

ASEAN HUMAN RIGHTS CHALLENGES: TOWARDS A REGIONAL-BASED SOUTHEAST ASIAN COURT OF HUMAN RIGHTS

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ABSTRAK

Pasca diterbitkannya *ASEAN Human Rights Declaration*, ASEAN telah membuka berbagai opsi baru *dalam kerangka* kesempatan pola penyelesaian permasalahan Hak Asasi Manusia (HAM) di kawasannya. Momentum ini memberikan ruangan untuk suatu transformasi nilai-nilai ASEAN yang konsultatif dan konsensual dalam menghadapi beberapa permasalahan seperti perihal hak asasi manusia di ASEAN. Nilai-nilai tersebut mulai dikaji kembali relevansinya dalam menghadapi permasalahan HAM di ASEAN yang telah terjadi, terlebih yang hampir tidak jelas status keberlangsungannya. Mekanisme penyelesaian HAM regional pun telah diterapkan dalam beberapa kawasan lainnya di dunia dan dapat menjadi contoh tersendiri kelak ASEAN memiliki Peradilan HAM tersendiri.

Kata kunci: ASEAN, Hak Asasi Manusia, Regional, Peradilan

ABSTRACT

As the declaration of *ASEAN Human Rights Declaration*, ASEAN had enabled new options in its framework of human rights settlement issues in its region. Such momentum shall be considered as an entry point in transforming long-standing values of consultative and consensual of ASEAN in dealing with human rights issues in ASEAN. Such aforementioned values had been assessed their relevance in handling ASEAN human rights violations which had been unresolved. The application of regional-based institution by several other regions might be considered as a blueprint for ASEAN court of human rights in the future.

Keywords: ASEAN, Human Rights, Regional, Court

I. Introduction

1.1. Background

On 18th of November 2012, the Association of Southeast Asian Nations (“ASEAN”) had finalized its ASEAN Human Rights Declaration (“AHRD”).¹ AHRD stipulates the respect and promotion of basic human rights upon the principle of universality, impartiality, objectivity, non-selectivity, non-discrimination, non-

¹ *ASEAN Human Rights Declaration* (<http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration>) accessed on September 16th 2013, 18:30 PM

confrontation.² This document also ensures the fulfillment of civil and political rights of ASEAN member states along with the economic, social and cultural rights, the right to peace and cooperation in the promotion of human rights.³ Contrastingly, such advancement of progress had been viewed as a failure to cope with the dense level of human rights abuses cases. Human trafficking and minority rights issues are considered to be an entry point in serving a better handling of human rights in ASEAN and deemed as an realistic way despite ASEAN principle of non-interference application so far.⁴ Such view, though seem criticizing the declaration of AHRD to be ineffective, had led into another entry point which enables ASEAN to start the deliberations on the issue of ASEAN Court of Human Rights in the near future, due to its alignment to the enhancement of new legal framework pursuant to ASEAN Charter.⁵ Such values of consultative and consensual which remain upheld shall be transformed for the sake of ASEAN to cope with the high exposure of various transboundary human rights issues.

1.2. Objective

Objective of the writing shall be addressing an illustrative perspective of ASEAN human rights advancement, challenges and prospects, focusing its transboundary-nature human rights issues in the manner of comparison toward similar regional-court based in setting up the blueprint of Southeast Asian Court of Human Rights (“SEACHR”).

II. Content

2.1. Research Method

Research method applied within this writing shall be normative legal research⁶ combined with comparative and statutory approach.⁷ It shall put an analysis towards relevant regulations of human rights within ASEAN compared with several regulations of human rights in various countries.

² *ibid*, See Art. 1-9

³ *ibid*

⁴ “Address Trafficking for Better Handling of Human Rights” (<http://www.thejakartapost.com/news/2013/10/02/address-trafficking-better-handling-human-rights.html>) accessed on September 16th 2013, 18:30 PM, See also Article 2(2) (e) and (g) of ASEAN Charter

⁵ ASEAN Charter (<http://www.asean.org/asean/asean-charter/asean-charter>) accessed on September 16th 2013, 18:30 PM, See Article 14 and 22 of ASEAN Charter

⁶ Soerjono Soekanto dan Sri Mamudji, 2007, *Penelitian Hukum Normatif, Suatu Tinjauan Singkat*. PT. Raja Grafindo Persada, Jakarta, h.12.

