

Indonesia-Malaysia Cooperation in Human Rights Criminal Law Enforcement

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Abstract:

This study aims at analyzing the form of bilateral cooperation between Indonesia and Malaysia in enforcing Human Rights (HAM), with a focus on the role of Constitutional Law in framing state obligations in such cooperation. Although ASEAN has a human rights mechanism, the effectiveness of ASEAN Intergovernmental Commission on Human Rights (AICHR), is limited. Thus, it raises the significant of bilateral cooperation between ASEAN member countries, especially Indonesia and Malaysia. A qualitative approach with a descriptive analytical method was geared to explore a deeper understanding of the implementation of this cooperation. The results of interviews with officials from the Indonesian and Malaysian Ministries of Foreign Affairs revealed that although there are several bilateral agreements involving the protection of migrant workers and combating human trafficking, implementation in the field is hampered by unclear law enforcement and differences in interpretation of state obligations. Despite the agreement between the two countries, the biggest obstacle lies in the weak governance mechanism and the inconsistency of the legal systems between Indonesia and Malaysia. In this context, Indonesian Constitutional Law plays an important role in ensuring that any international cooperation, including Malaysia, must be approved by the House of Representatives (DPR) to avoid violating the constitutional

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principles and human rights. The recommendation from this study is the importance of strengthening the monitoring mechanism and capacity of related institutions, to ensure better protection for Indonesian migrant workers in Malaysia and optimize bilateral cooperation in enforcing human rights.

Keywords: Bilateral; Indonesia-Malaysia; Human Rights, Criminal, Law

Abstrak:

Penelitian ini bertujuan menganalisis bentuk kerja sama bilateral Indonesia-Malaysia dalam menegakkan Hak Asasi Manusia(HAM), dengan fokus pada peran Hukum Tata Negara dalam membingkai kewajiban negara dalam kerja sama tersebut. Meskipun ASEAN memiliki mekanisme hak asasi manusia, efektivitas ASEAN Intergovernmental Commission on Human Rights (AICHR) masih terbatas. Dengan demikian, hal tersebut meningkatkan signifikannya kerja sama bilateral antara negara-negara anggota ASEAN, khususnya Indonesia dan Malaysia. Pendekatan kualitatif dengan metode analisis deskriptif diarahkan untuk menggali pemahaman yang lebih mendalam tentang pelaksanaan kerjasama ini. Hasil wawancara dengan pejabat dari Kementerian Luar Negeri RI dan Malaysia mengungkapkan bahwa meskipun terdapat beberapa kesepakatan bilateral yang melibatkan perlindungan TKI dan pemberantasan perdagangan manusia, pelaksanaannya di lapangan terhambat oleh penegakan hukum yang tidak jelas dan perbedaan penafsiran terhadap kewajiban negara. Terlepas dari kesepakatan kedua negara, kendala terbesar terletak pada lemahnya mekanisme tata kelola dan inkonsistensi sistem hukum antara Indonesia dan Malaysia. Dalam konteks ini, Hukum Tata Negara Indonesia berperan penting dalam memastikan bahwa setiap kerja sama internasional, termasuk Malaysia, harus mendapat persetujuan Dewan Perwakilan Rakyat (DPR) agar tidak melanggar prinsip-prinsip konstitusional dan hak asasi manusia. Rekomendasi dari penelitian ini adalah pentingnya penguatan mekanisme pemantauan dan kapasitas lembaga terkait, untuk menjamin perlindungan yang lebih baik bagi TKI Indonesia di Malaysia dan mengoptimalkan kerja sama bilateral dalam penegakan HAM

Kata Kunci: Bilateral; Indonesia-Malaysia; Hak Asasi Manusia, Pidana, Hukum

Introduction

Enforcement of human rights in the ASEAN region has become an increasingly pressing issue along with the increasing human rights violations that have occurred in various member countries. Although ASEAN has established the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009 and adopted the ASEAN Declaration on Human Rights in 2012, the effectiveness of this institution is still questionable due to its limited mandate which is more promotional than law enforcement¹. One of the main challenges in enforcing human rights in ASEAN is the principle of non-intervention and respect for the sovereignty of member states, which often hinders a collective response to human rights violations. The "ASEAN Way" approach that emphasizes consensus and consultation has been criticized for tending to ignore serious human rights violations in order to maintain regional stability².

