

**THE ROLE OF LAW IN THE FORMATION OF REGIONAL
PERSPECTIVES IN HUMAN RIGHTS AND REGIONAL SYSTEMS
FOR THE PROTECTION OF HUMAN RIGHTS: THE EUROPEAN
AND ASIAN MODELS AS ILLUSTRATIONS**

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Adopting the concept of “internal aspect of law”, the comment explains that law has a constitutive function (primary rules of conduct may embody the spirit of the community) and an instrumental function (secondary rules help to enforce the primary rules of conduct). Regions are well placed for the two functions to help to form regional perspectives and regional systems, but sometimes an “over-riding factor” plays a special role. There exist certain regional perspectives in Europe and Asia. However, the over-riding factor in Europe (fighting communism and preventing another World War II) helps to promote the formation of a strong regional system, whereas in Asia the staunch adherence to the principle of non-interference helps to prevent its formation.

I. INTRODUCTION

I propose to say something about the role of law in the formation of regional perspectives on human rights and the regional systems for the protection of human rights, using the European model and the Asian model (or the lack thereof) as illustrations. First, I would like to say that my goal is a modest one. I do not hope to have any last word on the topic; I simply would like to provoke those interested in the topic to consider some of these issues. Secondly, I would like to note that I am speaking from the perspective of someone who is interested in theoretical inquiry, and yet does not consider himself a theoretician. I am afraid what I have to say here will have to be more or less impressionistic, although, I guarantee to you, it does not come easily, and will be difficult to prove to any degree of certainty, whether theoretically or empirically.

II. THE ROLE OF LAW AND THE FORMATION OF COMMUNITY ORDER IN GENERAL¹

I will first speculate on the role of law and the formation of community order in general. Of course, for one to consider the role or rule of law, one must have a certain understanding of what law is. This is a question that has been with us for a long time, but has yet to induce a single right answer. Here I will simply adopt a particular answer, without attempting to defend it, although this is the version that I believe to be correct.

In its concrete manifestations, law means the legal rules and principles that frame and solidify the relationships (or rights and obligations) between and among the different players

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¹ This part draws heavily upon Sienho Yee, *Towards an International Law of Co-progressiveness* (Martinus Nijhoff Publishers, 2004) ff 42 (Chapter 3, “The Perfect Rule of Law”).

in society. How we arrive at these rules and principles, and how they are distinguished from other non-legal rules and principles, are very difficult questions to answer.

One answer to these questions is to say that what law is decided upon through the process by which the actors in society internalise laws so as to treat a certain course of conduct as the standard of conduct and to use it as the basis for critiquing (including self-critiquing) the conduct of the actors and ultimately serves as sufficient reason for voluntary action. Only then does law come into existence. This idea was considered by H.L.A. Hart to be the internal aspect of law.²

The internalisation process might result from and be aided by many factors, one of which may be certain rules of recognition. Under such rules (or better, normal rules) of recognition, the actors may quickly and easily recognise certain rules as rules of law. Law under such a regime of easy rules of recognition perhaps can be called “law for dummies” (to borrow a phrase from computer literature). There is much virtue in this; law must be easily accessible to ordinary people.

However, the leap from rules in general to rules of law cannot be reached simply through the rules of recognition, although H.L.A. Hart seemed to assume that it could or that the rules of recognition would necessarily lead to the internal aspects of law. Giving the rules of recognition so powerful a role may not be appropriate.³ Rather, that leap may have to be assisted by many additional factors such as morality.

The rules of recognition, in my view, only let us reach the “marks” of rules of law, but not *necessarily* the rules of law themselves.⁴ Certain rules that might have passed as rules of law according to the rules of recognition may be subsequently invalidated as against certain fundamental norms. Furthermore, the rules of recognition seem to have validity only within a certain defined regime and cannot take account of revolutions. For example, under normal rules of recognition, the decrees issued by a legislature and/or constituent assembly are to be complied with as law. During the French Revolution, however, neither such decrees nor such rules of recognition had any teeth. As Madame de Staël powerfully explained:

