

# CONSTITUTIONALISM AND THE DECLARATION OF ASEAN HUMAN RIGHTS

*Final Draft*

Human Rights Working Groups  
Jakarta, 2011

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# CHAPTER I

## PREFACE

### A. ASEAN and Human Rights

ASEAN (Association of South-East Asian Nations) as an organization of countries within the South-East Asia Region was established on 8 August 1967, out of the Bangkok Declaration that was declared by five nations, i.e. Indonesia, Malaysia, Philippines, Singapore, and Thailand.<sup>1</sup> In the beginning of its establishment, the organization was intended to be the forum of cooperation to accelerate economic growth, social progress, cultural development, and promote peace at the regional level. However, ASEAN's progress is considered less rapid in comparison to other regional organizations in terms of organizational capacity, range of co-operation, and integration among member states.

New rapid advance(s) occurred with the adoption and signing of the ASEAN Charter by the Head of States and Head of Government of the member states of ASEAN at the 13<sup>th</sup> ASEAN Summit in Singapore on 27 November 2007. The ASEAN Charter is a legal institutional framework that serves as a foundation for all organizations that have been established, all legal products generated and all activities accomplished. Furthermore, the ASEAN Charter is also a founding document of ASEAN as a regional organization that possesses legal personality.<sup>2</sup>

One of the expected progresses that can be achieved by the ASEAN Charter is in the field of Human Rights, which not only becomes one of the organization's scopes of activity but also one of its working principles in the organization. Orientation towards the interests of the people is evident from the Preamble of the Charter, which states that heads of states and governments sign the ASEAN Charter to serve as

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<sup>1</sup> ASEAN membership has increased owing to the enrollment of five other states in South-East Asia Region into ASEAN, i.e. Brunei on 7 January 1984, Viet Nam on 28 July 1995, Laos and Myanmar on 27 July 1997, and Cambodia on 16 December 1998.

<sup>2</sup> Chapter II Article 3 of the ASEAN Charter states that “ASEAN, as an inter-governmental organization, is hereby conferred legal personality”.

representatives of the people of the ASEAN member states.<sup>3</sup> Thus, although ASEAN is an inter-governmental organization, its main orientation is the interest of the people in each member state. Especially the Preamble also affirms that the principle of respect for and protection of human rights and fundamental freedoms are the principles inherent in the ASEAN Charter.<sup>4</sup>

The ASEAN Charter states 15 objectives to be achieved. At least four out of these fifteen are goals orientated towards the protection, respect, fulfillment, and promotion of Human Rights. These four are (1) to ensure that the people of ASEAN member states live in peace with the world in a fair, democratic, and harmonious environment,<sup>5</sup> (2) to strengthen democracy, promote good governance and the rule of law, and to promote and protect human rights and fundamental freedoms by focusing on rights and responsibilities of ASEAN member states,<sup>6</sup> (3) to improve the lives of ASEAN people by providing affordable access to the development of human resources, social wellbeing, and justice,<sup>7</sup> and (4) to promote a people-oriented ASEAN where all sectors of society are encouraged to participate and benefit from the process of integration and development of the ASEAN community.<sup>8</sup>

To achieve these objectives, the ASEAN Charter has formulated basic principles that should base all declarations, agreements, conventions, charters, and other instruments of ASEAN, as well as be implemented by all members of ASEAN. Those basic principles comprise nine principles, three of which are principles of human rights, i.e. (1) loyalty to the rule of law, good governance, democracy and constitutional government, (2) respect for fundamental freedoms, promotion and protection of human

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<sup>3</sup> Paragraph 1 of the Preamble of ASEAN Charter states that “**WE, THE PEOPLES** of the Member States of the Association of Southeast Asian Nations (ASEAN), as represented by the Head of State or Government of...”

<sup>4</sup> Paragraph 8 of the Preamble of ASEAN Charter states that “**ADHERING** to principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms.”

<sup>5</sup> Chapter I Article 1 Paragraph 4.

<sup>6</sup> Chapter I Article 1 Paragraph 7.

<sup>7</sup> Chapter I Article 1 Paragraph 11.

<sup>8</sup> Chapter I Article 1 Paragraph 13.

rights, and advancement of social justice, and (3) enforcement of the UN Charter, international laws, and international humanitarian laws.<sup>9</sup>

In addition to determining the objectives and principles that are based on human rights, the ASEAN Charter also instructs the establishment of the ASEAN Human Rights Body. Chapter IV Article 14 of the ASEAN Charter declares that pursuant to the objectives and principles adopted regarding the promotion and protection of human rights and fundamental freedoms, ASEAN should establish a human rights body. This Body shall work based on terms of reference specified by the ASEAN Foreign Ministers Meeting.

Human Rights Body of ASEAN as referred to in Article 14 of the ASEAN Charter has been founded on 23 October 2009 by the Cha-am Hua Hin Declaration, by the name of ASEAN Inter-governmental Commission on Human Rights (AICHR) that consists of 10 persons as the representatives of 10 ASEAN Member States. In the 15<sup>th</sup> ASEAN Summit, the Terms of Reference of AICHR have also been adopted based on the draft that had been compiled by High Level Panel and approved in the ASEAN Foreign Ministers Meeting in Thailand on 20 July 2009.

The purposes of the AICHR establishment under the Terms of Reference of AICHR are as what follows:

1. To promote and protect human rights and fundamental freedoms of peoples of ASEAN;
2. To uphold the right of the peoples of ASEAN to live in peace, dignity and prosperity;
3. To contribute to the realization of the purposes of ASEAN as set out in the ASEAN Charter in order to promote stability and harmony in the region, friendship and cooperation among ASEAN Member States, as well as the well-being, livelihood, welfare and participation of ASEAN peoples in the ASEAN Community building process;

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<sup>9</sup> The principles specified in Chapter I Article 2 Paragraph 2 letter h is “(h) adherence to the rule of law, good governance, the principles of democracy and constitutional government; (i) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice; (j) upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States.”

4. To promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and talking into account the balance between rights and responsibilities;
5. To enhance regional cooperation with a view to complementing national and international efforts on the promotion and protection of human rights; and
6. To uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties.

## **B. Constitution and Establishment of the ASEAN Human Rights Declaration**

One of the mandates and functions of the AICHR derived from the TOR of AICHR is to establish the ASEAN Human Rights Declaration, which simultaneously constitutes a human rights cooperation framework through various Conventions and instruments of ASEAN. The existence of the ASEAN Human Rights Declaration is seriously required as the basis for ASEAN as well as for its member states to promote the respect for and protection of Human Rights in accordance to the purposes and principles embraced by the ASEAN Charter. With the ASEAN Human Rights Declaration, member states of ASEAN possess the platform and support to implement the ASEAN Charter as well as to fulfill their obligation as members of ASEAN.<sup>10</sup> Although the ASEAN Human Rights Declaration is not legally binding, the Declaration is very important as the basic legal regional human rights instrument's establishment. The Declaration will be the foundation of ASEAN's conventions on human rights.

AICHR has made constituting efforts in ASEAN Human Rights Declaration by designating 10 experts from every member states who would work for

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<sup>10</sup> Chapter III Article 5 Paragraph 2 ASEAN Charter declares “*Member States shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of membership.*”

eight months from July to December 2011. The first draft of the Declaration is expected to be received by AICHR by the end of December 2011 and deliberated from January to June 2012. The second Draft will be put into the agenda and shall be delivered in the 45<sup>th</sup> ASEAN Ministerial Meeting in July 2012 in Cambodia, and it is scheduled to be adopted in the 21<sup>st</sup> ASEAN SUMMIT in October 2012.

There are two important things to be considered in the formulation of the ASEAN Human Rights Declaration. First is the fact that member states of ASEAN are inseparable from the international community and jurisdictionally are members of the United Nations. Therefore they have obligations to set international human rights instruments as references to the establishment of national and ASEAN's Human Rights Declaration. As member states of the United Nations, the member states of ASEAN definitely cannot compose a Declaration of Human Rights that contains contradictory materials against any of the UN Human Rights instruments. Article 2 of the ASEAN Charter, which is reaffirmed in the objectives of AICHR number 1.6, declares *"To uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties."* In fact, one of the principles adopted by the TOR of AICHR is the recognition of universality, indivisibility, interdependence and interrelatedness of Human Rights principles as well as avoidance of double standards and politicizing.<sup>11</sup>

Second is the main responsibility of promotion and reinforcement of Human Rights in each country.<sup>12</sup> Therefore, the Declaration to be composed must also be anchored in the recognition of, respect for, and protection of Human Rights in respective countries. The ASEAN Human Rights Declaration must be developed from Human Rights modalities of each member states that it genuinely has sociological roots to be

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<sup>11</sup> Number 2 of AICHR TOR point 2.2 declares that AICHR must hold a principle of *"Respect for international human rights principles, including universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms, as well as impartiality, objectivity, non-selectivity, non discrimination, and avoidance of double standards and politicization."*

<sup>12</sup> Number 2 of TOR AICHR point 2.3 declares *"Recognition that the primary responsibility to promote and protect human rights and fundamental freedoms rests with each Member States."*



implemented by keeping the international human rights instruments as the standard reference to be achieved.

The SAPA Task Force on ASEAN and Human Rights (SAPA TF-AHR) has accomplished a research and prepared a position paper for the ASEAN Human Rights Declaration that comprises principles that must be considered in the preparation of the Declaration and declaration draft with references to international human rights instruments. However, this position paper just briefly explores the Constitutions of ASEAN member states, which is limited to the guarantee of recognition of human dignity of six ASEAN member states.<sup>13</sup>

In seeking for the foundation of the ASEAN Human Rights Declaration that comes from every member state, the Constitutions as the supreme laws of each member state need to be researched and analyzed, including the ideas and practices of constitutionalism that have grown in each country. Therefore, this research prepares inputs on materials for the ASEAN Human Rights Declaration, which are sourced from the Constitutions and constitutionalism in the respective member states. Of course, each ASEAN member state should also have other legal products lower than the Constitution that guarantee human rights. This research perceives the Constitutions as the highest law and therefore highest obligation for the state. If human rights are guaranteed merely in the ordinary laws, these rights become the legal rights that are endowed and revocable by the state.

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<sup>13</sup> SAPA TF-AHR, *Civil Society's Position Paper on ASEAN Human Rights Declaration*, 21 June 2011.

## Chapter II

# HUMAN RIGHTS IN THE CONSTITUTION OF MEMBER STATES OF ASEAN

### A. Human Rights, Constitutionalism and Constitution

All member states of ASEAN have a Constitution as the supreme law that has been regarded as the highest form of agreement of the entire people or at least has been made in the name of the people. The birth and development of the Constitution cannot be separated from the idea of a modern state and the importance of the control of power. The Constitution is the manifestation of a general agreement that has been achieved through social conformity that authorizes the proclamation of a state in order to achieve particular goals. As the basic principles in organizing the state, citizens' rights must be protected and the state administration organized. The state is built by the people and intended to fulfill the needs and interests of the entire population. Even in countries that still maintain a pure monarchy system, the Constitution has been made and authorized by the Monarch as the sovereignty holder on behalf of the people.<sup>14</sup>

Presumed as an agreement made by the whole citizens as the possessor of the highest power or by the King as the holder or symbol of sovereignty, the Constitution also becomes the highest law in the life of government and citizenship (Thompson 1997, p. 3). The legal basis of Constitutional supremacy is the assumption concerning the position and

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<sup>14</sup> For instance the Proclamation of Brunei Darussalam in 1984 emphasizes that King Hassanal Bolkiah has proclaimed the sovereignty and independence of Brunei Darussalam as Malay Monarchy among other thing for and on behalf of Brunei Darussalam people. In full, paragraph 6 of the Proclamation declares "***NOW THEREFORE*** in the name of Allah the Compassionate, the Merciful, We, Sultan Hassanal Bolkiah Mu'izzadin Waddaulah, The Sultan and Yang Di-Pertuan of Brunei Darussalam and her Territory and all Her Dependencies, do ***HEREBY PROCLAIM AND DECLARE*** in Our name and on Our behalf and for and on behalf of Our Successors and ***for and on behalf of the people of Brunei Darussalam that ...***"

the sovereignty owned by its authors (constituent power). The Constitution binds its authors and State organizations that are generated from the Constitution itself.

The Constitution can also be approached from the idea of limitation of powers that flourished due to the practice of power abuse throughout human history. The power given to the state is very frequently misused for the benefit of the holder of State power itself instead of for the benefit of the people, and this abuses result in a power that oppresses the people. This is the thing that inspired Lord Acton to raise the iron law of power, *“powers tend to corrupt and absolute powers corrupt absolutely.”*

To prevent this corruption from happening, state power should be limited because without any restriction the power possessed by the state undoubtedly would be abused. To execute the restriction of state power, the people need a Constitution. This is constitutionalism, which is an ideology that power should be limited in order for a State to be organized in accordance with the objective of the proclamation of the State itself. Therefore, in essence every Constitution must comprise restrictions of power. Without any limitation of power, a Constitution loses its constitutional spirit and is only going to be legitimacy for unlimited State authority.

Barent (1997, p. 14) states that *“constitutionalism is a belief in composition of restraints on governance by means of a Constitution.”* Zoethout (1993, p. 88) explains three main definitions of constitutionalism that should be manifested in a Constitution, i.e.

- 1. A state, or any system of government, must be founded upon law, while the power exercised within the state should conform to definite legal rules and procedures.*
- 2. The institutional structure of government should ensure that power resides with, or is divided among, different branches which mutually control their exercise of power and which are obliged to co-operate.*
- 3. The relationship between the government and the individual members of society should be regulated in*

*such a manner that leaves the latter basic rights and freedoms unimpaired.*

Meanwhile, Wignyosubroto (2002, p. 405) has the opinion that developing constitutionalism in Europe contains two main concepts. First, the concept of the rule of law signifies that law exceeds the power of the state and politics. Second, the concept of citizen's rights means the freedom of a subject is guaranteed by the Constitution.

Therefore, the provisions in a Constitution concerning the purpose, philosophical foundation, Human Rights and constitutional rights of a citizen, and the position and authority of the State institutions should be defined as a control of power. If these provisions are defined as the conferring of power for State organs, the power to be given is limited for certain purposes and ought to be organized in a specified manner.

Human Rights are the main issue in the Constitutions during the process of Constitutional establishment as a result of general agreement and the practice of constitutionalism. The establishment of a State is a manifestation of a desire to protect humanity and Human Rights, which cannot be attained by a single individual or community without State organization. The State receives power from citizens as the holder of the foremost sovereignty with the intention of fulfilling and protecting citizens' rights.<sup>15</sup>

Therefore, the guarantee of Human Rights and people's rights should be the foremost parts in the Constitution. Guaranteed in the highest law, these rights certainly cannot be violated or excluded by lower laws and by any state's action that must not contradict the Constitution. Through this point, the guarantee of Human Rights simultaneously becomes the limitation of State power that has been given and regulated by the Constitution itself.<sup>16</sup>

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<sup>15</sup> This assertion is based on the theory of Social Contract of John Locke, **which has been further** developed by J.J. Rousseau. See Sabine (1961, pp. 517-596).

<sup>16</sup> Guarantee of Human Rights and citizens as material to be contained in Constitution also explained by Soemantri (1984, p. 45) and Manan and Megnar (1997, p. 45).

Nevertheless, considering that the position of Human Rights is a right adhered to in existence of the human race and not a state-given, and if the right is not guaranteed by the Constitution it won't cause the loss of foundation to claim for its fulfillment and protection. Instead, Human Rights still live because they are sourced from and cohere to the individual, even before the establishment of a state, and become the basis of criticism and control toward the Constitution and state practices that denied the original purpose of state establishment and the constitutionalism idea that is supposed to reside within the Constitution.

In the beginning, the Constitution and constitutionalism were always attached to a certain state as a system of independent law and politics. The guarantee for Human Rights as the core of state life's purpose and the limitation of power are actualized in national law and political systems. This pattern has undergone a shift that is triggered by two factors. First, universality of Human Rights has been recognized by every nation; therefore the issues of respect, protection, fulfillment, and promotion of Human Rights are questions for the entire human race. In national context, Human Rights are the state's responsibility and all human beings are entitled to insist on the state's responsibility.

Second, the developed international and regional organizations as well as national legislation have shown that the achievement of state-life's purpose and limitation of power are not only conducted through the legal system and national politics but also through the use of international laws as well as international and regional organizations. The main subject of international law that constitutes international law as well as international and regional organizations is the State. As such, every country has the obligation to strengthen the implementation of constitutionalism as mandated by its respective Constitution on regional and international levels, specifically to discharge the state's duty in respecting, protecting, and promoting Human Rights.

## **B. Human Rights in Constitutions of ASEAN States**

All ten member states of ASEAN have a Constitution both in terms of a legal document and in the general definition that covers the customs and practices of state administration. The Constitution in term of a specific

legal document, which becomes the supreme law in every state, is the primary basis and foundation in organizing the State. Therefore, the definition of the Constitution as the highest legal document shall be analyzed and described in relation with materials concerning Human Rights.

Although all ten member states of ASEAN equally own their own constitutions, they contain differences regarding the guarantee of Human Rights. The Constitutions of ten countries in question can at least be categorized in three categories, which are *first*, the Constitution that provides extensive Human Rights guarantees; *second*, the Constitution that provides Human Rights guarantees although with various restrictions; and *third*, a Constitution that does not or insignificantly provides guarantees of Human Rights. The Constitutions of states that provide extensive Human Rights guarantees are those of the Philippines, Thailand, Cambodia, Indonesia, and Laos. The Constitutions that give Human Rights guarantees with various restrictions are those of Malaysia, Singapore, Vietnam, and Myanmar. The Constitution that provides very few guarantees of Human Rights is the Constitution of Brunei Darussalam. In addition, there are also differences in the kind of protected rights whether as every individual's right or just citizens' rights? Some State Constitutions that formulate all rights strictly as citizen's rights are those of Laos and Vietnam, and some other states' Constitutions classify particular rights as citizen's rights and other rights as Human Rights.<sup>17</sup>

## 1. The Philippines

Besides specific articles concerning Human Rights (*Bill of Rights*), regulations regarding Human Rights in the Constitution of the Philippines are contained in the Preamble and 10 other sections or articles. In the Preamble, the highlighted purpose of establishing a State is to build a just and humane society. Undoubtedly to accomplish this goal there must

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<sup>17</sup> The formulation of citizens' rights as Human Rights from legal-formal aspect has consequence toward State's responsibility: whether it is restricted only for citizens only or for the entire human race? Shortly, this formulation determines the legal foundation of protection and fulfillment of the rights, e.g. can it only applied on citizens or on all individuals inside the country in question regardless of status as non-citizen?

be recognition, respect, and protection of Human Rights. For that reason, there is a specific article that regulates Human Rights, which is Article III that consists of 22 Sections. For more information, Article III is shown as a specimen below.