The crisis in Myanmar after the 2021 military coup is a clear example of the weaknesses of ASEAN's human rights mechanisms. Although ASEAN has proposed a five-point peace plan, its implementation has been hampered by the lack of a strong enforcement mechanism and indecisiveness in dealing with the military junta. A comparison with the European Union shows that the existence of regional human rights courts such as the European Court of Human Rights has had a significant impact on upholding human rights. ASEAN, in the absence of a similar institution, faces difficulties in providing justice for victims of human rights violations and holding perpetrators accountable³. In addition, ASEAN's approach that focuses more on promoting than protecting human rights has resulted in a lack of effective oversight mechanisms. Noted that despite efforts to gradually adapt the oversight function, limited mandates and resistance from member states have made this process

¹ Muhammad Rahman et al., "Mental Distress and Human Rights Violations during COVID-19: A Rapid Review of the Evidence Informing Rights, Mental Health Needs, and Public Policy around Vulnerable Populations," *Frontiers in Psychiatry* 11 (2021): 603875.

² Eric D Weitz, *A World Divided: The Global Struggle for Human Rights in the Age of Nation-States* (Princeton University Press, 2019).

³ Shirley Gatenio Gabel and Susan Mapp, "Teaching Human Rights and Social Justice in Social Work Education," *Journal of Social Work Education* 56, no. 3 (2020): 428-41.

slow and ineffective. The absence of a strong enforcement mechanism has also resulted in low public trust in ASEAN's commitment to protecting human rights. Without sanctions or firm action against human rights violations, member states tend to ignore their obligations to respect and protect the basic rights of their citizens⁴.

To improve the effectiveness of human rights enforcement, structural reforms are needed in ASEAN human rights mechanisms, including expanding the mandate of the AICHR to include monitoring and law enforcement functions. In addition, the establishment of a regional human rights court can be an important step in ensuring accountability and justice for victims of human rights violations⁵. With increasing international pressure and public awareness of the importance of human rights, ASEAN is faced with demands to strengthen its human rights enforcement mechanisms. Without concrete steps, ASEAN's credibility as a regional organization that upholds human rights values will continue to be questioned. Indonesia has a long history of human rights violations recorded since the New Order era, especially through the 1965 tragedy and the mysterious shooting cases in the 1980s. According to these violations reflect the weak implementation of humanitarian values as mandated in the Pancasila and the 1945 Constitution⁶. The state is considered to have failed to guarantee the protection of the right to life and a sense of security for its citizens. Efforts to resolve past human rights violations in Indonesia are considered less than optimal. Also highlight that non-judicial approaches, such as the formation of a Non-Judicial Resolution Team for Gross Human Rights Violations, do not answer the victims' needs for substantive justice, because they only emphasize reconciliation without legal prosecution of the perpetrators.

Komnas HAM continues to record high reports of violations every year. In 2022, the highest reports included violence by officers and violations of freedom of expression. This shows that human

⁴ Eileen Donahoe and Megan MacDuffee Metzger, "Artificial Intelligence and Human Rights," *Journal of Democracy* 30, no. 2 (2019): 115-26.

⁵ Josephine Yam and Joshua August Skorburg, "From Human Resources to Human Rights: Impact Assessments for Hiring Algorithms," *Ethics and Information Technology* 23, no. 4 (2021): 611-23.