The Constituent Assembly ever believed, erroneously, that there was some magic in its decrees, and that all would stop in every way at the line it traced. But its pronouncements can be compared to the ribbon which had been drawn through the garden of the palace (Tuileries) to keep the people at some distance from the palace; while

² See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 54-57, 79-91 and 102-103. As Hart observed, some people wrongly misrepresented the internal aspect of rules as a “mere matter of ‘feelings’ in contrast to externally observable physical behavior”, after saying that the psychological experiences analogous to those of restriction or compulsion may exist, he gave this response: “But such feelings are neither necessary nor sufficient for the existence of ‘binding’ rules. There is no contradiction in saying that people accept certain rules but experience no such feelings of compulsion. What is necessary is that there should be a critical reflective attitude to certain patterns of behavior as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of ‘ought’, ‘must’, and ‘should’, ‘right’ and ‘wrong’.” Hart at 57.

³ The confidence that H.L.A. Hart has in his rule of recognition may result from his own experience with the British legal system where Parliament is supreme. Under such a system, a rule of law considered as such—under a rule of recognition that an act of Parliament is a rule of law—will always be so. This is only peculiar to the British system or something like it. For his own treatment of “pathology” of the legal system, see *ibid.*, 117-23. He seemed to have only some particular forms of revolutions in mind, but not others.

⁴ I do not challenge the existences of such rules of recognition, although I am not sure whether they are necessarily “legal rules” or can be moral rules. All I am trying to say is that such rules of recognition are part, but not all, of the factors that would lead to the internalisation of law in the minds of players in society. O.A. Elias & C.L. Lim, *The Paradox of Consensualism* (The Hague/Boston/New York: Kluwer Law International, 1998) at 255-277, have argued that various state actors may perceive the rules of recognition differently, but none would disagree that there are such rules. In such a situation, all one can say is that the internalisation process becomes much easier. Indeed, in most situations such a state of affairs exists, and that is the reason, to a large extent, why generally there is order and stability. Still, one may wonder whether the content of such rules of recognition is “law”, or simply morality or tradition.

opinion remained favourable to those who had drawn the ribbon, no one dreamed of trespassing; but as soon as the people wanted no more of this barrier, it became meaningless.⁵

Obviously, many social factors contribute to the “internalisation” of law in the actors, leading to the phenomenon of law serving as the sufficient reason for voluntary action. No doubt there should be at least a general voluntary compliance with law; otherwise such a view of the law would appear ridiculous, which in turn would prevent any internalisation from taking place. Other factors may include certain substantive justness and procedural fairness,⁶ the “internal morality of law”,⁷ the certainty and clarity of the rules or a good judiciary that is characterized by independence, integrity and competence.⁸ Additional factors may include a relatively good educational level (particularly when society is getting more and more complex everyday), a tolerable standard of living, a general atmosphere of happiness or being content with the realities of life, and a strong-enough sense of belonging to the community. The cross-fertilization of ideas and virtue will also be important.

If we adopt this version of the concept of law, we may make several inferences regarding the role of law in the formation of community value. We first of all can discern a constitutive role of law. That is to say, law, the common standard of conduct, represents or constitutes the essence or spirit of the community. This happens when the internalisation process has been completed. This general observation would apply to both primary rules of conduct and the secondary rules regarding the making, changing and enforcing of the primary rules of conduct, as both may embody a certain spirit of the community. From this perspective, law has a passive quality, it can be no better than what the community is. The community’s tradition and morality finally concretize and solidify in what we call law.

Next, we may also discern an instrumental role of law which may manifest in several ways. First, some members of the community may agree to a certain course of conduct, and the rest of the members somehow see the value of that course of conduct and agree to it as the standard of behavior. In this instance, law performs the function of transforming the attitude of some of the members in the community.

Second, the secondary rules on enforcing the primary rules of conduct—such as bringing the policemen to help us, or asking the judge for an order—play a predominantly instrumental role. These rules ensure that the primary rules of conduct are adhered to.

Third, the instrumental role of the rules on enforcing the primary rules of conduct also manifests in the fact that, almost always, the enforcement of the primary rules of conduct leads to the further elaboration and improvement of the primary rules of conduct themselves.