*Bill of Rights*

**Section 1**

*No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.*

**Section 2**

*the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall be issued except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.*

**Section 3**

*(1) The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise, as prescribed by law.*

*(2) Any evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding.*

**Section 4**

*No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.*

**Section 5**

*No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed.*

*No religious test shall be required for the exercise of civil or political rights.*

**Section 6**

*The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except in the interest of national security, public safety, or public health, as may be provided by law.*

**Section 7**

*The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.*

**Section 8**

*The right of the people, including those employed in the public and private sectors, to form unions, associations, or societies for purposes not contrary to law shall not be abridged.*

**Section 9**

*Private property shall not be taken for public use without just compensation.*

**Section 10**

*No law impairing the obligation of contracts shall be passed.*

**Section 11**

*Free access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty.*

**Section 12**

*(1) Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.*



*(2) No torture, force, violence, threat, intimidation, or any other means which vitiate the free will shall be used against him. Secret detention places, solitary, incommunicado, or other similar forms of detention are prohibited.*

*(3) Any confession or admission obtained in violation of this or Section 17 hereof shall be inadmissible in evidence against him.*

*(4) The law shall provide for penal and civil sanctions for violations of this section as well as compensation to the rehabilitation of victims of torture or similar practices, and their families.*

### **Section 13**

*All persons, except those charged with offenses punishable by reclusion perpetual when evidence of guilt is strong, shall, before conviction, be bail-able by sufficient sureties, or be released on recognizance as may be provided by law. The right to bail shall not be impaired even when the privilege of the writ of habeas corpus is suspended. Excessive bail shall not be required.*

### **Section 14**

*(1) No person shall be held to answer for a criminal offense without due process of law.*

*(2) In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial, and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused: Provided that he has been duly notified and his failure to appear is unjustifiable.*

### **Section 15**

*The privilege of the writ of habeas corpus shall not be suspended except in cases of invasion or rebellion, when the public safety requires it.*

### **Section 16**

*All persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies.*

***Section 17***

*No person shall be compelled to be a witness against himself.*

***Section 18***

*(1) No person shall be detained solely by reason of his political beliefs and aspirations.*

*(2) No involuntary servitude in any form shall exist except as a punishment for a crime whereof the party shall have been duly convicted.*

***Section 19***

*(1) Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall death penalty be imposed, unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to reclusion perpetual.*

*(2) The employment of physical, psychological, or degrading punishment against any prisoner or detainee or the use of substandard or inadequate penal facilities under subhuman conditions shall be dealt with by law.*

***Section 20***

*No person shall be imprisoned for debt or non-payment of a poll tax.*

***Section 21***

*No person shall be twice put in jeopardy of punishment for the same offense. If an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act.*

***Section 22***

*No ex post facto law or bill of attainder shall be enacted.*

Human Rights Formulations in Article III of the Philippines Constitution comprises rights that are categorized as peoples' civil and political rights with the formula as every person's right or that no person can be violated of his/her right. Beside in Article III, guarantees of Human Rights

are also regulated in another article that gives direction towards State policies that should be taken specifically regarding economic, social, and cultural rights. The formula of this right is resolved in the form of state responsibility to do something. In Article II concerning the Declaration of Principles and State Policies, several rights that have been specified to be fulfilled and promoted by the State are as what follows:

***Section 9***

*The State shall promote a just and dynamic social order that will ensure the prosperity and independence of the nation and free the people from poverty through policies that provide adequate social services, promote full employment, a rising standard of living, and an improved quality of life for all.*

***Section 10***

*The State shall promote social justice in all phases of national development.*

***Section 11***

*The State values the dignity of every human person and guarantees full respect for human rights.*

***Section 12***

*The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. It shall equally protect the life of the mother and the life of the unborn from conception. The natural and primary right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall receive the support of the Government.*

***Section 14***

*The State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men.*

***Section 15***

*The State shall protect and promote the right to health of the people and instill health consciousness among them.*

***Section 16***

*The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.*

**Section 17**

*The State shall give priority to education, science and technology, arts, culture, and sports to foster patriotism and nationalism, accelerate social progress, and promote total human liberation and development.*

**Section 18**

*The State affirms labor as a primary social economic force. It shall protect the rights of workers and promote their welfare.*

**Section 22**

*The State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development.*

**Section 23**

*The State shall encourage non-governmental, community-based, or sectoral organizations that promote the welfare of the nation.*

In several other sections, there are also some stipulations that obligate the State to promote Human Rights as the followings.

- a. *The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good. To this end, the State shall regulate the acquisition, ownership, use, and disposition of property and its increments.<sup>18</sup>*
- b. *The State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full*

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<sup>18</sup> Article XIII Section 1 of the Constitution of [the Philippines](#).

- employment and equality of employment opportunities for all.*<sup>19</sup>
- c. Urban or rural poor dwellers shall not be evicted nor their dwelling demolished, except in accordance with law and in a just and humane manner.*<sup>20</sup>
  - d. The State shall adopt an integrated and comprehensive approach to health development which shall endeavor to make essential goods, health and other social services available to all the people at affordable cost.*<sup>21</sup>
  - e. The State shall protect working women.*<sup>22</sup>
  - f. The State shall respect the role of independent people's organizations to enable the people to pursue and protect, within the democratic framework, their legitimate and collective interests and aspirations through peaceful and lawful means.*<sup>23</sup>
  - g. The State shall protect and promote the right of all citizens to quality education at all levels, and shall take appropriate steps to make such education accessible to all.*<sup>24</sup>

The Constitution of the Philippines does provide not only guarantee or affirmation on state responsibility but also gives foundations of policy that must be taken to fulfill Human Rights or exercise State obligation. In the field of fulfilling social justice, the State must govern domination, possession, and utilization of property as well as its added value.<sup>25</sup> For the protection of labor, labor rights that must be guaranteed are rights to form organizations, carry out bargains and collective negotiations,

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<sup>19</sup> Article XIII Section 3 of the Constitution of **the Philippines**.

<sup>20</sup> Article XIII Section 10 of the Constitution of the Philippines.

<sup>21</sup> Article XIII Section 11 of the Constitution of the Philippines.

<sup>22</sup> Article XIII Section 14 of the Constitution of the Philippines.

<sup>23</sup> Article XIII Section 15 of the Constitution of the Philippines.

<sup>24</sup> Article XIV Section 1 of the Constitution of the Philippines.

<sup>25</sup> Article XIII Section 1 Paragraph 2 of the Constitution of the Philippines.

perform activity peacefully, and run a strike. The State must regulate the relationship between labor and businessmen by recognizing labor's rights.<sup>26</sup>

The fulfillment of healthcare rights is exercised by prioritizing the poor, sick, elderly, women, children, and persons with a disability. The State must constitute and run food and medicine regulatory systems, as well as implementing responsive activity toward the problems and needs of national health.<sup>27</sup>

The fulfillment of women's labor rights is exercised by providing a healthy and safe working environment towards maternal function.<sup>28</sup> In order to achieve the right to education, the government must build, maintain, and support an education system that is correct, complete, integrated, and according to the needs of the people and society. The State must also build and maintain a system of primary and secondary public education that is free of charge.<sup>29</sup>

## 2. Thailand

Thailand is a Constitutional Monarchy that implements a democratic government system with the King as Head of State.<sup>30</sup> Chapter I Section 4 of the Constitution of Thailand affirms that human dignity, rights, freedoms, and equality of every person must be protected. The people of Thailand must enjoy equal protection in the Constitution regardless of origin, sex, or religion.

Stipulation concerning Human Rights is regulated in Chapter III (Rights and Liberties of Thai People) that is divided into 13 sections. The first section consists of general provisions about state guarantees of Human Rights, the right to file a lawsuit against the violation of guaranteed rights, and the delineation of Human Rights.

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<sup>26</sup> Article XIII Section 3 of the Constitution of the Philippines.

<sup>27</sup> Article XIII Section 11 and 12 of the Constitution of the Philippines.

<sup>28</sup> Article XIII Section 14 of the Constitution of the Philippines.

<sup>29</sup> Article XIV Section 2 of the Constitution of the Philippines.

<sup>30</sup> Chapter I Section 2 of the Constitution of Thailand.

Section 2 contains the right of equal treatment and the right to be free from discrimination. However, the Government can take specific efforts to eliminate obstacles in order to promote a person's ability (*affirmative action*). The essences of Human Rights stipulation in Chapter III Part 2 of the Constitution of Thailand are as what follows.

1. *All persons are equal before the law and shall enjoy equal protection under the law.*
2. *Men and women shall enjoy equal rights.*
3. *Unjust discrimination against a person on the grounds of the difference in origin, race, language, sex, age, disability, physical or health condition, personal status, economic or social standing, religious belief, education or constitutionally political view, shall not be permitted.*
4. *Measures determined by the State in order to eliminate obstacle to or to promote persons' ability to exercise their rights and liberties as other persons shall not be deemed as unjust discrimination under paragraph three.*

The third section comprises the guarantee of individual rights and freedoms, particularly the rights and freedoms as part of civil rights. The guaranteed rights among other things are the right to enjoy freedom in life, free of torture and inhuman punishment, free of arbitrary arrest and detention, freedom of communication, freedom of religion, and freedom from slavery. In this section there is a stipulation for delimitation of Human Rights, which must be affirmed in legal regulation for the benefit of national security, maintaining public order, or good moral demand. The rights that are guaranteed in Chapter III Part 3 of the Constitution of Thailand are:

- a. *A person shall enjoy the right and liberty in his life and person.*
- b. *A torture, brutal act or punishment by a cruel or inhumane means shall not be made; provided that punishment under judgments of the Courts or by virtue of the law shall not be deemed the punishment by a cruel or inhumane means under this paragraph.*

- c. Arrest and detention of person shall not be made except by order or warrant issued by the Courts or there is a ground as provided by the law.*
- d. Search of person or act affecting the right and liberty under paragraph one shall not be made except by virtue of the law.*
- e. In the case where there is an act affecting right and liberty under paragraph one, the injured person, public prosecutor or any person acting for the benefit of the injured person shall have the right to bring lawsuit to the Courts so as to stop or nullify such act and to impose appropriate measure to alleviate damages occurred therefrom.*
- f. A person shall enjoy the liberty of dwelling.*
- g. A person is protected for his peaceful habitation in and for possession of his dwelling.*
- h. The entry into a dwelling without consent of its possessor or the search of a dwelling or private place shall not be made except by order or warrant issued by the Courts or there is a ground as provided virtue of the law.*
- i. A person shall enjoy the liberty of traveling and the liberty of making the choice of his residence within the Kingdom.*
- j. No person of Thai nationality shall be deported or prohibited from entering the Kingdom.*
- k. A person's family rights, dignity, reputation and the right of privacy shall be protected.*
- l. The assertion or circulation of a statement or picture in any manner whatsoever to the public, which violates or affects a person's family rights, dignity, reputation or the right of privacy, shall not be made except for the case which is beneficial to the public.*
- m. Personal data of a person shall be protected from the seeking of unlawful benefit as provided by the law.*
- n. A person shall enjoy the liberty of communication by lawful means.*
- o. The censorship, detention or disclosure of communication between persons including any other act of disclosing a statement in the communication between persons shall not*



*be made except by virtue of the law specifically enacted for security of the State or maintaining public order or good morals.*

- p. A person shall enjoy full liberty to profess a religion, a religious denomination or creed, and observe religious precepts or commandments or exercise a form of worship in accordance with his belief; provided that it is not contrary to his civic duties, public order or good morals.*
- q. In exercising the liberty referred to in paragraph one, a person shall be protected from any act of the State, which is derogatory to his rights or detrimental to his due benefits on the grounds of professing a religion, a religious denomination or creed or observing religious precepts or commandments or exercising a form of worship in accordance with his different belief from that of others.*
- r. Forced labor shall not be imposed except by virtue of the law specifically enacted for the purpose of averting imminent public calamity or by virtue of the law which provides for its imposition during the time when the country is in a state of war or armed conflict, or when a state of emergency or martial law is declared.*

Chapter III Part 4 specifically guarantees and governs rights in the judicial process. The assured rights among other things are the right not to be punished with retroactive legislation, the right of presumption of innocence, the right to access judicial process easily and without discrimination, and special treatment for children, juveniles, women, elderly, and persons with disability in cases that relate to sexual violence. For more information, the essentials of rights that have been guaranteed in this section are as the followings.

- a. No person shall be inflicted with a criminal punishment unless he has committed an act which the law in force at the time of commission provides to be an offence and imposes a punishment therefore, and the punishment to be inflicted on such person shall not be heavier than that*

*provided by the law in force at the time of the commission of the offence.*

- b. The suspect or the accused in a criminal case shall be presumed innocent.*
- c. Before the passing of a final judgment convicting a person of having committed an offence, such person shall not be treated as a convict.*
- d. A person shall have the right to access to judicial process easily, comfortably, quickly and indiscriminately;*
- e. A person shall have the fundamental rights in judicial process composing of, at least, right to public trial; right to be informed of and to examine into facts and related documents adequately; right to present facts, defenses and evidences in the case; right to object the partial judges; right to be considered by the full bench of judges; and right to be informed of justifications given in the judgment or order;*
- f. A person shall have the right to correct, prompt and fair trial;*
- g. An injured person, alleged offender, plaintiff, defendant or the accused, interested parties, interested person or witness to the case shall have the right to appropriate treatment in judicial process including the right to be investigated correctly, promptly and fairly and not to testify against himself;*
- h. An injured person, alleged offender, the accused and witness to a criminal case shall have the right to necessary and appropriate protection and assistance from State. The gratuity, compensation and expenses to be paid shall be provided by the law;*
- i. every child, youth, woman or aging or disabled person shall have the right to appropriate protection in judicial process and shall have the right to appropriate treatment in the case related to sexual offences;*
- j. An alleged offender and the accused in criminal case shall have the right to correct, prompt and fair investigation or trial with an adequate opportunity in defending his case, the right to examine or to be*

*informed of evidence, right to defend himself through counsel and the right to bail;*

- k. A person shall, in civil action, have the right to appropriate legal assistance from State.*

In Section 5 Chapter III the assured right is the right to property. This section declares that property rights of every person must be protected. Any expropriation of property over immovable objects cannot be executed unless for public interest, defense, planning and environmental setup, which is governed by regulation and shall receive fair compensation. The essential stipulations of this section are as the followings.

- a. The property right of a person is protected.*
- b. The succession is protected.*
- c. The expropriation of immovable property shall not be made except by virtue of the law specifically enacted for the purpose of public utilities, necessary national defense, exploitation of national resources, town and country planning, promotion and preservation of the quality of the environment, agricultural or industrial development, land reform, conservation of ancient monument and historic sites, or other public interests, and fair compensation shall be paid in due course to the owner thereof as well as to all persons having the rights thereto, who suffer loss by such expropriation, as provided by law. The amount of compensation shall be fairly assessed with due regard to the normal market price, mode of acquisition, condition and location of the immovable property, loss of the person whose property or right thereto is expropriated, and benefits that the State and the person whose property or right thereto is expropriated may receive from the use of the expropriated property.*
- d. The expropriation of immovable property law shall specify the purpose of the expropriation and shall clearly determine the period of time to fulfill that purpose. If the immovable property is not used to fulfill such purpose within such period of time, it shall be returned to the original owner or his heir.*

- e. The return of immovable property to the original owner or his heir under paragraph three and the claim of compensation paid shall be in accordance with the provisions of the law.*

Section 6 Chapter III provides guarantees of the right and freedom of occupation and enterprise. In addition, there is also a guarantee of the right to work safety and to welfare. Here are the essentials that are regulated in Chapter III Part 6:

- a. A person shall enjoy the liberties to engage in an enterprise or an occupation and to undertake a fair and free competition.*
- b. A person shall enjoy the right to work safety and welfare and to living security irrespective of whether he is employed or unemployed in accordance with the provisions of the law.*

Chapter III Part 7 assures and regulates individual freedom of expression and freedom of the press. Freedom of the press regulates not only printing media but also electronic media of television and radio. The regulation also covers the ownership status of media in Thailand in relation to political activity. Besides, it also regulates restrictions that can be executed on the basis of legislation solely for the interest of national security, protection of the right to freedom, dignity, and family reputation or privacy, to maintain public order or good moral, in addition to avert the dissemination of hatred. The essentials of stipulation in Chapter III Part 7 are as what follows.

- a. A person shall enjoy the liberty to express his opinion, make speech, write, print, publicize, and make expression by other means.*
- b. The restriction on liberty under paragraph one shall not be imposed except by virtue of the law specifically enacted for the purpose of maintaining the security of State, protecting the rights, liberties, dignity, reputation, family or privacy rights of other person, maintaining public*

- order or good morals or preventing or halting the deterioration of the mind or health of the public.*
- c. The closure of a newspaper or other mass media business in deprivation of the liberty under this section shall not be made.*
  - d. The prevention of a newspaper or other mass media from printing news or expressing their opinions, wholly or partly, or interference in any manner whatsoever in deprivation of the liberty under this section shall not be made except by the provisions of the law enacted in accordance with the provisions of paragraph two.*
  - e. The censorship by a competent official of news or articles before their publication in a newspaper or other mass media shall not be made except during the time when the country is in a state of war; provided that it must be made by virtue of the law enacted under the provisions of paragraph two.*
  - f. The owner of a newspaper or other mass media business shall be a Thai national.*
  - g. Officials or employees in a private sector undertaking newspaper, radio or television broadcasting businesses or other mass media business shall enjoy their liberties to present news and express their opinions under the constitutional restrictions without mandate of any government agency, State agency, State enterprise or the owner of such businesses; provided that it is not contrary to their professional ethics, and shall enjoy the right to form organization with balancing mechanism among professional organizations so as to protect rights, liberties and fairness.*
  - h. Government officials, officials or employees of a government agency, State agency or State enterprise engaging in the radio or television broadcasting business or other mass media business enjoy the same liberties as those enjoyed by officials or employees under paragraph one.*
  - i. Any act done by a person holding political position, State official or the owner of business with a view to obstruct*

*or interfere the presentation of news or an expression of opinions in public issue of the person under paragraph one or paragraph two, irrespective of whether such act has been done directly or indirectly, shall be deemed as willfully misuse of power and take no effect except where such act has been done through the enforcement of law or professional ethics.*

- j. Transmission frequencies for radio or television broadcasting and telecommunication are national communication resources for public interest.*
- k. No person holding a political position shall be the owner of, or hold shares in, newspaper, radio or television broadcasting or telecommunication business, irrespective of whether he so commits in his name, or through his proxy or nominee, or by other direct or indirect means which enable him to administer such business as if he is the owner of, or hold shares in, such business.*

The next Chapter regulates the right and freedom to education. Chapter III Part 8 guarantees everyone's right to enjoy education equally of no less than 12 years and guarantees the right of education for the poor and persons with special needs. As a part of freedom in the field of education, this part also guarantees academic freedom. The followings are the stipulations comprised in Chapter III Part 8:

- a. A person shall enjoy an equal right to receive education for the duration of not less than twelve years which shall be provided by State thoroughly, up to the quality, and without charge.*
- b. The indigent, disabled or handicapped, or destitute person shall enjoy an equal right under paragraph one and shall be supported by State to receive equal education with other persons.*
- c. The education and training provided by professional or private organization, alternative education of the public, self-directed learning and lifelong learning shall get appropriate protection and promotion from State.*
- d. A person shall enjoy an academic freedom.*

- e. Education and training, learning and teaching, research and disseminating of research according to academic principles shall be protected; provided that it is not contrary to his civic duties or good morals.*

Chapter III Part 9 provides the guarantee of the right to healthcare and welfare. This chapter affirms that every person must enjoy equal rights to receive healthcare, and the poor have the right to obtain medical treatment free of charge. Further rights that are also guaranteed in this chapter are rights of children and adolescents, elderly, and persons with special needs. More information on the stipulation of Chapter III Part 9 of the Constitution of Thailand is given as the followings.

