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"The 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms: Challenges and Prospects for Future Human Rights Mechanisms in ASEAN"

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The 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms:

Challenges and Prospects for Future Human Rights Mechanisms in ASEAN

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Abstract

Human rights discourse often stray far from any discussions on the ASEAN dispute settlement mechanisms, and vice versa. All ASEAN dispute settlement mechanisms before 2010 have not taken into account human rights disputes. The 1976 Treaty of Amity and Cooperation in Southeast Asia (TAC), to 1996 Protocol on the Dispute Settlement Mechanism (1996 Protocol) and the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM 2004) did not take human rights into account. These mechanisms tend to focus on settling economic disputes.

The year 2007 marked a 'new ASEAN' with the establishment of the ASEAN Charter. This led to two remarkable achievements for ASEAN. The first was carrying out a mandate to establish a new dispute settlement mechanism that could fill the gap in previous dispute settlement mechanisms and accommodate all types of disputes by adopting the 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (2010 Protocol). The second was the success of carrying out the mandate to create an ASEAN human rights body by establishing the ASEAN Intergovernmental Commission on Human Rights (AICHR). Both achievements show ASEAN's serious commitment to be a more rule-based organization.

The establishment of the AICHR also shows ASEAN's serious commitment to human rights. Unfortunately, many serious defects exist within the AICHR, especially the body's weak mandate and emphasis on promotion rather than on protection. Furthermore, there is still no exact mechanism for how the AICHR can settle human rights cases in the region.

There is good news from the latest ASEAN Dispute Settlement Mechanism, the 2010 Protocol, which allows for human rights disputes to be settled within its framework. This new Protocol gives a more detailed and comprehensive roadmap, including a precise time-frame for each phase. It is believed that the 2010 Protocol will succeed in overcoming the weaknesses of the previous Protocol. Unfortunately, to date, the ASEAN member states have not yet used it.

Research found shows that there is a possibility that the 2010 Protocol can be used for human rights disputes by involving the AICHR in the settlement process. It is also another

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possibility for AICHR to create its own human rights dispute settlement mechanisms under a new agreement. The nature and advantages of the ASEAN dispute settlement mechanism are in line with the ASEAN way, which offers more opportunity for states to agree on this human rights mechanism's proposal.

Keywords: Human Rights, AICHR, ASEAN, Dispute Settlement Mechanism, 2010 Protocol to the ASEAN Charter

I. Introduction

Prior to the establishment of the Association of Southeast Asian Nations (ASEAN) Charter in 2007, the human rights regime in the Southeast Asian region was lacking and there was no serious commitment to human rights. However and thereafter, Article 14 of the ASEAN Charter created the mandate to establish a human rights body in the region. In 2009, the ASEAN Intergovernmental Commission on Human Rights (AICHR) was established. The establishment of the AICHR shows serious commitment from ASEAN to human rights. Unfortunately, many serious defects remain with the AICHR, especially its weak mandate, the issue of independence, and lack of a comprehensive mechanism for how the AICHR can settle human rights cases in the region.

Many scholarly studies concerning human rights and ASEAN have been made. However, the studies mainly focus only on AICHR, which is the primary institution safeguarding human rights. Most observers and writers do not discuss the possibility of other ASEAN institutions and arrangements to contribute to enacting the mandate of the AICHR. ASEAN has the main responsibility to support the work of AICHR and protect the human rights of the citizen in this region.

Despite the lack of mandate and other institutional defects, AICHR has made many efforts to fulfill its mandate, especially in promoting human rights. However, when it comes to settling human rights cases, AICHR keeps silent. The Rohingya case is one example of when AICHR was not adequately involved as the ASEAN treated it as a humanitarian issue and appointed another body to settle the dispute. AICHR also struggles to accept complaints

made by individuals. The absence of human rights mechanism is indeed a big problem for AICHR. The Terms of Reference (TOR) of the AICHR does not cover that issue. There is a need to review and revise the TOR, but this work is not easy. Supposedly, there have been two reviews of the TOR. However, until now, the AICHR's TOR has not been yet been amended.

As stated above, to overcome this problem, one should look at other possibilities within ASEAN's institutional framework. There is good news from the latest ASEAN dispute settlement mechanism: the 2010 Protocol, under which there is an opportunity for human rights disputes to be settled. Observing Chapter VIII of the ASEAN Charter (i.e. Articles 22–28), the Charter offers suggests that human rights cases can be settled under this framework, especially after establishing the 2010 Protocol.