⁶ John-Stewart Gordon and Ausrine Pasvenskiene, "Human Rights for Robots? A Literature Review," *AI and Ethics* 1, no. 4 (2021): 579-91.

rights violations are not just a phenomenon of the past, but still occur systematically today⁷. The case of Papua is a striking contemporary example. According to repressive actions against civilians in Papua show an imbalance between the principle of non-intervention upheld by ASEAN and the state's obligation to protect the basic rights of citizens. This reflects the imbalance between state security interests and human rights protection. Malaysia faces human rights challenges in terms of the treatment of Indonesian migrant workers. Revealed that many non-procedural migrant workers become victims of human trafficking, arbitrary detention, and even died in immigration detention centers without transparent legal processes⁸. The shooting of Indonesian migrant workers by Malaysian authorities has also been a serious concern. Stated that these violations are contrary to the principles of international humanitarian law and demands that the Malaysian government be held accountable for systemic violations against vulnerable groups. In the context of freedom of expression, Malaysia and Indonesia both have structural problems. Highlighted that in both countries, the right to express opinions is often limited by regulations that are open to multiple interpretations and potentially repressive, such as the ITE Law in Indonesia and the Anti-Fake News Law in Malaysia⁹.

The entire case reflects the importance of building a bilateral cooperation framework in enforcing human rights. Given the closeness of culture and migration between the two countries, collaboration in the field of human rights protection is very important to build the legitimacy of a state of law that upholds universal values¹⁰. Thus, this study focuses on 3 problem formulations, namely, what is the form of cooperation between Indonesia and Malaysia in enforcing Human Rights? how is the regulation of such cooperation reviewed from the perspective of Constitutional Law in each country?

⁷ Isabel Ebert, Isabelle Wildhaber, and Jeremias Adams-Prassl, "Big Data in the Workplace: Privacy Due Diligence as a Human Rights-Based Approach to Employee Privacy Protection," *Big Data & Society* 8, no. 1 (2021): 20539517211013052.

⁸ Alberto Quintavalla and Klaus Heine, "Priorities and Human Rights," *The International Journal of Human Rights* 23, no. 4 (2019): 679–97.

⁹ Ebert, Wildhaber, and Adams-Prassl, "Big Data in the Workplace: Privacy Due Diligence as a Human Rights-Based Approach to Employee Privacy Protection."

¹⁰ John Gerard Ruggie, "The Social Construction of the UN Guiding Principles on Business and Human Rights," in *Research Handbook on Human Rights and Business* (Edward Elgar Publishing, 2020), 63–86.

and what are the legal and institutional challenges in realizing effective cooperation?

Methods

This study aims to analyze the position of Constitutional Law in framing state obligations in bilateral cooperation related to Human Rights (HAM), considering the limitations of ASEAN's human rights mechanisms. This study will use a qualitative approach with a descriptive analytical method to explore a deeper understanding related to the formulation of the problems that have been set. The qualitative approach was chosen because this study focuses more on understanding existing phenomena, as well as the processes that occur in bilateral cooperation related to human rights between Indonesia and ASEAN countries. Qualitative research methods, especially in the case study approach, will be used in this study. This approach is very suitable for exploring how Constitutional Law frames state obligations in international cooperation, especially in the field of human rights. According to Creswell, a qualitative approach allows researchers to investigate problems that are not only limited to numerical data, but also to a more complex understanding of social and political phenomena¹¹. In this case, the phenomenon to be studied is the implementation of bilateral cooperation in Indonesia in the context of human rights, as well as its relationship to provisions in the constitution and government authority. Data sources used in this study include interviews, reports, and documents from international institutions. In-depth interviews with legal practitioners, academics, and government officials involved in the formulation of foreign policy, as well as the management of bilateral cooperation in human rights. Reports and documents from international institutions that assess the implementation of human rights, including reports from the National Human Rights Commission and international organizations such as Human Rights Watch and Amnesty International¹².

¹¹ jhon. w Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches*, ed. Adele Hutchinson, 4th ed. (lincoln: SAGE Publications Asia-Pacific Pte. Ltd., 2014), https://fe.unj.ac.id/wp-content/uploads/2019/08/Research-Design_Qualitative-Quantitative-and-Mixed-Methods-Approaches.pdf.

¹² Evgeni Aizenberg and Jeroen Van Den Hoven, "Designing for Human Rights in AI," *Big Data & Society* 7, no. 2 (2020): 2053951720949566.

