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Why Rights are Wrong in ASEAN and Beyond: A Critique of the Foundations of Universal Human Rights

Abstract: The Association of Southeast Asian Nations (ASEAN) is a battleground, one theatre in what Pope Francis has referred to as a “World War” where universal human rights, ersatz rights, and Asian values clash. Its people seek to escape old style Asian dictators while at the same time ward off a new ideological colonisation. Part One of this article provides a brief overview of the development of ASEAN and its human rights mechanisms. Part Two then examines whether the original axiomatic listing of human rights or an iteration of human rights founded upon the human genome or a Kantian underpinning can legitimise human rights and, if not, whether reference to the human soul made in the image of God with its natural law may substantiate the human rights project, perhaps, articulated as congruent with the purpose and design courts now recognise in the natural laws found in every ecosystem of nature. Part Three contends that aspects of the public trust doctrine, i.e., the natural use principle and the precautionary principle, are analogous to natural law principles and, because ‘the book of nature is one’, these environmental law principles may help jurists to recognise a theory of natural law liability in order to promote and defend authentic human rights. Finally, the author recommends that NGOs of Catholic Inspiration should, when appropriate, appeal to immaterial realities, God and the human soul, as a firm foundation of human rights and, also, when appropriate, advance in domestic, regional and international venues a theory of natural law liability based on environmental law principles in order to promote and defend authentic human rights.

Keyword: ASEAN, Asia, environmental protection, human rights, natural law

Abstrakt: Stowarzyszenie Narodów Azji Południowo-Wschodniej (ASEAN) to pole bitewne, teatr, jak to określił Papież Franciszek, „wojny światowej”, gdzie ścierają się prawa człowieka, namiastki prawa i wartości azjatyckie. Ludzie

próbują uciec od starej azjatyckiej dyktatury, a jednocześnie odeprzeć nową ideologiczną kolonizację. Część pierwsza artykułu przedstawia krótki opis powstania ASEAN oraz jego mechanizmów w sprawie praw człowieka. W części drugiej zbadano, czy pierwotne aksjomatyczne zestawienie praw człowieka albo iteracja praw człowieka oparta na genomie ludzkim lub też kantowskie podstawy mogą uzasadniać prawa człowieka, a jeśli nie, to czy odniesienie do ludzkiej duszy stworzonej na obraz Boga razem z jej prawem naturalnym może uzasadniać projekt praw człowieka, sformułowany zgodnie z takim celem i zamysłem, jakie sądy uznają w prawach naturalnych spotykanych we wszystkich ekosystemach przyrody. W części trzeciej stwierdza się, że niektóre aspekty doktryny zaufania publicznego, tj. zasada naturalnego zastosowania i zasada ostrożności, są analogiczne do zasad prawa naturalnego, a jako że „księga natury jest jedna”, wymienione zasady prawa ochrony środowiska mogą pomóc prawnikom w uznaniu teorii odpowiedzialności prawa naturalnego w celu promowania i ochrony autentycznych praw człowieka. Na koniec autor proponuje, aby w stosownych przypadkach katolickie organizacje pozarządowe zwracały się do niematerialnych rzeczywistości, Boga i ludzkiej duszy, jako do solidnych podstaw praw człowieka, jak również aby rozpowszechniały podczas krajowych, regionalnych i międzynarodowych wydarzeń teorię odpowiedzialności prawa naturalnego opartą na zasadach prawa ochrony środowiska w celu promowania i ochrony autentycznych praw człowieka.

Słowa Kluczowe: ASEAN, Azja, ochrona środowiska, prawa człowieka, prawo naturalne

Introduction

Southeast Asia is home to people of diverse ethnicities, religions (Buddhist, Catholic/Christian and Muslim), cultures, political arrangements (monarchy, democracy, and dictatorships) and diversity of laws [Hooker 1978: 110-121]. Its growing population comprises approximately one quarter of the world's people [WHO 2019]. Positioned between India, China, and Australia the ten nations of Southeast Asia struggle to maintain an independent political and economic identity. One thing that all these nations do share in common, unfortunately, is a failed human rights record.

Thailand's military junta has failed to keep its promises made at the UN to respect human rights and restore democratic rule [Human Rights Watch 2018]. The extrajudicial killings by Filipino strong man, President Duterte, of alleged drug dealers and addicts continues [Heydarian 2018]. Viet Nam suppresses religious adherents and persecutes Christians [Tuan 2017]. Brunei does not allow the Catholic faith

to be taught even in Catholic schools¹. In Laos, the “government’s suppression of political dissent and lack of accountability for abuses stand out in a human rights record that is dire in just about every respect”. [Human Rights Watch 2017]. Cambodia’s Prime Minister, fearing he might lose the election in 2018, suppressed the opposition party [Human Rights Watch 2018]. The government in Indonesia has consistently failed to protect religious minorities from “harassment, intimidation from government authorities, and threats of violence from militant Islamists. Authorities continue to arrest, prosecute, and imprison people under Indonesia’s abusive blasphemy law” [Human Rights Watch 2017]. In Malaysia, authorities continue “to detain individuals without trial... [and] impose detention without trial for up to two years, renewable indefinitely, to order electronic monitoring, and to impose other significant restrictions on freedom of movement and freedom of association, with no possibility of judicial review”. [Human Rights Watch 2018]. In Singapore, the government restricts freedom of assembly and requires a police permit if it is held in a public place, or if the public is invited. “Permits are routinely denied for events addressing political topics” [Human Rights Watch 2016].

The Association of Southeast Asian Nations (ASEAN) is a battleground, one theatre in what Pope Francis [2016] has referred to as a “World War” where universal human rights, ersatz rights, and Asian values clash. Its people seek to escape old style Asian dictators while at the same time ward off a new ideological colonisation. Part One of this article provides a brief overview of the development of ASEAN and its human rights mechanisms. Part Two then examines whether the original axiomatic listing of human rights or an iteration of human rights founded upon the human genome or a Kantian underpinning can legitimise human rights and, if not, whether reference to the human soul made in the image of God with its natural law may substantiate the human rights project, perhaps, articulated as congruent with the purpose and design courts now recognise in the natural laws found in every ecosystem of nature. Part Three contends that aspects of the public trust doctrine, i.e., the natural use principle and the precautionary principle, are analogous to natural law principles and, because ‘the book of nature is one’, these environmental law principles may help jurists to recognise a theory of natural law liability in order to promote and defend authentic human rights. Finally, the author recommends that NGOs of Catholic Inspiration should, when appropriate, appeal to immaterial realities, God and the human soul, as a firm foundation of human

¹ Author’s personal conversations with Catholic priests during his visit to Brunei in 2010.

rights and, also, when appropriate, advance in domestic, regional and international venues a theory of natural law liability based on environmental law principles in order to promote and defend authentic human rights.

PART ONE: The Development of ASEAN and its Human Rights Mechanisms

ASEAN came into being in 1967 at the height of the Vietnam War as a political coalition of five Southeast Asian nations – the Philippines, Malaysia, Singapore, Indonesia, and Thailand [Tan 2008: 171, 197]. The Secretariat of ASEAN is located in Jakarta, Indonesia. Over the years, five new members were added – Brunei (1984), Vietnam (1995), Laos (1997), Burma (1997), and Cambodia (1999). Timor-Leste made application to become a member of ASEAN in March of 2011 [McGeown 2011]. Following the close of hostilities in Vietnam, ASEAN expanded its scope to include economic development, hoping to create a single market and economic community by 2015 [Tan 2008: 197].

At the time of its formation in 1967 until 2007, ASEAN's international personality remained “relative” or “subjective”. That is, it was ever dependent upon the express recognition of its member states [Desierto 2009: 77, 88]. However, its legal personality changed, once the ASEAN heads of government signed the Charter of the Association of Southeast Asian Nations (hereinafter, “the Charter”) at the 13th ASEAN Summit in Singapore. Indeed, on 20 November 2007, ASEAN evolved into an “‘intergovernmental organization’, enjoying functional immunities and privileges” [ibid.: 89].

The Charter became effective on 15 December 2008 [Tan 2008: 171-172] and has three main goals: 1) to give ASEAN international legal personality and to streamline its decision making; 2) to strengthen its institutions, especially the Secretariat; and 3) to establish mechanisms to monitor compliance of its agreements and settle disputes between its members [ibid.: 172]. The Charter contains thirteen chapters, fifty-five articles, and four annexes. ASEAN's declaration of international legal personality is found in chapter three [ibid.: 177]. Its human rights mechanism is mentioned in chapter four [ibid.].