While waiting for a stronger mechanism which may include a judicial body such as a human rights court, although this is unlikely to happen in the near future, empowering the AICHR is an acceptable and reliable alternative. To prepare to establish a judicial body, regional organisations usually require a commission to monitor whether obligations under agreements/conventions are implementated at the national level. Accordingly, ASEAN is on track having established the AICHR. AICHR can use any opportunity in the its constituent instruments (both the TOR and the ASEAN Charter), and other ASEAN legal instruments, such as the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP), to improve human rights in the region.

II. The 2010 Protocol: Challenges for Settling Human Rights Cases in ASEAN

Human rights discourse often stray far from any discussions on the ASEAN dispute settlement mechanisms, and vice versa. Referring to the latest ASEAN dispute settlement

mechanism, the 2010 Protocol, human rights disputes may be settled with this framework.[3] Although, this idea is not common among ASEAN stakeholders, but it is a worthy consideration. Before further discussing of this possibility, a brief explanation on the ASEAN dispute settlement mechanisms will be provided as a foundation for the paper's proposed ASEAN human rights mechanisms.

ASEAN dispute settlement mechanisms are not new for ASEAN. Since ASEAN was established in 1967, the Bangkok Declaration already provided for the need to promote regional peace and stability and collaborate. That being said, there was no mechanism was made to achieve this aim at the time. The Bangkok Declaration only set up an institutional framework for ASEAN beyond calling for annual meetings between foreign ministers. The mechanism did not develop much.[4]

In 1976, ASEAN leaders showed their strong will to settle disputes between them by adopting the Treaty of Amity and Cooperation in Southeast Asia (TAC) in Bali. The TAC is the first legal instrument in ASEAN.[5] Despite many criticisms of the TAC, its adoption shows that the ASEAN leaders have an intention to create regional mechanisms for settling the disputes. The TAC was a benchmark for the development of ASEAN dispute settlement

[3] Dispute Settlement Mechanism Protocol (adopted 2010 (DSMP), Art 2.
See article 2 of the 2010 DSMP, scope and application:
1. This Protocol shall apply to disputes which concern the interpretation or application of: (a) the ASEAN Charter; (b) other ASEAN instruments unless specific means of settling such disputes have already been provided for; or (c) other ASEAN instruments which expressly provide that this Protocol or part of this Protocol shall apply.
2. Paragraph 1 (b) of this Article shall be without prejudice to the right of the Parties to such disputes to mutually agree that this Protocol shall apply.

Article 1(a) 2010 DSMP: ASEAN instrument means any instrument which is concluded by Member States, as ASEAN Member States, in written form, that gives rise to their respective rights and obligations in accordance with international law;

[4] Working paper, Dispute Settlement Mechanism in ASEAN
Professor Walter Woon, "Dispute Settlement Mechanism in ASEAN," Centre for International Law <https://cil.nus.edu.sg/wp-content/uploads/2010/01/WalterWoon-Dispute-Settlement-the-ASEAN-Way-2012.pdf > (accessed …)

[5] Working paper, Dispute Settlement Mechanism in ASEAN
Professor Walter Woon, 4.

norms.[6]

According to the TAC, there are three options to settle the dispute: direct negotiation between member states (Article 13, TAC), seeking the High Council, and using Article 33 of the United Nations (UN) Charter. The TAC dispute settlement mechanism applies two essential principles: the renunciation uses of force and peaceful settlement of a dispute. Theoretically, peaceful settlement of a dispute could include judicial mechanisms through courts or other judicial bodies. The TAC does not directly include judicial mechanisms, however, as it refers to the Article 33 of the UN Charter, parties can indirectly choose adjudication.[7]

In 1992, ASEAN launched the ASEAN Free Trade Agreement (AFTA). AFTA is believed to be the basis for adopting the 1996 Protocol on the Dispute Settlement Mechanism (1996 Protocol).[8] This mechanism was more formal and comprehensive compared to the TAC. There is a fixed time-frame for each step of the settlement process. Also, there is a creation of the Panel similar to the World Trade Organisation's (WTO) Dispute Settlement Body's Panel. The selection of WTO model for dispute settlement in ASEAN indicates that ASEAN wanted a flexible approach in their regional organization.[9] They did not follow legal integration such as the European Union (EU). Anja Jetschke argued that it is not the failure of ASEAN, but it simply that ASEAN member states adopted a DSM from an organization other than the EU, namely the WTO.[10] However, the WTO is a rules-based system where members must comply with binding norms resolve disputes through formalized processes.

