



Social Transformation of International Human Rights Law Through Indonesian Constitutional Court

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Abstract

The importance of human rights in international law cannot be overstated. International Law plays a fundamental role in safeguarding and promoting human rights, which are safeguarded through a variety of legal instruments, including international conventions and international declarations, both of which are recognized as instruments of international law. The fundamental principles of Human Rights are recognized in the legal system of Indonesia. These fundamental principles are expressed in the Constitution and its related legal documents through the provisions and values that govern human rights. Thus, the preamble of the Constitution of the Republic of Indonesia includes the fundamental principles of Self-determination, Independence, Security, Social Welfare, and Education. This research will look at how the Indonesian Constitution regulates and guarantees the implementation of international human rights law through the Indonesian Constitutional Court, as well as how these rights are integrated into society from both the government's and society's perspective. This research is done through interdisciplinary approach, combining legal, social, and comparative studies. Ultimately, it's about how Indonesia's Constitutional Court can help make human rights practices better and more effective. As the highest judicial organ of a state, it is essential for the Constitutional Court to effectively and effectively implement the international human rights system as we know it in order to safeguard the interests of all stakeholders, especially in Indonesia.

Keywords: *human right ; constitution; International law;*



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Abstrak

Hak asasi manusia memiliki nilai yang signifikan dalam hukum internasional. Hukum Internasional memiliki peran penting dalam menjaga dan menegakkan hak asasi manusia yang diabadikan melalui berbagai instrumen hukum, seperti konvensi internasional maupun deklarasi internasional yang keduanya dianggap sebagai sumber hukum internasional. Sistem hukum Indonesia mengakui inti dari Hak Asasi Manusia. Hak-hak tersebut dinyatakan secara eksplisit. Hal itu dituangkan dalam UUD dan perangkat hukum di bawahnya melalui ketentuan dan nilai-nilai yang mengatur hak asasi manusia. Dengan demikian, konstitusi Indonesia dalam pembukaannya diabadikan dengan hak penentuan nasib sendiri, kemerdekaan, keamanan, kesejahteraan sosial, dan pendidikan. Oleh karena itu, melalui penelitian ini akan ditelaah lebih lanjut bagaimana konstitusi Indonesia mengatur dan memastikan Praktik Transformasi Sosial Hukum HAM Internasional Melalui Mahkamah Konstitusi Indonesia. Dengan kata lain dapat dianalisis lebih lanjut bagaimana hak asasi manusia terintegrasi secara efektif baik dari sudut pandang pemerintah maupun masyarakat secara sosiologis. Penelitian ini dilakukan melalui pendekatan interdisipliner yang terdiri dari kajian hukum normatif, kajian sosio-hukum, serta kajian komparatif. Pada akhirnya, bagaimana praktik HAM dapat lebih jauh ditransformasikan dan diimplementasikan secara efektif melalui tindakan yang dilakukan oleh Mahkamah Konstitusi Indonesia. Oleh karena itu, Mahkamah Konstitusi sebagai lembaga peradilan tertinggi di suatu negara, harus secara efektif mentransformasikan dan menerapkan hak asasi manusia internasional yang kita kenal sekarang sedemikian rupa sehingga kepentingan semua orang yang berkepentingan dapat dilindungi, khususnya di Indonesia.

Kata Kunci: *ham; konstitusi; hukum internasional.*

A. Introduction

In the current era of globalisation, legal systems have developed rapidly at both the national and international levels. International law, as defined and conceptualized, has developed into a far more intricate and internationalized legal order since its inception centuries ago. This development is

evident in both its theoretical and practical dimensions. One such aspect is the emergence of international legal concepts. Whereas public society once viewed states as the sole legal subjects, these concepts have expanded to include international organization, individuals, and rebellions. When it comes to international law, human rights are one of the most important aspects. Human rights have long been seen as a fundamental right for states. While these rights are largely defined in domestic legislation, international law continues to play an important role in defining them. It's clear that all human beings, no matter where they come from, are covered by human rights as defined by international law. There are also other legal documents that deal with human rights generally, like the International Criminal Court for the Protection of Human Rights and Fundamental Freedoms (ICCPR), the United Nations Human Rights Declaration of 1948, and other international legal instruments.¹

International law and national law are intertwined with one another. Standard values of international human rights principles are normally reflected within the constitution of each states. In that regard, there are many constitutional court's decision which enhance the development of constitution of the respective state. In Indonesia for instance,

¹ <https://www.un.org/en/global-issues/human-rights>, Accessed on 9 October 2023

there are several constitutional court's decision which highlights human rights values :

1. *Putusan No.065/PUU-II/2004 untuk menguji UU No. 26 Tahun 2000 tentang Pengadilan HAM, khususnya pemberlakuan hukum secara surut*
2. *Putusan 102/PUU-VII/2009 untuk menguji Undang-Undang Nomor 42 Tahun 2008 tentang Pemilihan Umum Presiden dan Wakil Presiden*
3. *Putusan No. 140/PUU-VII/2009 untuk menguji Undang-Undang Nomor 1/PNPS/1965 tentang Pencegahan Penyalahgunaan dan/atau Penodaan Agama.*

