

A Study through a Butlerian Lens on the ASEAN Intergovernmental  
Commission on Human Rights' (AICHR) and their Ineffectual Role in  
Protecting Sexual Orientation, Gender Identity and Expression

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Abstract

This research aims to criticize the role of the ASEAN Intergovernmental Commission on Human Rights (AICHR), that is, the ASEAN's Human Rights mechanism, in developing protections toward Sexual Orientation, Gender Identity and Expression (SOGIE), especially marriage rights, in this region. Since its formal existence in 2009 via ASEAN member's ratification, this intergovernmental organization hasn't provided any programs protecting the human rights of ASEAN peoples. However, Sexual Orientation, Gender Identity and Expression fares much worse because this issue becomes internalized as the particular state's responsibility, whenever there is an attempt to raise this issue to the international level, by asserting their right to non-interference from AICHR. The biggest constraint for SOGIE is that the state member's understanding and perception is severely limited by their inability to link SOGIE issues with human rights. Moreover, SOGIE issues are regularly treated as illegal and/or immoral behaviors in many ASEAN states such as Malaysia, Indonesia and Myanmar. These phenomena illustrate that ASEAN state members are still living in the past by interpreting human rights according to the binary dichotomy of the sexes. Hence, Judith Butler's idea on performativity would be suitable for critiquing this situation. Utilizing a Butlerian lens would show how sex, sexuality and gender is constructed and transformed by society over time. Finally, the study will collect and analyze the data via publications i.e. textbooks, factsheets and journal articles, to support the research's argument and to represent how states normalize a constructed heterosexuality to the public.

*Keywords: Sexual Orientation, Gender Identity and Expression (SOGIE); Performativity; Binarism; Noninterference; Intergovernmental Organization.*

1. Introduction

Since the establishment of ASEAN Intergovernmental Commission on Human Rights (hereinafter referred to as "AICHR") in October 2009 as a result of article 14 of the ASEAN Charter, human rights issues in this region is expected to be progressive. However, seven years has passed, AICHR hasn't represented any attempt to protect ASEAN people's rights.

A big constraint that keeps AICHR from being an effective regional human rights mechanism in the western perception is "ASEAN way". Although ASEAN usually claim that ASEAN way has benefitted this region, it decreases AICHR's capabilities of promoting and

protecting human rights and fundamental freedoms in the region.

Furthermore, when this norm combines with great diversities in southeast asia especially member state's perception on sexual orientation, gender identity and expression issues, that are normally taken as a domestic political issue then, it become worse and reduce the chance of enhancing it to be a transboundary issue.

As outlined above, I would divide the criticism of state's perception on sexual orientation, gender identity and expression issues, which is a part of human rights issues, in this paper into three parts by analyzing via AICHR's based documentations.

Firstly, I would illustrate what AICHR Terms of Reference says and how the principles frames AICHR's role in promoting and protecting human rights and fundamental freedoms. Subsequently, I would use 'performativity' approach to understand how states interpret and utilize this framework as a space for promotion and protection their people's rights via state representatives in the commission.

Secondly, I would compare the first Five-Year Work Plan of ASEAN Intergovernmental Commission on Human Rights with an existing plan to show how AICHR develops strategies to improve its performance on letting people get through their rights equally regardless of gender, race, religion, language, or social and cultural backgrounds. Then I would go back to Butler's idea on performativity again, to criticize how the second plan is changed and any part benefit gender issues in this region before moving forward to the third part.

Finally, I would conclude this paper with the criticism of AICHR's activities on gender issues, especially sexual orientation, gender identity and expression issues, to see how this intergovernmental organization state the issues in a regional level. After that, I would finish the section with ongoing and effective challenges that have been functioning in the region.

## 2. ASEAN Intergovernmental Commission on Human Rights (Terms of Reference)

As I mentioned above, AICHR is established from article 14 of ASEAN Charter. Actually it is not only an effect of that article, which strongly request for regional mechanism, but it has been clearly noticed in ASEAN since July 1993 when the twenty-sixth Ministerial Meeting declared in a Joint Communique that the Vienna Declaration and Programme of Action emphasizes the need to establish a regional human rights mechanism with the believe that this kind of mechanism would be easier to access than the international mechanism.

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Only few months before AICHR was officially established, AICHR Terms of Reference (hereinafter referred to as “TOR”) was launched in July 2009 as a framework of this mechanism. The making of TOR is also a result of article 14 however this TOR is not an ordinary principle because, as Numnak, Romandy and Trapp argue in their article, another facet of this framework is a representative of the negotiation among member states that enshrine in ASEAN way as a relationship indicator.

Despite the purposes and principles of TOR would give a space for both promotion and protection of human rights and fundamental freedoms, AICHR couldn't perform its capability because it could be asserted as a violation of legislation namely, preamble, purposes, article 2 of ASEAN Charter, and article 2 of TOR

Other causes that affect the performance as a regional human rights mechanism are the status as an ‘intergovernmental’ body in ASEAN’s organizational system and the great diversities within this region that give this mechanism with an unclear mandate and a little authority on human rights in the region.

All of the above-mentioned, it represents that the only one effective capability of AICHR is on promotion. Moreover the article 5 of TOR is another indicator in a little authority of the mechanism because in every step from a state representative selection to the last day in position depends on state decision. Even though state could claim that the selective process is accountable, most of them are related to the each government.