[6] Nattapat Limsiritong, "How to Apply Protocol to the ASEAN Charter on Dispute Settlement Mechanisms 2010 in Case of ASEAN Charter Interpretation", *Asian Political Science Review 1*, no. 1 (2017):8-13.
[7] Joseph Wira Koesnaidi, Jerry Shalmont, Yunita Fransisca, and Putri Sahari, "For a more effective and competitive ASEAN dispute settlement mechanism", *SECO/WTI Academic Cooperation Project Working Paper Series 6*, (2014): 7.
[8] Gonzalo Villalta Puig, and Lee Tsun Tat, "Problems with the ASEAN free trade area dispute settlement mechanism and solutions for the ASEAN Economic Community", *J. World Trade 49*, (2015): 277.
[9] Anja Jetschke, "What drives institutional reforms in regional organisations? Diffusion, contextual conditions, and the modular design of ASEAN", *TRaNS: Trans-Regional and-National Studies of Southeast Asia* 5, no. 1 (2017): 189.
[10] Anja, 187 .

ASEAN is a more relations-based system that uses soft law, where agreements are made mostly through mutual trust, knowledge and familiarity.[11] Unfortunately, this new mechanism's efficacy could not be tested as ASEAN member states have never used it to settle regional disputes.

In 2004, the ASEAN adopted a new protocol called the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM). The adoption of the ESDM was in response to the ineffectiveness of the 1996 Protocol. The ESDM aims to strengthen the dispute settlement mechanism in ASEAN, and is drafted with the intention to address economic disputes. Unfortunately, at least until 2007, the ESDM was also not used to settle any dispute in the region. Despite the issue of efficacy, the existence of the EDSM before the adoption of the ASEAN Charter was remarkable as it was one of many factors leading up to the establishment of the ASEAN Charter in 2007.[12]

The ASEAN Charter 2007 was not only a remarkable achievement but also indicated a new, a more rule-based organization.[13] For dispute settlement, the Charter gives power to any ASEAN Chair to settle the dispute with the Charter's spirit. Some cases at the International Court of Justice involving ASEAN member states as parties showed the weakness of the adjudication process. Adjudication relates to the winner and the loser, and this a zero-sum game could create a bad relationship. Given the ASEAN Way's focus on compromise, ASEAN is unlikely to rely on adjudication to resolve dispute. It is believed that this way will find the roots of the dispute. The ASEAN Way also suggests for disputing parties to cooperate in settling the dispute.[14]

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[11] Shaun Narine, "ASEAN and the ARF: The Limits of the "ASEAN Way". *Asian Survey*, vol. 37, no. 10 (1997): 962.
[12] Hao Duy Phan, "Towards a Rules-Based ASEAN: The Protocol to the ASEAN Charter on Dispute Settlement Mechanisms", *Arbitration Law Review 5*, no. 1 (2013): 254-276.
[13] Hao, Towards a Rules-Based ASEAN: The Protocol to the ASEAN Charter on Dispute Settlement Mechanisms, 254-276.
[14] Working paper, Dispute Settlement Mechanism in ASEAN
Professor Walter Woon, 11.

Concerning dispute settlement, Chapter VIII, Article 25 of the ASEAN Charter gives the mandate to create a new dispute settlement mechanism that can fill the previous dispute settlement mechanism gap and accommodate all types of disputes.[15] The previous mechanism, before 2007, mainly addressed economic dispute.

ASEAN successfully carried out the aforementioned mandate by adopting the 2010 Protocol in Hanoi, Vietnam. In the Preamble of the 2010 Protocol, it is clear that the ASEAN leaders wanted to transform ASEAN into a rules-based organization with practical, efficient, and credible mechanisms in place to resolve disputes in an effective and timely manner.[16] They were convinced that having credible dispute settlement mechanisms would help ASEAN prevent festering conflicts and confrontation among the member states, and preserve the cooperative atmosphere for concerted efforts towards building a peaceful and prosperous ASEAN Community.[17] This new Protocol gives a more detailed and comprehensive plan on how disputes should be managed. Therefore, it is believed that the 2010 Protocol will succeed in overcoming the weaknesses of the previous instruments.