Human beings are intrinsically linked to the core of human rights, which encompasses the fundamental rights of life, liberty, and the pursuit of happiness. These rights, as well as the right to freedom from slavery, torture, and other forms of oppression, are intrinsically linked to human humanity. Furthermore, the fundamental rights of freedom of expression, freedom to work, and the right to education are also intrinsically linked to human rights. Consequently, any form of discrimination is prohibited, as all individuals are entitled to these fundamental rights.²

² *Ibid.*,

Human Rights Law, as a legal system, encompasses the duties of Governments to enforce and uphold human rights, as well as to protect fundamental freedoms of individuals or groups. A comprehensive set of human rights law, which serves as a universal, internationally protected code that all nations can subscribe to and all people aspire to, is a remarkable accomplishment and creation of The United Nations. In reality, a wide range of internationally recognised rights, including civil rights, cultural rights, economic rights, political rights and social rights, have been defined by the United Nations. As States carry out their duties, they are guided by mechanisms established by the United Nations in an effort to promote and safeguard these rights. These mechanisms serve as the foundation of Human Rights Law. The scope of human rights law has evolved over time to include special requirements for women, minors, disabled people, minorities, and other vulnerable populations, granting them rights that safeguard them from the forms of discrimination that have long been prevalent in many societies.³

International Law and Human Rights are two integral legal aspects, particularly in the modern era of globalisation. Historically, human rights have been a primary and fundamental factor in the development of international law,

³ *Supra Note 1.*, Accessed on 5 June 2023

even though they predate the general concept of international law. Today, international law is largely shaped by the customs and fundamental rights of individuals. For instance, the passage of a Bill on Human Rights at the national level is not possible without an understanding of the nature of Human Rights in the eyes of International Law in general through its various legal instruments spread across the globe, such as the United Nations Declaration of Human Rights (UNDRG) and the International Covenant (ICPD).⁴ Indonesian constitution clearly recognizes Human Rights. For instance, The 1945 Indonesian constitution Article 28C states :

(1) Every person shall have the right to develop him/herself through the fulfilment of his/her basic needs, the right to get education and to benefit from science and technology, arts and culture, for the purpose of improving the quality of his/her life and for the welfare of the human race.

(2) Every person shall have the right to improve him/herself through collective struggle for his/her rights to develop his/her society, nation and state.

Furthermore, The 1945 Indonesian constitution Article 28D states :

(1) Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law.

⁴ <https://www.un.org/en/chronicle/article/international-human-rights-law-short-history>, Accessed on 10 Oktober 2023.

2) Every person shall have the right to work and to receive fair and proper remuneration and treatment in employment.

(3) Every citizen shall have the right to obtain equal opportunities in government.

(4) Every person shall have the right to citizenship status

As indicated above, the provisions of the Constitution of the Republic of Indonesia guarantee certainty and protection in the field of human rights. Human rights are a fundamental and inherent right of the Indonesian society, and thus have a bearing on other fundamental life values in political, legal, cultural, and social education contexts. This legal paper focuses on the legal issues that must be addressed as outlined in the text. The primary focus is on Indonesia's role in upholding international law, as well as the assurance and implementation of international human rights law through the actions of the Indonesian Constitutional Court within the framework of the national legal system and state policies. Additionally, the effectiveness of the Indonesian legal system in ensuring that human rights are enforced in a manner that safeguards the interests of all individuals.

B. Discussion

Human rights are the fundamental values and instruments of international law. Since the end of World War II, human rights have become increasingly prominent in international jurisprudence. States have a great deal in common in terms of human rights, such as the right of citizenship, the right to economic and political influence, equality, and policies to prevent cultural and racial discrimination. However, the manner in which states implement human rights can differ depending on their political ideology and policies. Generally, scholars concur that one of the primary objectives of the international human rights movement is to promote human rights in the world through international law. This is why human rights, particularly those under the auspices of the United Nations, have been addressed by numerous international organizations.⁵

Human rights are the exclusive rights that individuals possess due to their inherent humanity. These rights are not granted by society or the law of the State, but rather by individuals' pride and integrity. Despite the fact that individuals are born with unique skin color, gender identity, language,

⁵ Cher Weixia Chen, *Indigenous Rights in International Law*, School of Integrative Studies, George Mason University, <https://doi.org/10.1093/acrefore/9780190846626.013.77>, <https://oxfordre.com/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-77?print=pdf>, Edition : 20 November 2017, p. 1

cultural background, and citizenship, these rights are still held by individuals. These rights are shared by all individuals and are therefore inalienable in their entirety. This implies that, regardless of how mistreated or cruel an individual may be, they will remain human and thus retain these rights.⁶ This foundation is supported by John Locke's understanding of the natural rights revolution, which describes the emergence of rights in revolutionary events that occurred in England, America, and France during the 17th and 18th centuries. John Locke's concept of the inherent right of all individuals to life, liberty and property, which is the property of the individual and cannot be taken away by the state, was developed in his second book on civil government and a letter concerning toleration. According to Locke, individuals possess natural rights, which the state is obligated to protect by virtue of a social contract; however, if the contract is violated and the rights are violated, the people are entitled to rise up against their leaders and form a government that upholds their rights.⁷

⁶ Knut D. Asplund, Suparman Marzuki, Eko Riyadi (Editors). *Hukum Hak Asasi Manusia (The Human Rights Law. Translated by the Authors)* / Rhona K. M. Smith, et.al., Pusat Studi Hukum dan Hak Asasi Manusia, Yogyakarta: Universitas Islam Indonesia, (2008), p.11.