- a. A person shall enjoy an equal right to receive standard public health service, and the indigent shall have the right to receive free medical treatment from State's infirmary.*
- b. The public health service by the State shall be provided thoroughly and efficiently.*
- c. The State shall promptly prevent and eradicate harmful contagious diseases for the public without charge.*
- d. Children and youth shall enjoy the right to survive and to receive physical, mental and intellectual development potentially in suitable environment with due regard to their participation.*
- e. Children, youth, women and family members shall have the right to be protected by State against violence and unfair treatment and shall have the right to medical treatment or rehabilitation upon the occurrence thereof.*
- f. An interference and imposition of rights of children, youth and family members shall not be made except by virtue of the law specially enacted for the maintenance of family institution or utmost benefit of such person.*
- g. Children and youth with no guardian shall have the right to receive appropriate care and education from the State.*
- h. A person who is over sixty years of age and has insufficient income for living shall have the right to welfare, public facilities and appropriate aids from State.*

- i. The disabled or handicapped shall have the right to get access to, and to utilize of, welfare, public facilities and appropriate aids from State.*
- j. A person of unsound mind shall have the right to appropriate aids from State.*
- k. A person who is homeless and has insufficient income for living shall have the right to appropriate aids from State.*

The right to information and petition are governed in Chapter III Part 10. The Right to information covers the right to receive and get access to public information, to join public consultation forums, and to participate in the process of decision making. This right is related not only to the state or government but also regarding information necessary for the consumer. In addition, every person is also guaranteed for his right to present a petition and to request for and to follow up the performance of duties of a person holding a political position. In total, Chapter III Part 10 covers the followings.

- a. A person shall have the right to receive and to get access to public information in possession of a government agency, State agency, State enterprise or local government organization, unless the disclosure of such information shall affect the security of State, public safety, interests of other persons which shall be protected, or personal data of other persons as provided by law.*
- b. A person shall have the right to receive information, explanation and justification from a government agency, State agency, State enterprise or local government organization before permission is given for the operation of any project or activity which may affect the quality of the environment, health and sanitary conditions, the quality of life or any other material interest concerning him or a local community and shall have the right to express his opinions on such matters to the concerned agencies for their consideration.*
- c. The State shall organize public consultation thoroughly before the making of social, economic, politic and cultural development plan, the expropriation of immovable*



*property, the making of town and country planning, the determination of land use, and the enactment of rule which may affect material interest of the public.*

- d. A person shall have the right to participate in the decision-making process of State official in the performance of administrative functions which affect or may affect his rights and liberties, as provided by law.*
- e. A person shall have the right to present a petition and to be informed of the result of its consideration within the appropriate time.*
- f. A person shall have the right to sue a government agency, State agency, State enterprise, local government organization or other State authority which is a juristic person to be liable for an act or omission done by its government official, official or employee.*
- g. The right of a person who is a consumer to receive actual information shall be protected and a consumer shall have the right to make a complaint for remedy of damage and to amalgamate with another so as to protect consumers' rights.*
- h. There shall be an autonomous consumer protection organization which is not a State agency consisting of representatives of consumers for giving opinions to a State agency on the enactment and issuance of laws, rules and regulations and on the determination of various measures for consumer protection, and for examining and making a report on any act or omission related to consumer protection. The State shall provide financial support for an operation of such autonomous organization.*
- i. A person shall have the right to follow up, and to request for examination of, the performance of duties of a person holding political position, State agency and State officials.*
- j. A person who provides information related to the performance of duties of a person holding political position, State agency and State officials to the organization examining the misuse of State power or State agency shall be protected.*

Right to assembly and form association is guaranteed in the Section 11 of Chapter III. Every person has the liberty to assemble peacefully and form an organization or political party. In this chapter there are restrictions that can only be executed under the virtue of law with the intention of securing public convenience in the use of public places or for the maintenance of public order during the time when the country is in a state of war or emergency. Below are the stipulations comprised in Chapter III Part 11.

- a. A person shall enjoy the liberty to assemble peacefully and without arms.*
- b. The restriction on such liberty under paragraph one shall not be imposed except by virtue of the law specifically enacted for the purpose of public assembling and for securing public convenience in the use of public places or for the maintenance of public order during the time when the country is in a state of war, or when a state of emergency or martial law is declared.*
- c. A person shall enjoy the liberty to unite and form an association, a union, a league, a co-operative, a farmer group, a private organization, a non-governmental organization or any other group.*
- d. The government officials and State officials shall enjoy the liberty to association as other individual if it is not affect efficiency of State administration and the continuation in providing public services as provided by law.*
- e. The restriction on such liberty under paragraph one and paragraph two shall not be imposed except by virtue of the law specifically enacted for preventing common interests of the public, maintaining public order or good morals or preventing economic monopoly.*
- f. A person shall enjoy the liberty to unite and form a political party for the purpose of making political will of the people and carrying out political activities in fulfillment of such will through the democratic regime of government with the King as Head of State as provided in this Constitution.*

- g. The internal organization, management and regulations of a political party shall be consistent with the fundamental principles of the democratic regime of government with the King as Head of State.*
- h. Members of the House of Representatives who are members of a political party, members of the Executive Committee of a political party, or members of a political party, of not less than the number prescribed by the organic law on political parties shall, if of the opinion that their political party's resolution or regulation on any matter is contrary to the status and performance of duties of a member of the House of Representatives under this Constitution or contrary to or inconsistent with the fundamental principles of the democratic regime of government with the King as Head of State, have the right to refer it to the Constitutional Court for decision thereon.*
- i. In the case where the Constitutional Court decides that such resolution or regulation is contrary to or inconsistent with the fundamental principles of the democratic regime of government with the King as Head of State, such resolution or regulation shall lapse.*

In the Constitution of Thailand there is a special part that guarantees community rights, which is in Chapter III Part 12. In this chapter, the local community or traditional community has the right to conserve or restore their customs, local wisdom, arts or good culture of their community. The community also has the right to sue Government agencies that do not exercise the protection of their rights. Below are the stipulations in Part 12.

- a. Persons assembling as to be a community, local community or traditional local community shall have the right to conserve or restore their customs, local wisdom, arts or good culture of their community and of the nation and participate in the management, maintenance and exploitation of natural resources, the environment and biological diversity in a balanced and sustainable fashion.*

- b. The right of a person to participate with State and communities in the preservation and exploitation of natural resources and biological diversity and in the protection, promotion and conservation of the quality of the environment for usual and consistent survival in the environment which is not hazardous to his health and sanitary condition, welfare or quality of life, shall be protected appropriately.*
- c. Any project or activity which may seriously affect the quality of the environment, natural resources and biological diversity shall not be permitted, unless its impacts on the quality of the environment and on health of the people in the communities have been studied and evaluated and consultation with the public and interested parties have been organized, and opinions of an independent organization, consisting of representatives from private environmental and health organizations and from higher education institutions providing studies in the field of environment, natural resources or health, have been obtained prior to the operation of such project or activity.*
- d. The right of a community to sue a government agency, State agency, State enterprise, local government organization or other State authority which is a juristic person to perform the duties under this section shall be protected.*

In the Constitution of Thailand a guarantee of the right to protect the Constitution also exists. However a person in implementing his right may not eliminate the regime of democratic government. Consequently, every person can request for the Attorney General to conduct an investigation and file a lawsuit for the Constitutional Court to instruct termination of the act in question.<sup>31</sup>

In addition to the provision concerning Human Rights that has been regulated in a single specific chapter, the Constitution of Thailand also

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<sup>31</sup> Chapter III Part 13 of the Constitution of Thailand.

contains stipulations concerning essences of public policy, which incorporate the obligation of the State to protect and promote specific rights. This obligation is regulated in five sections, i.e. (1) Religions, Social, Public Health, Education, and Cultural Policies, (2) Law and Justice Policies, (3) Economic Policy, (4) Land Use, Natural Resources and Environment Policies, and (5) Public Participation Policy.

### 3. Cambodia

Cambodia is a state in the form of a Constitutional Monarchy based on the principle of liberal democracy and pluralism.<sup>32</sup> The Preamble of the Constitution of Cambodia in 1993 declares that one of the objectives to be accomplished is to restore Cambodia as the “Island of Peace” based on a multi-party liberal democracy that guarantees Human Rights and respect for the law.

Guarantees over Human Rights are given in the Chapter III with the title of “The Rights and Obligations of Khmer Citizens”, starting from Articles 31 to 50. Human Rights in those stipulations are formulated as the rights of citizens (Khmer citizen), instead of the right of every person. However, Article 31 Paragraph 1 affirms that the Kingdom of Cambodia must recognize and respect Human Rights as embraced in the Declaration of Universal Human Rights, all covenants and Conventions related with Human Rights, and women’s and children’s rights.<sup>33</sup> The limitation of Human Rights is expressed qualitatively that the implementation of rights shall not adversely affect the rights and freedoms of others, and the restriction of rights must be in accordance with the law. Chapter III Article 31 Paragraph 3 states that *“The exercise of personal rights and freedom by any individual shall not adversely affect the rights and freedom of others. The exercise of such rights and freedom shall be in accordance with the law.”*

Human Rights that are pledged in Chapter III comprise the right to be free from discrimination, the right to life and elimination of the death

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<sup>32</sup> Chapter 1 Article 1 of the Constitution of Cambodia.

<sup>33</sup> Chapter III Article 31 of the Constitution of Cambodia.

penalty, the right to personal freedom, right to security, right to a nationality and freedom to travel, right to be elected and to vote, right to actively participate in political, economic, and cultural life, right to choose employment and equal payment, right to social security guarantees, right to form and become a member of a union, right to strike and peaceful demonstration, right to be free from torture, right to defend self before the law, right to privacy, right to freedom of expression, freedom of the press and publication, freedom to assemble, right to form a political organization and party, right to freedom of faith and religion, right to property, and the right to protection for women from discrimination and exploitation. Besides those rights, the Constitution of Cambodia also specifically guarantees that house-wives must receive the same value as what they can receive when working outside the home. Below are the rights assured in Chapter III.

- 1. Every Khmer citizen shall be equal before the law, enjoying the same rights, freedom and fulfilling the same obligations regardless of race, color, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status.*
- 2. Every Khmer citizen shall have the right to life, personal freedom, and security.*
- 3. There shall be no capital punishment.*
- 4. Khmer citizens shall not be deprived of their nationality exiled or arrested and deported to any foreign country unless there is a mutual agreement on extradition.*
- 5. Khmer citizens residing abroad enjoy the protection of the State.*
- 6. Khmer citizens of either sex shall enjoy the right to vote and to stand as candidates for the election.*
- 7. Khmer citizens of either sex of at least eighteen years old have the right to vote.*
- 8. Khmer citizens of either sex of at least 25 years old, have the right to stand as candidates for the election as members of the National Assembly.*
- 9. Khmer citizens of either sex of at least 40 years old, have the right to stand as candidates for the election as members the Senate.*

10. *Khmer citizens of either sex shall have the right to participate actively in the political, economic, social and cultural life of the nation.*
11. *Khmer citizens of either sex shall enjoy the right to choose any employment according their ability and to the needs of the society.*
12. *Khmer citizens of either sex shall receive equal pay for equal work.*
13. *The work by housewives in the home shall have the same value as what they can receive when working outside the home.*
14. *Every Khmer citizen shall have the right to obtain social security and other social benefits as determined by law.*
15. *Khmer citizens of either sex shall have the right to form and to be member of trade unions.*
16. *The right to strike and to non-violent demonstration shall be implemented in the framework of a law.*
17. *The law guarantees there shall be no physical abuse against any individual.*
18. *The law shall protect life, honor, and dignity of the citizens.*
19. *The prosecution, arrest, or detention of any person shall not be done except in accordance with the law.*
20. *Coercion, physical ill-treatment or any other mistreatment that imposes additional punishment on a detainee or prisoner shall be prohibited. Persons who commit, participate or conspire in such acts shall be punished according to the law.*
21. *The accused shall be considered innocent until the court has judged finally on the case.*
22. *Every citizen shall enjoy the right to defense through judicial recourse.*
23. *Khmer citizens shall have the right to denounce, make complaints or file claims against any breach of the law by state and social organs or by members of such organs committed during the course of their duties. The settlement of complaints and claims shall be the competence of the courts.*

24. *Citizens' freedom to travel, far and near and legal settlement shall be respected.*
25. *Khmer citizens shall have the right to travel and settle abroad and return to the country.*
26. *The rights to privacy of residence, and to the confidentiality of correspondence by mail, telegram, fax, telex and telephone shall be guaranteed.*
27. *Any search of the house, material and body shall be in accordance with the law.*
28. *Khmer citizens shall have freedom of expression, press, publication and assembly. No one shall exercise this right to infringe upon the rights of others, to affect the good traditions of the society, to violate public law and order and national security.*
29. *Khmer Citizens shall have the right to establish associations and political parties. These rights shall be determined by law.*
30. *Khmer citizens of either sex shall have the right to freedom of belief.*
31. *Freedom of religious belief and worship shall be guaranteed by the State on the condition that such freedom does not affect other religious beliefs or violate public order and security.*
32. *All persons, individually or collectively, shall have the right to ownership. Only Khmer legal entities and citizens of Khmer nationality shall have the right to own land.*
33. *Legal private ownership shall be protected by law.*
34. *The right to confiscate properties from any person shall be exercised only in the public interest as provided for under the law and shall require fair and just compensation in advance.*
35. *All forms of discrimination against women shall be abolished.*
36. *The exploitation of women in employment shall be prohibited.*
37. *Men and women are equal in all fields especially with respect to marriage and family matters.*



- 38. Marriage shall be conducted according to conditions determined by law based on the principle of mutual consent between one husband and one wife.*
- 39. The commerce of human beings, exploitation by prostitution and obscenity which affect the reputation of women shall be prohibited.*
- 40. A woman shall not lose her job because of pregnancy. Woman shall have the right to take maternity leave with full pay and with no loss of seniority or other social benefits.*
- 41. The state and society shall provide opportunities to women, especially to those living in rural areas without adequate social support, so they can get employment, medical care, and send their children to school, and to have decent living conditions.*
- 42. The State shall protect the rights of children as stipulated in the Convention on Children, in particular, the right to life, education, protection during wartime, and from economic or sexual exploitation.*
- 43. The State shall protect children from acts that are injurious to their educational opportunities, health and welfare.*

Besides guaranteeing Human Rights, the Constitution of Cambodia also provides regulations concerning basic policies that must be taken by the State, which are directed towards the guarantee of protection and promotion of Human Rights. In the field of economy, every citizen is guaranteed for their right to sell their product. The State cannot make policy that coerces people to sell their product to the Government or their use of private property.<sup>34</sup>

In the fields of educational and socio-cultural, the State must protect and promote children's rights to good quality education at every level and must take necessary measures to be enjoyed by every child. The State must develop an education system that is comprehensive and has a good standard by guaranteeing the principle of freedom and good quality

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<sup>34</sup> Chapter V Article 60 of the Constitution of Cambodia.

education to ensure that all citizens have the same opportunity to benefit from it. The State must adopt education programs according to the principle of modern pedagogy. The State has to provide primary and secondary education free of charge in public schools for all citizens.<sup>35</sup>

In the area of healthcare, Article 72 reassures that people's health must be guaranteed. The State must provide full attention to the prevention of diseases and to provide healthcare. The poor must receive medical services free of charge at hospitals, maternity hospitals, and government-owned clinics. The State has to build clinics and maternity hospitals in rural areas. The State is also obligated to create social security systems amongst employees and employers.

#### **4. Indonesia**

Since Independence in 1945, Indonesia has been a State in the form of a Republic that recognizes that the highest power is in the hands of the people. The Preamble of the 1945 Constitution expresses the purposes of the State to protect the whole people of Indonesia and the entire homeland of Indonesia, to advance general prosperity, to develop the nation's intellectual life, and to contribute to the implementation of a world order based on freedom, lasting peace and social justice. Indonesia's National Independence shall be laid down in a Constitution of the State of Indonesia, which establishes the State of the Republic of Indonesia with sovereignty of the people and based on the belief in the God Almighty, on just and civilized humanity, on the unity of Indonesia and on democratic rule that is guided by the strength of wisdom resulting from deliberation/representation to realize social justice for all the people of Indonesia.

The 1945 Constitution that came to power on 18 August 1945 contains stipulations on Human Rights although still in limited quantity. The guarantee of Human Rights protection has undergone a major change when entering the Reformation Era of 1998 and followed by the series of amendment process with additional clauses on Human Rights. Before the

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<sup>35</sup> Chapter V Article 65 up to Article 68 of the Constitution of Cambodia.

this amendment, the 1945 Constitution only comprises seven points of regulation related to Human Rights that cannot strictly be defined as the constitutional guarantee of Human Rights. After the series of amendment during the Reformation Era, the 1945 Constitution embraces some Human Rights clauses starting from Articles 28A to 28J and several other clauses that are distributed in several articles categorized into four Human Rights groups containing 37 clauses (Asshiddiqie 2008). Among those four Human Rights groups, there are several fundamental human rights that cannot be derogated under any circumstances (non-derogable rights) as the followings.

1. Right to life,
2. Right to remain free from torture,
3. Right to freedom of thought and conscience,
4. Right to adhere a religion,
5. Right not to be enslaved,
6. Right to be treated as an individual before the law, and
7. Right not to be prosecuted on the basis of retroactive legislation.

The first group is the group of clauses concerning civil rights, including the followings.

1. Each person has the right to life and the right to defend his life and existence,
2. Each person has the right to be free from torture, cruel or inhuman and degrading treatment or punishment,
3. Each person has the right to be free from any form of slavery,
4. Each person is free to worship and to practice the religion of his choice,
5. Each person has the right to be free in his convictions, thoughts and conscience,
6. Each person has the right to be recognized as an individual before the law,
7. Each person has the right to be treated as an individual before the law and government,
8. Each person has the right not to be prosecuted on the basis of retroactive legislation,
9. Each person has the right to establish a family and to generate offspring through a lawful marriage,
10. Each person has the right to a nationality,

11. Each person has the right of his residency in the territory of the country that he shall be able to leave and to which he shall have the right to return,
12. Each person has the right to obtain political asylum,
13. Each person has the right to be free from acts of discrimination based on what grounds ever and shall be entitled to protection against such discriminative treatment.

The second group contains political, economic, social, and cultural rights as the followings.

1. Each citizen has the liberties of association and assembly, the freedom of thought expressed verbally or in writing,
2. Each citizen has the right to vote and be elected in people's representatives body,
3. Each citizen can be appointed to occupy public offices,
4. Each citizen has the right to acquire and choose a legitimate and decent work for humanity,
5. Every person is entitled to an occupation as well as to get income and a fair and proper treatment in labor relations,
6. Each person has the right to own private property,
7. Each person is entitled to social security enabling him to develop his entire self unimpaired as a dignified human being,
8. Each person has the right to communication and to acquiring information,
9. Each citizen has the right to an education and teaching,
10. Every person has the right to develop and to partake in the benefits of science and technology, art and culture, so as to improve the quality of his life and the well-being of mankind,
11. The state guarantees the respect for cultural identity and the rights of indigenous people compatible with times and level of civilization of nations,
12. The State guaranteed every culture as part of national culture,
13. The state guarantees each and every citizen the freedom of religion and of worship in accordance with his religion and belief.