According to the 2010 Protocol, parties can choose good offices, mediation, and conciliation at any time.[18] If they do not have any solution from that step, parties can choose whether they will go further for consultation,[19] request for arbitration, or seek the ASEAN Coordinating Council (ACC).[20] Each process has fixed time-frames from 30 days to 60 days to 90 days. When arbitration or any chosen means fail, the dispute will refer to the ACC.[21] The ACC will resolve disputes through good offices, mediation, conciliation, or arbitration. If the ACC is unable to solve the dispute, the dispute may be referred to as an unresolved

[15] The ASEAN Charter (adopted 2007 (AC), Art 25.
Article 25, the ASEAN Charter "Where not otherwise specifically provided, appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments."
[16] The 2010 DSMP, Preamble.
[17] The 2010 DSMP, Preamble.
[18] The 2010 DSMP, Art 6.
[19] The 2010 DSMP, Art 5.
[20] The 2010 DSMP, Art 8(4).
[21] The 2010 DSMP, Art 8(4).

dispute.[22] An unresolved dispute is a dispute over the interpretation or application of the ASEAN Charter or other ASEAN instruments that have failed to be resolved by mutual agreement and after applying and implementing Article 9 of the 2010 Protocol.[23]

An unresolved dispute is a unique term in this framework. It is interesting to know why the ACC's end output must be called and decided as an "unresolved dispute." It seems that the ACC can resolve the dispute simply by issuing its decision that the dispute is unresolved. One thing to note is that this term is only for the dispute over interpretation or application of the ASEAN Charter or other ASEAN instruments. This term raises questions: is there any impact if a dispute that could not be settled later by the ACC has been decided as an unresolved dispute? Is the ACC's decision a key to bring the "unresolved dispute" to the higher level, such as to the ASEAN Summit? Despite this a weakness of the 2010 Protocol, this mechanism continues to give ASEAN more opportunities to be a more rule-based and integrated organization. If the member states try this mechanism, there would be more positive than negative contributions in settling the dispute.

Relating to the interpretation of the ASEAN Charter, three steps can be followed. Step one is based on the ASEAN Charter; step two is based on the 2010 Protocol; step three is based on the ASEAN Charter.[24]

At the first stage, according to Article 51 of the ASEAN Charter, upon the request of any member state, the interpretation of the Charter shall be undertaken by the ASEAN Secretariat under the rules of procedure determined by the ASEAN Coordinating Council.[25] Furthermore, any dispute arising from the Charter's interpretation shall be settled under Chapter VIII's relevant provisions, which governs the settlement of disputes.[26] In this context, the 2010 Protocol applies.

[22] The 2010 DSMP, Art 9.
[23] The 2010 DSMP, Art 1(e).
[24] Nattapat, 10-12.
[25] AC, Art 51(1).
[26] AC, Art 51(2).

At the second stage, under Article 25 of the ASEAN Charter, the dispute will be settled by the 2010 Protocol until the ACC has a decision, as explained above. When the ACC decides the dispute "unresolved", the dispute goes to the third stage. [27]

At the third stage, under Article 26 of the ASEAN Charter, when a dispute remains unresolved, after applying the preceding provisions of this Chapter, the dispute shall be referred to the ASEAN Summit for its decision. According to Article 20(1), decision-making in ASEAN shall be based on consultation and consensus as a fundamental principle.[28]

Several issues are highlighted. Although the ASEAN Secretariat has been given authority to settle the dispute, unfortunately, their decision is not binding and it is stated that the decision does not represent the ASEAN as an organization. This is biased and ambiguous. Supposedly, the ASEAN Secretariat's decision, even though not binding, has to represent ASEAN as an organization. Not only must it be respected, but it can be morally binding.

Another highlighted issue is using the term "unresolved dispute" as the final decision. This term does not exist in other international or regional dispute settlement mechanisms. It adds to the many ambiguities and uncertainties in ASEAN.[29] It reflects that ASEAN continues to prefer its 'ASEAN Way' character.