⁷ *Ibid.*, p. 13.

1. International Human Rights Law and Social Transformation

Human rights responsibilities and obligations play a significant role in the design and delivery of social protection schemes, not just in the final outcome. Social protection schemes and frameworks help States fulfill their obligations and responsibilities under domestic, regional or international human rights legislation to guarantee at least essential economic, social and cultural rights, including the right to a fair standard of living, social security, education and the highest possible standard of health. Human rights standards require States to ensure that human rights provisions are incorporated into the content of social protection schemes.⁸ Human rights provide a disjointed discursive and political tool for the marginalized. On the other hand, they can be subject to a radical reinterpretation that can weaken them as well as strengthen them. There is no unifying definition of human rights. Fair and just social change necessitates that human rights must be asserted and reclaimed. How human rights can be used in the service of radically different and conflicting visions within society is explained by human rights' role in India's quest for social transformation. Human rights as embodied in the

⁸ Magdalena Sepúlveda and Carly Nyst, *The Human Rights Approach to Social Protection*, Ministry for Foreign Affairs of Finland, <https://www.ohchr.org/sites/default/files/Documents/Issues/EPoverty/HumanRightsApproachToSocialProtection.pdf>, Accessed on Nov 21 2022

Constitution are looked upon with respect and dignity in a country where human rights discourse and human rights claims are influential. Lobbying has a conceptual as well as a political dimension. On the other hand, legal cases can produce a body of case law with concrete effects. However, the gains made under human rights can disappear.⁹ Housing rights are a manifestation of human rights standards, which are located in various developing nations. All social action in the pursuit of rights everywhere is a process of claim, relinquishment, and restitution; human rights are never fully achieved, and as long as rights are sought and asserted, they will remain unalienable. While unjust and weakening human rights interpretations can impede equitable social transformation, further opportunities for equity, inclusion, and social citizenship, as well as social transformation, remain within our grasp through continued dialogue on human rights.¹⁰

2. Right of Access to Justice in International Human Rights Law, Social Transformation, and Rule of law

Another basic pillar of international human rights law is access to justice, which is a right in itself and also serves as a means to restore the exercise of violated or unrecognized rights. Certain obligations in judicial matters are imposed on

⁹ *Ibid.*,

¹⁰ *Supra* Note 19, p. 184

States by the requirements of rule of law and due process. Key elements for the protection of human rights, including the right to equality before courts and tribunals and the right to a fair trial, are procedural means to reinstate the rule of law. Therefore, certain standards in the administration of justice must be followed by States, such as the principles of legality, effectiveness, publicity, and transparency, as well as the establishment of clear, fair, appropriate, and independent procedures, the right of defense, and the right of appeal to a higher authority. Moreover, the distribution of costs in a judicial proceeding that weakens access to justice de facto can pose threat and challenges in terms of paragraph 1 of article 14. Specific obligations in this regard are derived from other international legal instruments such as International Convention on the Elimination of All Forms of Racial Discrimination (articles 5 and 6), Convention on the Elimination of All Forms of Discrimination against Women (article 15), Convention on the Rights of the Child (articles 12 and 40) and Convention on the Rights of Persons with Disabilities (articles 12 and 13).

One prime example on social transformation through Constitutional Court is Women Rights. The Committee on the Elimination of Discrimination against Women has summarized and acknowledged six essential and relevant components to ensure access to justice. **Justiciability** request unbridled access to justice and capability as well as empowerment to claim rights

as legal embodiment. **Availability** requires the establishment of courts, quasi-judicial organs or other organs throughout the State party in urban, rural and remote areas, as well as their maintenance and funding. **Accessibility** requires that all judicial systems, both formal and quasi-judicial, are secure, acceptable and physically accessible, and adapted and appropriate to the different needs. **Good quality of judicial systems** requires that all components of the system are in line with international standards of competence, efficiency, independence and impartiality as well as delivering, in a timely fashion, appropriate and effective remedies which are enforced and lead to sustainable dispute resolution. **Provision of remedies** request that justice systems provide accessible and acceptable protection as well as meaningful redress for any harm suffered. **Accountability of justice systems** is assured through supervision to assure that they run according to the principles of justiciability, availability, accessibility, good quality and provision of remedies.

The Special Rapporteur on the impartiality of judges and lawyers has found a number of aspects as the prime barriers to access justice. First, **Financial barriers**. It encompasses costs which include initiating and pursuing the proceedings, and possible delays. Second, **Extreme poverty**. It encompasses financial factors taking on even more importance when they combine other social, cultural or employment factors and bring to marginalization and public isolation which create

difficulty for the low income economy to gain justice. Third, **Barriers relating to information**. It encompasses clients' negligence of their rights and all matters concerning to their case. Fourth, **Cultural barriers**. It encompasses language and social difficulties as well as distinction in cultural and economic backgrounds of those concerned. Sixth, **Physical barriers**. It encompasses the physical distance between client and court or the layout composition.