The Terms of Reference (TOR) for the ASEAN Human Rights Body (AHRB) were formally adopted on 20 July 2009 by all ten ASEAN Foreign Ministers [Hsien-Li 2010: 239, 255]. On 23 October 2009, ASEAN leaders inaugurated the ASEAN Intergovernmental Commission on Human Rights (AICHR) as the overarching

human rights institution for the promotion and protection of human rights in ASEAN.

On 18 November 2012, ASEAN adopted a Human Rights Declaration at its summit in Phnom Penh. However, this long-awaited achievement was not greeted with enthusiasm [Human Rights 2012; Human Rights Brief 2013]. Article 8 of the Declaration, in particular, contains language emphasising national security, public order, health, safety, and morals as limiting factors on the universality of human rights:

The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, *and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society* [ASEAN 2013: 8, 18].

The following factors may help to explain why those who drafted the ASEAN's Human Rights Declaration conditioned the scope of human rights as they did.

“The ASEAN Way”

The core values of ASEAN can be found in Article 2 of the Charter as “Principles”, which include respect for different cultures, languages, and religions, while emphasising “common values in the spirit of unity in diversity”. The “ASEAN Way” is a process of consultation, consensus, and “non-interference”, all of which was eventually codified in the Charter in Article 20(1). However, the Charter also modified the rules for ASEAN to address the human rights violation of its members by adding provisions for arbitrating obdurate “hold out” postures of state members. The Charter provides that the ASEAN Summit may “decide” disputes involving state members of ASEAN whether or not they consent [Tan 2008: 189]. The option exists for ASEAN to resolve disputes and the non-compliance of state members [ASEAN 2013: 26-27], which is an expression of its new objective legal personality, i.e., “the possession of the organization’s own ‘distinct will’ apart from that of its members, evidenced by the organization’s power to take binding decisions upon the entire membership through the vote of a mere majority of its members” [Desierto 2009: 92].

For example, when Cambodia asked to be admitted to ASEAN, it was told to first secure peace within its borders. This same requirement was not imposed

on Burma/Myanmar when it sought admittance. What justified the different treatment? ASEAN is more willing to intervene in the internal affairs of its member states if that nation's domestic turbulence threatens to spill over into other countries. This was the case with Cambodia. Otherwise, even if a nation's internal affairs involve egregious violations of human rights, as in the case of Myanmar, ASEAN did not view them as a threat to regional stability and, so, did not condition in any way the admission of Myanmar. All the state members of ASEAN are guilty of human rights violations. So, unless a member state's domestic affairs pose a threat to its neighbours, they take a hands-off approach with regard to how each member handles its internal affairs [Thio 1999: 57].

This approach is analogous to that taken by the Allies during the Nuremberg War Trials. The Allies alleged that they had no jurisdiction to adjudicate issues concerning the criminality of internal affairs in a sovereign nation under the rubric of "crimes against humanity". Only if the atrocities of a government against its own citizens *in times of peace* were in some way in preparation for a war of aggression against its neighbors did the prosecutors for the Allies claim that they had jurisdiction over peacetime atrocities. The Allies were aware that they would expose their own governments to possible charges of crimes against humanity, for racial discrimination or various colonial policies, if they laid too heavy an emphasis on peacetime violations of human rights. Therefore, the prosecution of war crimes had precedent over crimes against humanity at Nuremberg [Huhle].

"Asian Values"

The "Asian Values" debate first came to a head when ASEAN delegations to the Vienna World Conference on Human Rights (1993) claimed an exception from the imposition of, so-called, Western universal human rights. The 26th ASEAN Ministerial Meeting sent a joint communiqué which stressed development over human rights: "[D]evelopment is an inalienable right and the use of human rights as a conditionality for economic cooperation and developmental assistance is detrimental to international cooperation and could undermine an international consensus on human rights" [ASEAN 2013: 17; also Tan 2008: 182-183]. The Vienna Declaration rejected these claims: "It is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms" [Desierto 2009: 83].

The arguments put forward by Asian values proponents can be seen in one of two ways or a combination of both: 1) As an excuse for tyrant's rights, that is, as an

attempt by various Asian dictatorial regimes to avoid scrutiny of their abysmal human rights record; and/or 2) as the last line of defence in resisting post-modern Western cultural relativism [Peeters 2007].

From Status to Contract

It is important to note that, unlike Western Civilization, there is no long-standing tradition of individual human rights in Asia. Henry Sumner Maine [2005: 100] in his classic work, *Ancient Law*, described the journey of societies as an historical process from “Status to Contract”.² This transition is still ongoing in many nations of Asia and the Pacific. In ancient societies, the tribal chief held all property in trust for his tribe. The chief, not individuals, had rights for the good of the individual members of the tribe. The members of his family, tribe, or nation enjoyed privileges (not rights) according to their rank and status within the group, but they could not alienate the common property held in trust by the tribal chief for the benefit of the group. In Western societies, over the course of time, slowly the individual began to emerge as one possessing juridical personality, a free agent with a right to contract, to own and alienate property and express other individual rights³.

This shift from status to contract and from privilege, based on one’s status within the group to free standing personal rights, is still on-going in Asia. Before the advent of Western commerce and colonisation in Asia, the concept of individual human rights had little resonance in Asian cultures. Individual people in Asia were seen not so much as *autonomous* but as *inherently relational beings* whose identity depended upon their rank or status within a larger group. One author put it this way:

In Asia, there was no explicit concept of human rights before the experience with the Western liberal discourse. Especially in East Asia, Confucianism emphasizes social relation and obligation stemming from those relations, e.g. respect towards the elders or duty to the family. Perceptions of human rights are also reflective of social and class position in society. Traditionally, East Asian states such as Japan and Korea associated inequality with order and equality with chaos. People were not believed to [be] born equal: the ruling class and men were more superior than the underlings and women. Before the modern-state era,

² “[W]e may say that the movement of the progressive societies has hitherto been a movement from *Status to Contract*”.

³ See also: Chapter V, “Law in Primitive Society”.

countries under absolute monarchism such as Thailand view “rights” as [pertaining to the] legitimacy and authority of the King (and/or the elites). They also have duties to those under their [rule]. For the serfs, rights pertain to communal well-being and their obligations according to their position and status. Thus, rights are not conceptualized for any particular individual. It can be seen that the cognitive prior in the region has been about the state and society stability, not individual security. The cognitive prior at that time was not particularly receptive to human-centric values [Cheppensook 2013: 231].

Asia’s long-standing traditions preferring group cohesion and harmony over individual autonomy is at the heart of the cultural clash between post-modern Western versus Asian values. Many in the West find justification for human rights in the philosophy of Immanuel Kant [Caranti 2013]. However, their reliance on Kantian ethics as justification for the human rights project, with its heavy emphasis on individual autonomy as the irreducible foundation of human dignity and worth, does not resonate in Asia:

Leaving aside the difficulties with Kant’s proof of our freedom to which in a sense his entire moral thought is devoted, the problem here is that autonomy is not given the same importance everywhere in the world. Especially non-western cultures, even if convinced that human are free... would likely remain unimpressed by this feature. Filial piety, honor, obedience to the established authority, loyalty to a religious belief are commonly viewed as elements of human worth as important as autonomy, to say the least. Moreover, Kant’s implicit assumption according to which the individual is the sole legitimate subject of ethics is questioned by alternative, non-western approaches that are told to give priority to the group, as exemplified by the so-called East Asian challenge to human rights [ibid.: 2].

That the group, i.e., the state, should plan the economic welfare of the nation in Asian societies, not autonomous free market entrepreneurs and the “invisible hand of the market”, was bolstered by the World Bank Report of 1993 that attributed the unprecedented economic growth that the nations of Southeast Asia had enjoyed to government intervention in their economies. That the state, not the private sector, was seen as fostering economic growth led ASEAN leaders to believe that Asian state-centric economic and developmental rights were superior to Western human-centric civil and political rights [Cheppensook: 232-234, 247].

At the Regional Meeting for Asia of the World Conference on Human Rights in March of 1993, Asian states issued the *Bangkok Declaration* that proclaimed Asian values and asserted that human rights were relative and regional, and international organisations must allow for diversity in the expression of human rights: “[T]hat while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural, and religious backgrounds” [ibid.: 236; Bangkok Declaration 1993: 8]. As mentioned above, a few months later, the UN *Vienna Declaration* categorically denied this assertion stating: “All human rights are universal, indivisible and interdependent and interrelated...” [ibid.: 234; Vienna Declaration 1993: 5].