Of course, you can see that in the above analysis I have been speaking about a community. The presumed prototype of that community is that of a more or less self-contained and more or less homogeneous community. As the community expands to cover greater space both geographically and socially, the quantity of the common course of conduct that is accepted as law may be reduced, in general and as a natural development. That is to say, the constitutive role of law diminishes naturally. In such a situation, if one were to reverse this, one could perhaps strengthen the instrumental role of law by beefing up enforcement.

This is an observation that would be helpful when one examines the formation of regional perspectives of law or human rights. Generally, one can see that a regional setting is well-placed for the deepening of certain norms. Regions are neither too big nor too small, and can still be more or less self-contained. As a result, regions make such deepening more likely.

⁵ Mme Baronne de Staël, *1 Considérations sur les Principaux Evénements de la Révolution Française* (Liege: J. Latour, 1918) at 416 (English translation taken from Bertrand de Jouvenel, *The Pure Theory of Politics* (Cambridge: University Press, 1963) at 47).

⁶ See Mireille Delmas-Marty, “Present-day China and the Rule of Law: Progress and Resistance” (2003) 2 Chinese J.I.L. 12.

⁷ See generally, Lon L. Fuller, *The Morality of Law* (New Haven, Yale University Press, 1963).

⁸ Sandra Day O’Connor, “Vindicating the Rule of Law: The Role of the Judiciary” (2003) 2 Chinese J.I.L. 1.

As one commentator has observed, “shared legal, political, socioeconomic, intellectual, and cultural traditions and aspirations within a regional setting are more likely and do serve as cardinal bases for particularized and effective human rights protections at the regional level.”⁹

Finally, as a general observation, one can see from history that there can be a certain “over-riding factor” that may “make or break”, so to speak, the formation of a regional system, but always “makes” the regional perspective, of which the over-riding factor may form a part. Thus, this over-riding factor no doubt plays a constitutive role, but sometimes its instrumental role may predominate. This will become clearer later on in my discussion.

III. THE EUROPEAN PERSPECTIVES ON HUMAN RIGHTS AND THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

The above general observations can find some proof in the formation of the European perspectives on human rights and the European system for human rights protection. As has been told time and time again, several factors are important in the emergence of the European system.

First of all, the most important factor is the European humanist culture. As the main drafter of the *European Convention on Human Rights*, P.-H. Teitgen, observed:

The nations of western Europe as a community are co-heirs to an inheritance, a common heritage which they have to join forces to protect. This is their humanist culture, according to which right is pre-eminent over might and the purpose of the State, as of any other societal structure, is not its own greatness, power or riches but the individual self-fulfilment of everyone subject to its rule with due respect for his or her dignity and freedom. In short, in our humanist culture all persons, by reason of their origin, their nature and their destiny, have certain inalienable rights, against which no reason of State may prevail.¹⁰

Against the background of such a tradition and such a culture, it is no wonder that the modern European perspectives on human rights and the system for their protection would have emerged, sooner or later. The reason why it emerged shortly after the Second World War has to do with what I described as the over-riding factor above. The horrible experience that the Europeans went through during the Second World War and the fear of the Soviet Union served as the over-riding factor in a positive way to bring about the European system of human rights protection. In so doing, the system builders hoped that the humanist culture would be further strengthened and would become the citadel against any possible future suppression. They had high expectations for the instrumental role of the law. To a large extent their attempt has been successful, as has been generally recognised. In an ironic way, one can find in this success at least one beneficial function of Communism!

The humanist culture is now reflected in the content of the European human rights law. This part of the law plays the constitutive role. The crowning achievement of this system is the *European Convention on Human Rights* and its effective enforcement. The Convention generally reflects a particular vision of the nature of human beings and of what the European region or societies believe to be most important for the self-fulfillment of individuals. This is not the place to go into the details but suffice it to say that this vision has the individual as the sacred being, more or less atomised, and most in love with civil and political rights. Painting the picture with a broad brush has its perils but sketches also serve the function of

⁹ George William Mugwanya, “Realizing Universal Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System” (1999) 10 *Ind.Int'l & Comp.L.Rev.* 35 at 41.