After the Indonesian reform of 1998 and the amendment of the 1945 Constitution, the affirmation of the teaching approach and the understanding of human rights has changed. The regulation of advanced human rights material has propelled the categorization of rights from basic individual/personal rights to social rights. Chapter XA on Human Rights governs these rights, consisting of 10 Articles beginning with Article 28A to Article 28J. The 1945 Constitution's acknowledgement of human rights has contributed significantly to the promotion, protection, and fulfillment of human rights. Other legal norms are obliged to elaborate the provisions of the constitution, including the regulation and further detail of more operational and concrete human rights. The written constitution of Indonesia is the highest law.¹¹

¹¹ Jimly Asshiddiqie, *Gagasan Dasar tentang Konstitusi dan Mahkamah Konstitusi (Basic Idea on Constitution and Constitutional*

In aiming this goal, through the Third Amendment of the 1945 Constitution (Article 24), the Constitutional Court is set up to maintain and to uphold the Constitution and the constitutionalism, assuring the enforcement, safeguarding, and the fulfillment of human rights.¹² The Constitutional Court is set up, through the Third Amendment of the 1945 Constitution (Article 24), to maintain and uphold the Constitution and constitutionalism, assure the enforcement, safeguarding, and fulfillment of human rights in aiming this goal. The existence of the 1945 Constitution and its amendment and the Constitutional Court as the prime tool for human rights protection in Indonesia will be further elaborated in this paper. The urgency of the amendment to the 1945 Constitution as the written constitution and the prime tool of human rights protection in Indonesia and the function of the Constitutional Court as “the protector of human rights” in Indonesia must be understood in order to answer the question. Justice within the real society can be upheld by the core substance of the Indonesian constitution and its role in assuring legal access for

Court. Translated by the Authors), in Sri Rahayu Oktoberina and Niken Savitri (Editors) Butir-Butir Pemikiran dalam Hukum, Memperingati 70 Tahun Prof. Dr. B. Arief Sidharta (Pieces of Thoughts on Law, Celebrating the 70 Years of Prof. Dr. B. Arief Sidharta), Bandung: Revika Aditama, (2008), p. 207.

¹² Abdul Latif, *Fungsi Mahkamah Konstitusi Upaya Mewujudkan Negara Hukum Demokrasi (The Constitutional Court Function in Order to Fulfill the Democratic Law State, Translated by The Authors)*, Jakarta: Total Media, (2009), p. 5

the society so that it will be able to uphold justice within the realm of human rights.

The realization of a much better nation and state for the society has been sought through the amendment of the 1945 Constitution, which has brought significant changes to the system, structure, mechanisms, and institutions of the state. The provisions governing the institutional state have been altered, and changes have been made in terms of legal perspective and state bureaucracy. Basic principles, such as the rule of law with constitutional supremacy, a presidential system, the separation of powers, checks and balances, and the protection of human rights and the rights of citizens, have been upheld.¹³ A system or mechanism of mutual control between institutions of state power and a means of assuring the protection and the fulfillment of human rights, as well as tools and mechanisms to enhance rights in the event of a violation thereon must be delivered by a good constitution based on sensible constitutionalism.¹⁴

¹³ Jimly Asshiddiqie, “*Hubungan antara Lembaga Negara Pasca Perubahan UUD 1945 (The Relation Between the State Institutions After the Amendment of the 1945 Constitution. Translated by the Authors)*”. Paper on Pendidikan dan Latihan Kepemimpinan (Diklatpim) Tingkat I Angkatan XVII Lembaga Administrasi Negara, Jakarta, 30 Oktober 2008.

¹⁴ Leli Tibaka & Rosdian, *The Protection of Human Rights in Indonesian Constitutional Law after the Amendment of the 1945 Constitution of the Republic of Indonesia*, Volume 11 Number 3, July-September 2017: pp. 279, Copyright © 2017 FIAT JUSTISIA. Faculty of

3. The Social Transformation of International Human Rights Law by Indonesian Constitutional Court (MK Decision related to human rights issue)

Indonesian human rights culture is based on kinship and collectivist values, and the protection of human rights for individual and social interests must be balanced. In that regard, as reflected through the UN Convention on the Protection and Use of Transboundary Watercourses and International Lakes, added by The UN Protocol on Water and Health Driving Action on Water, Sanitation, Hygiene and Health, One example of social transformation of international human rights law is reflected through the MKRI decision No. 85/PUU XI/2013 regarding the cancellation of the Water Resources Law No.7/2004, the court used proportionality analysis to assess the law's purpose and the use of the right to water in Indonesia. It balanced the rights and obligations of the citizens. The legal reason as the basis for limiting and canceling the Water Resources Law was that the law aims to integrate and coordinate the interests of the community. Conflicts do not occur between members of the community or within the communities, or at least these conflicts could be minimized.¹⁵