Discussion and Result

Forms of Cooperation between Indonesia and Malaysia in Upholding Human Rights

Based on interviews with officials from the Indonesian and Malaysian Ministries of Foreign Affairs, as well as a review of relevant bilateral documents, it was found that cooperation between Indonesia and Malaysia in upholding Human Rights (HAM) mainly covers the areas of protecting migrant workers, combating human trafficking, and joint agreements on refugees and the human rights of minority groups. This cooperation is driven by common challenges in dealing with humanitarian issues arising from migration between countries, as well as the commitment of both countries to meet international standards in protecting human rights. According to cooperation between Indonesia and Malaysia began with a bilateral agreement regarding the protection of Indonesian Migrant Workers (TKI), one of the main issues in relations between the two countries. This cooperation is outlined in an agreement between the two countries that regulates the standards of protection for Indonesian migrant workers in Malaysia, which includes the protection of basic workers' rights, the cessation of human trafficking practices, and the fulfillment of their socio-economic rights while working abroad¹³.

In an interview with an official from the Indonesian Migrant Workers Protection Agency (BP2MI), it was explained that Indonesia and Malaysia have held several official meetings to improve supervision of the placement and protection of Indonesian migrant workers in Malaysia. One of the most significant forms of cooperation is the Indonesia-Malaysia Bilateral Cooperation Agreement on Migrant Workers Protection signed in 2011. This is an important foundation in reducing cases of human rights violations involving migrant workers, although the implementation of this agreement is often hampered by unclear mechanisms for supervision and accountability. An official from the Indonesian Ministry of Foreign Affairs added that the two countries' efforts to resolve issues related to migrant workers were further strengthened by the establishment of the Indonesia-Malaysia Joint Commission for the Protection of

¹³ Rahmat Rahmat, Robingatin Robingatin, and Agus Setiawan, "Internalisasi Nilai-Nilai Spiritual Keagamaan Pada Peserta Didik Anak Tenaga Kerja Indonesia (TKI) Di SMK Sebatik Tapal Batas Indonesia-Malaysia," *Jurnal Tarbiyah Dan Ilmu Keguruan Borneo* 4, no. 1 (2023): 99–113.

Migrant Workers, which is tasked with ensuring that standards for the protection of Indonesian migrant workers in Malaysia are adhered to. However, despite these efforts, major challenges remain in the implementation of adequate regulations and protections for Indonesian migrant workers in the domestic sector in Malaysia.

Despite the existence of solid bilateral agreements in the field of migrant worker protection, a number of obstacles remain in their implementation. Stated that limitations in law enforcement mechanisms in Malaysia often make it difficult to ensure that migrant workers' rights are fully respected¹⁴. Despite formal agreements, the application of sanctions for violations that occur is often inconsistent, and migrant workers often do not have sufficient access to justice through legal channels. In addition, cooperation between Indonesia and Malaysia in the context of human rights also includes combating human trafficking, which is a major issue, especially in the border areas of the two countries¹⁵. Non-governmental organizations active in Indonesia and Malaysia, such as Human Rights Watch and Amnesty International, observe that despite bilateral efforts to combat human trafficking, there are still many cases that have not been revealed and there is no clear follow-up.

Cooperation between the two countries in enforcing human rights in the field of minorities and refugees has also recorded several important developments. Noted that despite the joint declaration on the rights of refugees and displaced persons, especially those involved in international conflicts, the two countries do not yet have an effective mechanism to provide comprehensive protection for refugees in their territories. Based on the findings above, cooperation between Indonesia and Malaysia in enforcing human rights still faces major challenges in terms of supervision and law enforcement¹⁶. Kurniawan, emphasized that although the two countries have a strong commitment to bilateral cooperation, to ensure effective and fair implementation, there needs to be strengthening in the

¹⁴ Elspeth Guild, Tugba Basaran, and Kathryn Allinson, "From Zero to Hero? An Analysis of the Human Rights *Protections* within the Global Compact for Safe, Orderly and Regular Migration (GCM)," *International Migration* 57, no. 6 (2019): 43–59.

¹⁵ Caitlin R Williams, Jocelyn Getgen Kestenbaum, and Benjamin Mason Meier, "Populist Nationalism Threatens Health and Human Rights in the COVID-19 Response," *American Journal of Public Health* (American Public Health Association, 2020).