The Asian values debate continued until the 1997 Asian economic crisis. This financial meltdown of the economies of Southeast Asia occurred in large part due to the “pull-out of international capital, which was the main cause of economic growth in Southeast Asia”. [ibid.: 245]. As unemployment more than doubled in Asian nations and crime and suicide rates went up across the region, this undermined “the rationale to prioritize group social and economic rights over individual political and civil rights which was decided by the state” [ibid.: 247]. The economic tiger of Southeast Asia had fallen into a financial tiger pit and could no longer roar that Asian values were the reason for its prowess. Although on a different scale, some compare the Asian financial crisis to the Holocaust during World War II. In both cases the existing political structures proved inadequate to prevent massive social disintegration which, in the aftermath of the crises, provided impetus for the creation of formal human rights mechanisms [ibid.: 248].

Humbled but not entirely beaten, in the face of mounting pressure from civil society and the international entrepreneurs of globalisation, in 2008 ASEAN drafted a Charter that for the first time provided it with international legal personality and committed its member states to protect *both* universal and regional values. Article 1, paragraph 7 states that ASEAN will “promote and protect human rights and fundamental freedoms” along with “the rights and responsibilities of Member States of ASEAN”. However, in 2012 when ASEAN promulgated the ASEAN Human Rights Declaration (AHRD), Article 8 of the AHRD reignited the Asian values debate by conditioning human-centric rights so as “to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society”.

ASEAN's Identity Crisis

Several theories have been offered to explain the identity crisis of ASEAN, that is, the tension between the universal human rights and Asian values it simultaneously espouses in its human rights instruments as well as the lack of congruity between those universal human rights it proclaims and the violation of those rights by its member states.

Realist

From a realist perspective, ASEAN is an organisation that its member states created and continue to use purely to maximise their own power and security. However, critics of the Realist position point out that if this is so, why waste time and effort to draft a human rights declaration at all? On the other hand, some member states take human rights seriously under their domestic laws. These states, at least, would seem to have an interest in the extension of those norms regionally [Davies 2014: 115, 129-179, footnote 37].

Constructivist

Constructivism, the leading explanatory hypothesis concerning the identity of ASEAN, suggests that state actors “are convinced to adopt new standards because those standards are thought to hold superior moral weight... they are right not merely expedient”. [ibid.]. In addition, constructionists believe that through a process of socialisation these morally superior norms are internalised, changing the identity of the actors. However, state actors in ASEAN regularly violate the human-centric norms they promote regionally in the domestic human rights violations. This seems to prove constructionists are “too optimistic about the power of norms to reconstitute and drive the behavior of actors” [ibid.: 116-117].

Acculturationist

Acculturation and rational choice theorists argue that member states in ASEAN take human rights norms seriously for utilitarian ends but these norms do not transform the character or identity of the state actors. The member states of ASEAN have adopted human rights mechanisms to reinforce their legitimacy and that of ASEAN. Human rights mechanisms in ASEAN are a stratagem employed to further their ulterior motives. This explains why member states fail to comply domestically with the human rights norms they promote regionally: “States use norms when it is in their strategic interest to do so, and violate them when their cost-benefit calculations suggest that that is the most effective course of action available to them” [Davies 2013: 207-231].

However, all these theories speak as if these ten Southeast Asian nations were of one mind with respect to the value they attribute to individual human rights. On the contrary, with respect to their commitment to human rights, ASEAN member states may be divided into three groups – progressive (Philippines, Indonesia), cautious (Singapore, Malaysia and Thailand), and recalcitrant (Myanmar, Laos, Cambodia, Vietnam and Brunei). Each of these groups got something of what they hoped to include in the ASEAN Human Rights Declaration:

Strong commitments to civil and political rights, distasteful to the recalcitrant members but of great importance to the progressives, are balanced by commitments to Asian values and forceful restatements of the “ASEAN Way” as the guiding approach to (non-) implementation. Conversely, strong commitments to the right to develop, the right to live in peace and to economic, cultural and social rights that recalcitrant members have greater engagement with were inserted alongside, but not as substitutes, for civil and political concerns and the assertion that rights are universal and indivisible [Davies 2014: 119].

Anti-colonialism

State members of ASEAN are, also, ambivalent about creating a strong regional structure for ASEAN or strengthening its human rights mechanisms because the spectre of neo-colonialism haunts this region of the world. The nations of Southeast Asia are positioned between two regional hegemon, India and China, and one international hegemon [Cheppensook: 140]⁴. the United States and its First World allies. All of these foreign powers contend for influence and dominance in this region of the world.

Since World War II the leaders of the states members of ASEAN have been wary of neo-colonialism. When former U.S. Secretary of State John Forest Dulles sought, during the height of the Cold War, to create a NATO-like defence pact with the nations of Southeast Asia, he “predictably met with suspicion from some Asian leaders who shared long and enduring experiences of struggle for independence, resulting in a strong sense of anti-colonialism”. [ibid.: 107]. Collective defence was seen by them as a means to weaken their authority over security issues, a feature of the colonial era. The ASEAN way of non-interference and non-intervention was promoted, not just as a way to foster regional harmony but as a strategy to ward

⁴ “[In the wake of the financial crisis of 1997] Fearing the rise of China and India, they strive to create the economic pillar of ASEAN community”.

off external intervention [ibid.: 112]. Fighting between the states in Southeast Asia could be used as a pretext for external powers to return and “project their own agendas onto the politics of Southeast Asia or to manipulate one neighbor against the other [ibid.: 117].

Just as regional conflicts in Southeast Asia could trigger external powers to intervene in the region, so too, could human rights violations be used by external powers to project their agendas more forcefully in Southeast Asia. When drafting the ASEAN Charter, the Minister of Thailand pushed hard to include strong language in support of individual human security. His efforts failed because other delegates feared that the concept of human security would be “used as a pretext for humanitarian intervention” [ibid.: 254].

The Manipulation of Human Rights Mechanisms

One would think that the nations of Southeast Asia would want to create a strong regional alliance in order to strengthen their common defence against external subordination from foreign powers. If so, then why have the states members of ASEAN intentionally hobbled their regional organisation, making it a toothless tiger? [Suwastoyo 2009; van Veen 2015]. A closer look at how regional intergovernmental organisations in regions formerly ruled by colonial powers actually operate, however, tells a different story.

In 1962 the Organisation of African Unity was formed and dedicated to the eradication of colonialism on the African continent. It was disbanded in 2002 and succeeded by the African Union (AU) that same year. Within a year member states of the AU signed and promulgated the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, better known as the “Maputo Protocol” [African Union 2003]. This charter guarantees comprehensive rights to women including the right to take part in the political process, to social and political equality with men and, last but not least, autonomy in their so-called reproductive health decisions.

Thirteen years after the promulgation of the Maputo Protocol, the Catholic Bishops of Africa and Madagascar excoriated both the AU and the Maputo Protocol as instruments of globalist neo-colonial design. The bishops warn that “[s]elfish and perverse interests are imposing themselves on our continent with a speed that keeps on acceleration, with unabated aggressiveness, in an ever more organized and powerfully financed manner” [2015: 4]. The Bishops recognised a “terrify

resurgence of a colonialist spirit” under the name of rights, democratisation and development. This new ideological colonialism pushes condoms, decadent sex education programs, and so-called gender perspective that keeps Africa from “developing in harmony with her soul” [ibid.: 5]. They warn that “agents of the civilisation of death”, using ambivalent language, have seduced national decision-makers and entire populations to pursue their ideological objectives [ibid.: 6]. Under the influence of this new colonialism the nations of Africa have become “servile partners” committing Africa to a “new type of slavery” [ibid.: 7]. Even more disheartening for African bishops is the fact that the African Union was always “under the yoke of neo-colonial lobbies”:

Now we observe with profound pain that our pan-African institutions have been, since their creation, under the yoke of neo-colonising lobbies. In 2003, these lobbies made the newly formed African Union adopt the [Maputo Protocol], the first international treaty to shamefully recognise abortion as a right of women. While it was mandated to represent, serve and make the African peoples be respected, the African Union sold their sovereignty for a lentil stew and some pitiful “technical help” coming from abroad and highly toxic for Africa [ibid.: 8]⁵.

African human rights activist, Obianuju Ekocho, points out that although abortion is only mentioned in article 14 of the Maputo Protocol, that article is the driver of an agenda, “the one most lobbied, campaigned, and promoted by Western-funded feminist organizations across Africa... to weaponize the forty words of the article... to kill Africa’s unborn children” [Ekocho 2018: 95].

What the Catholic bishops of Africa and Madagascar shrewdly discern and denounce is that regional intergovernmental bodies leverage power away from nation states, national leaders, and ordinary citizens even as they make the leavers of power in the region more accessible to transnational power brokers with hegemonic designs. Canadian investigative journalist, Elaine Dewar, interviewed Maurice Strong, United Nations Chair for the Rio Conference on Environment and Development (1992). Strong explained that the thrust of globalism was, in fact, aimed at limiting the sovereignty of nation states, the better to colonise them:

⁵ Pope Francis reiterated the African Bishops’ denunciation a few months later in his address to the General Assembly of the United Nations. He said that development can be used “as a cover... for carrying out an ideological colonization by the imposition of anomalous models and lifestyles that are alien to peoples’ identity” [Auza 2018].