The role of the ASEAN Summit is also another highlighted issue. The ASEAN Summit is the ultimate step, stuck in its inefficient decision-making process of deciding through consensus. Consensus is identical to having veto rights: it will be challenging for the ASEAN Summit to deliver a fast and fair decision. Reforming the ASEAN Summit rule by applying negative consensus can be an option to avoid a deadlock.[30]

Following from the explanation above, it is understandable why member states to the dispute are reluctant to use the mechanism. The lack of legal certainty and expertise under

[27] Nattapat, 10-12.
[28] Nattapat, 10-12.
[29] Hao, 269.
[30] Nattapat Limsiritong, "The Deadlock of ASEAN Dispute Settlement Mechanisms and Why ASEAN Cannot Unlock It?", *RSU International Journal of College of Government (RSUIJCG) Vol* 3 (2016).22

these mechanisms are among the reasons why.[31] Parties prefer to bring the case to WTO because WTO offers greater clarity and certainty, so greater predictability also on the outcome of the dispute.[32]

ASEAN leaders hoped that the 2010 Protocol could bring the ASEAN towards a rule-based organization. However, the mechanism is ineffective and too political. This is unfortunate given that the 2010 Protocol offers quite a comprehensive mechanism, and is more or less similar to the WTO dispute settlement mechanism. However, those highlighted issues above presumably mean that the mechanism is unlikely to work well.[33]

Despite all of its weaknesses, the 2010 Protocol's existence was remarkable and becomes an alternative solution for member states. Moreover, all countries have ratified this Protocol, and it has entered into force on 28th July 2017. As stated above, parties are encouraged to use this mechanism to settle their dispute before using international channels. Trying this mechanism will also open possibilities to revise, add, or develop this mechanism. An idea to have a more permanent arbitration or other judicial bodies is more likely to pass if the Protocol has been used.

ASEAN member states will also need to trust the mechanism. Unfortunately, ASEAN's dispute settlement mechanisms have not gained as much trust/reputation as other dispute settlement forums. The fact that the first WTO dispute, DS1, is between two ASEAN member states (Singapore and Malaysia) speaks volumes.[34]

Returning back to the 2010 Protocol, it is suggested that human rights disputes should

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[31] Joseph Wira Koesnaidi, Jerry Shalmont, Yunita Fransisca, and Putri Sahari, "For a more effective and competitive ASEAN dispute settlement mechanism", *SECO/WTI Academic Cooperation Project Working Paper Paper Series 25 and 27*, (2014).

[32] Joseph Wira Koesnaidi, Jerry Shalmont, Yunita Fransisca, and Putri Sahari, "For a more effective and competitive ASEAN dispute settlement mechanism", *SECO/WTI Academic Cooperation Project Working Paper 26.*

[33] Joseph Wira Koesnaidi, Jerry Shalmont, Yunita Fransisca, and Putri Sahari, "For a more effective and competitive ASEAN dispute settlement mechanism", *SECO/WTI Academic Cooperation Project Working Paper* 6, (2014): 4.

[34] Joseph Wira Koesnaidi, Jerry Shalmont, Yunita Fransisca, and Putri Sahari, "For a more effective and competitive ASEAN dispute settlement mechanism", *SECO/WTI Academic Cooperation Project Working Paper 4.*

test and be resolved by the 2010 Protocol. There are many human rights violations cases in the region which has resulted in there being different point of views between ASEAN countries. For example, respondents often claim that the case is not about human rights violations but terrorism, and therefore considers it a matter of domestic interest and rejects/condemns external interference.

In most cases, it is quite challenging to involve ASEAN, ASEAN member states, or other international organizations in human rights disputes. The existence of the AICHR as an overarching human rights body gives them authority to be involved in such cases. Ideally, the 2010 Protocol should provide for AICHR to be formally included in the dispute settlement framework. Unfortunately, the 2010 Protocol does not mention any direct involvement of AICHR. However, in its current capacity as a human rights body, AICHR can indirectly use its role and function as stipulated in the TOR of AICHR, namely the provisions governing its relationship with other bodies, especially the ACC and the Secretary-General (ASG). This can be a "gate" for AICHR to indirectly use the 2010 Protocol to involve itself in the dispute settlement process.