The third group contains special rights and the right to development that consist of the followings.

1. Each citizen with social problem, including isolated community and community living in remote locations, has the right to obtain facility and special treatment to access equal opportunity,
2. Women's rights are guaranteed and protected to achieve gender equality in national life,
3. Special right inherent to women, due to their reproduction function, is guaranteed and protected by law,
4. Every child has the right to affection, attention, and protection from his parents, family, society and the State for his physical and mental growth and his personal development,
5. Every citizen has the right to participate in managing and also enjoying the benefit from the management of natural resources,
6. Every person has the right to clean and healthy environment,
7. Special policy, treatment or action that is temporary and poured into authorized legislation, which has been intended to equalize the level of development of particular group whom had suffered discriminative treatment from other groups of the society, and the special treatment in question, is not included in the definition of discrimination.

In addition, there is the 4<sup>th</sup> group that regulates State responsibility and human rights obligations that comprises:

1. Every person has the obligation to respect for Human Rights of others in the code of conduct of societal, national, and state life;
2. In implementing his right and freedom, every person is duty-bound to submit to the restriction determined by the law, with sole intention in order to guarantee the recognition of and respect for right and freedom of others, as well as to fulfill the demand of justice in accordance with the values of religion, morality, and decency, security, and public order in a democratic society;
3. The State is responsible for the protection, promotion, upholding, and fulfillment of Human Rights;
4. To ensure the implementation of Human Rights, the National Commission on Human Rights is established as independent and impartial entity whose establishment, structure, and position are regulated under the virtue of law.

From the formulation of rights within the 1945 Constitution, it can be seen that there is a formulation of every one's rights as Human Rights

that apply to all people who live and reside in the territory of the Republic of Indonesia, and some rights are formulated as citizen's rights that only apply for citizens of the Republic of Indonesia.

## 5. Laos

Lao People's Democratic Republic (PDR) is a State that professes a one party system, which is the Lao People's Revolutionary Party. Nevertheless, in the Constitution of 1991 it declares that the State recognizes the division of powers amongst executive, legislative, and judicative. This Constitution also provides the foundation of improvement, promotion, and protection of Human Rights. The 1991 Constitution states that the objective to be achieved is to build Laos as a peaceful, independent, democratic, and prosperous State.

Provisions on Human Rights are regulated in Chapter 4 "Fundamental Rights and Obligations of Citizens", which is formulated as the right of Lao citizens. In addition, the stipulations concerning Human Rights can also be found in principles of State policy in the political regime and socio-economic regime.

The rights ensured in Chapter 4, among others, are the right to equality before the law without any form of discrimination, right to vote and to be elected, right to be treated equally in political, economic, and social-cultural aspects, right to education, right to occupation, right to rest, right to obtain medical acts, right to receive relief for those who are in need, right to present objection and petition, right to be free from violation of the body, house, and honor, right to freedom of religion or to not have any religion, right to freedom of expression, right to freedom of the press, right to freedom of association, right to form an organization, right to demonstrate, right and freedom to study and apply science, as well as the right to be protected as a citizen. The rights ensured in Chapter 4 are as follows.

- 1. Lao citizens are all equal before the law irrespective of their gender, social status, education, beliefs and ethnic group.*

2. *Lao citizens aged eighteen years and above have the right to vote and those aged twenty years and above have the right to be elected, except insane persons, persons with mental disorders and persons whose rights to vote and to be elected have been revoked by a court.*
3. *Citizens of both genders enjoy equal rights in the political, economic, cultural and social fields and in family affairs.*
4. *Lao citizens have the right to receive education and upgrade themselves.*
5. *Lao citizens have the right to work and engage in occupations which are not contrary to the laws. Working people have the right to rest, to receive medical treatment in times of illness, [and] to receive assistance in the event of incapacity or disability, in old age, and in other cases as provided by the laws.*
6. *Lao citizens have the right to lodge complaints and petitions and to propose ideas to the relevant State organizations in connection with issues pertaining to the public interest or to their own rights and interests.*
7. *The right of Lao citizens in their bodies, honor and houses are inviolable. Lao citizens cannot be arrested or searched without the order of the Public Prosecutor<sup>4</sup> or the people's courts, except if otherwise provided by the laws.*
8. *Lao citizens have the right and freedom to believe or not to believe in religions.*
9. *Lao citizens have the right and freedom of speech, press and assembly; and have the right to set up associations and to stage demonstrations which are not contrary to the laws.*
10. *Lao citizens have the right and freedom to conduct studies in and to apply advanced sciences, techniques and technologies; to create artistic and literary works [;] and to engage in cultural activities which are not contrary to the laws.*
11. *The State protects the legitimate rights and interests of Lao citizens residing abroad.*

*12. The rights and freedoms of aliens and apatrids are protected by the laws of the Lao People's Democratic Republic. They have the right to file claims in the courts and [to lodge petitions with] other concerned organizations of the Lao People's Democratic Republic and have the obligation to respect the Constitution and laws of the Lao People's Democratic Republic.*

*13. The Lao People's Democratic Republic grants asylum to foreigners who are persecuted for their struggle for freedom, justice, peace and scientific causes.*

The Constitution of Laos also determines the basis of political and economic regimes that are established and related with the guarantee of Human Rights. Chapter 1 determines the basics of political regimes, that all power is on the people and run by and for the interest of the people from multi-ethnics of all levels. The people elect their representatives and have the right to request for the dismissal of their representative. The State must protect the freedom and democratic rights that cannot be violated by any one. It is also reaffirmed that the State makes policies to promote equality amongst ethnics. All ethnic groups have the right in protecting, conserving, and advancing their own customs and culture.

In the socio-economy field it is reaffirmed that the State must run a primary education that is compulsory, develop good quality national education, and create opportunities for all citizens to enjoy education. The State must also increase and enlarge medical service and create situations to ensure that the people have access to health protection, specifically women, children, the poor, and people in isolated areas. The State is also responsible for developing skilled labor and protecting the right of and advantage for labor.

## **6. Malaysia**

Malaysia is a Constitutional Monarchy in the form of a Federal state. As a constitutional State, Malaysia has a Constitution that contains Human Rights guarantees in Part I and Part II of Articles 3 to 12. However, those parts are not only specifying the rights that are guaranteed but also



denoting the forms of implementation of rights in question as well as their exceptions.

Part I Article 3 reaffirms that Islam is the official religion of the Federation, but other religions can be run peacefully and in harmony as part of the Federation. Article 5 assures that no person may be deprived of the right to life and personal freedom as well as right to be free from arbitrary arrest and imprisonment. In spite of this right acknowledgment, it does not apply to strangers who are considered an enemy of the State.

Article 6 emphasizes that no one shall be enslaved and all forms of forced labor are prohibited. Nevertheless, the Parliament can generate mandatory rules to work for national interests. Moreover, obligatory tasks in prison that are settled by the Courts cannot be categorized as slavery or forced labor.

Article 7 contains the legality principle and the right not to be punished without any legislation that has existed beforehand and not to be punished more severely than the penalty specified in the legislation at that particular moment. Besides, this Article also guarantees the right not to be punished twice for one crime that had been perpetrated.

Article 8 guarantees the right to equality before the law, right to be free from discriminative action, and the right to property and to run commerce, business, profession, or a particular venture. Although Paragraph 5 determines that the guarantee in Article 8 does not cancel or prohibit the provision that regulates private law, restrictions concerning the occupation that is allocated for followers of a particular religion, and the stipulation on the protection of Malay society. The rights set out in Article 8 Paragraph 5 are as what follows.

*(5) This Article does not invalidate or prohibit -*

*(a) Any provision regulating personal law;*

*(b) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion;*

- (c) Any provision for the protection, wellbeing or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;*
- (d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election;*
- (e) Any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;*
- (f) Any provision restricting enlistment in the Malay Regiment to Malays.*

Article 9 provides guarantees that no citizen shall be banished or exiled from the Federation, and he has the freedom to travel. However, this freedom can be restricted amongst States. Article 10 provides guarantee for each citizen of right to freedom of speaking and expression, right to assemble peacefully, and the right to form an association. But, the rights guaranteed in Article 10 limited in Paragraph 2 to 4 are as follows.

*(2) Parliament may by law impose -*

- (a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;*
- (b) on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, or public order;*
- (c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in*

- the interest of the security of the Federation or any part thereof, public order or morality.*
- (3) Restrictions on the right to form associations conferred by paragraph (c) of Clause (1) may also be imposed by any law relating to labor or education.*
- (4) In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2) (a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.*

Article 11 regulates guarantees of the citizens' right to believe and practice their religion. Each religious group has the right to manage their respective religious affairs, to form and practice religious institutions for charity acts, and to occupy and own property. However, these rights can also be limited and controlled for religious groups that practice Islam. The limitation can be executed on behalf of public order, public health, and good morality.

Part II Article 119 reaffirms the existence of the right to vote. Every citizen of 21 years of age who has not lost his right shall have the right to vote.

In addition to restrictions in every article, the Constitution of Malaysia also sets restrictions on Human Rights on the basis of emergency situations and special authority that is regulated in Part XI as what follows.

*Article 149*

- (1) If an act of parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation -*
- (a) To cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or*

- (b) To excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or*
- (c) To promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or*
- (d) To procure the alteration, otherwise than by lawful means, of anything by law established; or*
- (e) Which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or*
- (f) Which is prejudicial to public order in, or the security of, the Federation or any part thereof.*

*[A]ny provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.*

## 7. Singapore

Singapore is a State in the form of a Republic<sup>36</sup>. The Constitution that applies presently is the Constitution established in 1965. The stipulation of Human Rights in the Constitution of Singapore has similarities with the Constitution of Malaysia.

Human Rights in the Constitution of Singapore are specified in one particular Chapter, which is Part IV on Fundamental Liberty that consists of eight articles. Article 9 provides guarantees for the right to life and personal freedom. This article is also a specified mechanism of complaint against detention and arrest, along these lines:

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<sup>36</sup> Part II Article 3 of the Constitution of Singapore declares “Singapore shall be a sovereign republic to be known as the Republic of Singapore”.

- (2) Where a complaint is made to the High Court or any Judge thereof that a person is being unlawfully detained, the Court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the Court and release him.*
- (3) Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.*
- (4) Where a person is arrested and not released, he shall, without unreasonable delay, and in any case within 48 hours (excluding the time of any necessary journey), be produced before a magistrate and shall not be further detained in custody without the magistrate's authority.*

Nevertheless, in Article 9 there are also restrictions where complaint mechanisms are not applicable, i.e. regarding the act of contempt of Parliament. The restriction of right to life and personal freedom did not apply before 16 September 1963 and does not apply for any act concerning drug abuse for rehabilitation reasons. Below are the restrictions regulated in Article 9 Clauses (5) and (6).

- (5) Clauses (3) and (4) shall not apply to an enemy alien or to any person arrested for contempt of Parliament pursuant to a warrant issued under the hand of the Speaker.*
- (6) Nothing in this article shall invalidate any law*
  - (a) In force before 16 Sep 1963 which authorizes the arrest and detention of any person in the interests of public safety, peace and good order; or*
  - (b) Relating to the misuse of drugs or intoxicating substances which authorizes the arrest and detention of any person for the purpose of treatment and rehabilitation, by reason of such law being inconsistent with clauses (3) and (4), and, in particular, nothing in this article shall affect the validity or operation of any such law before 10 March 1978.*

Article 10 specifies on Slavery and Forced Labor Prohibition. Clause 1 Article 10 strictly states that no person shall be held in slavery. However, in Clauses (2) and (3) it is declared that forced labor is made possible by the Parliament for national interest and the works conducted by inmates are not categorized as forced labor. The full stipulations in Article 10 are as what follows.

- 1) No person shall be held in slavery.*
- 2) All forms of forced labor are prohibited, but Parliament may by law provide for compulsory service for national purposes.*
- 3) Work incidental to the serving of a sentence of imprisonment imposed by a court of law shall not be taken to be forced labor within the meaning of this article.*

Article 11 guarantees every person's right not to be punished by retroactive legislation and not to be arbitrated more than once for a single crime unless there is a retrial under the order of a higher court. Article 12 guarantees the right to equality before the law and equal rights for the protection of law. Article 12 also guarantees the right to be free from discrimination for citizens both in legislation and before public authority as well as in state administration. Nonetheless, Clause (3) Article 12 provides exception that the stipulation of non-discriminative principles is not including the provision that specifies private law or the stipulation and practice that restricts employees who are related with particular religious affairs.

Article 13 gives the guarantee for citizens of Singapore not be banished or exiled from Singapore. Furthermore, the freedom to travel is guaranteed within the territory of Singapore except being prearranged differently under the virtue of law regarding a national security issue.

Article 14 Clause (1) guarantees citizen's rights to freedom of expression, right to assemble peacefully without any weapon, and the right to form an association. However those rights can be restricted for the interest of national security, relationships with other States, public order, privilege of the Parliament, blasphemy, and can also be restricted by legislation

concerning labor or education. Clauses (2) and (3) of the Constitution of Singapore declare the followings.

*(2) Parliament may by law impose*

*(a) on the rights conferred by clause (1)(a), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence;*

*(b) on the right conferred by clause (1)(b), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof or public order; and*

*(c) on the right conferred by clause (1)(c), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, public order or morality.*

*(3) Restrictions on the right to form associations conferred by clause (1) (c) may also be imposed by any law relating to labor or education.*

Freedom of religion is guaranteed in Article 15 Clause (1) that asserts “Every person has the right to profess and practice his religion and to propagate it”. Every religious group in Clause (3) is declared to have the right to (a) manage their own religious affairs, (b) establish and run an institution for the intention of a religious charity, and (c) to acquire and own property and preserve and manage it according to the rule of law. The last provision concerning Human Rights is Article 16 that secures the right to education, which incorporates within it the right for religious groups to build and run an education system.

## **8. Vietnam**

Vietnam is a Member State of ASEAN that is based on the socialist system. The Constitution of Vietnam specifies that the Socialist Republic

of Vietnam is the people's State, from the, and for the people. The people in this term are the alliances among classes of workers, agriculture labor, and intellectual.<sup>37</sup> The State is run based on the principle of concentrated democracy, which is run by the Communist Party.<sup>38</sup>

As a State based on communism, it reaffirms its objectives for the mastery of the people in all fields, as assured in Article 3 as follows:

*The State guarantees and unceasingly promotes the people's mastery in all fields, and severely punishes all acts violating the interests of the motherland and the people; it strives to build a rich and strong country in which social justice prevails, all men have enough to eat and to wear, enjoy freedom, happiness and all necessary conditions for complete development.*

The provisions regarding Human Rights can be found in Chapter V (Fundamental Rights and Duties of the Citizen) as well as in several other parts that regulate main policies of the State. In Article 50 it is confirmed that in the Socialist Republic of Vietnam, Human Rights in the fields of politics, civil, economic, culture, and social right are respected. Those rights are integrated in citizen's rights that are specified by the Constitution and legislation. Therefore, the formulation of rights in the Constitution is as "citizen's rights". It is also reaffirmed in Article 51 that citizens' rights are not separated from their obligations.

Citizen's rights guaranteed in Article 52 to Article 75 are as follows:

1. Right to be equal before the law,
2. Right to partake in government, present petition, and use his voting right in referendum,
3. Right to vote and be elected without discrimination,
4. Right to occupation,
5. Right to freedom of venture that regulated under the virtue of law,
6. Right to property,
7. Right to education and training,

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<sup>37</sup> Article 2 Constitution of Vietnam.

<sup>38</sup> Article 4 Constitution of Vietnam.



8. Right to do research, invention, creation, and other cultural activities,
9. Right to health protection,
10. Right to build housing according to the regulation of municipal landscape,
11. Right to equality of men and women in fields of politic, economic, cultural, social, and family,
12. Right of children to be free from discrimination,
13. Right of children to protection and education,
14. Right of freedom to travel and reside,
15. Right to freedom of belief and religion, to profess a religion or not to profess any,
16. Right to protection of life, health, honor, and dignity,
17. Right not to be punished based on retroactive legislation,
18. Right to protection of place to dwell,
19. Right to the confidentiality of correspondence, telephone conversation and telegram,
20. Right to protection for a citizen in a foreign country.

Each right mentioned above is also entailed with the stipulation of duty or responsibility and action that must be conducted by the State. The requirements concerning the right to education for example, Article 59 declares that basic education is compulsory and free. The State must create a policy on school fees and scholarships and create circumstances that are essential for children with a disability in order to be able to obtain general knowledge and receive proper training. For the right to health care Article 61 states that the State must build a hospital financing system to reduce the costs of healthcare.

Although Vietnam is a State with communism, the right to property is recognized. Moreover, Article 23 asserts that an individual or organizational legal ownership according to the law cannot be nationalized, except in particular cases for the interest of national defense and security, then the State can purchase it compellingly.

## 9. Myanmar

The Constitution of Myanmar presently is the Constitution that has been authorized in 2008. As explained in the Preamble of the Constitution, the system employed is based on a one party system due to the unsuccessful materialization of the democratic system.<sup>39</sup> The Preamble also reassures that the State is based on eternal principles that comprise justice, liberty, equality, peace, and prosperity. Paragraph 9 of the Preamble of the Constitution of Myanmar asserts the followings.

*We, the National people, firmly resolve that we shall:*

- *Steadfastly adhere to the objectives of non-disintegration of the Union, no disintegration of National solidarity, and perpetuation of sovereignty;*
- *Stalwartly strive for further burgeoning the eternal principles namely justice, liberty, equality and perpetuation of peace and prosperity of the National people;*
- *uphold racial equality, living eternally in unity fostering the firm Union Spirit of true patriotism;*
- *Constantly endeavor to uphold the principles of peaceful co-existence among nations with a view to having world peace and friendly relations among nations.*

The provisions concerning Human Rights are also integrated in Chapter VIII and formulated as citizen's rights, i.e. in chapters concerning "Citizen, Fundamental Rights and Duties of the Citizens" starts from Articles 347 to 384. Citizen's rights that are guaranteed in this section are the followings.

1. Right to be equal before the law,
2. Right to get protection of law,
3. Right to be free from discrimination,
4. Right to equal opportunity to become government official, to occupation, business, industry, knowledge and expertise, as well as exploration of art, science, and technology,
5. Right to women of equal right and pay for equal job,
6. Right to mothers, children, and pregnant women of equal guarantee of rights,

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<sup>39</sup> Third paragraph of the Preamble of the Constitution of Myanmar, as the Basic Principle of state life as regulated in Chapter I Article 6, articulates that the system to be developed is a disciplined multi-party democratic system.

7. Right to life and personal freedom,
8. Right to deliver and disseminate opinion and beliefs,
9. Right to assemble peacefully and unarmed,
10. Right to form association and organization,
11. Right to develop language, literature, professed religion, and custom,
12. Right to reside in Myanmar territory,
13. Right to protection of property,
14. Right to protection of privacy and safety of the house, property, correspondence, and communication,
15. Right to be free from slavery and human trafficking,
16. Right to freedom of religion and run religious activity,
17. Right to education,
18. Right to conduct research and science activity,
19. Right to health care,
20. Right to vote and to be elected,
21. Right of not to be punished more severely than the threat of punishment in legislation,
22. Right of not to be judged twice for the same case,
23. Right to defend self before the law,
24. Right of not to be arrested and imprisoned arbitrarily,
25. Right to seek asylum in and out of the country.