I then understood that he [Maurice Strong] hoped to get national governments to take the first and second and third steps in the diminution of their own powers at Rio. It was like hearing a distant trumpet sound outside the walls, a signal that a great work had begun. The Rio Summit, like the Stockholm Conference, was aimed at reorganising the world into very much larger administrative units, with real power redistributed from national governments to vast regional organisations. The idea of relative sovereignty was going to apply to all nation states. [Dewar 1995: 295].

Post-Modern Western Messianism

In the past, Western missionaries preceded the military and political colonisation of much of Southeast Asia. Today the zealous advocates of the post-modern human rights project, with their incessant demands that Asians adopt Euro-centric moral practices including contraception, abortion, and pansexual transgenderism as universal human rights, smacks of a new messianism. Instead of colonial missionaries putting loin cloths on the natives as in the past, today's post-modern human rights zealots insist the natives wear condoms or they will surely go to hell (in a proverbial hand basket) from malnutrition, maternal and infant mortality, environmental depletion, etc. However, the declassification of the United States Security Council's national security memorandum, NSSM 200, in 1989 reveals that the First World's big push to crash the fertility of the Developing World has more to do with a well-established agenda, maintaining hegemony and ready access to vital resources and markets, than with integral and sustainable development [Kissinger Report 1974].

Post-modern secular messianism is, also, suspect from the perspective of Catholic social teaching. Pope John Paul explained, "[w]hen people think they possess the secret of a perfect social organization which makes evil impossible, they also think that they can use any means including violence and deceit, in order to bring that organization into being. Politics then becomes a 'secular religion' which operates under the illusion of creating paradise in this world" [John Paul II 1991: 25]. The idea that the world can be saved by human effort from poverty if only all nations agree to adopt some grandiose international development scheme is illusory, and may be used to mystify an agenda: "Christian realism, while appreciating on the one hand the praise worthy efforts being made to defeat poverty, is cautious on the other hand regarding ideological positions and Messianistic beliefs that sustain the illusion that it is possible to eliminate the problem of poverty completely from this world" [Vatican 2005: 183]. The Church teaches that secular messianism,

especially its more viral political variants, is nothing less than a foreshadowing of the Antichrist who deceives the nations promising Parousia now, paradise on earth, which only Christ himself will bring about at his second coming at the end of time [CCC: 675-676]⁶.

Summary of Part One: This section reviewed the history of ASEAN and its human rights mechanisms. ASEAN began as a regional trading block between countries whose domestic policies often showed little respect for universal human rights. At the Vienna World Conference on Human Rights in 1993 the states members of ASEAN openly challenged the human rights project as a Western imposition on Asian cultures. They claimed that “Asian values” uphold group status and cohesion over individual autonomy as the bases of human worth and dignity. However, because of their precarious political position they made concessions to Western powers who insisted that they adopt human rights mechanism. In 2008 the states members of ASEAN adopted a formal Charter providing ASEAN an independent juridical personality apart from its states members. In 2009 they commissioned a Human Rights Body together with an Intergovernmental Commission on Human Rights (2009). And in 2012 they issued a Human Rights Declaration. However, the member states of ASEAN inserted in its Human Rights Declaration “Asian Values”, such as deference to culture, religion and national security, as limiting factors on the reach of human rights. Theories as to why ASEAN has hobbled its intergovernmental organisation and human rights mechanism vary but contributing factors include opportunism, fear of human rights will be used as a pretext for foreign intervention and a new colonialism, an ideological messianism, that seeks weaken “Asian values” supplanting them with alien Western cultural values and practices.

PART TWO: Human Rights Foundations – Axiomatic, Kantian, Genomic or *Imago Dei*?

Is there a philosophical foundation of human rights? There was no consensus on the objective foundation of human rights listed in the *Universal Declaration of Human Rights* in 1948. One of the drafters of the UDHR, Jacques Maritain [1949],

⁶ “The supreme religious deception is that of the Antichrist, a pseudo-messianism by which man glorifies himself in place of God and of his Messiah come in the flesh. The Antichrist’s deception already begins to take shape in the world every time the claim is made to realize within history that messianic hope which can only be realized beyond history through the eschatological judgment. The Church has rejected even modified forms of this falsification of the kingdom to come under the name of millenarianism, especially the ‘intrinsically perverse’ political form of a secular messianism”.

famously said, “Yes, we agree about the rights, but on condition no one asks us why”. However, today there is no longer agreement about the rights. For instance, the United States President’s Commission on Unalienable Human Rights was criticised for daring to suggest that there is a “distinction between unalienable rights and ad hoc rights granted by governments” and whether this test will be used, critics fear, to define rights narrowly and marginalise LGBTQI people, for instance [Berkowitz 2019]. With disagreement over which so-called human rights are truly unalienable or universal and which are “ad hoc” or ersatz, all the more does the issue of the foundation and source of human come to the fore.

Axiomatic

Given that there is still no agreement on the foundation of human rights, simply an axiomatic consensus⁷, Asian critics complain that assent to universal human rights is comparable to an act of faith in a new Western religion: “As the debate on foundations [of human rights] stands, then, human rights cannot pretend to the quasi-scientific authority that naturalists would endow them with. At most, they can claim the internal rational coherence that is characteristic of ideologies and religions, justifying the religious analogy”. [Feron 2014: 181, 184]. The human rights project appears as an attempt to “unite humankind into a ‘moral community,’ justifying their comparison with a religion” [ibid.: 182].

The human rights project can be seen as a continuation of a long line of ideologies that attempt to fill the vacuum left by religion in post-Christian Europe: “During the 19th century, many Europeans thought they could compensate for the decline of the Christian faith by attaching themselves to ideologies: socialism, nationalism, communism, Marxism. The rights panacea is the latest of these...” [Scruton 2015]. Those of a utilitarian frame of mind also view human rights with blind trust:

One of the most popular foundations of human rights is offered by Michael Ignatieff who argues that the only plausible grounding is prudential. In his view, we should stop asking why we have human rights, and concentrate on what they do for us. Similar is the approach of Alan Dershowitz in *Rights from Wrongs*, who argues that the only valid legitimization of human rights rests on the experience of the atrocities that infallibly take place in political regimes where human rights do not inform the constitutional law [Caranti 2014: footnote 4, 18].

⁷ Some argue that a natural law bases underlies the articles of the UDHR [Woodcock].

Genomic

Anticipating the threats to human dignity likely to develop as research on the human genome progressed, the United Nations issued the *Universal Declaration on the Human Genome and Human Rights* (UDHG) [1997]. It declared that the human genome is the basis of human dignity: “The human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity. In a symbolic sense, it is the heritage of humanity”⁸. The UDHG states that regardless of one’s genetic characteristics everyone “has a right to respect for their dignity and for their rights” [ibid.: 2 (a)] and it is imperative “not to reduce individuals to their genetic characteristics” [ibid.: 2 (b)].

One of the issues the UDHG left unresolved was a criterion for determining the humanness of hybrid beings, admixtures of human and nonhuman DNA. Ethicists now ask, “what human percentage does a genome have to be to count as human?” [MacKeller, Jones 2012: 29]. What impact will this question have on universal human rights? It seems inescapable that the axiomatic foundation of universal human rights that underlies the UDHR will crumble:

In other words, if some human-nonhuman interspecies entities are not given the full inherent dignity to which they are entitled, nor given the benefit of the doubt, this could eventually serve to challenge the very idea of conferring any kind of full inherent dignity to any individual even those who may be completely human... In this manner, the global protective network which this dignity gives would become unstable, inconsistent and unclear while the whole concept of society and its rule of law would begin to be injured... In short, this means that full human inherent dignity is not endangered just because human-nonhuman interspecies being may not be part of the *Homo sapiens* species per se... Instead, it is the whole concept of conferring full dignity and fundamental rights to all individuals within the global community, without having to pass some *test* of acceptance that would be in danger of being undermined [ibid.: 203].

The Holy See’s [1997] intervention on the UDHG pointed out that the basis of human dignity is not the human genome but vice versa: “[A]s formulated the text would seem to mean that the genome is the foundation of the human being’s dignity. In reality, it is human dignity and the unity of the human family which

⁸ See also [International Declaration on Human Genetic Data 2003: 1].

confer value upon the human genome and requires that it be protected in a special way”. Even if the frontier between species becomes fluid, the bases of human dignity rests not simply in human DNA but in uniquely human relations with other people, the unity of the human family, and with God.