Using the relation with the ASG, AICHR can request the ASG to bring the idea of settling human rights disputes under the 2010 Protocol. The ASG can then bring the issue to the ASEAN Summit. At the ASEAN Summit, ASEAN leaders can lobby for member states having a human rights dispute to bring the case under the 2010 Protocol. AICHR, due to its limited mandate, can perhaps only act as an expert or appointed mediator if disputed countries give their consent. Of course, in the end, it lies on parties whether to use the 2010 Protocol or not. There would be many loopholes, both legally and procedurally. The 2010 Protocol can be used to allow the AICHR to closely consult, coordinate, and collaborate with other ASEAN bodies to promote and protect human rights in the region. In practice, this idea will be very hard to realize. However, this little opportunity is indeed a worthy trial.

In sum, the 2010 Protocol at least shows the ASEAN countries' interest and commitment to settle their disputes in the regional forum. However, ASEAN countries remain keen to avoid any legal or formal way of settling regional disputes. They prefer other international forums such the WTO. At the regional level, they tend to rely on the ASEAN Way. The ASEAN Way in this context can both have a positive and negative impact on the development of dispute settlement mechanisms in the region. The ASEAN Way however, is not only a hindrance to having more formal and binding mechanisms, it is also a strength of the region. Peace and security have been well maintained due to the existence of this principle.[35] The challenge is to prove that the region can maintain peace and security and create a more just and prosperous community with the ASEAN Way.

There is an interesting trend in recent times where states tend to choose more non-formal and flexible means to resolve their disputes effectively and with high compliance rates through arbitration.[36] Arbitration, from the state's perspective, is more flexible and yields more to principles of sovereignty than litigation before a court would.[37] The principle of internationalization of cooperation duties in arbitration motivates parties to reach a win-win solution.[38] Anne Peters observes that the international law of dispute settlement mechanism is heading the phase of mere cooperation.[39]

III. Dispute Settlement Mechanisms: A New Approach for Establishing a Reliable ASEAN Human Rights Mechanism

The current ASEAN dispute settlement mechanism after the adoption of the 2010 Protocol opens an opportunity for ASEAN to settle human rights cases under the scheme of dispute

[35] Amitav Acharya, "Ideas, identity, and institution-building: From the "ASEAN way to the Asia-Pacific way?", *The Pacific Review* 10, no. 3 (1997): 321.
[36] Anne Peters, "International dispute settlement: a network of cooperational duties", *European Journal of International Law* 14, no. 1 (2003): 7.
[37] Anne, 7.
[38] Anne, 8.
[39] Anne, 1.

settlement mechanisms. In addition, there is also a possibility to create a specific dispute settlement mechanism for human rights.

Why should a dispute settlement mechanism be chosen as a new approach for future human rights institutional development? ASEAN dispute settlement mechanisms involve formal means of resolving disputes, but they also provide many alternatives that are relatively informal, such as resolving privately or through arbitration. The selection of these tools is a state's choice. It considers accommodating member states' interests and the ASEAN Way. This mechanism was adopted, and therefore accepted by ASEAN member states, although it has never been used. The dispute settlement mechanism in ASEAN also considers more progressive in the legal sense: there has been significant progress from the establishment of the TAC in 1976 to the latest ASEAN Protocol on Enhanced Dispute Settlement in 2019.

Whereas, human rights is the least developed mechanism and may like this if there is no breakthrough, many argue that ASEAN should create a human rights court as done by other regional organizations to replace the weak human rights mechanism under AICHR as a solution. The idea is indeed brilliant, but ASEAN member states are unlikely to do so. ASEAN does not want to have a strong AICHR with a protection mandate, much less a human rights court. Today's situation is not the right time to propose for a court.

Instead, the advantages of a dispute settlement mechanism in ASEAN can be applied to be argue that a similar mechanism be used to settle human rights disputes. Besides, the 2010 Protocol, the nature of the dispute settlement mechanism offers more opportunity for states to agree on this proposal. The main advantage of adopting the dispute settlement mechanism is that there would be a formal channel with a set time-frame but remain respectful to the ASEAN Way and regional norms. It will give more certainty and protection for alleged victims.

