



Strengthening the Role of the ASEAN Human Rights Declaration in the Implementation of Human Rights-Based Approach to Climate Change through Regional Complaints Mechanism

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Southeast Asia (SEA)'s high vulnerability to adverse impacts of climate change threatens the ability of its people to enjoy human rights, including the right to life, health, safe drinking water, food, adequate housing, and clean environment (Sasipornkarn, 2021; Lewis, 2018).¹ Ironically, the current national policies of Association of Southeast Asian Nations (ASEAN) Member States (AMS) are inadequate in mitigating climate change and its impacts based on the Paris Agreement (ASEAN, 2021; Overland et al., 2021). Therefore, these policies are not in line with AMS' responsibility to protect human rights as enshrined in the ASEAN Human Rights Declaration (AHRD). This essay argues that the AHRD has a critical role in institutionalizing a human rights-based approach to climate change in ASEAN through its human rights body, the ASEAN Intergovernmental Commission on Human Rights (AICHR).

The adoption of the AHRD in 2012 marked significant progress in the development of the human rights system in ASEAN (Clarke, 2012).² It can be viewed as "a hortatory text setting common standards" for protecting human rights in the region (Naldi & Magliveras, 2014). Clearly recognizing environment-related human rights as previously mentioned and AMS as primary duty-bearers,³ the AHRD can be used as an agreed "reference point" for all AMS to integrate human rights protection into climate policies (Nonthasoot, 2014).

However, ten years after its adoption, the AHRD has hardly played any role in ASEAN's effort to address climate change. No recent key documents relating to climate change

¹ These impacts include rising sea levels, heat waves, drought, flooding, and intense rainstorms.

² Davies (2014) mentions that the "very fact that it [the AHRD] exists is remarkable given the lack of concern ASEAN member states displayed in the human rights field just twenty years ago."

³ See Art. 6, 11, 29(1), and 28 of the AHRD.



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were made with reference to the AHRD or human rights in general.⁴ The AICHR, tasked with promoting the implementation of the AHRD, only briefly explored the relationship between the AHRD and climate change in workshop reports. Moreover, the AICHR has not published any specific work plan or thematic study on this issue. These absences indicate a gap between the ASEAN human rights system and climate change governance.

Strengthening the role of the AHRD as a “common standard” and “reference point” is important to bridge this gap. This can be done by establishing a complaints mechanism within the AICHR for climate change victims in SEA. The environment-related human rights in the AHRD will be more operationalized because they serve as a regional human rights foundation that must be considered by victims in filing the complaints and the AICHR in addressing those complaints.⁵ Hence, a complaints mechanism enables further interpretation and implementation of these rights. This mechanism also emphasizes the State obligation to protect human rights through adequate climate actions (Jodoin et al., 2021).

This proposal faces two challenges. First, the AICHR has no explicit mandate for a complaints mechanism in its Terms of Reference (ToR). Second, AMS place a strong emphasis on national sovereignty and non-interference in their regional relations. This limits any confrontational forum where AMS can effectively be held accountable for their inadequate action to mitigate climate change and consequently protect human rights (Aguirre & Pietropaoli, 2012).

There is room for improvement to answer the first challenge. The specific mandate can be added through the ToR review process, but its development remains stagnant. As a temporary measure, the AICHR agreed in 2019 that complaints on human rights violations will be acknowledged, tabled, and forwarded to the relevant country representative

⁴ Particularly the ASEAN Joint Statement on Climate Change to the 26th Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, and ASEAN State of Climate Change Report 2021.

⁵ The articles of a non-binding regional human rights instrument like the AHRD for human rights-based climate change complaints have been primarily used and referenced in a landmark case filed by Sheila Watt-Cloutier on behalf of “all Inuit of the arctic regions of the United States of America” to the Inter-American Commission on Human Rights (IACHR). They alleged that the greenhouse gas contribution of the United States has threatened the enjoyment of several human rights guaranteed by the American Declaration of the Rights and Duties of Man, a regional non-binding human rights instrument in the inter-America region. For a more detailed analysis of this petition, see, e.g., Chapman (2010) and Osofsky (2009).



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(Wahyuningrum, 2019). This presents a significant foundation for a more robust complaints mechanism.

For the second challenge, AMS have been more open to recognizing each State's responsibility to address regional environmental problems, notably transboundary haze pollution (Nurhidayah et al., 2015).⁶ This offers potential for greater recognition in addressing transboundary harm caused by climate change. Climate action in one state has been increasingly linked to adverse human rights impacts in another state (Savaresi & Auz, 2019).⁷ Institutional transformation in ASEAN politics should be prioritized to implement a stronger regional State accountability regime.

In the short term, the AICHR should conduct non-confrontational means in responding to these complaints. Instead of addressing individual complaints to individual States, the AICHR can call or urge AMS to implement more ambitious human rights-based climate policies.⁸ The AICHR can also conduct a regional hearing with victims, develop a thematic study to better understand the relationship between human rights, climate change, and State obligations in ASEAN, and create policy recommendations/guidance for AMS. Therefore, establishing a complaints mechanism within the AICHR, based on the AHRD, can present strategic opportunities to provide regional platform for victims, increase public awareness, spur government actions, and push the mainstreaming of a human rights-based approach to climate change in ASEAN.⁹

References:

⁶ All AMS have adopted the ASEAN Agreement on Transboundary Haze Pollution (AATHP). Article 3(1) of AATHP states that the "Parties have ... responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment and harm to human health of other States or of areas beyond the limits of national jurisdiction." However, the recognition of State responsibility is limited due to weak enforcement of this responsibility and absent liability regime or dispute settlement in the agreement. See Nurhidayah *et al.* (2015) and Varkkey (2014).

⁷ In the regional context, this extraterritorial linkage has been mainly used in the Americas, but it has some potential to be used in other jurisdictions. See, e.g., Savaresi & Auz (2019) and Peel & Osofsky (2018).

⁸ On May 2020, the AICHR took an unprecedented measure by issuing a statement that "directly addressed a human rights issue of concern to the region" relating to AMS' responses to the COVID-19 pandemic. See: ASEAN (2020) and Paulsen (2020). The AICHR can and should produce similar statement using stronger language and concrete recommendations for all AMS to address climate change and human rights protection.

⁹ For more analysis on the strategic impact of human rights-approach to hold States accountable for mitigating climate change, see, e.g., Guruparan & Moynihan (2021) on international and national experiences, and Osofsky (2009) on inter-American regional experience.



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