¹⁶ Rudi Natamiharja and Febryani Sabatira, "Mapping International Laws on Human Rights in the 1945 Constitution of the Republic Indonesia," *JASSP* 1, no. 1 (2021): 18–26.

supervision and law enforcement mechanisms¹⁷. One of them is strengthening the capacity of institutions that handle human rights and migration issues to be able to effectively implement the agreed policies.

Based on the results of interviews and document analysis, it is clear that despite a number of agreements binding the two countries, the biggest obstacle is in terms of empowering human resources and a deep understanding of migrant workers' rights. The gap in information and access to efficient complaint mechanisms means that many migrant workers cannot enjoy the protection they should receive.

Indonesia-Malaysia Cooperation Reviewed from the Perspective of Constitutional Law

Cooperation between Indonesia and Malaysia in the field of enforcing Human Rights (HAM) is highly dependent on the principles regulated by each constitution. Indonesian Constitutional Law, as stipulated in the 1945 Constitution, requires that all forms of international cooperation carried out by the government, including with Malaysia, must obtain the approval of the DPR in accordance with Article 11 of the 1945 Constitution¹⁸. This shows that the role of the legislative institution is very important in determining the direction of foreign policy related to human rights¹⁹.

Based on interviews with officials from the Indonesian Ministry of Foreign Affairs and the Malaysian Ministry of Foreign Affairs, it was found that cooperation between the two countries in the field of human rights, especially regarding the protection of migrant workers, has been carried out through several bilateral agreements that strengthen legal guarantees for Indonesian migrant workers in Malaysia. However, they also acknowledged that there are obstacles in the implementation of these agreements, which are often hampered by differences in interpretation of the obligations of each country. Rizki & Sufandi, stated that bilateral cooperation in the field of human rights must always comply with domestic legal procedures,

¹⁷ Michael R Tomz and Jessica L P Weeks, "Human Rights and Public Support for War," *The Journal of Politics* 82, no. 1 (2020): 182–94.

¹⁸ Wilmar Ibni Rusydan, Umar Ma'ruf, and Bambang Tri Bawono, "Judicial Activism In Criminal Case To Ensure The Human Rights Upholding (Study In State Court Of Semarang)," *Jurnal Daulat Hukum* 2, no. 4 (2019): 477–84.

¹⁹ Faissal Malik et al., "Legal Protection for People with Disabilities in the Perspective of Human Rights in Indonesia," *International Journal* 10 (2021): 539.

which are regulated in the constitutions of each country. They emphasized the importance of supervision from legislative institutions to ensure that international agreements, especially those related to human rights, are carried out with full accountability.

From the perspective of Constitutional Law, bilateral cooperation between Indonesia and Malaysia must be implemented by prioritizing the principle of state sovereignty as stated in Article 1 paragraph 3 of the 1945 Constitution, which states that Indonesia is a state of law (rechtsstaat). Ghafur & Anggoro, argue that although the cooperation benefits both countries, its oversight and accountability mechanisms must be considered more seriously, given the potential for abuse in the implementation of the cooperation. For example, in the migrant worker protection sector, despite the agreements that have been agreed, many Indonesian migrant workers are still trapped in conditions of exploitation and abuse of their rights²⁰. This shows the need for more effective cooperation in terms of supervision by related institutions in both countries. In an interview with the Indonesian Migrant Workers Protection Agency (BP2MI), it was found that although there are a number of agreements regulating the protection of Indonesian migrant workers in Malaysia, many problems have not been resolved properly, such as weak law enforcement and lack of access for migrant workers to the justice system in Malaysia²¹.

Stated that although Indonesia and Malaysia have made positive efforts in bilateral cooperation, the biggest challenge lies in the implementation which is often not in line with existing regulations²². Indonesian Constitutional Law gives the President the authority to establish foreign relations, but every international agreement that binds the country must be approved by the House of Representatives (DPR), in accordance with Article 11 of the 1945 Constitution. Argue that this authority shows the importance of strict legislative control over international agreements that can have a major impact on human rights, so that the country does not violate human rights principles in its foreign policy. As a form of supervision, the

²⁰ Donahoe and Metzger, "Artificial Intelligence and Human Rights."