The guarantees of those rights are also followed by several basic provisions of State policy that should be taken for the protection and promotion of the guaranteed rights. To guarantee the right to freedom of religion, for instance, Article 364 prohibits the abuse of religion for the interests in politics. The fulfillment of the right to education affirms that primary education is compulsory.

Inside the provisions of Human Rights, there are also certain common limitations. The freedom of expression, right to state opinion, freedom of assembly and to form a union that are guaranteed in Article 354 are respected as long as these rights have not violated legislations that protect national security, the laws and order, peace in society, as well as public order and good moral.

In addition to Human Rights guarantees above, there are also materials that reaffirm the obligation of the State regarding Human Rights. In the fields of education and healthcare, Article 28 declares as follows:

*28. The Union shall:*

- (a) Earnestly strive to improve education and health of the people;*
- (b) Enact the necessary law to enable National people to participate in matters of their education and health;*
- (c) Implement free, compulsory primary education system;*
- (d) Implement a modern education system that will promote all-around correct thinking and a good moral character contributing towards the building of the Nation.*

In the field of health care, Article 32 affirms responsibility of the State specifically for mothers, children, elderly, and other groups with special needs, as what follows.

*32. The Union shall:*

- (a) Care for mothers and children, orphans, fallen Defense Services personnel's children, the aged and the disabled;*
- (b) Ensure disabled ex-Defense Services personnel a decent living and free vocational training.*

The restriction of Human Rights, in addition to qualitatively stated in provisions on Human Rights, is also aggravated by the Defense Services institution that possesses enormous power. This fact is emphasized in Article 20 along the following lines.

- (a) The Defense Services is the sole patriotic defense force which is strong, competent and modern.*
- (b) The Defense Services has the right to independently administer and adjudicate all affairs of the armed forces.*
- (c) The Commander-in-Chief of the Defense Services is the Supreme Commander of all armed forces.*
- (d) The Defense Services has the right to administer for participation of the entire people in Union security and defense.*

*(e) The Defense Services is mainly responsible for safeguarding the non-disintegration of the Union, the non-disintegration of National solidarity and the perpetuation of sovereignty.*

*(f) The Defense Services is mainly responsible for safeguarding the Constitution.*

## **10. Brunei Darussalam**

Brunei Darussalam is a Kingdom that professes the ideology of the King's sovereignty. Although Brunei Darussalam has a Constitution that has recently been amended in 2004, the Constitution is more concerned with the structure and mechanism of the government where the power of Sultan and Yang Dipertuan is the supreme power. As one of the consequences of the sovereignty, *Sultan* and *Yang Di-Pertuan* have immunity rights as regulated in Article 84B.

The existence of the Constitution among other things is to constitute representative institutions as highlighted in the Second Paragraph of the 1959 Constitution like so:

*WHEREAS WE intend to govern in accordance with the provisions of this Constitution and the laws of Brunei Darussalam and, by progressive steps hereafter, to introduce further representative institutions into the government of Brunei Darussalam;*

Indirectly, the Constitution of Brunei Darussalam has two provisions regarding Human Rights, i.e. Article 3 Clause (1) declaring that although the official religion is Islam, other religions can be run peacefully and in harmony by the people who profess it. Besides, the Constitution of 2004 also protects citizens' right to be elected as members of the Legislative Council. Article 29 declares:

*“Subject to Article 30, any person (other than a Regent) who is a citizen of Brunei Darussalam and who has attained the*

*age of 21 years shall be qualified to be a Member of the Legislative Council.”*

At least the stipulation concerning Human Rights is made more difficult to implement by the provision of the state of emergency that is regulated in Article 84. Clause (4) Article 84 declares that in an emergency condition some actions that violate and restrict Human Rights can be executed in the following manners.

*83. State emergency.*

*(4) Without prejudice to the generality of subsection (3), such Orders may be made with regard to any matters coming within the classes of subject hereinafter enumerated, that is to say—*

- (a) Censorship, and the control and suppression of publications, writing, maps, plans, photographs, communications and means of communication;*
- (b) Arrest, detention, exclusion and deportation;*
- (c) Control of the harbors, ports and territorial waters of Brunei Darussalam, and of the movements of vessels.*
- (d) Transportation by land, air or water and the control of the transport and movement of persons, animals and things;*
- (e) Trading, storage, exportation, importation, production and manufacture;*
- (f) Supply and distribution of food, water, fuel, light and other necessities;*
- (g) Appropriation, control, forfeiture and disposition of property and the use thereof;*
- (h) Conferring powers on public officers and others;*
- (i) Requiring persons to do work or render services;*
- (j) Constituting a special police force;*
- (k) Formation of tribunals and other bodies for the purpose of deciding any matters specified in any such Orders, but having no power to inflict imprisonment or fines;*
- (l) Modification, amendment, supersession or suspension of all or any of the provisions of any written law;*

- (m) Entry into, and search of, premises or other places, and search and interrogation of persons;*
- (n) Prescribing fees or other payments.*

### **C. IDENTIFICATION OF HUMAN RIGHTS IN THE CONSTITUTION OF STATE MEMBERS OF ASEAN**

The previous sub-chapter has presented the differences regarding the guarantee of Human Rights inside the Constitutions of the member states of ASEAN both in quantity and quality aspects. From the ten States the Constitutions can be categorized in three categories, i.e. those that provide Human Rights guarantees, those that provide Human Rights guarantees but with various restrictions, and those that does not or insignificantly provide guarantees of Human Rights. Constitutions of the state that provide Human Rights guarantees are the Constitutions of the Philippines, Thailand, Cambodia, Indonesia, and Laos. Constitutions that give Human Rights guarantees including various restrictions are the Constitutions of Malaysia, Singapore, Vietnam, and Myanmar. The Constitution that gives very few guarantees of Human Rights is the Constitution of Brunei Darussalam.

In addition, in formulating Human Rights guarantees there is also a difference between those that only formulate the rights as citizens' rights and those that formulate Human Rights as the inherent right of the human race. The States that formulate all rights in the form of citizen's rights are Cambodia, Laos, Myanmar, and Vietnam. The States that formulate rights as Human Rights and citizen's rights for particular rights are Thailand, the Philippines, Indonesia, Singapore, and Malaysia. The formulation of Human Rights as citizen rights certainly brings consequences because its scope is narrow, e.g. only for citizens. That kind of formulation is not suitable with the concept of Human Rights as inherent rights of the human beings owing to their humanity instead of their nationality. Of its own accord, in the State where Human Rights are formulated as citizen's rights, Human Rights are slumped down into a set of merely legal right instead of moral rights with intrinsic nature. In this context the existence of the ASEAN Human Rights Declaration is enormously necessary to restore the position of Human Rights in the member States' legal system. When the States ratify ASEAN Human Rights Declaration they automatically recognize the position and character of Human Rights as moral rights that are intrinsic in nature.



Regardless the issue of rights formulation and quantity of the guarantees, Table 1 below identifies the rights that have been guaranteed in the Constitutions of the member states of ASEAN.

**Table 1**  
**Human Rights in the Constitutions of ASEAN States**

No.	Rights that are Guaranteed	The State
1.	Right to life and livelihood	The Philippines, Thailand, Malaysia, Cambodia, Singapore, Indonesia.
2.	Right to be equal and personal freedom	The Philippines, Thailand, Malaysia, Cambodia, Myanmar, Singapore, Indonesia.
3.	Right to property	The Philippines, Thailand, Cambodia, Myanmar, Vietnam, Indonesia.
4.	Right to safety	The Philippines, Cambodia, Indonesia
5.	Right to be free from arbitrary arrest, detention, and raid	The Philippines, Thailand, Malaysia, Laos, Myanmar, Vietnam.
6.	Right to confidentiality of communication and correspondence	The Philippines, Vietnam.
7.	Right to freedom of opinion and expression, freedom of press.	The Philippines, Thailand, Malaysia, Cambodia, Laos, Myanmar, Singapore, Vietnam, Indonesia.
8.	Right to freedom of assembly	The Philippines, Thailand, Malaysia,

	Cambodia, Laos, Myanmar, Singapore, Vietnam, Indonesia.
9. Right to deliver objection and petition	The Philippines, Thailand, Laos, Vietnam.
10. Right to freedom of beliefs, religion and to practice religion	The Philippines, Thailand, Brunei Darussalam, Malaysia, Cambodia, Laos, Myanmar, Singapore, Indonesia.
11. Right to information and communication	The Philippines, Thailand, Vietnam, Indonesia.
12. Right to a just trial.	The Philippines, Thailand.
14. Right to be free from coercion, torture and intimidation.	The Philippines, Cambodia, Indonesia.
15. Right not to be declared guilty before any fixed verdict exists (presumption of innocence).	The Philippines, Thailand, Vietnam.
16. Right to be free from slavery and forced labor	The Philippines, Thailand, Malaysia, Singapore.
17. Right to be free from cruel and degrading punishment	The Philippines, Myanmar, Indonesia.
18. Right to be free from imprisonment due to the inability pay debt or tax	The Philippines.
19. Right of not to be adjudicated and punished twice for the same crime	The Philippines, Malaysia.
20. Right of not to be punished based on retroactive legislation	The Philippines, Thailand, Malaysia, Myanmar, Indonesia.
21. Right to vote and be elected	The Philippines, Thailand, Brunei Darussalam, Malaysia, Cambodia, Laos,

	Myanmar, Vietnam, Indonesia.
22. Right of indigenous people, ethnic group, tribe, and traditional community to conserve local custom and wisdom.	The Philippines, Thailand, Laos, Indonesia.
23. Right to place of dwelling	The Philippines, Thailand, Vietnam, Indonesia.
24. Right of health care	The Philippines, Thailand, Cambodia, Laos, Vietnam, Indonesia.
25. Right to protection and equality for women labor	The Philippines, Cambodia, Myanmar, Vietnam.
26. Right to partake in social, political and economic life.	The Philippines, Thailand, Cambodia, Vietnam, Indonesia.
27. Right to education	The Philippines, Thailand, Cambodia, Laos, Myanmar, Singapore, Vietnam, Indonesia.
28. Right to be equal before the law and have protection of the law	Thailand, Malaysia, Cambodia, Laos, Myanmar, Singapore, Vietnam, Indonesia.
29. Right to be free from discriminative treatment on whatsoever grounds	Thailand, Cambodia, Laos, Indonesia.
30. Right to be free to travel	Thailand, Malaysia, Cambodia, Vietnam, Indonesia.
31. Right to family's right, dignity, reputation and privacy	Thailand.
32. Right to confidentiality of personal data	Thailand.
33. Right of children, juveniles, women, pregnant women, elderly and persons with disability to get protection and service.	Thailand, Laos, Myanmar.

34.	Right to freedom of venture and occupation, and guarantee of work safety	Thailand, Cambodia, Laos, Myanmar, Vietnam, Indonesia.
35.	Right of academic freedom of academic	Thailand.
36.	Right to welfare, public facility and relief from the State for the poor and groups with special needs	Thailand, Laos, Indonesia.
37.	Right to sue government institution owing to an action perpetrated	Thailand.
38.	Right to follow up and request for responsibility of political officials	Thailand, Laos.
39.	Right to form union and organization	Thailand, Malaysia, Cambodia, Laos, Myanmar, Singapore, Vietnam, Indonesia.
40.	Right of not to be banished or exiled	Malaysia, Singapore.
41.	Right to social security	Cambodia, Indonesia.
42.	Right of housewives to earn the same values or remuneration as when they are working outside the house	Cambodia.
43.	Right to perform a strike and demonstration	Cambodia.
44.	Right of women to be free from discrimination and exploitation	Cambodia, Vietnam.
45.	Right of children to life, growth and development, obtain education, protection and free from discrimination	Cambodia, Vietnam, Indonesia.
46.	Right and freedom to perform study, research and development of science and technology.	Laos
47.	Right to establish a family and to generate offspring through a lawful marriage	Indonesia
48.	Right to advance selves in fight for collective rights	Indonesia
49.	Right to a nationality	Indonesia
50.	Right to prosper and deserve a healthy environment.	Indonesia

This list of rights in the Constitutions of all States of ASEAN shows nearly all rights have a constitutional basis in one or more Constitutions of the Member States of ASEAN; only several rights have not existed in any Constitution of the ASEAN states. These unlisted rights indeed are special in character and are derivatives of other rights, which are usually regulated in specific international human rights instruments, such as the followings.

1. Right to be free from forced disappearance,
2. Right of the minorities, whether ethnic, religion, and cultural minorities,
3. Right to be free from discrimination based on sexual orientation and gender identity,
4. Rights of the internal refugees,
5. Right to receive remedy and rehabilitation due to Human Rights violation, and
6. Right and protection for migrant workers and members of their families.

In the Constitutions of ASEAN States there are also certain guarantees of rights that are commonly recognized and can be said to be typical for ASEAN States such as the followings.

1. Right of mothers and pregnant women to receive health care and aid,
2. Right of the poor to obtain relief to live properly,
3. Right to be free from slavery and forced labor,
4. Right to protection for the elderly.

## **Chapter III**

# **DEVELOPMENT OF THE CONSTITUTIONS IN ASEAN STATES TOWARDS THE ASEAN HUMAN RIGHTS DECLARATION**

The Constitutions are commonly interpreted through the texts that reveal the working political configuration. A Constitution is a deliberate agreement made its makers and decision makers with a number of comprehensions and interests they possess. Although believed as ideal important values and meanings in managing the state's social, economic and political life, Constitution is still likely creating frictions between the dominant power and the less powerful ones. Therefore the consistency of Constitution's application in State's policy is never ascertained.

Incorporated Human Rights into State Constitution is one of the characters of a modern Constitution. Among 120 State Constitutions known in the world, more than 80 percent of them have incorporated Human Rights Articles specifically the 1948 Universal Declaration of Human Rights. This progress is a consequence of the relationship structure of nations as part of one international community mainly through United Nation organizations. Since the declaration of the 1948 Universal Declaration of Human Rights, which then followed by a number of Covenants and International Conventions concerning Human Rights, these were gradually adopted by the states as a part of the state regimes' recognition to the international legislation regime constructed for the advancement of respect for Human Rights in international relationships.

This part briefly describes the development of the Constitutions in ASEAN states, both from normative aspects (amendments) and from practice or implementation on the field towards the advancement of Human Rights issues and towards the same standard for the guarantees of human rights protection among the ASEAN States.

## 1. Indonesia

Major changes in the political structure of Indonesia's legislation happened after the Soeharto regime collapsed in 1998. Reformation marked these changes, one of which was the four amendments of the 1945 Constitution of the Republic of Indonesia (henceforth the 1945 Constitution).

The most interesting thing from the amendments of the 1945 Constitution is the Second Amendment to the 1945 Constitution that had taken effect on 18 August 2000. Those articles concerning Human Rights were so completely adopted from Chapter XA on Human Rights. From the aspect of quality of the guaranteed rights, the 1945 Constitution after this Amendment regulates more comprehensively in comparison to the previous Amendment, i.e. from just five articles (right to occupation and proper living for humanity, freedom of association and assembly and to express thoughts verbally and in writing, the guarantee of freedom of religion and beliefs, and the right to teaching, and the right to access natural resources) to at least 17 articles (with 38 substances of various rights) regarding Human Rights. And, these articles also have been regulated by and emphasized in the Law No. 39 of 1999 on Human Rights. Meanwhile, Indonesia has also ratified a number of main instruments of international Human Rights laws such as CRC (child right convention), CEDAW (discrimination against women), CAT (convention against torture), CERD (convention against racial discrimination), ICCPR (civil and political rights), ICESCR (economic social cultural rights), and CMW (convention on migrant workers).

The expansion of Human Rights guarantees through Articles inside the 1945 Constitution and the guarantee of legislation, whether the Laws on Human Rights or their ratifications, is a progress in building the legal foundation of the State to strengthen the contract between the ruler and the people in the spirit of Indonesian constitutionalism. The constitutionalism spirit of Indonesia must put forward two purposes of its political Constitution building: First, restriction of power to mitigate arbitrariness; and second, guarantee of respect for, protection and fulfillment of Human Rights. The advancement of Human Rights Articles in the Constitution is a global tendency in various States related to the

recognition of Universal Principles of Human Rights. This tendency would gradually fortify the capacity of the State in supporting human dignity in civilized societies.

International Human Rights instruments that had been signed or ratified by Indonesia are as the followings.

- a) International Covenant on Civil and Political Rights (ICCPR).
- b) International Covenant on Economic, Social and Cultural Rights (ICESCR).
- c) International Convention on the Elimination of All Forms of Racial Discrimination.
- d) Convention on the Elimination of All Forms of Discrimination against Women, (CEDAW).
- e) Convention on the Rights of the Child.
- f) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- g) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (signing).
- h) International Convention for the Protection of All Persons from Enforced Disappearance.
- i) Convention on the Rights of Persons with Disabilities.

This set of ratified or signed Conventions and Covenants does not always mean that understanding, interpretation and implementation of Human Rights reinforcement would progress in accordance with the texts since the relationship between the texts and the political contexts has undergone political and legal dynamics. The authorities who are no longer concerned with and sensitive to problems of the poor, tend to reduce the guarantee of, for example, freedom of expression and freedom of assembly. In addition, if those with authority believe that they are the most righteous and beyond criticism they likely to disregard people's rights. Merely progressive texts are insufficient to provide guarantees of protection and fulfillment of Human Rights because the rights need progressive and effective interpretation to realize them. In this context, frictions between interpretation of power and power of interpretation shall affect each other, specifically in the promotion of Human Rights (Wiratraman 2006).



Four Amendments of the 1945 Constitution have been supported by many parties although the amendments still leave a number of problems. For the program of judicial reform that is supported by many parties, including political support and funds by several foreign funding agencies, many repressive laws have been withdrawn and replaced with numerous legislations that have been more transparent in their making process. For example, the protection for freedom of expression presently is quite ready and indeed supported by many Human Rights Articles. State violence apparently has decreased although it still takes place frequently with impunity for the state actors. State violence has happened in several cases after the Amendment of the 1945 Constitution, e.g. shootings by security forces maiming indigenous people and farmers in Bulukumba (South Sulawesi), Manggarai (East Nusa Tenggara), and Alas Tlogo (East Java); violence against the press (Tomy Winata vs. Tempo, etc); and the murder case of a human rights defender (Munir).

Article 28I line (4) of the Amended 1945 Constitution clearly delineates the State's responsibility in Human Rights. Article 28I line (5) highlights the reinforcement and protection of Human Rights in accordance to principles of the democratic State, and the Article guarantees, regulates, and comprises Human Rights in the legislation.

The term 'in' used in Article 28I line (5), i.e. "...guaranteed, regulated, and comprised in legislation," sets that Human Rights are legislated not only within a specific legislation but also 'in' all legislations that do not reduce the substantiality of Human Rights in the Constitution. This kind of enumeration should be understood by the State as a sign of progress in concept of Human Rights obligations and protection of constitutional rights through strategy of legislation (known as 'progressive realization').

That the authority of the Constitutional Court can become the protective fortress when constitutional rights are violated is very important in democratic country to emphasize the balance of power (in this context between the legislative and the judicative powers). The battle in politics of legislation politics, unfair "deals" for particular legislation package, the weaknesses of human resources in the Parliament in generating proper legal products, which can happen anytime, can be 'corrected' and

‘canceled’ through an appeal to this Constitutional Court.<sup>40</sup> Therefore, restriction of arbitrary abuse of power shall be managed simultaneously with the revitalization of the spirit of constitutionalism, which at present is constantly scrubbed by dominant discourse conglomeration in the frame of ‘human rights’ market-friendly paradigm’ (Wiratraman 2007a).