Part of gender issues, I could say that AICHR has been stuck in the same position for seven years. A big evidence, that support this argument, is the representative’s qualifications. As it states in the article 5 (3) of TOR that “the member state shall give due consideration to gender equality, integrity and competence in the field of human rights”.

It illustrates an expectation to implement an international norm that gender is not the barrier, however the fact is member state does not concern about it. Even though there are both male and female representatives in the commission especially the second set of representative, it is just the proportion.

In fact, It does not qualify for the enhancement to gender issues because it does not mean female representative would concern about it. Moreover, when this constraint combines with other three constraints namely, a lack of representative’s qualification in gender issues, ASEAN way, and a state’s knowledge about gender.

For the first constraint, there is only an Indonesia’s representative that has an experience

in gender issues, as it shows on AICHR website, however it could not prove he would mention anything about it as well.

For the second and the third constraint that usually be linked together, all member states are still thinking about gender as a binary dichotomy. Furthermore, each state has its own way to deal with anyone who does not identify him/herself as male or female by an internal norm. It is a part that normally be related to ASEAN way because all member states take gender issue as a domestic issue, then it is quite hard to mention it in the commission's meeting.

As mentioned before, the state's perception on gender is different from Butler's idea on performativity that mentioned in *Gender Trouble*. In that book, Butler mentioned about this approach as a changeable form. A person could describe his/her gender as male or female but he/she could change it freely and no one could force him/her to be strict with his/her sex or gender. However state always force people to be strict with his/her sex and gender that be assigned at birth, if he/she would like to fully get through his/her rights.

Hence, when this barrier combines with a little authority that AICHR gets from ASEAN Charter and TOR, nothing in action about gender issues is changed.

### 3. Five-Year Work Plan of ASEAN Intergovernmental Commission on Human Rights 1<sup>st</sup> (2010 – 2015) VS. 2<sup>nd</sup> (2016 – 2020)

The five-year work plan is a kind of strategic plan that AICHR provide for showing that what the commission would do in the next five years. Each five-year plan is composed of programmes and activities with indicative budget, however, AICHR has to submit the plan to be approved by the ASEAN Foreign Ministers Meeting.

The first five-year work plan could be seen that there is an effort to engage the implementation of international norm, as it mentioned in the universal declaration of human rights, in this region by determining a development of ASEAN human rights declaration as one of AICHR's responsibilities in the first five years.

After this declaration be launched in November 2012, this declaration is one of factors that lead this human rights mechanism into the worse place because the declaration is based with the universal declaration without adapting it with ASEAN environment. Moreover, it also emphasizes women rights separately via the principles and the committee especially mentioning about it many times in both plan as one of the commission responsibilities.

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Another cause that effect AICHR's performance is theme issues. In the mandate (12) (1) of both plans assign that the commission has to choose at least one issue per year, in close consultation with sectoral and other relevant ASEAN bodies. It demonstrates that the commission has no choice to raise any issue freely however although the commission has the rights to choose, there is not gender issues in those choices. The issues that could interpret as a part of gender issues are "trafficking in person particularly women and children" and "women and children in conflicts and disasters" however both issues could be seen that there are many effective conventions and working groups support for it.

For the development of five-year work plan, there are some different points in the second plan that represents the effort in exercising the commission's authority in action. For example,

1. This plan directly mentioned about responsibility on persons with disabilities in the mandate (1) (4), (5) (4), and (6) (5, 6).

2. This plan totally base the responsibility with the ASEAN Community Post-2015 Vision, ASEAN human rights declaration, and Phnom Penh Statement, as be shown in the every part of the plan.

3. The emphasis about enhancement of working with civil society organizations.

From gender view, there is nothing that benefit for this issue except the efforts to mainstream the sub-issue about women rights as be mentioned above and four times of raising concerns about gender and LGBT issues in the meeting namely, However these mentioning are still under the concept of binarism and fixed gender.

#### 4. Conclusion

All of the above-mentioned, I could say that from the gender view, especially performativity approach, AICHR hasn't provided any programmes and activities that benefit gender issues. Moreover this commission could be seen as a factor that let the binary dichotomy is still strong because the commission bases itself with the universal norm.

It does not mean that trying to base itself with the universal norm is totally abuse a gender issue but implementation of universal norm without adaptation could be a part of gender abuse. However there are not only negative changes that happen from AICHR's establishment but there are also some positive changes.

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One of positive changes is the better relationship with civil society. This development illustrates the positive steps to become a “people-centred” as it is argued in Sriprapha’s paper. This better relationship let civil society organizations raise their human rights concerns to be noticed. The examples of that change are the raising rate of civil society that has participated in the AICHR’s programmes and activities although there are a few activities about gender issues as they are above mentioned.

Another positive change is the increase of gender movements in southeast asia. These movements could be seen as the result of AICHR’s promotion on human rights and fundamental freedoms. Even though it is quite hard to claim that they raise an awareness from outside the binarism.

However the challenges are still unresolved because AICHR’s role is still in control by member states and ASEAN way. All of these reasons keep the commission in stuck and can not move forward to achieve the purposes as the promotion and protection of human rights and fundamental freedoms.

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