Law, Lampung University, Bandar Lampung, Lampung, Indonesia. ISSN: 1978-5186 | e-ISSN: 2477-6238

¹⁵ Tanto Lailam and Putri Anggia, *The Indonesian Constitutional Court Approaches the Proportionality Principle to the Cases Involving*

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The provision under Indonesian constitution is heavily intertwined with ASEAN's legal framework since numerous ASEAN's legal instruments deliver impact to human rights implementation in Indonesia. Thus, it is also directly or indirectly adopted within Indonesian national legal system which ultimately also affect legal decision making, including decisions taken by Indonesian Constitutional Court on Human Rights. During the years of ASEAN's existence, various developments have taken place. Human rights principles, both common and specific, have not been violated by any of the ASEAN member states. There are three reasons why human rights violations occur: First, leaders who allow such violations of the law itself. Second, the political treatment of groups within society. Third, social and economic gaps within the society. The research also found that ASEAN's human rights records are ranked differently based on the responsibility of the member state towards international human rights instruments. Four instruments and institutions are available in ASEAN to address human rights violations: the ASEAN Charter, the ASEAN Community, the National Commission on Human Rights, and the ASEAN Intergovernmental Commission on Human Rights (AICHR) which bring about efforts to promote and safeguard human rights within ASEAN. Nevertheless, these subsidiary

Competing Rights, Faculty of Law, Law Reform, Journal, Vol. 19, No. 1, 2023, Universitas Diponegoro, p. 110-127

organs of ASEAN are far from exercising the function and tasks in promoting and upholding human rights within the region effectively.¹⁶ We can qualify ASEAN's member states according to the scale of human rights violations cases that take place in each member state. Singapore, Malaysia, Brunei, Vietnam, and Laos are member states with much smaller-scale human rights violations. On the other hand, Myanmar, Thailand, the Philippines, Indonesia, and Cambodia are countries with massive human rights violation cases.¹⁷ Below is the table explaining the rank of ASEAN Member States : ¹⁸

Country	Freedom Qualification	Human Development Index	Press Freedom Qualification	Number of Human Rights Ratifications
Brunei	Not Free	Very High	Difficult	3/22
Cambodia	Not Free	Medium	Difficult	11/22

¹⁶ Dr. Nazaruddin Nasution, MA, *Human Rights Violations in Southeast Asia : The Case of Khmer Rouge of 1975-1979 (Cambodia) and The Case of East Timor of 1999 (Indonesia)*, Advances in Social Science, Education and Humanities Research (ASSEHR), Volume 129, Third International Conference on Social and Political Sciences (ICSPS 2017), Atlantis Press, 2018, p. 43.

¹⁷ *Ibid.*, p. 44

¹⁸ *Supra* Note 19, p. 44

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Indonesia	Partly Free	Medium	Difficult	11/22
Laos	Not Free	Medium	Severely Prohibited	9/22
Malaysia	Partly Free	High	Difficult	5/22
Myanmar	Not Free	Low	Difficult	4/22
Phillipinnes	Partly Free	Medium	Difficult	14/22
Singapore	Partly Free	Very High	Difficult	3/22
Thailand	Partly Free	High	Difficult	11/22
Vietnam	Not Free	Medium	Severely Prohibited	7/22

From the table stated above, it could be clearly elaborated that Countries in South East Asia, not to mention Indonesia, remain to be seen whether they can fully enhance the political and legal stance in upholding human rights issues more effectively. The description on the table clearly explains that there is still a widening gap on human rights development among ASEAN member states due to their economic, political, legal, social, and cultural differences which needs to be addressed further as to how such widening gap on human rights

issues could be dealt with effectively among ASEAN member states.

The human rights situation in the region has been deteriorating, but all the issues remain unaddressed by the AICHR. To describe the physiognomy of human rights in Southeast Asia, the term ambivalence has been used.¹⁹ There are many factors that contribute to this, such as substantive and procedural factors. There are three factors regarding the limitations of the substantive factors. First is the narrow interpretation of the principle of sovereignty and nonintervention.²⁰ In Southeast Asia, human rights and international supervision by human rights mechanisms have always been viewed as a threat to the sovereignty of the state and therefore considered a domestic issue.²¹ AICHR representatives strongly adhere to the principle of noninterference²² where there is a high degree of respect for

¹⁹ Muntarbhorn, V. (2002). *Dimensions of Human Rights in Asia Pacific Region*. Bangkok: Office of the National Human Rights Commission

²⁰ Jati, I. (2017). *Comparative Study of the Roles of ASEAN and the Organization of Islamic Cooperation in Responding to the Rohingya Crisis*, *The Indonesian Journal of Southeast Asian Studies*. 1(1).

²¹ Caballero-Anthony, M. (1995). *Human Rights, Economic Change and Political Development*. In J. T. Tang, *Human Rights and International Relations in the Asia Pacific* (pp. 47-48). London: Pinter.

²² Hsien-Li, Tan, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalising Human Rights in Southeast Asia*, Cambridge University Press, 2011.

the right of every member state to lead its national existence free from external interference, subversion and coercion. According to many Southeast Asian states, no one can dictate or make judgments on others about human rights, and the international community has no right to intervene, including the AICHR.