Rather than attempting to explain human nature simply in terms of its material and its efficient causes (the human genome and sexual or artificial reproduction), emphasis needs to be placed on the formal and final causes of human nature (human soul made in God’s image called to serve the common good and to final beatitude). It is not improper to describe the material cause of human nature as the human genome and its efficient cause as the parents who procreate *in vivo* or the technicians who violate human ecology by bring together human gametes *in vitro*. However, this is only a partial explanation of human nature. These processes explain the “*of what*” and “*how*” human beings come to be. “*What*” human beings are essentially and “*why*”, for what purpose they come to be, are deeply personal moral and religious questions every person asks. Science and technology cannot answer these kinds of questions except to say that human life happens for who knows what end. Of course, this is no explanation at all:

Aristotle shows that an opponent who claims that material and efficient causes alone suffice to explain natural change fails to account for their characteristic regularity... Where there is regularity there is also a call for an explanation, and coincidence is no explanation at all [*Stanford Encyclopedia of Philosophy*].

Kantian

Kantian philosophical justification for human rights is problematic with regard to the basic premise of human rights, i.e., their universality. Philosopher, Luigi Caranti [2014] notes that there are both conceptual and practical issues that disqualify Kantian ethic as a firm foundation for human rights: “Leaving aside the difficulties of Kant’s proof of our freedom... autonomy is not given the same importance everywhere in the world,” especially, he says, “in East Asia”. Kant’s practical philosophy of ethics is not a good intellectual basis for establishing a philosophical foundation for human right unless one is already predisposed in favour of human rights:

At best, Kant’s ethics seems to spell out specific reasons why liberals take human rights seriously. Given a pre-decided commitment in favour of the individual and

of certain liberties, Kant is perceived as capable of reinforcing this commitment by cashing out what is there in the individual that commands respect and dignity (two key notions in the human rights discourse). Beyond this consideration, however, Kant seems to have little to offer to thinkers who work toward a broadening of the world consensus on human rights. Actually, in this regard, some feel that Kant's emphasis on the individual and his liberties is not just unhelpful, but turns out to be an authentic obstacle⁹.

The human rights project, legitimised by the Kantian notion of individual autonomy and the sovereignty of reason to choose values and set moral norms, is foreign not only in East Asia but also presents a barrier for the inclusion of the Muslim minorities in Europe: "Had Christianity retained its status as the foundation of domestic custom and public law, it would have been easier for a Muslim to accept the European order. Our way of life would have seemed like a form of obedience and a human adaptation to the will of God. But the foundationless idea of human rights leaves the Muslim no alternative but to dismiss the secular law entirely as an impertinent attempt by human beings to usurp a privilege which is God's alone: the privilege of guiding us to our salvation" [Scruton 2015: 6].

Moreover, the Kantian notion of autonomy as the foundation of universal human rights has been critiqued by the Catholic Church and found wanting [John Paul II 1993: 38-40]. Kant and neo-Kantians contrast autonomy (obligations one freely chooses free from internal emotional desires or external coercion) and heteronomy (obligations imposed upon an individual by internal emotional desires or external coercion) and posit that only the former manifest human dignity and may serve as the foundation of human rights. However, in *Veritatis Splendor*, John Paul

⁹ However, Caranti suggests that Kantian ethics might still serve as a foundation for universal (inter-cultural) human rights, provided that autonomy, as the ground of all possible values, were proven, which is not the case: "Most needed in this regard would be an argument that shows how autonomy is not, as commonly perceived, one value among the many considered as important by different cultures, but as a sort of condition of possibilities of all possible values. After all, even religious loyalty, or attachment to group traditions and the like have some significance if and only if they are endorsed by free, autonomous individuals... Hence, it may be possible to show that independently of what value a group ranks as first, a condition of cogency is that it is autonomously endorsed by the members of that group. If this transcendental uncovering of the logical dependency of all value from autonomous is combined with the notion of respect along the lines above suggested, then we may end up with a powerful foundation of human rights capable to cut across the moral plurality of our world" [ibid.: 16].

II pointed out that “[t]here is, in short a ‘rightful autonomy,’ a ‘genuine moral autonomy,’ and a *wrongful or spurious autonomy*” [ibid.: 40].

John Paul II points out that between complete moral autonomy and heteronomy there is a third alternative, that is, “participated theonomy, since man’s free obedience to God’s law effectively implies that human reason and human will participate in God’s wisdom and providence... Law must therefore be considered an expression of divine wisdom: by submitting to the law, freedom submits to the truth of creation”. [ibid.]. Participated theonomy (literally, participation in God law) as mentioned in *Veritatis Splendor* describes how a rational creature participates in God’s eternal law: “[T]he concept of ‘participated theonomy’ is congruent with a God in whom the freedom of the creative act is really inseparable from the Wisdom and from the provident Love marking out a plan for man, in such a way that its gradual discovery on the part of human reason must be considered as a participation in the eternal law of God” [Horrigan 1995: 252].

In fact, the Kantian analysis not only presents a false dilemma, absolute autonomy versus heteronomy, but absolute autonomy turns out to be a disguised form of heteronomy:

“Heteronomy, or obedience to an alien ‘other’, they [neo-Kantians] view as slavery: autonomy, or obedience to myself, they view as freedom. But St. Thomas recognizes three alternatives, Heteronomy, or obedience to an alien ‘other’, is certainly slavery. Autonomy, or obedience to myself in alienation from God, is still slavery because it is disguised heteronomy. For since I am made in God’s image, if I am alienated from Him, then I am also alienated from myself. Obedience to my alienated self is but obedience to yet another alien ‘other’. The only true freedom is ‘participated theonomy’, joyful participation in the law of the God in whose image I am made. Only in this way can I be fully what I am; and so only in this way can I be full and truly free” [Budziszewski 2016].

Finally, a “grotesque” reading of Kant can justify what John Paul II referred to as a “spurious autonomy” that dismisses as morally insignificant acts that are otherwise considered intrinsically evil:

[W]e must avoid attributing to Kant, as it has been done so often, the grotesque view that only moral agency if free [done free of internal

desire and external coercion] and non-moral agency [that done under the compulsion of desire or threat of external force] is not accountable precisely because it is not free. Needless to say, sometimes Kant lends himself to such an interpretation when, for example, he claims: “what else, then, can freedom of the will be but autonomy, i.e., the property that the will has of being a law to itself [Caranti 2014: footnote 10, 19].

Some moral theologians read Kant in this way as granting to the human person a spurious autonomy. For Franz Bockle, “(following Kant), God is not the author of the moral law, since for him, man is the sole creator of moral norms... God assigned to man the task of autonomously shaping the world” [Horrigan 1995: 8]. As Rodriguez Luno points out, the spurious autonomy attributed by Bockle to man allows man free to choose without moral blame which if any of the moral commandments he will follow:

[For Bockle] a relationship between finite freedom and infinite Freedom [is] actuated on the transcendental level, but not on the categorical level of the fundamental content of the natural moral law (do not kill, commit adultery, etc.), content that Christ unequivocally presents as divine commandments [ibid.: 10].

Bockle’s grotesque reading of Kant would seem to justify many of the new tenants of human rights such as the recent inclusion of sexual and reproductive rights, including contraception, sterilisation, and abortion, as well as the recent inclusion of sexual preference and gender identity, including same-sex marriage and transgender sex-change/reassignment surgery [Human Rights Watch 2016: 3]¹⁰.

Image of God

As already mentioned, the axiomatic positing of the tenants of human rights as found in the Universal Declaration of Human Rights appears today as a religious confession of faith to many in the non-Western world. Human nature understood

¹⁰ “UN Makes History on Sexual Orientation, Gender Identity”, June 3, 2016: “The United Nations Human Rights Council, in a defining vote, adopted a resolution on June 30, 2016, on ‘Protection against violence and discrimination based on sexual orientation, and gender identity’, to mandate the appointment of an independent expert on the subject. It is a historic victory for the human rights of anyone at risk of discrimination and violence because of their sexual orientation or gender identity, a coalition of human rights groups said today. This resolution builds upon two previous resolutions, adopted by the Council in 2011 and 2014”.

solely in terms of human DNA cannot confer human dignity on all human beings as advances in genomics make human germ line genetic manipulation easier and the advent of a new eugenics more tempting. Moreover, the Kantian philosophical underpinning for the human rights project with its exultation of human autonomy does not resonate well in non-Western regions of the world, in East Asia or with Muslims, nor with the Catholic Church and, when given a grotesque reading, may justify inhuman rights, such as abortion and self-mutilation. If this is true, then what common ground or point of convergence remains as the foundation for human rights? Can we simply ignore the question and focus on what it can do for us? But, how can we ignore the question of their foundation when we no longer agree on the list of human rights? If human dignity based on human free will (autonomy) is interpreted equivocally (co-writing law within the bounds of God's image in us, a participated theonomy, versus writing law independently of any external force including God, an absolute or spurious autonomy), then how shall we settle our differences regarding what goes into the list of human rights except by force, at least a forced consensus.

