing and same emphasis.

Cultural relativism has also worked in Indonesia. Things are different in Indonesia when it comes to the right to live, freedom of religion and conscience, sexual orientation rights, apostasy, and some specific children rights. Indonesian values and Asian Values are both worked in Indonesia.

On the other hand, many developing nations in Asia suspiciously perceive that human rights are simply a new kind of westernization. People may say that this is not true since the human rights (Universal Declaration of Human Rights) contain some universal values and aimed to be the international standard of norm and conduct for the governments and people throughout the world. Unfortunately, some western countries which tirelessly promoting human rights, sometimes also undermine human rights by applying double standards through

²⁸ See Simon S.C. Tay, *Human Rights, Culture, and The Singapore Example* (Mc Gill Law Journal), page. 751.

aggression and intervention to developing countries domestic problems.

This criticism of universal human rights is not new. Even Council of Europe (through the European Court of Human Rights) has introduced a margin of appreciation²⁹ in dealing with human rights case. Some degree of discretion is permitted, under special supervision.

What about in Indonesia and other Asian Countries? Different from Europe, America and Africa, Asia does not have a regional mechanism and regional charter on human rights. Therefore, if there are any challenges or discretion to universal human rights provision in any respected Asian countries, there will be no further clarification and justification.

Needless to say, Indonesia and other Asian Countries have implemented their version of ‘universal human rights’ due to their cultural and social uniqueness. Correction and clarification are mostly can not be made by the international regime since mostly national laws are always more powerful than the international law regime.

²⁹. The margin of appreciation is a doctrine that the European Court of Human Rights has developed when considering whether a member state has breached the Convention. It means that a member state is permitted a degree of discretion, subject to Strasbourg supervision when it takes legislative, administrative or judicial action in the area of a Convention right. The doctrine allows the Court to take into account the fact that the Convention will be interpreted differently in different member states, given their divergent legal and cultural traditions. As the Council of Europe has observed, the margin of appreciation gives the Court the necessary flexibility to balance the sovereignty of member states with their obligations under the Convention. Please see <https://www.justiceinitiative.org/uploads/918a3997-3d40-4936-884b-bf8562b9512b/echr-reform-margin-of-appreciation.pdf>

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