Second is the limitations of human rights that are incompatible with international human rights instruments. Limitations of human rights are also regulated in the ASEAN Human Rights Declaration (ADHR). Third is the lack of determination to ratify core treaties. The ASEAN family is divided into two groups on the issue of human rights. Indonesia, Malaysia, the Philippines and Thailand are positively more open to human rights and norm change. They have ratified many of the core international human rights treaties, have national human rights institutions in place and in terms of democracy and development are not at the bottom of the scale. On the other side is Cambodia, Laos, Myanmar and Vietnam, a distinct group in which the standard of living, GDP, human rights and standards of rule-based governance are substantially below other ASEAN member states.²³ Brunei and Singapore are

²³ Jones Lee (2008), ASEAN's Albatross: ASEAN's Burma Policy, from Constructive Engagement to Critical Disengagement, in: *Asian Security*, 4, 3, 271–293.

somewhere between the camps.²⁴ Despite that the TOR of the AICHR clearly states that ASEAN member states are encouraged to accede and ratify international human rights instruments,²⁵ there is a lack of determination among them. Among all 10 members, only Indonesia, Cambodia and the Philippines have adopted all major international human rights treaties.²⁶

In the view of establishing a regional human rights regime and improving human rights standards, ratification of international human rights treaties is a critical factor²⁷ because it displays a prima facie acceptance to international human rights norms. However, mere ratification is no guarantee for acceptance or implementation of international human rights norms. The table below may give us an idea of the national

²⁴ Koh, T. (2009), 'ASEAN Charter at one: a thriving tiger cub', Think Tank, 9 December. http://lkyspp.nus.edu.sg/ips/wp-content/uploads/sites/2/2013/04/pa_tk_think-tank_Asean-Charter-at-one-A-thriving-tiger-pup_0912091.pdf

²⁵ Terms of Reference of ASEAN Intergovernmental Commission on Human, Article 4.5

²⁶ International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); International Convention on the Elimination of Racial Discrimination (ICERD), Convention on the Elimination of Discrimination Against Women (CEDAW); Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child (CRC); Convention on the Protection of the Rights of Migrant Workers (CMW), Convention on the Rights of Persons with Disabilities (CPRD) and Convention on the Protection of all Persons from Enforced Disappearance (CPED).

²⁷ Hashimoto, H. (2004). *The prospects for a Regional Human Rights Mechanism in East Asia*. New York: Routledge.

interest of each state through its way to consent to be bound to certain international conventions. Moreover, the substantive reservations to several conventions by some member states shows us the differences and nonuniform understanding and approach among ASEAN member states.

	ICPPR	ICESR	ICERD	CEDAW	CAT
Brunei	-	-	-	A	S
Cambodia	A	A	R	A	A
Indonesia	A	A	A	R	R
Laos	R	R	A	R	R
Malaysia	-	-	-	A	-
Myanmar	-	R	-	A	-
Phillipines	R	R	R	R	A
Singapore	-	-	R	A	-
Thailand	A	A	A	A	A
Vietnam	A	A	A	R	R

A: Accession; S: (signed but not ratified); R: (Signed and Ratified)

On the other hand, there are also two procedural factors, namely the structure of the AICHR with a lack of independence and weak mandates for protection.²⁸

First, there is a lack of independence in the system. However, this is not the case given that the AICHR is a consultative intergovernmental body.²⁹ Specifically, AICHR functions in a way that allows the promotion and protection of human rights to be influenced by the political will of its member states. The conflict of interest between the AICHR's members, governments and victims of human rights abuses interferes with the AICHR's impartiality when performing its duties. Second is the broad and weak mandates of the TOR. The ASEAN human rights regime mainly focuses on promoting human rights rather than protecting them.³⁰ The AICHR does not provide a protective mechanism in receiving complaints from individuals or groups.³¹ That is why the AICHR has not actively been involved in dealing with human rights violations in the

²⁸ Phan, Hao D. (2012). *A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia: The Case for a Southeast Asian Court Of Human Rights*. Leiden and Boston: Martinus Nijhoff Publishers.

²⁹ Terms of Reference of ASEAN Intergovernmental Commission of Human Rights, July 2009, Article 3.

³⁰ Victor Beyer, *Assessing an ASEAN Human Rights Regime: A New Dawn for Human Rights in Southeast Asia?* (Saarbrücken, Germany: Lambert Academic Publishing, 2011), p. 77

³¹ Muntarbhorn, V. (2013), *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region*. Leiden, The Netherlands/Boston, MA: Brill/Nijhoff.

region. The case of the mistreatment of the Rohingya in Myanmar has been one of the examples where ASEAN and especially the AICHR have been criticized for being unable to fully address the continuation of human rights violations in the region.³² In other words, the AICHR fails to recognize the concept of the responsibility to protect. The summary of the factors, both substantive and procedural, that contribute to the ineffectiveness of the ASEAN human rights system can be seen in the table below.