The use of dispute settlement mechanisms has also been practiced by the human

rights commissions in other regions. In Europe, the European Commission on Human Rights has settled cases for individuals who did not have direct access to the Court (ECtHR). If the Commission found the case to be well-founded, it would launch a case in the Court on the individual's behalf. The Commission had been abolished, and individuals can now bring their cases directly to the Court.[40] The role of the Commission at that time was to settle cases in a friendly manner. The Commission would issue a report on the facts with an opinion on whether or not a violation had occurred.[41]

In Africa, the Rules of Procedure of the African Commission on Human and Peoples' Rights (ACHPR), at rule 90, provides for amicable dispute settlement.[42] The ACHPR acts as a consultation body for state parties who wish to amicably resolve their disputes. At the end of the process, the ACHPR acts as a monitoring body to monitor the implementation of the agreement between disputants.[43]

The Organization of American States' Inter-American Commission on Human Rights (IACHR) also practices dispute settlement under its human rights mechanism. The IACHR offers good offices to the disputants' countries, so they can reach or sign a friendly settlement agreement. There have been dozens of cases that resolved with parties signing settlement agreements under these mechanisms. The good thing is the IACHR watches the implementation of the agreement especially after the adoption of measures with far-reaching structural effects across all sectors of government, including legislative reforms, implementation of public policies, and programs at the service of the community.[44]

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[40] Protocol 11 to The European Convention on Human Rights

[41] *European Court of Human Right (ECHR)*, "Reform of the Court", <https://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform&c=>, (accessed 2 November, 2020).

[42] The Rules of Procedure were adopted by the African Commission on Human and Peoples' Rights during its 2nd ordinary session held in Dakar (Senegal) from February 2 to 13, 1988 and it was revised during its 18th ordinary session held in Praia (Cabo-Verde) from October 2 to 11, 1995.

[43] *African Commission on Human and Peoples' Rights (ACHPR)*, "Mandate of the Commission", <https://www.achpr.org/mandateofthecommission>, (accessed 2 November, 2020).

[44] *Organization of America State (OAS)*, "The friendly settlement mechanism provides an opportunity for dialogue between petitioners and states", <https://www.oas.org/en/iachr/friendly_settlements/>, (accessed 2 November, 2020)

The main basis to develop a framework for protecting human rights of the people in the ASEAN region, including this proposal of having a human rights dispute settlement mechanism, is ASEAN's desire to be a more rule-based organization as stipulated in the ASEAN Charter. In particular, regard must be given to the purposes in Article 1(7) to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedom with due regard to the rights and responsibilities of the member states of ASEAN.[45]

Many said that the ASEAN Charter makes an ASEAN toothless tiger. Despite facts supporting this criticism, this paper argues that ASEAN is developing norms through soft law. It is a compromising process: soft law is an indicator that the member states are moving towards a rule-based ASEAN. The ASEAN Charter is simply a formalized commitment to both relations-based governance and to soft law.[46] Lee Leviter describes it into three features: obligation, precision, and delegation. Obligation relates to subject of law of being by rules. Precision relates to which rules define specific acts. Delegation defines which third party has authority to interpret the rules and resolve disputes.[47] Accordingly, the ASEAN Charter is a strong basis to develop this proposed mechanism.

The study identifies several legal basis that supports the establishment of Human Rights Dispute Settlement Mechanism in ASEAN as follows:

1. Article 2 (2.d) of the ASEAN Charter
2. The Article 22 paragraph 1 and 2 of the ASEAN Charter
3. The Article 25 of the ASEAN Charter
4. Point 1.3 of the TOR AICHR
5. Paragraph 2 of the TOR AICHR

[45] The ASEAN Charter (adopted 2007 (AC), Art 1.7.
[46] Lee Leviter, "The ASEAN Charter: ASEAN failure or member failure", *NYUJ Int'l L. & Pol.* 43 (2010): 159.
[47] Lee Leviter, "The ASEAN Charter: ASEAN failure or member failure", *NYUJ Int'l L. & Pol.* 43 (2010): 159-169.

6. Paragraph 4.2 of the TOR AICHR
7. Paragraph 6.1, 6.8, 6.9 of the TOR AICHR
8. The 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanism
9. The Treaty of Amity and Cooperation (TAC) 1976
10. International treaties/ conventions/ instruments where member states of ASEAN are parties
11. Human rights mechanisms in another universal or regional organization as a source of inspiration

IV. Two Options for a Human Rights Dispute Settlement Mechanism

There are two options for human rights cases to be settled through dispute settlement. The first option is to allow human rights cases to be settled under the current ASEAN dispute settlement mechanisms. The second option is to establish a new, independent dispute settlement mechanism for human rights that is separate from the current dispute settlement mechanisms. Both options involve the AICHR playing a role as a human rights body with different levels of engagement. This study only provides a detailed proposal for the second option.