Thus, the political dynamics of Human Rights in the context of Indonesia must be corrected constantly, not only for its conception and management but also for facing the challenge of building the State’s capability and power to implement human rights in the middle of overpowering market liberalization that mystifies Human Rights politics. In these circumstances, Indonesia’s constitutionalism needs to be incessantly encouraged to staunchly guarantee and protect Human Rights that have already been supported as constitutional rights.

Although some inconsistencies still mar the practice, generally Human Rights in Indonesia have been regulated completely in the Constitution, the highest law in the land.

## 2. Thailand

In its Constitution, the political system of government in Thailand is a Constitutional Monarchy that ranks the King’s position as the Head of the State. Although the Constitution has undergone amendments repeatedly, the political system has never been changed since 1932. Until now, in terms of Constitutional amendments, Thailand is the State with the highest number of amendments. In the period of 79 years since the Constitutional Monarchy Era, Thailand has changed its Constitution 18 times. For Thai people, *coup d’état* and overthrowing of Prime Ministers are not something extraordinary. In the same period of time, there has been 39 times of government leadership changes, both normally (22

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<sup>40</sup>Several Constitutional Court’s verdicts also need to be appreciated as a form of protection of constitutional rights, such as the Constitutional Court’s decision No. 011-017/PUU-I/2003 as Judicial Review of Law No. 12 of 2003 concerning General Election of People Representative Boards (DPR, DPD and DPRD). In this verdict, majority of Constitutional Court Judges granted the appeal with substance of rehabilitation of citizen’s rights (civil and political rights) of previous members/followers of the former Communist Party.

times through General Election) and abnormally through military *coup d'état*.

The last *coup d'état* happened on 19 September 2006 when Prime Minister Thaksin Shinawatra was overthrown by the military, which then followed the coup with the most recent amendment of the Constitution in August 2007. The succession of Prime Minister happened again in 2011 through the election of Thaksin's younger sister Yingluck Shinawatra on 5 August 2011; it is not surprising that numerous Constitutional amendments and successions of government leaders keep producing prolonged political instability.

In fact this situation cannot be separated from the existence of the middle class that enormously affects in coloring the political life since the beginning of the establishment of the Constitution and government reshuffle. The middle class movement, particularly in Bangkok, has been relatively significant in reconstructing the political discourse, including the pressure to change political structures of statehood.

However, in Thai political history each discourse reproduced and capitalized by the middle class movement towards the public is not always a fundamental issue that is faced by the people of Thailand in reality. The exploitation of the issue on insider-trading of company assets with no tax obligation is obviously an example of an elite discourse not immediately comprehended by most people. However Human Rights issues related to mass extra-judicial murder operations against around 1,300 drug suspects, the escalation of violence and disappearance of people in Southern Thailand, the construction of Pak Moon Dam that expropriated and threatened the life of thousands of villagers in northern Thailand, as well as the liberalization of the trade agreement under the United States' control are not so much brought up by the middle class. (It shows that the reproduction of the discourse by the middle class, without relating it with issues of Human Rights violations that has been suffered by the people hitherto, is truly risky in the political context of Thailand. WHAT?)

The process of the 1997 Constitution establishment in Thailand has been considered as the most democratic process, by extensive involvement of the public and a relatively long mechanism in the history of Constitutional

amendments. However, the Constitution is not a basic legislation that is free of values as it is a textual product of actual political dialectics, and the amendments of the Constitution of Thailand reveal a number of articles that have been settled for the interests of the market and power.

The incidence of dissolution of the Parliament by Prime Minister Thaksin Shinawatra in 2006 blew up when a member of the Parliament criticized him and asked for his accountability. This was the simplest example to show that the Constitution system of Thailand was extremely weak at that point in time.<sup>41</sup>

The implementation of a good Constitution is not always congruent to the reality in the field, particularly realities of state policies. In Thailand, for example, *The People's Constitution* that was admired by Lubis (2002, pp. 157-158) as a nearly perfect Constitution was nevertheless overpowered easily by the regime of Thaksin Shinawatra.

Regardless the volatile political situation, Thailand has a relatively long history in the process of recognition of international law instruments and the recognition of Human Rights in its Constitution. Thailand had unswervingly participated in the establishment of the 1948 Declaration of Human Rights.

Thailand has also accessed a number of international conventions and covenants such as the followings.

- a) International Covenant on Civil and Political Rights (ICCPR).
- b) International Covenant on Economic, Social and Cultural Rights (ICESCR).
- c) International Convention on the Elimination of All Forms of Racial Discrimination.
- d) Convention on the Elimination of All Forms of Discrimination against Women, (CEDAW).
- e) Convention on the Rights of the Child.

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<sup>41</sup>Article 116 (1997 Constitution) declares that the King has prerogative right to dissolve the Parliament. Thaksin, who has proved that he was justified enough to present "truth" in front of the King, could arbitrarily dissolve the Parliament. With the stipulation of the Article, Prime Minister, with the shield of Constitution, can easily dissolve the Parliament and replace it with a Parliament that is more friendly to the interests of Prime Minister (*Daily Kompas*, 10 March 2006, 'Constitution Crisis in Thailand').

- f) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- g) Convention on the Rights of Persons with Disabilities.

Although the government of Thailand also had proclaimed a number of reservations on numerous international Conventions and Covenants, those reservations were withdrawn gradually later.<sup>42</sup> When the Constitution was legitimated in August 2007 it contained at least 30 articles of Human Rights, including recognitions of civil and political rights as well as economic, social and cultural rights. The guarantee of human dignity and equality without discrimination as guaranteed in the 1948 Declaration of Human Rights has been adopted thoroughly in the Constitution. The Constitution of Thailand even guarantees communities' rights to manage and use natural resources.

In addition to the Human Rights instruments, Thailand also has a number of mechanisms of protection of Human Rights such as the Institution of the National Commission on Human Rights of Thailand, the Office of the National Anti-Corruption Commission, Ombudsman, The Rights and Liberties Protection Department, Ministry of Justice, Department of Peoples' Rights Protection and Legal Aid, and the Constitutional Court. These mechanisms of Human Rights protection are space for the public to encourage the efforts of Human Rights promotion at the national level. This set of efforts is also supported by the bond between Thailand and the Human Rights mechanisms in ASEAN (ASEAN Inter-Governmental Commission of Human Rights or AICHR and ACWC).

Although Thailand has been quite progressive in the recognition of international law as well as in support of Human Rights mechanisms whether at the national, regional and international levels, the Human Rights issues in Thailand remain fundamental. For instance, a number of Human Rights reports claim that only a few people are liable over more than 20 disappear or murdered Human Rights defenders and people activists since 2001, the prolonged violence conflict in Southern Thailand,

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<sup>42</sup> For instance, reservation of Articles 4 and 22 of the ICERD, Article 1 paragraph 1 of the ICESCR, Article 1 of the ICCPR, Articles 16 and 29 of the CEDAW, Article 30 of the CAT, and Article 22 of the CRC.

extrajudicial killing of almost 3,000 persons in the “war on drugs” policy, and government pressure or influence in restricting freedom of the press.<sup>43</sup>

This situation affects the function of law and Human Rights reinforcement in Thailand, which simultaneously become the challenge in building the spirit of Human Rights constitutionalism.

### 3. Viet Nam

Vietnam has amended its Constitution repetitively since 1946. The amendments happened both in time of the Democratic Republic of Vietnam or DRV (1945-1976) and in time of Socialist Republic of Vietnam or SRV (1976 to date). The most recent Constitution amendment took place in 2001.

Discussion of the performance of Vietnam’s Constitution cannot be separated from the existence of the Constitution of the Vietnam Communist Party (*Dieu le Dang*) because the Party’s Constitution is always in closely related with the State/Government. This is why the amendment of the Constitution for the ranks and files in the Communist Party becomes important as sign of progress. For example, the amendment of the Constitution of Vietnam’s Communist Party in 2006<sup>1</sup> was emphasizing of the Party’s role in the transformation of the State and society by strengthening monitoring units of Party to investigate anti-Party violation by party members and government officials/employees, boundaries and policies of the Communist Party, resolutions of the Committee, the Party’s ethics and Way of Life derived from the Central Committee of the Party (Sidel 2009, p. 10).

The Constitution of Vietnam, specifically Chapter V, regulates a number of Human Rights, i.e. protection to the right to education, self development, equality before the law, guarantee of rights without discrimination to vote

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<sup>43</sup>Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with Paragraph 15 (b) of the annex to Human Rights Council resolution 5/1, Human Rights Council, Working Group on the Universal Periodic Review (Twelfth Session, Geneva, 3–14 October 2011), A/HRC/WG.6/12/THA/2, 25 July 2011.

for the National Assembly and House of Commons, right to proper living, right to develop business activity, right to health care, protection of women rights, right of the persons with a disability, right to receive rehabilitation for war victims, equality political, social, economic, and cultural rights, guarantee of proper life in family, right to live and travel from abroad, right to speak, freedom of the press, right to obtain information, freedom of religion, freedom of torture, guarantee of a fair trial, and the right to be free from eviction. Besides, several articles in its Constitution also regulate citizen's obligations in Human Rights and governance affairs.

Compared to the Constitution of the Communist Party, Vietnam's Constitution regulates more of the guarantees and protections of Human Rights. For that reason, Human Rights guarantees incorporated into the Constitution are applied and or intended for all citizens without exception although citizens of Vietnam are not involved in the political process such as the General Election.

An interesting thing in the Constitution of Vietnam is that it can be considered as a very complete set of rules covering from the observation on civil and political rights to economic, social, and cultural rights. Human Rights articles are apparently sufficient to be the foundation of development of the instrument and basis of the implementation of Human Rights reinforcement at the domestic level, or at least they are enough to be the base of citizen's protection.

Moreover, several international Human Rights legal instruments also have been ratified by the Government of Vietnam as the followings.

- a) International Covenant on Civil and Political Rights (ICCPR).
- b) International Covenant on Economic, Social and Cultural Rights (ICESCR).
- c) International Convention on the Elimination of All Forms of Racial Discrimination.
- d) Convention on the Elimination of All Forms of Discrimination against Women, (CEDAW).
- e) Convention on the Rights of the Child.
- f) Convention on the Rights of Persons with Disabilities.

A number of reservations has also been applied such as the reservation of Article 22 of ICERD and Article 29 of CEDAW, both related to issues of interpretation conflict of the Convention that has been submitted for its resolution through ICJ/International Court of Justice. However, the international legislations that had been ratified became important due to their position in strengthening the position of Vietnam's Constitution that had given so many guarantees and protection of fundamental rights for its citizens.

Although having many constitutional bases of Human Rights in the Constitution of Vietnam, many of the Human Rights articles in Vietnam are still ignored or not strongly upheld or just simple rhetorics, such as the protection of the constitutional rights of freedom of assembly, freedom of association, freedom of expression and freedom of Press (Article 69). The right of assembly and form an association were troubled by problems of registration, reporting, and other control mechanisms that restrict union performance and the guarantee on citizen's rights. The government, especially for the domination by the Communist Party, is extremely conscientious in controlling the growth of existing social organizations that they do not turn into the opposition or opponent against the dominant State power (Sidel 2009, pp. 131-138).

Freedom of the press and freedom of movement for critical news reporter are so limited to perform objective and critical news coverage. For example, journalist Cu Huy Ha Vu has been punished because he is accused as executing anti-Government propaganda on 4 April 2011 when he reveals opinion on the necessity of the multi-party system in Vietnam. Similar cases are still happening, and journalists are arrested by the authorities in Vietnam. This is one of the challenges for Vietnam to be more advanced and open to uphold freedom of expression in the State, given the fact that the Constitution of Vietnam has literally guaranteed those rights. The main challenge is to encourage the Constitution not to merely become a futile document or guarantee on paper but also as a powerful instrument of those fundamental rights to be realized for the interests of its citizens.

#### 4. Myanmar



The release of Aung San Suu Kyi on 13 November 2010 has been thought as a political change in Myanmar. It is believed that the change shall open gradually the atmosphere of democratization although it does not fully guarantee freedom, democracy, and Human Rights. Aung San Suu Kyi believes that the sign of change is happening and shall be happening more, at least from her observation regarding the government under the new President Thein Sein (*The Telegraph*, 18 September 2011).

The Human Rights situation in Myanmar has also received international attention, specially through the UN organization that assigns the UN Special Rapporteur on the Situation of Human Rights in Myanmar Tomas Ojea Quintana since May 2008. According to Quintana's report in his 5-day mission in August 2011 to Myanmar, there are a number of important Human Rights issues to be concerned about, e.g. numerous political prisoners, the continuation of torture and inhuman treatment during interrogations, attacks over civilians, extrajudicial killings, sexual violence, arbitrary arrests, eviction or expropriation of land, recruitment of child soldiers, and forced labor.

Furthermore, violation of economic, social, and cultural rights continue unabated such as the shortcomings of supply and access to education and health care, of access to a proper dwelling, and protection against rampant property expropriation by the military for its infrastructure. Marginalization often happens against ethnic minorities that continue to suffer threats and violence, evictions, and tortures; so terrible that they seek refuge to the border to get protection from the government of the neighboring States mainly Thailand. In sum the situation of enforcement and promotion of Human Rights in Myanmar is heavily challenging not only domestically but also regionally at the South-East Asia level.

Several things still need to take into account regarding the problem of the normative framework of Human Rights. *First*, the international Human Rights legal instruments that have been recognized or ratified by the Government of Myanmar are still limited in quantity. From a number of main covenants or the Convention of Human Rights, the Myanmar government has ratified only two (CRC and CEDAW, with reservations on Article 29) in 1991 and 1997. The rest still have not been recognized or ratified.

Although recognizing only a few of international Human Rights laws, on a national scale the Government of Myanmar in its recent Constitution of 2008 has recognized a number of Human Rights, both civil and political rights as well as economic, social, and cultural rights. Although not mentioned completely, limited and full of ambiguity in their formulation, those human rights norms are still important and necessary for a start to develop a program and/or policy of Human Rights. Those articles can be seen in Chapter VII (on Citizen, Basic Rights and Obligations of Citizen, Articles 345-390 Constitution of Myanmar 2008). These Articles are concerning equality of citizens before the law, guarantees of non-discrimination on whatever basis, protection of the right to life, guarantee of freedom of expression, prohibition of slavery and human trafficking, guarantee of freedom of religion, right to education and health care, right to property and develop economic activity.

Certainly, the guarantees of those basic rights become important for the Government of Myanmar to develop more extensive and advanced Human Rights guarantees. Human Rights enforcement on the basis of the 2008 Constitution is realized when the State shows strong commitment in building a fair legal system.

In the context of Myanmar, the issues of capacity, liberty and independency of judicial power have also become very significant issue. A number of regulations and legislation still restrict basic rights and contradict the International Human Rights legislation standards. The challenges in realizing Articles of the Constitution include not only the State refusal to implement the local normative framework that transgresses the Human Rights, but also the State refusal to realize the fulfillment and protection of Human Rights in Myanmar today.

## **5. The Philippines**

The Philippines is one of the Member States of ASEAN that is considered to have the most complete legal framework on Human Rights, both sourced from international Human Rights legal instruments, fundamental law (Constitution), and other supporting legislations.

The Philippines has ratified a large number of Covenants and Conventions such as the followings.

- a) International Covenant on Civil and Political Rights (ICCPR).
- b) International Covenant on Economic, Social and Cultural Rights (ICESCR).
- c) International Convention on the Elimination of All Forms of Racial Discrimination.
- d) Convention on the Elimination of All Forms of Discrimination against Women, (CEDAW).
- e) Convention on the Rights of the Child.
- f) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- g) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (signing).
- h) Convention on the Rights of Persons with Disabilities.

From these international legislations, nearly all have been ratified by the Government of the Philippines without reservation except for one, which is CRC-OP-AC (or Operational Protocol on Children in Armed Conflict). The Government of the Philippines is involved in running the mechanism required in a number of international legislations. Therefore, the Government of the Philippines has shown full commitment to engage in support of international legislations.

Besides the ratified international Human Rights legislation, and national law, the Constitution also has a complete basic legislation that guarantees Human Rights. The 1987 Constitution of the Philippines regulates the guarantee of freedom from poverty, guarantee of social services, of occupation and proper livelihood, and the improvement of quality of life. The Constitution also obligates the State to promote social justice, to recognize women's rights, to protect and promote right to health care, right to education, right of labor, right of indigenous people, and to support the role of non-Government organizations, social organizations, and sectoral organizations.

Particularly, Articles III and XIII of the Constitution also regulate Human Rights more specifically. The rights in this Article III (of *Bill of Rights*) are

right to life, right to freedom and right to safety, right to have fair trial, right to personal communication, guarantee of freedom of religion, and guarantee of no violence and discrimination during legal process. The rights offered in Article XIII (*Social Justice and Human Rights*) are State protection on human dignity; the reduction of social, economic and political disparities; promotion of social justice; protection of rights of labor, farmer, fishermen, urban poor; right to health care, right to food, right of the persons with disability, protection to women's right; guarantee of existence and role of non-Government organization and social organization; right to affordable and good quality education, academic freedom; and right to establish family or to generate offspring according to his religion or beliefs, protection of children's right, and development of social security.

Basic rights that have been regulated in detail can become an example for other States to develop guarantees of rights or freedom not only written in the Constitution and legislation but also in reality of the protection of the citizens' interests.

In the Philippines the challenge of the protection and fulfillment of Human Rights is of great importance to the State. For example, both reports of the Special Rapporteur and Human Rights Committee emphasize concern on 'extrajudicial execution' targeting the left activists, Human Rights defender activists, leaders or members of indigenous peoples, and journalists and reporters. This concern includes the issue of widespread violence practice and torture against convicts in prisons, inmates' communication access with their family and legal advisor that has been restricted by law enforcement agencies, all of which are revealing the facts that Human Rights in the Philippines are not protected sufficiently.<sup>44</sup>

The burning issues of economic, social and cultural rights, particularly the right to social security and proper living standards, which are considered as insufficiently fulfilled by the Government, draw the attention of the

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<sup>44</sup>Paragraph 13-14, Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the Annex to Human Rights Council Resolution 5/1, Human Rights Council, Working Group on the Universal Periodic Review (First session, Geneva, 7-18 April 2008), A/HRC/WG.6/1/PHL/2, 31 March 2008.

OHCHR.<sup>45</sup> The challenge of Human Rights constitutionalism in the Philippines is not different from the neighboring States in South-East Asia. However, compared to other States' Constitutions from the constitutional normative guarantees in it, the 1987 Constitution of the Philippines is considered as the most complete and can become a reference or platform to develop or expand the normative guarantees of *Constitutionalism* of Human Rights at the broader level, specifically at the level of ASEAN Region.

## 6. Brunei Darussalam

Brunei Darussalam is the only member state of ASEAN that embraces a system of Absolute Monarchy where the King, or *Sultan yang Di-Pertuan*, still holds the highest power and runs the Government Institution. In the Kingdom of Brunei Darussalam there are several efforts to establish legislative institutions that have been elected through the General Election. Although the 1959 Constitution had enumerated that the membership of the Legislative Council as appointees of the Sultan, the 1962 General Election's results canceled this Constitutional rule after a party won the General Election for the Legislative Council.