No	Substantive Factors	Procedural Factors
1	Narrow interpretation on sovereignty and principle of non intervention	Lack of independence in human rights system
2	Limitations of human rights incompatible with international human rights instruments	Broad and weak mandates of the AICHR TOR
3	Lack of determination to ratify core human rights treaties	

³² Kimberly Ramos Gamez. (2017). Examining The ASEAN Intergovernmental Commission on Human Rights (AICHR): The Case Study of The Rohingya Crisis. Tilburg: Tilburg University.

The above explanation clearly describes, while some core international human rights treaties have been signed by some ASEAN member states, implementation remains poor particularly due to its weak organizational structure and function.³³ While domestic processes are weak and slow, foreign contribution is complementary and welcome, and much endorsement is received by Indonesian human rights promoters at this level. Nevertheless, significant changes have been undergone by the country, with implications for the way it is internationally viewed, the kind of guidance it receives, and the internal human rights situation. Generally speaking, a fascinating development of democratic process is internationally seen as changes within Indonesia. Highly praised are abuse survivors and civil society organizations. Millions of dollars, expertise and knowledge have been made available to enhance the democratic transition, and the world is being opened for Indonesia through the development of technology.³⁴ Legislation which limits freedom and demands 'responsibility as well as respect' for human rights has been adopted by the Government and Parliament. Additionally,

³³ Aguirre, K., & Pietropaoli, I. (2012). Human Rights Protection the ASEAN Way: Non-Intervention and the Newest Regional Human Rights System. *Human Rights Law Review*, 1(2), 276-311. <https://doi.org/10.1163/22131035-00102003>

³⁴ Haris Azhar, *The Human Rights Struggle in Indonesia: International Advances*, Journal Sur of Domestic Deadlocks : Human Rights in Motion Perspectives, v. 11 n. 20 Jun./Dec. 2, p. 231

discussing human rights has been labeled “anti-religious”. A number of challenges are posed by utilizing social media. The Minister of Communication and Information has repeatedly shown his unwillingness in propelling access to the internet, apart from the new law on Electronic Information and Transaction. Therefore, technically and legally speaking, information is free but its access is liable to be infringed.³⁵

C. Conclusion

International Human Rights Law are governed under several international legal instruments, such as The Universal Declaration of Human Rights (UDHR) in 1948, UN Declaration on The Rights of Indigineous Peoples 2007, International Covenant on Civil and Political Rights 1966, and other sources of international law. Indonesian Constitution and its subsidiary legal instruments ensure and govern the protection of human rights in accordance to international law. The urgency of the Amendment of the 1945 Constitution of the Republic of Indonesia as the written constitution has brought progress and social transformation in enhancing, respecting, protecting and fulfilling human rights in Indonesia. The 1945 Constitution regulate human rights materials starting from the affirmation of the fundamental rights, individual rights, social rights, rights

³⁵ Lucia Nader, Juana Kweitel, Marcos Fuchs, *Human Rights In Motion: A Map To A Movement's Future*, Sur Journal, v. 11 n. 20 Jun./Dec. 2014, p. 230

of solidarity, and even affirmation of rights included in the category of non-derogable rights in the Second Amendment of the 1945 Constitution. This fact shows progress on the level of legislation and protection of human rights in Indonesia so that the post-amendment 1945 Constitution may be referred to as the *Social Transformation Towards a More Effective Indonesian Constitution of Human Rights*. Effective indicators to the history of the implementation of human rights in the constitution are as follows: Accessibility to Human Rights Justice, Availability, Good quality of judicial systems, Provision of remedies, Accountability of justice systems. Throughout analysis stated in the previous chapter, there are several recommendations as a follow up of the conclusion previously stated. First, Indonesian government should in many ways bring about a more effective legal enforcement in assuring the protection and social transformation of international human rights law within the legal framework of Indonesian constitution. Although human rights are inherently governed under Indonesian legal system, there is still work to be done to ensure such task could be carried out in such a way that the interest of all people concerned could be protected. Last but not least, International Law Commission may in many ways develop and invent new sources through its regular meeting in helping to ensure the progressive development in international human rights law on upholding and protecting human rights on a global scale more effectively.

Referensi

Aguirre, K., & Pietropaoli, I. (2012). Human Rights Protection the ASEAN Way: Non-Intervention and the Newest Regional Human Rights System. *Human Rights Law Review*, 1(2), 276-311. <https://doi.org/10.1163/22131035-00102003>

Asshiddiqie, Jimly. *Gagasan Dasar tentang Konstitusi dan Mahkamah Konstitusi (Basic Idea on Constitution and Constitutional Court. Translated by the Authorss)*, in Sri Rahayu Oktoberina and Niken Savitri (Editors) *Butir-Butir Pemikiran dalam Hukum, Memperingati 70 Tahun Prof. Dr. B. Arief Sidharta (Pieces of Thoughts on Law, Celebrating the 70 Years of Prof. Dr. B. Arief Sidharta)*, Bandung: Revika Aditama, (2008).

_____, "Hubungan antara Lembaga Negara Pasca Perubahan UUD 1945 (*The Relation Between the State Institutions After the Amendment of the 1945 Constitution. Translated by the Authors*)". Paper on Pendidikan dan Latihan Kepemimpinan (Diklatpim) Tingkat I Angkatan XVII Lembaga Administrasi Negara, Jakarta, 30 Oktober 2008.