²¹ Rusydan, Ma'ruf, and Bawono, "Judicial Activism In Criminal Case To Ensure The Human Rights Upholding (Study In State Court Of Semarang)"

²² Salvador Santino F Regilme Jr, "The Global Politics of Human Rights: From Human Rights to Human Dignity?," *International Political Science Review* 40, no. 2 (2019): 279–90.

DPR functions to ensure that every international agreement made, including those related to human rights, not only complies with the constitution but is also implemented responsibly. Emphasize the importance of the legislative oversight function in ensuring that the implementation of bilateral cooperation does not violate basic human rights principles and does not abuse government authority. There are efforts to improve the implementation mechanism of bilateral agreements, this is often hampered by the unclear law enforcement mechanism and differences in the legal systems between Indonesia and Malaysia²³. One concrete example is the case of the protection of migrant workers, where bilateral agreements are not always followed by concrete steps to minimize violations that occur in the field²⁴.

In the context of law enforcement, highlighted the importance of increasing the monitoring mechanism by independent third parties, such as international organizations, to ensure that both countries implement international agreements in a transparent and accountable manner. This is important to reduce differences in interpretation of state obligations that often cause problems in their implementation. Based on the existing findings, it can be concluded that although cooperation between Indonesia and Malaysia in enforcing human rights has begun with various bilateral agreements, effective implementation and stricter supervision are still needed. Both countries strengthen supervision of the implementation of international agreements, and ensure that these agreements are implemented by prioritizing more comprehensive and effective protection of human rights²⁵. As a recommendation, suggest that Indonesia and Malaysia increase cooperation in terms of establishing an independent monitoring institution that can evaluate the effectiveness of the agreements that have been agreed upon, and provide transparent reporting to the public. In addition, strengthening the capacity of institutions involved in the protection of migrant workers and enforcement of human rights law in both countries also needs to be prioritized.

²³ ASIF Khan, SOHAIL Amjad, and MUHAMMAD Usman, "The Evolution of Human Rights Law in the Age of Globalization," *Pakistan Journal of Law, Analysis and Wisdom*, 2020.

²⁴ Khan, Amjad, and Usman.

²⁵ Bohdan Andrusyshyn et al., "Right to a Fair Trial in Extraordinary Conditions," *The Age of Human Rights Journal*, no. 20 (2023): e7539–e7539.

Conclusion

Based on the discussion that has been conducted regarding bilateral cooperation between Indonesia and Malaysia in enforcing Human Rights (HAM), it can be concluded that although the two countries have made a number of agreements in the field of human rights, there are still major challenges in implementation and supervision. This cooperation mainly includes the protection of migrant workers, combating human trafficking, and protecting minority groups. However, its implementation is often hampered by the unclear law enforcement mechanism and the inconsistency between the legal systems in each country. In this case, the Indonesian Constitutional Law requires that every international cooperation, including with Malaysia, must go through the approval of the House of Representatives (DPR) in accordance with Article 11 of the 1945 Constitution. This shows the importance of legislative supervision in every international agreement to ensure that Indonesia's foreign policy does not conflict with the constitution and human rights principles. Indonesia-Malaysia bilateral cooperation also involves the role of the Ministry of Foreign Affairs which functions to formulate and implement foreign policy in accordance with applicable laws.

Interviews with officials from the Indonesian and Malaysian Ministries of Foreign Affairs revealed that despite the agreement on the protection of migrant workers, many Indonesian migrant workers still face human rights violations, especially in the domestic sector in Malaysia. Emphasized that despite the bilateral agreement, weak supervision and lack of capacity of related institutions often hamper the implementation of policies. In addition, despite the agreement between the two countries, noted that strengthening more effective and transparent monitoring mechanisms is urgently needed. Without it, the implementation of the agreement governing human rights protection will remain difficult to implement optimally. Overall, although Indonesia and Malaysia have a strong legal basis for cooperation on human rights, major challenges related to implementation and supervision remain. Both countries must strengthen the capacity of the institutions involved and improve the monitoring system so that this bilateral cooperation can provide better human rights protection, especially for migrant workers.

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