¹⁰ P.-H. Teitgen, “Introduction to the European Convention on Human Rights” in R. St. J. Macdonald *et al.* eds., *The European System for the Protection of Human Rights* (Boston: Kluwer, 1993) at 3.

capturing the essential features of the object. This picture may have a point if you ask why the European Social Charter does not enjoy much success, not yet anyway.

As a system of enforcement mechanism, the Convention obliges each State party to ensure that the human rights of every person within its jurisdiction be respected, in a legally and, one should add, judicially, enforceable manner. Now every State party to the Convention also agrees to be sued by a person within its jurisdiction and by another State party before the Europe Court of Human Rights. It is well recognised that this system is most effective not only in enforcing the rights enumerated in the European Convention, but also, as has been noted, in helping to “accelerate” the harmonious evolution of human-rights standards in Europe.¹¹ The law plays a most effective instrumental role in the European system.

IV. THE ASIAN PERSPECTIVES ON HUMAN RIGHTS AND THE LACK OF AN ASIAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS¹²

On the other hand, the vast area of Asia as a whole has not witnessed any homogenised culture or tradition that covers the entire geographical span of Asia, other than their common experience of being under colonial control, to a large extent if not completely.

The nature of this situation naturally leads to a diminishing constitutive role of law. However, one must take note that the *Bangkok Declaration*, adopted in 1993 by the Asian States in preparation for the Vienna Conference on Human Rights, does reflect some broad principles that can be considered to constitute the Asian perspectives of human rights. These may be summarized as follows:

First of all, the Asian States do not disagree with the sacred nature of the human being. However, many of them do not agree with the atomized image of the individual. They believe that the individual stands in a balanced relationship with society. Particularly in areas where Confucianism holds sway, the individual is cultivated to possess a certain sense of being conscious of the existence of other fellow individuals or “two-men-mindedness”, to use the literal translation of the corresponding Chinese character 仁 (ren), a composite of the characters for “man” (人) and “two” (二),¹³ and with a sense of responsibility to him- or herself and the world other than him- or herself. This is succinctly stated in the Confucianist maxim: Cultivating oneself, regulating the family, ordering the State and bringing peace to the world.¹⁴ I believe it was in this spirit that Hu Jintao, when introducing President Bush to students at Tsinghua University, said, from a slightly different angle, that China and the United States had many things in common, among which was their common responsibility to the world.¹⁵

Asian States generally have stressed the need for taking account of the historical, cultural, and national background of the different States in human rights discourse.¹⁶ While such

¹¹ Catherine Lalumière, “Human Rights in Europe: Challenges for the Next Millennium” in R. St. J. Macdonald *et al.* eds., *The European System for the Protection of Human Rights* (Boston: Kluwer, 1993) xv-xvi.

¹² This section draws heavily upon Sienho Yee, *Towards an International Law of Co-progressiveness* (Martinus Nijhoff Publishers, 2004) at 289-300 (Chapter 14, “The Concept of Human Rights in Asia”).

¹³ During the drafting of the *Universal Declaration of Human Rights*, P.C. Chang attempted to enshrine this in the Declaration, but the idea was only “imperfectly” included. See Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001) at 67-68.

¹⁴ The maxim is from *Daxue* (大學, The Great Learning), and appears in Chinese as “修身齊家治國平天下”, pronounced as “xiushen qijia zhiguo pingtianxia”. I have translated the maxim slightly differently than the translation commonly found.

¹⁵ “Chinese Vice-President Welcomes US President at Tsinghua University” *Xinhua News Agency* (22 February 2002) online: China Internet Information Centre <<http://www.china.org.cn/english/27348.htm>>.

¹⁶ *Bangkok Declaration*, reprinted in (2002) 1 Chinese J.I.L. 730; Liu Huaqiu Statement at Vienna Conference, *ibid.*, 735; Statements by Indonesian authorities, as related by Christina M. Cerna, “East Asian Approaches to Human Rights” (1995-1996) 2 *Buff.J.Int'l L.* 201. See also Ming Wan, *Human Rights in Chinese Foreign Relations* (Philadelphia: University of Pennsylvania Press, 2000).

an emphasis can be (and normally has been) considered one regarding the implementation of human rights, it can also be rationalized as implying that one's personhood is inherently tied to one's cultural, historical and national background. Few would say history, culture and nationality would not inform and enrich their personality. Their sense of belonging to a particular history, culture, and State can be significant. The common argument asserting the decay of State and State sovereignty ignores this aspect.