_____, *Pengantar Ilmu Hukum Tata Negara (Introduction to the Indonesian Constitutional Law. Translated by the Authors)*, Bandung: Rajagrafindo Persada, (2009),

Azhar, Haris. *The Human Rights Struggle in Indonesia: International Advances*, Journal Sur of Domestic Deadlocks : Human Rights in Motion Perspectives, v. 11 n. 20 Jun./Dec. 2

Beyer, Wictor. *Assessing an ASEAN Human Rights Regime: A New Dawn for Human Rights in Southeast Asia?* (Saarbrucken, Germany: Lambert Academic Publishing, 2011).

- Caballero-Anthony, M. (1995). Human Rights, Economic Change and Political Development. In J. T. Tang, Human Rights and International Relations in the Asia Pacific (pp. 47-48). London: Pinter.
- Chen, Cher Weixia. *Indigenous Rights in International Law*, School of Integrative Studies, George Mason University, <https://doi.org/10.1093/acrefore/9780190846626.013.77>, <https://oxfordre.com/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-77?print=pdf>, Edition : 20 November 2017
- Gamez, Kimberly Ramos. (2017). Examining The ASEAN Intergovernmental Commission on Human Rights (AICHR): The Case Study of The Rohingya Crisis. Tilburg: Tilburg University.
- Hashimoto, H. (2004). The prospects for a Regional Human Rights Mechanism in East Asia. New York: Routledge.
- Hsien-Li, Tan, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalising Human Rights in Southeast Asia*, Cambridge University Press, 2011.
- Jati, I. (2017). Comparative Study of the Roles of ASEAN and the Organization of Islamic Cociteration in Responding to the Rohingya Crisis, *The Indonesian Journal of Southeast Asian Studies*. 1(1).
- Jones Lee (2008), ASEAN's Albatross: ASEAN's Burma Policy, from Constructive Engagement to Critical Disengagement, in: *Asian Security*, 4, 3, 271–293.
- Knut D. Asplund, Suparman Marzuki, Eko Riyadi (Editors). *Hukum Hak Asasi Manusia (The Human Rights Law. Translated by the Authors) / Rhona K. M. Smith, et.al.*, Pusat Studi Hukum dan Hak Asasi Manusia, Yogyakarta: Universitas Islam Indonesia, (2008)

Koh, T. (2009), 'ASEAN Charter at one: a thriving tiger cub',
Think Tank, 9 December.
http://lkyspp.nus.edu.sg/ips/wp-content/uploads/sites/2/2013/04/pa_tk_

Latif, Abdul. *Fungsi Mahkamah Konstitusi Upaya Mewujudkan Negara Hukum Demokrasi (The Constitutional Court Function in Order to Fulfill the Democratic Law State, Translated by The Authors)*, Jakarta: Total Media, (2009).

Leli Tibaka & Rosdian, *The Protection of Human Rights in Indonesian Constitutional Law after the Amendment of the 1945 Constitution of the Republic of Indonesia*, Volume 11 Number 3, July-September 2017, Copyright © 2017 FIAT JUSTISIA. Faculty of Law, Lampung University, Bandar Lampung, Lampung, Indonesia. ISSN: 1978-5186 | e-ISSN: 2477-6238

Lucia Nader, Juana Kweitel, Marcos Fuchs, *Human Rights In Motion: A Map To A Movement's Future*, Sur Journal, v. 11 n. 20 Jun./Dec. 2014

Magdalena Sepúlveda and Carly Nyst, *The Human Rights Approach to Social Protection*, Ministry for Foreign Affairs of Finland, https://www.ohchr.org/sites/default/files/Document_s/Issues/EPoverty/HumanRightsApproachToSocialProtection.pdf

M. Hohmann, Jessie. *Visions of Social Transformation and the Invocation of Human Rights in Mumbai: The Struggle for the Right to Housing*, British Academy Postdoctoral Research Fellow, University of Cambridge Faculty of Law & Junior Research Fellow, Darwin College, Cambridge, YALE HUMAN RIGHTS & DEVELOPMENT Law Journal, Volume 13

Muntarbhorn, V. (2002). *Dimensions of Human Rights in Asia Pacific Region*. Bangkok: Office of the National Human Rights Commission

Muntarbhorn, V. (2013), *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region*. Leiden, The Netherlands/Boston, MA: Brill/Nijhoff.

Nasution, Nazaruddin. *Human Rights Violations in Southeast Asia : The Case of Khmer Rouge of 1975-1979 (Cambodia) and The Case of East Timor of 1999 (Indonesia)*, *Advances in Social Science, Education and Humanities Research (ASSEHR)*, Volume 129, Third International Conference on Social and Political Sciences (ICSPS 2017), Atlantis Press, 2018,

Phan, Hao D. (2012). *A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia: The Case for a Southeast Asian Court Of Human Rights*. Leiden and Boston: Martinus Nijhof Publishers.

<https://www.un.org/en/global-issues/human-rights>