In 2004, through the Amendment of the Constitution, Legislative Council members had been extended into 45 people by adding members that were elected through the General Election in addition to the members appointed by the Sultan. Members of the Legislative Council also have the freedom to state their opinion. However, in 2005 the Sultan dismissed some members of the Legislative Council and replaced them with 27 members that the Sultan appointed by himself. The stipulation on the General Election and Legislative Council in the Amended Constitution was therefore no longer applied. Brunei Darussalam still announces a state of

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<sup>45</sup>Paragraph 25-27, Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the Annex to Human Rights Council Resolution 5/1, Human Rights Council, Working Group on the Universal Periodic Review (First session, Geneva, 7-18 April 2008), A/HRC/WG.6/1/PHL/2, 31 March 2008.

emergency since 1962 and practices the Internal Security Act since 1983.<sup>46</sup>

The Constitution of Brunei Darussalam is a Constitution that gives the smallest amount of guarantees of protection of and respect for Human Rights. However, Brunei Darussalam had ratified several international Human Rights instruments such as the followings.

- a) Convention on the Elimination of All Forms of Discrimination against Women, (CEDAW).
- b) Convention on the Rights of the Child.
- c) Convention on the Rights of Persons with Disabilities.

In this situation, citizens of Brunei Darussalam do not have freedom and protection over their rights, especially political rights. Citizens of Brunei Darussalam cannot participate in the Government or change the Government to be more democratic. The life of the political party is also pressured and directed to pay more attention on social issues instead of political issues that, in reality, is enormously restrained. Even the National Development Party led by Awang Muhammad Yasin is forced to take a loyalty oath to the Sultan.

The restraining of freedom is also suffered by mass media. Based on a regulation of 2001, government officials can close down printing media without any requirements of going through a judicial process and impose penalty and imprisonment to journalists who are considered to have published “lies and propagating crimes”. In 2005 an amendment on Law concerning Agitation had fortified the prohibition to criticize the Sultan and the National Ideology. Therefore, mass media in Brunei presently apply a system of self-censorship.

Although in the Constitution there is a guarantee of freedom to profess religions other than Islam, in practice some violations against particular Islamic groups (for example Al-Arqam), restrictions on space and

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<sup>46</sup>The illustration for Human Rights situation in Brunei Darussalam can be seen for example in the Report compiled by Amnesty International, which has been sent to the Universal Periodic Review of United Nations. See Amnesty International Brunei Darussalam (2009).

movement of other religions, restrictions on the publication of Holy Scriptures to the establishment of worship houses and sites are reported. Freedom of assembly is very restricted since the State was declared as being in an emergency situation in 1962 and extended every two years (Elfandani 2010). Strikes and demonstrations are illegal actions. The emergency law provides authority to the State to execute arrest without a judicial process that can be extended to two years. In 2005 several people were arrested based on subversive reasons because they expressed anti-Government opinions in chatting spaces on the internet. From the institutional aspect, Brunei Darussalam so far has not established any National Commission on Human Rights.

## 7. Lao PDR (Laos)

As a State with a one party system, the 1991 Laos Constitution is one of the constitutions that have provided guarantees of Human Rights. Laos also signed and ratified several international Human Rights instruments such as the followings.

- a) International Covenant on Civil and Political Rights (ICCPR).
- b) International Covenant on Economic, Social and Cultural Rights (ICESCR).
- c) International Convention on the Elimination of All Forms of Racial Discrimination.
- d) Convention on the Elimination of All Forms of Discrimination against Women, (CEDAW).
- e) Convention on the Rights of the Child.
- f) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- g) International Convention for the Protection of All Persons from Enforced Disappearance.
- h) Convention on the Rights of Persons with Disabilities.

However, in practice Laos actually restricts the freedom of expression, freedom of assembly, and freedom of association, as well as freedom of press. In Laos, it is also difficult for independent Human Rights monitoring agencies to enter. The restriction of freedom is also implemented on

Internet-based media. This restriction generates many political prisoners; some of them have been arrested for 20 years without trial. On 2 November 2010 security forces surrounded 300 farmers who were going to perform a demonstration, and nine of them were arrested and their fate is still unknown.

A major Human Rights case occurred in Laos when Thailand forcibly repatriated thousands of Hmong refugees who had taken refuge to Thailand to seek for asylum. The forced repatriation contravenes the Human Rights conventions, particularly in handling refugees. This case deprived person's right to seek asylum as guaranteed by the Covenant of Civil and Political Rights that has been ratified by Laos.

In the field of freedom of religion, some cases have taken place to show the restriction of this freedom. In addition to that, there are also practices of detention and other punishments against citizens solely based on religion they profess or religious activities they perform (Amnesty International 2011). From the aspect of organization, Laos until now has not established any National Commission on Human Rights (Elfandani 2010).

## **8. Cambodia**

A State with a system of Constitutional Monarchy, Cambodia had given guarantee of Human Rights in its 1993 Constitution. In July 2000, the Government of Cambodia agreed with UN legislation to establish a mixed judiciary of judges and attorneys from Cambodia and the international community to arbitrate Human Rights violations perpetrated by the Red Khmer regime. Presently there is an indication of efforts made by the Government of Cambodia to influence this Court with the intention of limiting the cases to be judged (AI Index 2011).

Several international Human Rights instruments that have been ratified by Cambodia are the followings.

- a) International Covenant on Civil and Political Rights (ICCPR).
- b) International Covenant on Economic, Social and Cultural Rights (ICESCR).



- c) International Convention on the Elimination of All Forms of Racial Discrimination.
- d) Convention on the Elimination of All Forms of Discrimination against Women, (CEDAW).
- e) Convention on the Rights of the Child.
- f) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- g) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (signing).
- h) Convention on the Rights of Persons with Disabilities.

Since 1996 the Government has established the National Commission on Human Rights. The objective is to promote the protection of and to perform the monitoring of Human Rights. The effort of protecting Human Rights can also be observed from various legal products that have been generated. In 1995 a Law that provides freedom of the press has been established. In addition, initial activities of people's organizations that work in Human Rights field were very dynamic and full of freedom.

However, currently there is a draft of Bill regarded by many as potentially disruptive and restrictive to non-Governmental organizations' activities in Cambodia (Office of the High Commissioner for Human Rights 2011). The draft is concurrent with the escalation of the Government's attempts to ban demonstration activities and to utilized violence and intimidation against politicians and journalists who have criticized the Government. The other burning Human Rights issues are cases of women and child trafficking for sexual exploitation, which allegedly are connected to networks sheltered by the Government or police officials. The Government of Cambodia seems to turn a deaf ear towards this set of Human Rights issues.

## 9. Malaysia

Malaysia is one of the member states of ASEAN whose Constitution contains Human Rights stipulations that are peppered with restrictions. From several international Human Rights instruments, Malaysia had ratified some international Human Rights instruments such as the followings.

- a) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).
- b) Convention on the Rights of the Child.
- c) Convention on the Rights of Persons with Disabilities.

Positive action of Malaysia in the field of Human Rights enforcement is the establishment of the National Commission on Human Rights in 1999. The organization was established by the Government in the middle of pressure enforced by 34 NGOs (Saravanamutu, n.d). However, the Human Rights situation in Malaysia is still full with restrictions and violations that have been legitimated by State legislations.

In the field of freedom of expression, the authority of Malaysia executes restrictions by requiring Government permission for publication and by implementing penal codes that are based on the Sedition Act for anyone who speaks against the Government. For example, the forced termination of the distribution of *Suara Keadilan* newspapers that had been managed by the opposition party was executed by the Ministry of Home Affairs in June 2011. Besides, the Government in July also limited the distribution of *Harakah* Magazine, which had been managed by the Malaysian Islamic Party (Amnesty International, The State of the Worlds Human Rights, 2011).

The largest numbers of human rights violations are arbitrary arrests and imprisonment by utilizing the Internal Security Act that has been implemented for 50 years. Based on this Law anybody can be arrested without obvious reason and detained for two years without a fair judicial process. For example, Mohamad Fadzullah bin Abdul Razak, a citizen of Malaysia (28 years), has been imprisoned for two years since he was suspected and detained by the Government for connection to an international terrorist network. Arbitrary detention is also largely imposed on refugees and immigrants, specifically migrant workers (Amnesty International, The State of the Worlds Human Rights, 2011).

In addition, Malaysia retains the implementation of punishment by caning for particular violations including immigration infringements. This punishment is considered as one form of cruel and degrading punishment. In average, every week an immigration case committed by

migrant workers is sentenced with caning before deportation (Amnesty International, *The State of the World's Human Rights*, 2011).

## 10. Singapore

Singapore shares similarities with Malaysia concerning the issue of Human Rights regulations in its Constitution. However, Singapore has ratified more international Human Rights instruments than Malaysia, i.e. Convention for the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, and Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. According to its development level, Singapore is a State that largely fulfills economic rights, as well as providing facilities in detention sites and security-related facilities that have complied with international standards.

However, the most highlighted Human Rights issues are the restriction and restraining of political opposition, restriction of freedom of expression, freedom of assembly, freedom of association, and freedom of religion. Singapore also still applies caning, a cruel and degrading punishment for 30 types of violations (Amnesty International, *2010 Human Rights Report: Singapore*, 2011).

Other major Human Rights issues are the International Security Act (ISA) and Criminal Law Act (CLA). The Constitution and other legislations state that arbitrary arrest and imprisonment are prohibited; in spite of this prohibition, ISA and CLA allow preventive detention without possibility of review through the Court on the pretext of 'maintaining security and public order.' By the end of 2010, around 15 persons were arrested based on ISA because they had been suspected to be involved in a terrorist organization (Amnesty International, *2010 Human Rights Report: Singapore*, 2011).

Other highlighted restrictions are against freedom of expression and freedom of press run or managed by the opposition parties. The Government usually exploits the Court to muzzle the freedom with allegation of aspersion or defamation. The indictment is not only in the

form of a penal code but also through civil courts, which in many cases has inflicted bankruptcy to the opposition parties. This restriction against freedom of expression produces futile self-censorship that has been committed by the press and the opposition.

Freedom of assembly is limited in terms of location and the content of discussion. The assembly or other kinds of activity to express one's opinion is determined only around the infamous "Speaker Corner" and may not discuss topics that are considered by the Government as "sensitive." Every organization that has been formed by more than 10 persons must register to the Government based on the Societies Act. If the organization is considered as disturbance to peace, welfare, and public order, the Government can reject its registration (Amnesty International, *2010 Human Rights Report: Singapore*, 2011).

## Chapter IV

# CONSTITUTIONAL FOUNDATIONS OF ASEAN HUMAN RIGHTS DECLARATION

Having observed the development of Constitutions in a number of South-East Asian States, this report notices that the progress to constitutionalize fundamental rights is getting broader and more detailed. The *Constitutionalization* (process to constitutionalize) has been founded on the development of States that further improve democratic processes on the internal level, accompanied by their active participation in fulfilling numerous international legal mechanisms, which is gradually and progressively endorsing Human Rights constitutionalism towards a more positive goal.

However, a number of differences or limitations on the processes and materials to constitutionalize Human Rights in each State is still apparent. This diversity becomes inevitable to add values for the existence of the ASEAN organization that contains these states. ASEAN has the potential for effective media that is able to uncover numerous diversity and substantive values to constitutionalize Human Rights at the regional level of South-East Asia. Based on the *Constitutionalization* of Human Rights in each Constitution of the State, the effort to formulate the ASEAN Human Rights Declaration can refer to the same process of *Constitutionalization*. This process is important to become part of the foundation or basis of constitutionalizing Human Rights.

Discovery for the constitutional basis of Human Rights for ASEAN can begin from three sources: *first*, values or philosophies of the States concerning Human Rights which are usually inscribed in the Preambles of the Constitutions; *second*, referring to basic rights enlisted in articles or paragraphs in each of the Constitutions; *third*, instrumentation of international law of Human Rights; and *fourth*, revelations from the social-cultural idea, thoughts or wisdom, which have become South-East Asian characters that support Human Rights. This set of four sources turns into

the basis of constitutionalizing Human Rights for ASEAN to regulate stipulations that are more down to earth and advanced in comparison to other *Constitutionalization* of Human Rights in other States of the world.

### **A. First Constitutional Basis: National Values and Philosophies**

Values and philosophies of nations and states in relation to Human Rights are written in a number of Constitutions' Preambles. The Preamble of the Constitution, in addition to implying the context of history of the nation or the State, also affirms the objectives or foundations of state life; therefore, it contains substantial amount of national or state philosophy values. Nonetheless, not all the Constitutions of State members of ASEAN has a Constitution Preamble. This omission does not mean that the State has no objectives, foundations or philosophies in national and state life; instead these values can be uncovered in the articles of its Constitution.

The Preambles of the Constitutions of the 10 States of ASEAN have numerous values and philosophies of national and State life that strongly relate to the efforts of respecting, protecting and fulfilling the Human Rights such as the followings.

1. The desire to encourage all efforts of peace, both in the country and among nations.  
The peace effort becomes the commitment of majority States in ASEAN that have been written in the Preambles of their constitutions, such as affirmed in the Constitution Preambles of Indonesia, Vietnam, Philippines, Cambodia, Laos and Myanmar. The effort to create peace not only applies inside their respective state but also towards the interest of the other States in the world.
2. The confirmation of freedom as the right of all nations and refusal against all forms of colonialism of a nation against others.  
The Preambles of Laos', Indonesia's and the Philippines' Constitutions, declared about independence and rejection of all forms of colonialism. Except for Thailand, almost all South-East Asia states have been colonized by other States. Therefore, the historical experience has a

significant memory in order to prevent the repetition of bitter incidents during the colonization.

3. Strong desire to guarantee freedom, social justice and citizens' rights, including the effort to bring prosperity for the citizens.

Usually the independence claim of nations in the world is founded by the spirit to provide freedom, social justice and Human Rights guarantees for their citizens. The majority of ASEAN States, especially Indonesia, Laos, Vietnam, Thailand, the Philippines, Myanmar and Cambodia declare this spirit in the Preambles of their Constitutions.

4. Promotion of Human Rights equality without discrimination.

Quoting from the expression in the Constitution Preambles of Thailand and Myanmar, promotion of Human Rights equality without discrimination both in aspects of race and religion is therefore very important. The affirmation is significant because ASEAN States are states that have multi-ethnic, multi nationals, and diversity of religious customs; therefore it is necessary for ASEAN to be able to conserve this diversity.

5. The desire to build a democratic regime.

National histories in ASEAN states have experienced times of tyranny or authoritarian power. The experience under the power of a tyrant and authoritarian leader obviously disrupts the establishment of power that guarantees Human Rights. Therefore, the desire to build a democratic regime is a basic thought of a number of States, as shown in the Constitution Preambles of Thailand, Cambodia, Laos and the Philippines. With the naissance of the democratic regime and support from other States or co-operation amongst states for supporting processes towards a democratic regime, this desire is an important and universal thought among ASEAN states.

## **B. Second Constitutional Basis: Articles of Constitution**

A more explicit formulation of a constitutional basis can be reflected from every article in the Constitutions of member states of ASEAN. The formulation of Human Rights articles in the Constitutions has been put into a map and explained in Part II of this paper. Nonetheless, these

Constitution articles are not limited in Constitution articles of a State (domestically); they also foresee the Constitution articles in the ASEAN body.<sup>47</sup>

## 1. Constitution of ASEAN Body/ASEAN Human Rights Body

The ‘1993 ASEAN Joint Communiqué’ generated an agreement to establish an appropriate regional mechanism on Human Rights. However, the initiation seemed to stop for a decade due to the political diversity at the level of member states of ASEAN. Only recently the Human Rights discourse has returned to ASEAN Dialogue during the formulation of the Vientiane Program Action (VAP) in 2004, concerning the strategy of building the ASEAN Community in which the agreement points on Human Rights cooperation are mentioned. Human Rights Cooperation has occurred as a part of political structure in the political and security communities.

After 2004 the progress of Human Rights discourse was still developing although very slowly. This progress had been marked by the establishment of the Cebu Declaration on Promotion and Protection of the Rights of Migrant Workers that was adopted in 2007, followed by the founding of the ASEAN Committee on the Implementation of the ASEAN Declaration on The Protection and Promotion of the Rights of Migrant Workers (often abbreviated with ACMW) in 2008.

Also in 2008, the ASEAN Charter was approved, and it mandated the Constitution of ASEAN Human Rights Body. As the follow up action, the TOR of ASEAN Inter-Governmental Commission of Human Rights or AICHR was adopted within 3 months in July 2009. During the 15<sup>th</sup> ASEAN SUMMIT on 23 October 2009 the AICHR was established with Sriprapha Petcharamesree as its first Chairperson.

During this progress, the constitutive character of Human Rights can be observed from the TOR of the AICHR and its mutual recognition among

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<sup>47</sup> The deployment of ‘constitutive’ terms here is intended to explain that although Constitution is not precisely the highest basic legal product in ASEAN body, it has been founded by an agreement among the ASEAN states.



the member states of ASEAN. Article 1 of the TOR of the AICHR mentions six purposes that can be settled as the basic formulation to constitutionalize Human Rights in the ASEAN Human Rights Declaration.

1. To promote and protect human rights and fundamental freedoms of the peoples of ASEAN;
2. To uphold the right of the peoples of ASEAN to live in peace, dignity and prosperity;
3. To contribute to the realization of the purposes of ASEAN as set out in the ASEAN Charter in order to promote stability and harmony in the region, friendship and cooperation among ASEAN Member States, as well as the well-being, livelihood, welfare and participation of ASEAN peoples in the ASEAN Community building process;
4. To promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities;
5. To enhance regional cooperation with a view to complementing national and international efforts on the promotion and protection of human rights; and
6. To uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties.

These purposes relating to efforts of protection and promotion of Human Rights in these TOR clauses, which appear as a result of a high degree of consensus and agreement among the Member States of ASEAN, can be the foundation or formulation of *Constitutionalization* of the ASEAN Human Rights Declaration.

## 2. Constitution of Each State

As mentioned in the previous section and observed from the articles regarding Human Rights in the Constitutions of member states of ASEAN, there are differences among the Constitutions that have adopted Human Rights completely and just partially. However, the Constitution in each State no longer recognizes restrictions, specifically restrictions based on articles. The recognition of Human Rights has reached a number of international legal foundations as been formulated in the TOR of the AICHR, which is “... [t]o uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties.”

On this foundation, all Human Rights substances in international law are getting a stronger position because some of the member states of ASEAN have recognized them in their Constitutions. Human Rights Articles that have been recognized in the Constitution and affixed with the Declaration Universal Human Rights (Declaration of Universal Human Rights 1948) are consisting of the followings.