What is a Person?

Given this conundrum, perhaps we should reconsider first things first. What essential quality capacitates one as a rights bearer? Currently at law there is *personhood test* that measures juridical personality. Real people who possess the human genome do not necessarily qualify as rights bearers. According to the United States Supreme Court the test that they must pass to be granted legal personality is birth [see: *Roe v. Wade*, 410 U.S. 1973: 113, 156-158]. Birth in some ways is analogous to a border crossing. Wanted alien children and wanted prenatal children who cross their respective borders with permission will be granted asylum and citizenship. Unwanted alien children and unwanted prenatal children who would cross their respective borders without permission are denied asylum and subject to expulsion. The exclusion of alien children fleeing dire poverty and persecution and the exclusion of unwanted prenatal children seeking welcome and asylum to be born seem equally tragic. What they share in common is the image of God. Why they have been denied their border crossings is similar. In both cases they are perceived as a threat to the jobs, livelihoods, resources and leisure of their hosts. They are seen as takers not as givers, as problems not as solutions and as potential criminals not as real people, merely potential people.

To better understand the meaning of the word person, however, we should consider its etymology. In doing so we find that we must look to God. Originally the word

“person” entered the lexicon of the West as a term of art to explain the relational nature of the triune God of Christian revelation – God the Father, God the Son, and God the Holy Spirit.

Thomas Aquinas explained that the word “person” was derived from the Latin word for a Roman actor’s mask, a “persona”. During the great Trinitarian crisis with the Arian heretics in the fourth and fifth centuries, this word was adapted by Church Fathers to signify what is distinct in the plurality within the unity of God:

The word person seems to be taken from those people who represented men in comedies and tragedies. For person comes from sounding through (personando), since a greater volume of sound is produced through the cavity in the mask. These “people” or masks... were placed on the face and covered the features before the eyes [S.T.: I, Q 29, A.3, response 2, cit. Boethius]. The urgency of confuting heretics made it necessary to find new words to express the ancient faith about God. Nor is such a kind of novelty to be shunned; since it is by no means profane, for it does not lead us astray from the sense of Scripture [ibid.: I, Q 29, A 3, response 1].

The Advent of Jesus Christ introduced a new element into Jewish monotheism. Christians came to believe that Jesus was God, equal to, but not, God the Father, and equal to, but not, God the Holy Spirit. This revelation, however, did not shake their belief that there was only one God. What then distinguishes plurality in the Godhead? The Father, Son, and Holy Spirit all share the same undivided divine nature, divine mind, and divine will. So, what is unique to each of them? The teaching authority of the Church declared it was their *relations* to each other that was unique to each: God the Son is “from” God the Father, he is the word “of” God the Father. Conversely God the Father is not “from” God the Son nor is he the word “of” God the Son. The Holy Spirit proceeds “from” the Father and the Son. The human mind cannot grasp the inner nature of the triune God without reference to God’s innate relations [ibid.: Q 40, A 3; Q 36, A 2]. Hence, the original meaning of the word “person” signified three unique relations within the Blessed Trinity. Hence, “[w]e do not confess three Gods, but one God in three people, the ‘consubstantial Trinity’ [CCC: 253]¹¹.

Each divine person is essentially a gift, a complete and complementary self-offering to the other divine people. Man, male and female, made by God in his

¹¹ Citing Council of Constantinople II (553), *The Densinger Series*, 421.

image and likeness, possesses an analogous inner relationality written into their complementarity sexuality, male and female, masculine and feminine. Through a complete gift of self, a man and a woman unfold themselves and discover who they are in mutual and committed love, the foundation of natural marriage and the family, open to the procreation of new life. Relationality expresses the personhood of God. Relationality is also the foundation of the human dignity of the human person made in God's image.

Why are all Persons Equal?

Relationality is the foundation of the equality of all human people. In every other respect human beings are unequal in their various mental, physical and psychological capacities. Only as children of God are we radically the same, equal, possessing full human dignity no matter what dysgenic genome, disabilities or genetic modification they may have: "Created in the image of the one God and equally endowed with rational souls, all men have the same nature and the same origin. Redeemed by the sacrifice of Christ, all are called to participate in the same divine beatitude: all therefore enjoy an equal dignity" [CCC: 1934]. All human beings are equal in dignity and worth because they are created by and come *from* God, they are called to an eternal destiny with and *for* God and they possess *the image of God*, being relational and rational beings.

The image of God is found in the acts and faculties of the soul, reason and will, that capacitate each person to naturally turn to God and know and love him [S.T.: I, Q 93, A 8].. When we are capable of using reason (when not incompetent due to immaturity, sleep, or incapacity) we are called to use reason to put ourselves in right relations with God, other people, and our natural environment.

Aquinas explains that the deep structure of human reason exhibits two innate binaries, *is/is not* in the search for truth and *do well/don't do poorly* in our quest for goodness and happiness [ibid.: II-II, Q 94, A 2].¹² Reason intuitively pursues happiness under three aspects: 1) that good we share with all created things, i.e., preserving our existence (from electrons in their valances to stars in their orbit, all things seek to preserve their existence); 2) that good we share with all animals, i.e., to reproduce their kind; and 3) those goods specific to men and women as the rational and relational beings, namely, to live in society built on friendship, to cultivate the riches of the material universe and thereby unleash our talents,

¹² This innate binary of practical reason is usually expressed as do good, avoid evil.

to know truth and appreciate beauty [ibid.]. These are the basic inclinations of human nature, its *natural use*¹³, if you will, that lay out the fundamental obligations human nature imposes upon human freedom.

The Relationality of Rationality within the Image of God

Precisely because we are rational and relational, we cannot pursue the goods we share in common with all things or other animals at the sacrifice of those goods that pertain uniquely to our rational human nature. This would be an unnatural use of reason. Hence, one cannot simply follow one's emotional desires and grasp at preserving one's life nor mate as animals blindly do or gratuitously harm innocent people since doing so would violate living and working harmoniously in society. Likewise, to disrespect what is true and beautiful violates the basic inclination of all human being to pursue happiness in what is good [Budziszewski 2014: 249]. These basic inclinations of human nature are its innate *telos*, its relational orientation and natural law. They delineate the boundaries of the natural use of human nature and our inescapable duties. Flourishing the natural use and duties of human nature is the rule and measure, the real *test*, of authentic human rights recognized by the wise, lettered and unlettered, from antiquity to modern times:

“I learnt from my illiterate but wise mother that all rights to be deserved and preserved came from duty well done. Thus, the very right to live accrues to us only when we do the duty of citizenship of the world. From this one fundamental statement, perhaps it is easy enough to define the duties of Man and Woman and correlate very right to some corresponding duty to be first performed. Every other right can be shown to be a usurpation hardly worth fighting for.

Yours sincerely,
M.K. Gandhi” [1948]

Natural Law – its Universal Conclusions and its Ad Hoc Specifications

Human law and human rights must be an iteration of right reason and substantiate the basic inclinations of human nature, i.e., the natural use and duties of human nature or they are simply a lawless law and an ersatz right that usurps the place of authentic human rights [S.T.: I, II, Q 96, A 4]. As we seek to preserve our lives in existence (a natural use of human nature) we intuitively avoid all

¹³ The natural use principle is an axiom of the Public Trust Doctrine of environmental law. Its application to issues concerning human ecology will be explained more fully in Part III of this article.

that could harm or destroy it. Reflecting on what we do intuitively, we articulate a general proposition – *not to gratuitously harm ourselves or our fellow human beings*. To not gratuitously harm oneself or others has influenced all people, from all time, in all places, to articulate as a *necessary conclusion* of the natural law of human flourishing that no one may wilfully take the life of an innocent human being and that those who do so must be sanctioned. In what manner a murderer should be sanctioned, as a *variable specification* of that necessary conclusion, may vary according to time and place. However, no human society allows those who commit murder to go unsanctioned. Likewise, the natural use of human nature’s duty – *to reproduce one’s own kind* – has led all people from all time, in all places to necessarily conclude that they must set apart or make “sacred” marriage between a man and a woman in order to fulfil this duty both for personal happiness and for the survival of the human community. No healthy human society has failed to sanction in some manner those who dishonour the natural use of human nature to be fruitful and multiply, as do adulterers and sodomites [S.T.: II-II, Q 95, A 2].¹⁴ To fail in this regard is to create what Pope John Paul referred to as a “civilization of use” that attempts to deconstruct human nature to *un-natural* uses contrary to the innate relational orientation of human nature [John Paul II 1995: 13].