Many Asian States have also emphasized equality between States, and the even-handedness required for the treatment of human rights issues. This, while outwardly assuming the appearance of an argument from State sovereignty, can be seen as a manifestation of the fight for dignity and equality, which is part of any personhood.

In the context of most Asian States, the emphasis on history, culture, sovereignty and national identity, and equality also takes on a dimension of self-determination. For those who have been through the troubled history of Asia, their personality must have been imprinted with deep scars that have resulted from oppression and with great pride that has resulted from achieving self-determination.¹⁷ The fact that the Asians were willing to take such a more or less confrontational attitude on these issues show that they took self-determination seriously, and their history of being under colonial domination may have a great deal to do with it.

Regarding the particular rights, many Asian States tend to argue for an integrated approach,¹⁸ while, at the same time, they often—if not always—list economic, social and cultural rights (and sometimes the right to development) first,¹⁹ thus implicitly emphasizing them. The statements by officials make the emphasis much clearer.²⁰ They stress the economic, social and cultural rights, both as a separate category of rights, and as a condition for the realization of other rights. Such emphasis sometimes is characterized as a manifestation of Marxist and Third World approaches taking root, and, therefore, not very "Asian". Whatever label one might prefer, the logic for this emphasis is apparent: it is an argument from necessity as well as from history. Necessity tells these statesmen that the people must be fed reasonably well first before other human rights can be implemented. One cannot demand the impossible. History tells them that "they have been there" and other approaches have been tried and they did not work.

The emphasis on economic, social and cultural rights has a concomitant emphasis on stability—whose most prominent champions include Mr. Lee Kuan Yew²¹—which serves as the precondition for economic, social, and cultural development, and a concomitant non-implementation of direct democracy at the national level anyway. There is merit to such a way of seeing the world. The difficulty is in finding the right mix.

As an Asian, I might indulge myself in thinking that these perspectives on human rights are quite rich. And yet, there is no Asian system for the protection of human rights similar to that which prevails in Europe. One naturally would ask why. I venture to give you the following reasons for this absence.

First of all, although these perspectives of human rights are rich, they consist of mostly broad principles and philosophical ideas on the nature of the individual and the community that are not susceptible of being concretized as enforceable rules and principles of law.

¹⁷ State Council Information Office of the Peoples' Republic of China, "White Paper, Fifty Years of Progress in China's Human Rights (June 2000)" reprinted in (2002) 1 Chinese J.I.L. 741 at 744; Statements by General Carlos Romulo, in Mary Ann Glendon *supra* note 13 at 215-16.

¹⁸ See *Bangkok Declaration*, preamble, *supra* note 16.

¹⁹ *Ibid.* See also Fifty Years of Progress in China's Human Rights (June 2000), *supra* note 17.

²⁰ See, e.g., Liu Huaqiu Statement, *ibid.*, 737; Wang Guangya Statement, *ibid.*, 782.

²¹ See, e.g., Richard Klein, "Cultural Relativism, Economic Development and International Human Rights in the Asian Content" (2001) 9 *Touro Int'l L.Rev.* 1 at 31 fn. 69 and Jacques deLisle & Kevin P. Lane, "Hong Kong's Endgame and the Rule of Law (II): The Battle over 'the People' and the Business Community in the Transition to Chinese Rule" (1997) 18 *U.Pa.J.Int'l Econ.L.* 811 at 880-881.

Then one may ask why a system has not been established for the part of the perspectives that can be concretized as enforceable rules and principles of law. There is merit to this question, as the Asian States do not mount any frontal attack, in general, against civil and political rights as such; in fact, they agree to the universal character of human rights, if one can trust the official declarations such as the *Vienna Declaration and Programme of Action*.²² So in principle a collective system like that of the European system can be established in Asia, and yet none exists there *so far*.