No.	Human Rights	Declaration of Universal Human Rights (1948)	The State that has recognized it in its Constitution
1.	Right to life and livelihood	Article 3	The Philippines, Thailand, Malaysia, Cambodia, Singapore, Indonesia.
2.	Right to equality and privacy	Article 1, 2	The Philippines, Thailand, Malaysia, Cambodia, Myanmar, Singapore, Indonesia.
3.	Right to property	Article 17	The Philippines, Thailand, Cambodia, Myanmar,

			Vietnam, Indonesia.
4.	Right to safety	Article 3	The Philippines, Cambodia, Indonesia
5.	Right to be free from arbitrary arrest, detention, and raid	Article 9	The Philippines, Thailand, Malaysia, Laos, Myanmar, Vietnam.
6.	Right to confidentiality of communication and correspondence	Article 12	The Philippines, Vietnam.
7.	Right to freedom of opinion and expression, freedom of the press.	Article 19	The Philippines, Thailand, Malaysia, Cambodia, Laos, Myanmar, Singapore, Vietnam, Indonesia.
8.	Freedom of assembly	Article 20	The Philippines, Thailand, Malaysia, Cambodia, Laos, Myanmar, Singapore, Vietnam, Indonesia.
9.	Right to present objection and petition	-	The Philippines, Thailand, Laos, Vietnam.
10.	Right to freedom of beliefs, religion and to practice religion	Article 18	The Philippines, Thailand, Brunei Darussalam, Malaysia, Cambodia, Laos, Myanmar, Singapore, Indonesia.
11.	Right to information and communication	-	The Philippines, Thailand, Vietnam, Indonesia.
12.	Right to a just trial.	Article 10	The Philippines, Thailand.
14.	Right to be free from coercion, torture and	Article 5	The Philippines, Cambodia, Indonesia.

	intimidation.		
15.	Right not to be declared guilty before any fixed verdict exists (presumption of innocence).	Article 11	The Philippines, Thailand, Vietnam.
16.	Right to be free from slavery and forced labor	Article 4	The Philippines, Thailand, Malaysia, Singapore.
17.	Right to be free from cruel and degrading punishment	Article 5	The Philippines, Myanmar, Indonesia.
18.	Right to be free from imprisonment due to the incapability of paying debt or tax	-	The Philippines.
19.	Right of not to be adjudicated and punished twice for the same act	-	The Philippines, Malaysia.
20.	Right of not to be punished based on retroactive legislation	Article 11 (2)	The Philippines, Thailand, Malaysia, Myanmar, Indonesia.
21.	Right to vote and be elected	Article 21	The Philippines, Thailand, Brunei Darussalam, Malaysia, Cambodia, Laos, Myanmar, Vietnam, Indonesia.
22.	Right of indigenous people, ethnic group, tribe, and traditional community to conserve local customs and	-	The Philippines, Thailand, Laos, Indonesia.

	wisdom.		
23.	Right to place of dwelling	Article 25 (1)	The Philippines, Thailand, Vietnam, Indonesia.
24.	Right of health care	Article 25 (1)	The Philippines, Thailand, Cambodia, Laos, Vietnam, Indonesia.
25.	Right to protection and equality for women labor	Article 23 (2)	The Philippines, Cambodia, Myanmar, Vietnam.
26.	Right to participate in social, political, and economic life.	Article 21	The Philippines, Thailand, Cambodia, Vietnam, Indonesia.
27.	Right to education	Article 26	The Philippines, Thailand, Cambodia, Laos, Myanmar, Singapore, Vietnam, Indonesia.
28.	Right to be equal before the law and have protection of the law	Article 6, 7	Thailand, Malaysia, Cambodia, Laos, Myanmar, Singapore, Vietnam, Indonesia.
29.	Right to be free from discriminative treatment on whatever grounds	Article 2	Thailand, Cambodia, Laos, Indonesia.
30.	Right to be free to travel	Article 13	Thailand, Malaysia, Cambodia, Vietnam, Indonesia.
31.	Right to family's right, dignity, reputation and privacy	Article 12	Thailand.
32.	Right to confidentiality of personal data	Article 12	Thailand.

33.	Right of children, juveniles, women, pregnant women, elderly and persons with disability to get protection and service.	Article 22	Thailand, Laos, Myanmar.
34.	Right to freedom of venture and occupation, and guarantee of work safety	Article 23	Thailand, Cambodia, Laos, Myanmar, Vietnam, Indonesia.
35.	Right to academic freedom	Article 27	Thailand, Philippine
36.	Right to welfare, public facility and relief from the State for the poor and groups with special needs	Article 22, 25 (1)	Thailand, Laos, Indonesia.
37.	Right to sue government institution owing to an action perpetrated	-	Thailand.
38.	Right to follow up and request for responsibility of state officials	-	Thailand, Laos.
39.	Right to form union and organization	Article 20	Thailand, Malaysia, Cambodia, Laos, Myanmar, Singapore, Vietnam, Indonesia.
40.	Right of not to be banished or exiled	Article 13 (2), 15 (2)	Malaysia, Singapore.
41.	Right to social security	Article 22	Cambodia, Indonesia.

42.	Right of housewives to have the same values or remuneration as when they are working outside the house	-	Cambodia.
43.	Right to perform a strike and demonstration	Article 19	Cambodia.
44.	Right of women to be free from discrimination and exploitation	Preamble	Cambodia, Vietnam.
45.	Right of children to life, growth and development, obtain education, protection and free from discrimination	Article 26	Cambodia, Vietnam, Indonesia.
46.	Right and freedom to perform study, research and development of science and technology.	Article 27	Laos
47.	Right to establish a family and to generate offspring through a lawful marriage	Article 16	Indonesia
48.	Right to improve themselves in fighting for their rights collectively	Article 23 (3), 25 (1)	Indonesia
49.	Right to a nationality	Article 15	Indonesia
50.	Right to prosperity and to obtain healthy	Article 25 (1)	Indonesia

environment.

Correlating the Human Rights elements between the Declaration of Universal Human Rights and the Constitutions of member states of ASEAN shows that there is same spirit in encouraging the progress of effort for recognition, protection, and fulfillment of Human Rights. Juxtaposed against the Declaration of Universal Human Rights, Human Rights regulated in the Constitutions of the member states of ASEAN have more specific formulations that are not completely covered in the original Declaration of Universal Human Rights such as the followings.

1. Right to present objection and petition
2. Right to information and communication
3. Right to be free from imprisonment due to the incapability of paying debt or tax
4. Right of not to be adjudicated and punished twice for the same act
5. Right of indigenous people, ethnic group, tribe, and traditional community to conserve local custom and wisdom
6. Right to sue government institution owing to an action perpetrated
7. Right to follow up and request for responsibility of political officials
8. Right of house wives to have the same values as when they are working outside the house

A number of rights are the improvement of Human Rights stipulations that have been accommodated by ASEAN States through people's social-cultural characters that have survived and developed for years. As an example, although not all states recognizes the guarantee and protection of community rights, the States in African<sup>48</sup> and Asian continents strongly regulate community rights as parts of traditions, laws, and social-cultural life of the people that are still respected and practiced.

In Thailand, the right of community is guaranteed in the Constitution, Section 12, Articles 66 and 67.

Section 66: The people who gather as a community, local community, and local traditional community have a right to

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<sup>48</sup>See African (Banjul) Charter on Human and People's Rights (adopted on 27 June 1981, applied on 21 October 1986).



maintain and conserve and restore their custom, local wisdom, art and cultural community and nation and to participate in the management, maintenance and exploitation of natural resources, environment and bio diversity in a balanced and sustained model.

Section 67: Right of somebody to participate in State and communities in conserving and exploiting natural resources and bio diversity and protection, promotion, and conservation of environment quality for survival that have been the custom and consistent in environment that is not dangerous for health and its sanitation condition, prosperity and quality of life, must be properly protected.

In case of Indonesia, its 1945 Constitution mentions in Articles 18B line (2) and 28I line (3) the followings.

Article 18B line (2): The State shall recognize and respect, as to be regulated by law, the homogeneity of societies with customary law along with their traditional rights for as long as they remain in existence and in agreement with societal development and with the principle of the Unitary State of the Republic of Indonesia.

Article 28I line (3): The cultural identities and rights of traditional communities are to be respected in conjunction with progressing times and civilization.

This kind of stipulations of the Constitutions can be seen in among the ASEAN states with high plurality and rich social cultural characters that are still enduring until now. Hence, these kinds of community rights need to get recognition and better legal protection in fundamental legislation.

### **C. Third Constitutional Basis: International Law Instruments**

The Constitutional basis through reference to the stipulation of international Human Rights law can also be adopted for the need of Human Rights constitutionalism in ASEAN. From the ten states of ASEAN, all have equally ratified two international Conventions, which are

concerning protection of children rights (CRC) and elimination of all forms of discrimination against women (CEDAW). This ratification means all legal frameworks concerning the protection and fulfillment of Human Rights that is related with CRC and CEDAW can be adopted or become the foundation of *Constitutionalization*.

However, referring to these two is still not enough. First, *Constitutionalization* of ASEAN Human Rights must also accommodate further a number of Human Rights principles professed generally in the international Human Rights legislation, specifically principles of universalism, equality, non-discrimination, human dignity, interdependence, inalienability, indivisibility, and responsibility of the State. These basic principles need to be projected as a platform to promote Human Rights.

Second, *Constitutionalization* basis needs to consider the recognition of non-derogable rights as well. These rights comprise of the followings.

1. Right to life,
2. Right to be free from torture and degrading treatment/punishment,
3. Right to be free from slavery and trafficking,
4. Prohibition of imprisonment solely on basis of his inability to fulfill his promised obligation,
5. Prohibition to use retroactive penal code,
6. Right to obtain equal treatment before the law and fair trial,
7. Right to freedom of thoughts, beliefs and religion.

Third, besides the rights that are categorized as non-derogable rights, the stipulations of international Human Rights legislation, both regarding civil and political rights as well as economic, social and cultural rights, need to be developed and adopted completely in the *Constitutionalization* of ASEAN Human Rights. Those rights and freedoms comprise of the followings.

1. Right to freedom of and personal security,
2. Prohibition of forced disappearance,
3. Prohibition of slavery, exploitation and trafficking,
4. Freedom of expression and opinion,
5. Freedom to obtain information,
6. Freedom to assemble and form union,

7. Freedom to travel and choose place to dwell,
8. Right to seek and obtain asylum,
9. Right to a nationality,
10. Freedom to establish family,
11. Respect for family and private life,
12. Right of the Human Rights Defenders,
13. Prohibition of discrimination,
14. Right to obtain equal protection,
15. Right of women,
16. Right of children,
17. Right of the minorities,
18. Right of indigenous people,
19. Right of the elderly,
20. Right of persons with disabilities,
21. Right to sexual orientation,
22. Right of refugees,
23. Right to equality before the law and effective remedy,
24. Right to presumption of innocence and right to defense self,
25. Prohibition of impunity,
26. Right to participate in the Government,
27. Right to participate in the General Election,
28. Right to proper livelihood,
29. Right to social security,
30. Right of the migrant workers and protection for members of his family,
31. Right to proper life,
32. Right to property,
33. Right to health and good quality health care,
34. Right to education.

Most of the rights mentioned here have been recognized both in terms of the State's legal process and the ratification process of various Conventions or other international Human Rights laws. For example, rights of persons with a disability that have been recognized by CRPD of 2006 (*Convention on the Rights of Persons with Disabilities*) have also been recognized by most of the member states of ASEAN. Similarly the ILO Convention of 1930 concerning Forced Labor (*C29 Forced Labor Convention*) has also been ratified by nine of ASEAN member states

except Brunei Darussalam. The majority of members that have ratified these kinds of Conventions should pay attention to create a minimum standard in the *Constitutionalization* process.

#### ***4.3. Fourth Constitutional Basis: Joint Statement of ASEAN States Leaders***

This Constitutional basis is also very feasible and openly available through the joint statements made by the leaders of ASEAN states regarding Human Rights issues. This statement is important to be identified as a note of support or position of the States to support the effort of Human Rights promotion in the ASEAN region.

Compilations of the remarks or statements of support or position of the States on Human Rights have been well assembled by the Working Group for an ASEAN Human Rights Mechanism (Medina 2003). In this compilation, systemization that is based on general statements, specific issues, and vulnerable groups has simplified the revelations of references of States' assertions on Human Rights issues.

One of the general statements, such as regarding the crimes against humanity and trans-national crimes, has been found: "ASEAN strongly condemned the Apartheid Regime in South Africa." This statement shows that ASEAN has a mutual desire to prevent discrimination or racial-based violence.

On specific issues or themes, several statements have been mentioned regarding civil and political rights, Governmental issues and participation, development, culture, environment, self-determination, peace, security and resolution of conflict, right to affordable and good quality of food, health care and medicine, right to travel and migration, and monitoring of weapons.

For instance, the recognition of ASEAN States on the protection of the right to information and guarantee of freedom of the press was announced in the Declaration of ASEAN Ministerial Meeting on Information, Jakarta, 25 May 1989<sup>49</sup> as the followings.

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<sup>49</sup> Declaration of ASEAN Ministers Responsible for Information, Jakarta, 25 May 1989.

[R]ecognize the importance of role of the press and television, radio, film and video in national development among member states of ASEAN and in expanding regional co-operation of ASEAN.

Principle of freedom of the press with social responsibility is the foundation of press in ASEAN States.

1. [M]inistries of ASEAN who responsible for information affairs must strengthen ASEAN cooperation and their role in promotion and development of press, television, radio, film, and video.
2. ...
3. [A]n exchange of news and information among member States must be promoted in order to achieve balanced and free information current amongst member states of ASEAN.

Another example from the issue of workers can be quoted below.

[P]romotion of opportunity for workers particularly in rural area and to enhance income specifically for small enterprise farmers.<sup>50</sup>

To increase the opportunity of employment through formulation of effective programs, policies, and national plans to reduce unemployment of the youth.<sup>51</sup>

Statements and agreements that have been delivered officially by the ASEAN Organization can also become a reference for the development of Human Rights Constitutionalization to formulate the ASEAN Human Rights Declaration. The recommendation is a form to affirm consistency of what has been stated/delivered, formulated/agreed, and the measures striven for the promotion of Human Rights for the ASEAN Human Rights Declaration.

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<sup>50</sup> Article 1 (vii), Agreement on the ASEAN Food Security Reserve, New York 4 October 1979.

<sup>51</sup> Declaration of Principles to Strengthening ASEAN Collaboration on Youth, Bangkok 24 June 1983.

#### **D. Effecting the Implementation of Rights Substance**

Another question that cannot be absent from the process of formulation and discussion of *Human Rights constitutionalism* is regarding how the rights that had been regulated can become more effective in their implementation. The regulation is necessary to be focused to ensure that *Constitutionalization* in the ASEAN Human Rights Declaration in the end shall be enforceable’.

At least there are two options that can be turned into a foundation to strive for the implementation of those rights’ substances: first, formulation a special clause in the form of a mandate that rules the member states of ASEAN to immediately follow up the stipulation of the Declaration of Human Rights, and second, formulation of a mandate to encourage joint efforts to make the Declaration of Human Rights as inseparable part in the legal systems of ASEAN states. That kind of operational provisions must be directed to becoming more advanced in its implementation. For example, a time limit for a production of a convention must be settled by ASEAN. Administratively, these are not easy points given the fact that the legal processes of ratification in each State are different. However, Human Rights *constitutionalism* in the Declaration shall be striven to have an obligatory character for the member states of ASEAN, which is “legally binding“.

Without deliberation on the process of implementation or commitment to implement the Declaration, the spirit of Human Rights constitutionalism in the ASEAN Human Rights Declaration itself would be debilitated. The mandate to formulate a form of legislation in the ‘Declaration’ does not mean that the legislation is intended to be a meaningless pile of papers; instead it should have substantial meaning as part of progressive attempt in building the ASEAN Community in the future with more respect to the Human Rights without exception.

## Chapter V

### CLOSING

The fortification of Human Rights textually in a Constitution is not necessarily creating its normative framework as a comprehensive answer for questions in its implementation framework. Instead, as reminded by Baxi (2002: viii) in *The Future of Human Rights*, “The number of the *rightless* peoples also grows even as human rights norms and standards proliferate. The more people stand endowed with normative human rights by international and constitutional instruments, the greater and keener emerges the suffering of people existentially deprived of realization and enjoyment of human rights” (emphasis original). The slow development of the ASEAN Human Rights regulations reflects the high level of sensitivity of the issues at the regional level.

However, the more conspicuous progress towards the establishment of the AICHR and a number of bodies in relation with other Human Rights within the issues on women and migrant workers shows more positive trends in the effort of recognition, protection, and fulfillment of Human Rights for member states of ASEAN for these issues.

The investigation of the Constitutions in the member States of ASEAN and the attempt afterwards to raise them into a more abstract and

general set of Human Rights ideas at the ASEAN level would begin a *Constitutionalization* effort that tends to be more meaningful and suitable with the social and cultural character among the South-East Asian people. Excavating 'social and cultural character' in this context does not mean that the attempts would end up in desire to display a particular set of philosophies. If understood as 'restrictions of human rights', then the *Constitutionalization* shall only deliver justification to the reduction and restriction of Human Rights, which would become a setback for the struggle of Human Rights promotion in ASEAN. The ASEAN Human Rights Declaration would become the view of the citizens of ASEAN States that show and contribute to the world that ASEAN people also participate in supporting an advanced view of universalism of Human Rights, especially the protection of rights that probably have not been recognized fully by the international community.

Efforts of *Constitutionalization* are not enough if just relying on the Articles of the Constitutions; instead the efforts must reveals the spirits that are shown for the process of democratization as well as the advanced effort of civilization that has more respect for humanity.

In this context, the agenda of the ASEAN Human Rights Declaration formulation is welcomed by providing more progressive meanings based on constitutionalism that grows and develops at the South-East Asia level. This constitutionalism would also support the politics of democratization that is more open, advanced, developed, and strategic in comparison to the other regions of the world.

Regarding the spirit of constitutionalism, there are several important elements to be underlined to encourage the Human Rights *Constitutionalization* in the ASEAN Human Rights Declaration as the followings.

1. Human Rights have become the part of ASEAN's organizational development particularly in the last two decades. Human Rights have become a set of important and fundamental assets for the Human Rights promotion efforts in the South-East Asia region.
2. Thus, the development must be striven through the willingness to commit changes in every State, both in building more democratic



Governments and respectful towards Human Rights. Without any change at the domestic level, the Human Rights promotion process at the regional level would be impeded and the political and legal commitment into respecting, protecting, and fulfilling Human Rights would be damaged.

3. The idea of Human Rights constitutionalism substantively is not limited only to normative provisions that have been explored from the Constitutions of all the member States of ASEAN but also to understanding national values and philosophy, affirming minimum standards that are derived from international legislation instruments, and reappointing the track of mutual thoughts and statements of the ASEAN States' leaders.
4. Anchored in the joint desire to make the effort of Human Rights promotion to be effective and real, *Constitutionalization* of Human Rights must also consider mechanisms and mandates that are binding in domestic legal systems to ensure members of ASEAN to be involved and willing to implement the ASEAN Human Rights Declaration substantively and progressively.
5. The process of Human Rights constitutionalism in the ASEAN Human Rights Declaration must also incorporate political participations of civil society as much as possible to assure that the involvement is intended for emphasizing communal steps forward or that it is not limited as exclusive concern of ASEAN states' leaders. Ideally, to strengthen Human Rights constitutionalism, no party is eliminated or left behind. Furthermore the voices of the victims of Human Rights violations should be heard in the determination of political decision at the leadership level of ASEAN States.

Based on the elements mentioned above, the desire of ASEAN to be a community of nations in the South-East Asia region gives birth to ideas and thoughts that have vastly advanced characters for political, economic, social, and cultural transformation that include Human Rights norms more appropriately.



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