⁷ Fakultas Hukum Universitas Udayana, *Pedoman Pendidikan Fakultas Hukum Universitas Udayana*, 2013, h.75

2.2. Result

2.2.1. Current Human Rights Mechanism In ASEAN

ASEAN values had established consultative style of discussion among member of ASEAN in resolving its regional disputes.⁸ The establishment of ASEAN Intergovernmental Commission on Human Rights (AICHR), transforming the ASEAN Human Rights Body,⁹ had been its realization. Under its Terms of Reference (TOR), ASEAN had affirmed such consultative style in their human rights settlement mechanism. It is ascertained that the nature of AICHR shall be an intergovernmental consultative body.¹⁰

Due to unresolved issues of human rights such as minority rights and human trafficking, AICHR role of advisory seems inadequate in addressing future challenges. What the region needs is a strong mechanism that is composed of independent experts who are able to: investigate and evaluate reports of human rights violations; consider individual complaints free from outside interference; and make decisions that the concerned nations are obligated to follow.¹¹

2.2.2. Comparison of Other Human Rights Regional Systems

Author focus to comparison upon three systems, namely : 1) *African Commission and Court of Human and Peoples' Rights*,¹² 2) *European Court of Human Rights*,¹³ and 3) *Inter-American Court of Human Rights*.¹⁴

African Court on Human and Peoples rights shall recognized eleven number of judges with six years period of term of office. Meanwhile, Inter-American Court shall have seven judges composition with similar period of term of office to African Court. Aside from such differences, all aforementioned

⁸ Article 2 of 1976 ASEAN Treaty of Amity and Cooperation ("TAC")

⁹ Article 14 of ASEAN Charter

¹⁰ Article 3 of AICHR TOR

¹¹ Hao Duy Phan, 2009, *A Blueprint for Southeast Asian Court of Human Rights*, Asian Pacific Law and Policy Journal Vol. 10: 2, p.386

¹² The African Commission of Human and Peoples' Rights is a quasi-judicial body tasked with promoting and protecting human rights and collective (peoples') rights throughout the African continent, as well as interpreting the African Charter on Human and Peoples' Rights.

¹³ The European Court of Human Rights was established by the Council of Europe in the immediate aftermath of World War II. The admissibility of applications to the court was originally assessed by the European Commission of Human Rights, but this was replaced by committees within the court in the late 1990s.

¹⁴ The inter-American system of human rights promotion and protection was founded by the Organization of American States in Bogota, Colombia, in 1948.

Courts shall preclude judge of related national from hearing any cases where judges nationals are considered to be party and be replaced by ad hoc judges if necessary.

Compared from the nature of admissibility of cases, both African and European Court shall recognize case submitted by both individual and state party.¹⁵ From the nature of the commission, both African and Inter-American Court shall positioned a commission of human rights which are complementary to the court as judicial organ which affirms the admissibility of cases brought before the court.

Compared from the nature of decision and its jurisdiction all aforementioned courts shall possess the power of adjudicatory and advisory and binding to parties concerned.¹⁶

2.2.3. Blueprint of Southeast Asian Court Of Human Rights

Having compared the aspect of judges composition, admissibility of cases before the court and its nature of decision, author shall offer the blueprint of Southeast Asian Court of Human rights combined with the current provided human rights mechanism in ASEAN. It is likely to be offered that African and Inter-American model shall be more suitable to current condition of ASEAN. Under such model, the AICHR shall be transformed as means of commission as provided on African and Inter-American Court Commission, and act complementarily. It is based upon the consideration of such legal pluralism in ASEAN member countries.

However, in terms of composition of judges, European format is more favorable, where it recognized all contracting parties in nominating its judges into composition. It is under the consideration of fairness to all ASEAN member countries and acceptable ratio of number of judges, where ASEAN members shall be comprised of 10 States.

III. CONCLUSION

Entering its new level of regionalism as a more one-united-envisioned community by 2015, ASEAN had been put in the position to reform its longstanding

¹⁵ See Article 33 and 34 of European Convention on Human Rights and see also Article 36 (4) of African Protocol

¹⁶ See Article 61-64 Statute of Inter-American Court of Human Rights.

principle of ASEAN Way, especially in the view of human rights cases. As presented by the other regionalism practice, an idea of regional court in ASEAN had a lot to offer and also considered as a potential entry-point in strengthening the community into a stronger regionalism, as it is aligned by the sole purpose of ASEAN.

In offering a model of blueprint, comparison upon courts similar in other regionalism shall serve as a mixed model of Inter-American and African Courts in utilizing a commission in the matter of assessing the case admissible and European Court format in number of judges composed. However, a deeper research is more likely to be conducted in assessing a more proper blueprint.

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LEGAL INSTRUMENTS

ASEAN Charter

ASEAN Declaration of Human Rights

Term of Reference of the ASEAN Intergovernmental Commission on Human Rights

European Convention on Human Rights

Protocol on the Statute of African Court of Human and Peoples' Rights

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LAW REVIEW AND DIGESTS

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MISCELLANOUS

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