The fact that some human laws vary from place to place, being specifications that pin down one of many ways to regulate human conduct (such as driving on the right or left side of the road), has led some people to believe that all human laws are relative, merely a matter of cultural consensus and/or a dictate posited by public authority. This is not so. Reasonable minds do not differ on the fundamental principles of the natural law, i.e., the natural use of human nature and the *necessary conclusions* that logically follow. As we have seen, from the general principle that we must be fruitful and preserve the human race in a reasonable manner, it follows as a necessary conclusion that only a man and a woman may come together in a stable union (marriage) for their own good and that of their children (family). How this necessary conclusion is specified (such as what age a man and a woman may marry, whether a woman loses her separate legal identity after she marries her husband, or what rites legitimise marriage in a given society) may vary over time and in various societies. However, the necessary conclusion that sexual intimacy is inseparably from the natural use of human nature, the fundamental duty of man

¹⁴ But it must be noted that something may be derived from the natural law in two ways: first, as a conclusion from premises; secondly, by way of determination of certain generalities.

and woman to marry and procreate, cannot change and has been recognised at law from time immemorial¹⁵.

Summary of Part Two: The axiomatic, genomic and Kantian foundations of human rights were considered and found wanting for the following reasons: An axiomatic collection of rights may have served its purpose when in 1948 all could agree on a list of truly universal rights. Today, this is no longer the case. Ad hoc rights and worse, inhuman rights, are routinely included in lists of universal rights. Their inclusion forces the issue – upon what basis are rights deemed universal. The UN proclamation of the human genome as the foundations of human equality and human rights begs the question of whether materiality is the only foundation of human nature and disregards the religious beliefs and cultural traditions of a majority of the world’s population. Likewise, grounding human dignity on the ability of the human will to choose free of internal desire or external coercion, including pressure from religion, culture or tradition, as Kantians suggest, does not resonate in non-Western cultures and, if for no other reason, cannot serve as an inter-cultural, i.e., universal underpinning for human rights. Finally, the image of God impressed on the soul of each human being speaks of what is true and is a more inclusive underpinning for human dignity. Based as it is on a clearer vision of human autonomy seen as a “participated theonomy” wherein human beings are truly free when they unfold themselves within the designs of God know in the deep recesses of their hearts, the Image of God in each human being is a firm foundation for universal human rights.

PART THREE: A Natural Law Theory of Liability

The natural use principle found in environmental law protects the status quo of the environment by enjoining human activity that would introduce unnatural and non-integral development in an ecosystem. This natural law from below, if you will,¹⁶

¹⁵ See [*Obergefell v. Hodges*, 576 U.S. ____ (2015)] (C.J. Roberts, dissent at page 3). Chief Justice Roberts argued that although the incidentals of marriage have changed over time (which the Majority in their opinion point to as justification for striking down laws restricting marriage to one man and one woman), the basic structure of marriage, as between a man and a woman, has not. It has remained unchanged, the same now as for “the Kalahari Bushmen, and the Han Chinese, the Carthaginians and the Aztecs”. He concludes by saying “Just who do we think we are?” in attempting to overturn the natural customs of people everywhere from all times and all places by deinstitutionalising and no longer setting apart with special privileges natural marriage, the basic cell and foundation of all human societies.

¹⁶ The reference to natural law from below is borrowed from Lon L. Fuller [1965: 96], even though he limited his approach to what may be referred to as procedural, not substantive, natural law issues.

proscribes alterations of an ecosystem that change the fundamental characteristics of that environment in violation of its natural laws. For instance, there is no right to develop land so as to change its natural character to non-indigenous property uses because a landowner is only entitled to reasonable expectations of what can be done to the land given the natural character of the property and nature's laws. In *Just v. Marinette County* [201 N.W. 2d 761, 768, 768 (Wis. 1972)] the issue before the court was whether "the ownership of a parcel of land [is] so absolute that man can change its nature to suit any of his purposes?" The Supreme Court of Wisconsin ruled, no: A property owner must conform the use of his property to its natural use and "has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others".

Environmental law strategists also suggest that a new tort be enacted in statute and gradually adopted in common law for "environmental degradation" [Guth 2007-2008: 431, 494]. The proposed statute would require a person who causes ecological degradation to assert an affirmative defence or be enjoined. To proceed with a project that would endanger the natural environment, they would have to prove that there are no known feasible alternatives to the processes they currently employ or that they are "conducting a vigorous program to develop a feasible alternative to the conduct that is likely to contribute less to ecological degradation". [ibid.: 495]. Moreover, a person would not need to have already suffered personal injury to have standing to sue for equitable or monetary relief: "Any member of a community that may be affected by an ecological threat may bring an action for ecological degradation" [tamže].

The natural use principle together with the precautionary principle, which shifts the burden of proof to those who activity threatens an ecosystem, may provide a theory of liability based on natural law principles.¹⁷ Environmental law has reintroduced the notion that to violate an ecosystem's *telos*, its innate manner of flourishing, merits legal sanction. Courts now must discern the formal and final causes of nature's ecosystems and proscribe human intervention that fundamentally alters benign networks of nature. Pope Francis makes clear that "the world cannot be analysed by isolating only one of its aspects, since 'the book the book of nature is one and indivisible', and includes not only the natural environment

¹⁷ See the following conclusion and recommendations for further application of the precautionary principle applied to issues concerning human ecology.

but, also, human life, sexuality, the family, social relations, and so forth. It follows that “the deterioration of nature is closely connected to the culture which shapes human coexistence” [Francis 2015: 6, Benedict XVI 2009: 687].

Therefore, since “the book of nature is one”, is it not just to insist that the human ecosystem be respected no less than those of flora and fauna and that sanctions be imposed upon human activity that burdens the fulfilment of fundamental human duties, i.e., the natural use of human nature. State laws that contravene the natural uses of human nature must be declared null and void, contrary to *jus cogens* preemptory norms of international law.

Summary of Part Three: Certain aspects of the public trust doctrine, i.e., the natural use principle and the precautionary principle, are analogous to natural law principles and, because “the book of nature is one”, these environmental law principles may prove useful in developing a theory of natural law liability to promote and defend not only the natural environment but human ecology and authentic human rights in ASEAN.

Recommendations

Therefore, in order to uphold the genuine values of Asian culture and to safeguard the human rights project from post-modern deconstruction and genetic reductionism, the following recommendations are offered.

First Recommendation – proclaim, when appropriate, that immaterial realities are indispensable in the promotion and defence of full human dignity and universal human rights

The task of NGOs of Catholic inspiration is to re-root, if you will, human rights in their native soil, the natural law. We need to speak a prophetic word, when appropriate, and state that the true foundation of human dignity rests on immaterial realities, God and the human soul made in the image of God. This may seem ludicrous given our post-modern cultural prohibition of “God talk”. However, a God-given foundation for human rights still resonates in many non-Western cultures. In his book, *Our Posthuman Future: Consequences of the Biotechnology Revolution*, Francis Fukuyama points out, “that our culture has failed to come up with any viable theory to take the place that the Christian notion of the human soul once occupied”. [Fukuyama 2002: 150-151] Only the notion of the human soul sealed with the image of God provides true autonomy, a participated theonomy

in the eternal law of God¹⁸, and lays an unalienable foundation for human dignity and universal human rights.

We mustn't forget, Jacque Maritain [1949] looked for "points of convergence" and an ethical underpinning upon which to build consensus for the tenants of the UDHR. Those tenants were built upon the foundation of human dignity, the "tuning fork" that would calibrate and fine tune all human rights. Since 1948, however, an Enlightenment ethical underpinning for human dignity has been tried and found wanting. And because of the limitations of Enlightenment ethics, the very concept of human dignity is losing its pitch. We must recall that Maritain's understanding of the ethical underpinnings of human dignity, his "tuning fork", was not made from an idealist Kantian metal unable to know reality and things-in-themselves outside mental categories [Woodcock 2006: 245-246, 260]. but was instead made of a metal in touch with reality, the natural law: "Maritain sees human dignity as the ultimate determinant of the natural law for the source of human rights" [ibid.: 260].

We, too, should not shy away from using a natural law tuning fork to set the correct tone and pitch of human rights discourse. For example, amici curie, the Ethics & Religious Liberty Commission of the Southern Baptists Convention and Professor Brian Scarnechia, filed a brief before the United States Supreme Court on the issue of the patentability of human DNA [2013] that opposed granting patents on human DNA because it disparages God's gift to humanity:

Products of nature, [like human DNA] which are gifts given to all of humanity by God, cannot be exclusively claimed by an individual or corporation. The genetic code is a divine gift and an intrinsic, inseparable part of human existence. Permitting a corporation or person to own this fundamental component of a person corrupts the relationships between human beings and the Creator, and between human beings. The person should not be treated as a commodity for sale to the highest bidder, and property must be recognised in a way that respects all of the members of society. These principles are prevalent in Christian theology, and several religious organisations specifically oppose gene patents on these grounds [ibid.: 2].