The first option was inspired by the EU. The EU is not a human rights institution during the beginning of its establishment; however, it finally recognised the necessity to and integrated human rights.[48] Though it is an economics-driven organization, there are many cross-cutting issues between trade and human rights. The European Court of Justice started to adjudicate human rights cases that involved the implementation of the EU law. Similarly, ASEAN can reflect on how its economic agreements can be used to protect human rights,

[48] Rachminawati and Anna Syngellakis, "Law and policy: a useful model for ASEAN?" In *EU-ASEAN Relations in the 21st Century: Strategic Partnership in the Making*, edited by Daniel Novotny and Clara Portela (United Kingdom: Palgrave Macmillan, 2012): 108-123.

even if only through a limited amount of protection compared to ECtHR or other regional human rights court.

In the context of ASEAN, ASEAN is also more concerned with the economy than with human rights. Therefore, the ASEAN dispute settlement mechanism exists to settle economic disputes. Since the AICHR does not have a mechanism to settle human rights cases, the current ASEAN dispute settlement mechanism can be used to settle human rights disputes, especially now after the adoption of the 2010 Protocol. Of course, ideally, it covers all type of human rights cases. However, at the very least, it should be used to settle human rights cases which arise from the implementation, or lack thereof, of ASEAN economic agreements. There are many threats or potential violations of human rights from the implementation of many economic agreements between ASEAN member states and other stakeholders. The AICHR alone, with a very weak mandate, will not be able to protect peoples' human rights, nor the national mechanism.

The second option is to establish an independent dispute settlement mechanism for human rights that is separate from the current regime. The independent human rights dispute settlement mechanism would be chosen to accommodate the unique nature of human rights cases and cover all kinds of human rights violations that occur in the region. This is different from the previous recommendation that only covers violation arising from the implementation of economic agreements. The value and nature of the current ASEAN dispute settlement mechanisms are strong bases for ASEAN to establish an independent ASEAN human rights dispute settlement. Member states of ASEAN have drafted flexible, non-legal binding mechanisms that respect ASEAN values, including the dispute settlement

mechanisms themselves.[49] Therefore, the dispute settlement mechanism approach to human rights will likely also fulfill those conditions.

Despite all of its advantages, the dispute settlement mechanism itself has many weaknesses, especially with the enforcement mechanism.[50] Arbitration often faces problems at the implementation stage; when a decision does not go in favour of a state, the state usually just ignores the decision and absolutely will not comply with it. However, despite its weaknesses, at least the dispute settlement mechanism sets a time-frame for each step of the process. To some extent, it gives more certainty. The AICHR, as the overarching human rights body in ASEAN, will play a role in this proposed mechanism. There is a need for further study to provide how this proposed mechanism will work in detail.

V. Conclusion

Human rights and dispute settlement mechanisms have their place in the ASEAN Charter in its different Chapters and arrangements. Human rights discourse often strays away from any discussion of the ASEAN Dispute Settlement framework, and vice versa. The AICHR seems the only body that can settle all issues about human rights. If the AICHR only relies on the TOR of the AICHR, the body will remain weak because of the weak mandate the AICHR has.

As a response to this issue, the AICHR can use the power and mandate under the ASEAN Charter and other relevant ASEAN instruments to act beyond its limited mandate under its TOR. Observing Chapter VIII of the ASEAN Charter, namely Articles 22–28, this Chapter offers an opportunity or possibility for human rights cases to be settled under this framework, especially after establishing the 2010 Protocol, although, the 2010 Protocol does

[49] Shaun Narine, "ASEAN and the ARF: The Limits of the "ASEAN Way". *Asian Survey* 37, no. 10 (1997): 965.
[50] Working paper, Dispute Settlement Mechanism in ASEAN
Professor Walter Woon, 12-13.

not mention any direct involvement of the AICHR. Furthermore, in its current capacity as a human rights body, the AICHR can indirectly use its role and function as stipulated in the TOR of AICHR. The AICHR has a formal channels with other bodies, especially the ACC and the ASG, to enact the mandate. Accordingly, this rule can be a "gate" for the AICHR to indirectly use the 2010 Protocol to be involved in the process.

As ASEAN member states tend to use such informal and non-legal tools, using this approach is possible to create a more reliable human rights mechanism under the AICHR. The idea will be very hard to realize. However, this little opportunity is indeed worth testing.

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