One reason for this absence may be that the current economic development in Asia generally is such that the States may not believe they are capable of fulfilling their obligations yet. This may explain why they are willing to make a political declaration like that of the *Bangkok Declaration*, but not willing to make a legal convention about human rights.

One may wonder whether Asia's favorite mode of getting things done in a conciliatory nature may prevent a system like that of the European system from being established. Litigating may go against the Asian style, so to speak. This explains, at least in part, the Asian—particularly the Chinese—penchant for quiet dialogues and negotiations regarding human rights issues.²³ However, if this is the obstacle, then a more conciliatory system can be created to achieve the same goal, if not to the same extent of success.

The most important reason, I speculate, is what I consider to be the over-riding factor in the Asian context: their staunch adherence to the principle of non-interference in the domestic affairs of another State²⁴ as a reaction to their experience of being under colonial control. This principle is ingrained in the Asian psyche and constitutes an essential part of it at the present anyway. While Asian States may now agree that in principle human rights issues are not purely domestic issues anymore, they still seem to believe the *enforcement* of human rights is still essentially a domestic issue. Having suffered dearly when they were under colonial control, Asian States now zealously guard against any encroachment on their sovereignty. The effect of this attitude is often unelaborated in writing but can hardly be underestimated. Building a system of human rights protection that would allow a citizen to haul his or her government before an *international* court is contrary to the principle of non-interference. At least that is the appearance. The recent Western enlisting of human rights as an aid in ideological and political struggles or the demonstration of moral superiority does not help to alleviate the concerns of Asian States.

For the reasons mentioned above, law has not been able to play a more effective instrumental role in improving the systematic enforcement of human rights in Asia, at least not as effective as it has been in Europe. However, one must not be blind to the fact that the vast majority of the people in Asia are not in any dire straits at the moment. So law may be playing an instrumental role in the national systems. Of course the visible incidents have always had a strong hold on our imagination, and rightly so. Yet we must put the phenomenon and the causes for it in perspective. Perhaps this part of the world is *generally* doing better than some other parts of the world that have established systems of human rights protection. Moreover, with regard to particular rights, one must not forget that different people may value different rights differently. Some particular rights that do not fare well in Asia may have a stronger hold on the imagination of the Westerners than that of the Asians. For

²² A/CONF.157/23.

²³ Bangkok Declaration, *supra* note 16 at 734 para. 25. Also, Liu Huaqiu Statement, *supra* note 16 at 739.

²⁴ For example, the Bangkok Declaration, *supra* note 16 at 731-32 para. 5, emphasizes "the principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure." See also State Council Information Office of the Peoples' Republic of China, "White Paper on Human Rights Record of the United States in 2001" (2002) 1 Chinese J.I.L. 767 at 776-780 and Statement of Sha Zhu Kang, the Head of Chinese Delegation to the United Nations Human Rights Commission at the 58th Session of the Commission on Human Rights (8 April 2003 in (2004) 3 Chinese J.I.L. 342 at 343. On these questions, literature abounds. See generally, e.g., Richard Klein, *supra* note 21 and Michael C. Davis, "Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values" (1998) 11 Harv.Hum.Rts.J. 109.

example, freedom of speech may not be enjoyed in Asia as in the West, yet one can walk at night in the streets of a big part of Asia feeling safer than in many parts of the United States. So it might be a mistake if one judges the human rights situation in Asia simply by reading the sensational news reports in the mass media.

Perhaps there will be no collective system for the protection of human rights in Asia until Asian States have changed their attitude toward this over-riding factor—the principle of non-interference. I do not know when this may happen. However, the reports from Asia are positive. Recent developments in ASEAN show that changes may be on the way. For example, the governments decided at a meeting in Cambodia in June 2003 that they would speak with the Myanmar government about the plight of the Nobel Peace Prize laureate Daw Aung San Suu Kyi.²⁵ We may take this as cause for optimism. When the Asian States feel more secure about themselves, they will naturally give greater consideration to the possibility of establishing a regional system for the protection of human rights.

²⁵ See “ASEAN calls for Suu Kyi release” *CNN* (17 June 2003) online: Cable News Network <<http://www.cnn.com/2003/WORLD/asiapcf/southeast/06/17/myanmar.asean/>>.