¹⁸ . See Section Two, "Kantian" above.

Second Recommendation – employ environmental law principles to create a theory of liability for strategic litigation

NGOs of Catholic inspiration should insist that two corollaries of the Public Trust Doctrine, the *precautionary principle* and the *natural use principle*, utilised by environmental litigators also apply when large scale social change is being proposed that may threaten the human ecosystem.

The precautionary principle is employed when studies indicate that environmental harm may occur even when a conclusive causal link to actual harm has not been established. When the stakes are high and catastrophic harms are predictable and irremediable, the precautionary principle shifts the burden of proof to those whose projects threaten the natural environment. They must prove that foreseeable speculative harm will not occur: “Note that the precautionary approach dismantles the general argument of industry that it should not be regulated until the agency has proven harm from the industry practice” [Blumm, Wood 2014: 70; also Stevens 2002: 13-15]. Pope Francis [2015] counsels that prudent foresight and anticipatory action be taken when assessing environmental risks:

This precautionary principle makes it possible to protect those who are most vulnerable and whose ability to defend their interests and to assemble incontrovertible evidence is limited. If objective information suggests that serious and irreversible damage may result, a project should be halted or modified, even in the absence of indisputable proof. Here the burden of proof is effectively reversed.

For instance, had the social engineers behind the Peoples Republic of China’s notorious one child policy been required to satisfy the precautionary principle and prove, beforehand, that their policy to crash China’s population would not result in catastrophic demographic harm, the government would not now have to rush to reverse this policy to try and fix what may prove to be irremediable population decline [Abbamonte, Mosher 2018]. Certainly, India should be enjoined from enacting a two child policy based on China’s failed program until its advocates provide hard evidence that irreversible and catastrophic demographic imbalance, the ratio of male verses female births and other related economic and social harms will not ensue [Abbamonte 2018].

In the debate between H.L.A. Hart and Lord Devlin over whether harm would befall marriage and family life in England by decriminalising homosexual sodomy in the 1960s, had the burden of proof been on Hart he would not have been able

prove that no harm would occur from decriminalising homosexual sodomy. However, the precautionary principle was not employed, therefore the burden fell upon Lord Devlin to prove actual damages and provide conclusive evidence [Francis 2016]¹⁹ that harm would occur to society if legal sanctions proscribing sodomy were removed. Because Lord Devlin could only prove broad societal repugnance towards sodomy and alleged mere speculative damages would occur to the status quo of marriage with the decriminalisation of sodomy, Hart won the debate [Dworkin 1966]²⁰.

If these tenants of environmental law, the precautionary principle and natural use principle, were vigorously applied to the human ecosystem, the sale of birth control pills would be banned or the product modified. Studies show that the cumulative effect of women on birth control pills is that when they void, they release significant amounts of estrogen which then leaches into the water table. The increase in estrogen in the water table from women on the Pill together with the release of estrogen from synthetic fertilisers has a causal connection to infertility in males and birth defects in the offspring of both animals and human beings [Lancet 2017; Association of Reproductive Health Professionals 2011; Jay 2017].

NGOs of Catholic inspiration made known to the World Health Organization that barrier method contraceptives cause a 200% + rise in incidents of pre-eclampsia, one of the leading causes of maternal mortality around the world [Bastami, Hamdi, Abdollahi 2007: 840-844, abstract 840; Hernander-Valencia, Munoz et al. 2000]. They urged WHO to include lower condom usage as an indicator of improved maternal health in the Sustainable Development Goals [Scarnecchia 2014: 309].

¹⁹ Pope Francis explained that gender theory is “an ideology... which denies the difference and reciprocity in nature of a man and a woman and envisages a society without sexual differences, thereby eliminating the anthropological basis of the family. This ideology leads to educational programmes and legislative enactments that promote a personal identity and emotional intimacy radically separated from the biological difference between male and female. Consequently, human identity becomes the choice of the individual, one which can also change over time.”

²⁰ Note, a different result occurred more recently when a court considered harm to dolphin populations. Those who challenge the status quo of a natural ecosystem had to bear the burden of proof. In *Earth Island Institute v. Hogarth*, the factual issue was whether catching dolphins in purse-seine netting harmed dolphin populations. Scientists could not decide one way or another. Therefore, the court applied the precautionary principle and held that the benefit of the doubt should be given to dolphins and ruled purse-seine nets unsafe because “there is no bases on which to change the status quo if all of the evidence is inconclusive” [*Earth Island Inst. V. Hogarth*, 484 F.3d 1123, 1133-34 (9th Cir. 2007)].

Strategic litigation should be initiated in countries that recognise the public trust doctrine [Blumm, Guthrie 2012: 741]. Public authorities should be enjoined from legalising sexual and reproductive services or same-sex marriage, gender theory indoctrination in schools or transgender accommodations until their proponents prove with clear and convincing evidence that these practices will not depress the biodiversity and the integral and sustainable development of indigenous populations in furtherance of ideological neo-colonialism [Scarnecchia 2015].

Conclusion

Rights are wrong in ASEAN and beyond because the human rights project rests on three foundational errors: The first, its original axiomatic foundation in 1948; The second, that the human genome is the locus of human dignity (1997); The third, a flawed anthropological foundation justified and expressed in terms of Enlightenment ethic that does not resonate in non-Western cultures because it posits human nature has no fixed content or natural use that limits individual autonomy to “the truths of existence”²¹ (circa 1990). To insist that East Asians assent to the first error, the axiomatic formulation of human rights expressed in the UDHR, appears as an authoritarian forced confession of faith. To posit that the human genome is the foundation of human dignity, and not the unique immaterial soul or spirit of each human being, is an affront to the long-standing cultural traditions and religious heritage of Asia (and the rest of the world). Finally, to demand that they adopt patterns of thought and behaviour giving expression to unbounded personal autonomy is totalitarian. It is totalitarian in the sense that the process of internalising post-modern Euro-centric disvalues requires the deconstruction of their individual and cultural identity and then the reconstruction of a new identity in the image of their ideological colonisers, and not in accord with the Image of God within them.

The original axiomatic formulation of human rights and its current articulation based on unlimited personal autonomy as well as truncating the foundation of human dignity to the information contained in human DNA run counter to Asian values that place emphasis on group cohesion, one’s status within the group and

²¹ “Gender theory (especially in its most radical forms) speaks of a gradual process of denaturalization, that is a move away from *nature* and towards an absolute option for the decision of the feelings of the human subject...founded on nothing more than a confused concept of freedom in the realm of feelings and wants, or momentary desires provoked by emotional impulses and the will of the individual, as opposed to anything based on the truths of existence”. [Congregation for Catholic Education 2019: 11].

a sense of transcendence. However, an articulation of human rights that gives expression to the relational orientation of human rights, not to a totalitarian collective but to the *common good* of the community, would be congenial to the peoples of Southeast Asia. Natural law theory presented as integral human ecology, i.e., the law of relationality harmonising the status of individuals within larger and larger groups (according to the principle of *subsidiarity*), with respect for present and future generation, God and all creation (according to the principle of *solidarity*) can provide a true and firm foundation for human rights²².

The image of God in every human being includes the basic inclinations of human nature, its natural uses and duties that orient human freedom in a participated theonomy. Every human being has an authentic right to fulfil the duties that flow from the basic inclinations of human nature. These fundamental duties and corresponding universal rights precede recognition by the state because they are written on the human heart and are universal and unalienable, all other claims are ad hoc, either changeable cultural specifications of natural law or expressions of spurious autonomy, i.e., usurpation of genuine human rights. Mahatma Gandhi [1948: 3] said the same when asked to comment on the UDHR in 1948: “[C]orrelate every right to some corresponding duty to be first performed. Every other right can be shown to be a usurpation hardly worth fighting for”.. The nations of Southeast Asia need to hear the truth about why rights are wrong in ASEAN and beyond.

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²² Caveat: An understanding of participation in being and analogy is needed to avoid the animism and pantheism found in various currents of Asian spirituality. For instance, we are like God, but God is not like us. Likewise, animals are like us (having bodily appetites/emotions), but we are not like them (human emotions form a bridge between the life of the body and the rational soul). See [Aquinas, *De Veritate*, Q 23, A 7, ad. 9] where he explains that there is an analogy of “transferred” or “proper proportionality”, (a one-way analogy, if you will) between God and creatures. “[W]hile the creature has a real determined relation to God, God has no real determined relation to the creature, because God infinitely – that is, by no mere finite increment – transcends the creature”. [Long 2011: 3].

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