The European Doctrine of Margin of Appreciation What ASEAN can learn from its Concept and Application in Universalizing "Controversial" Asean Declaration of Human Rights?

Rachminawati, Universitas Padjadjaran, Indonesia

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Abstract
The European Court of Human Rights has developed the doctrine of Margin of Appreciation in supervising when member states of the Council of Europe breach the European Convention of Human Rights (ECHR). This paper argues that the margin of appreciation is not a particularity in the traditional sense; rather, it is a moderate way to bridge the unresolved issue between universality and particularity of human rights.

In the ASEAN context, particularity and universality of human rights have been the topic of everlasting debate among the scholars and human rights activists. Most of them have argued that ASEAN promotes the particularity of human rights by inserting "Asian [ASEAN] values" to its human rights concept as stated in the "controversial" ASEAN Declaration of Human Rights and also in their constituent instrument ASEAN Charter.

This paper concludes and reiterates that human rights should be universally accepted. However, to avoid the reluctance of this universal value of human rights in this region, the incremental acceptance of the principle is needed – its particularity of human rights; particular in terms of application. The acceptance of asian values in ADHR could bridge the reluctances. As in the Europe, ASEAN will also put international human rights standard in their region.

Keywords: Margin of Appreciation – Universality – Particularity – European Court of Human Rights – ASEAN Values – ASEAN Human Rights Declaration

1. Introduction

Due to lack of references discussing deeply about ASEAN (Asean) as international regional organization as well as its member states, the researcher uses a lot of books or journals focusing on the study of Asia. Since ASEAN is part of Asia, the use of such materials is still relevan.

This paper will try to seek the European Doctrine of Margin of Appreciation (MoA) used by The European Court of Human Rights (ECtHR) in supervising when member states of the Council of Europe breach the European Convention of Human Rights (ECHR). The concept, process, and application of this doctrine will be the outcome of this paper to be a lesson learned for ASEAN in universalizing "controversial" ASEAN Declaration of Human Rights (AHRD).

This paper argues that the MoA is not a particularity in the traditional sense; rather, it is a moderate way to bridge the unresolved issues between universality and particularity of human rights. Therefore, for the most part ASEAN can learn from Europe.

To that end, this paper is devided into three parts. The first part deals with the need to redifine human rights; second and third part are the main parts, second part deals with the discussion on MoA which aims to prove that MoA is a concrete form of particularism in European regime; third part will come with the analysis of lesson learned from the concept and application of MoA for ASEAN to universalising their ADHR; these parts are followed by a conclusion.

2. Redifining Human Rights: The Need for Effective Human Implementation

Beginning with the definition of human rights, this part will identify the problem of universality and particularity of human rights especially in ASEAN context. Human rights derive from dignity and worth inherent in the human person (Vienna Declaration, 1993). The recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world (The Preamble to the UDHR 1948). The preambles of the two main human rights covenant - ICCPR and ICESCR, restate that human rights derive from the inherent dignity of human person, but neither addresses this concept further (Connie de la Vega, 2013, 72). Human rights are the rights of all human beings (Smith et al, 2008, 7). It is based on the dignity of human nature endowed by reason and conscience inherent in human beings (UDHR, 1948). Smith argued that human rights are believed to have a universal value and moral with no boundaries of space and time inherent to all human (Rachminawati, 2014).

Human dignity is the basis of human rights, and therefore human rights norms and principles are universally accepted. However, Shaw in his book highlights that the implementation of human rights in the domestic level will sliglthly contradict the main principle in international law, that is the principle of 'State Sovereignity' (Shaw, 2008, 265). He strongly argued that indeed respect for human rights is the fondation for the world peace, but emphasizing the role of the state as the main sources of international human rights law as in the ICJ judgement in the Military and Paramilitary Activities in and against Nicaragua case stated that "... the fundamental

principle of State soverignity, 'is a basic tenet,' on which the whole international law rest," (Shaw, 2008, 268). Similar to Shaw, Bedi (Bedi, Shiv R S, 2007, 37) argues that the development of human rights on the international level is one of the most startling innovation in modern international law, because it has a potential to unleash explosive forces that challenge the basic tenet of international law system—the principle of state sovereignity. However, 'third world states' claim that human rights is a product of western world. Western world often used 'the principle of state soverignity' as a tool to refuse any interferences on behalf of human rights.

Considering the big role of the state in the implementation of the universal human rights norms and values, the internal dynamics of normative development in each society should be considered equally important (Baik, 2012, 48). Amartya Sen in Baik (2012, 48) articulates that the liberty and rights ideas, the antecendents of individual freedom exis not only in Western culture, but in Asian [ASEAN] cultures as well. The cultural roots of humanism and the concept of human dignity are also recognised in Asian society in its religious or philosophical traditions. Kim emphasizes that because human rights are not attributed solely to Western concepts or philosophical traditions, the recognition of diversity and particularities in different cultures is increasingly important (Baik, 2012, 49).

In the context of ASEAN, the important thing to note is to not always refuse the Asian values in 'human rights tunnels,' but to make sure that the Asian values did not misuse the 'tunnels.' Today ASEAN member states show good performance in the use of this 'flexibility' term for the best implementation of human rights in their regime. The establishment of the ASEAN Declaration of Human Rights (hereinafter ADHR) shows the improved recognition of human rights in ASEAN countries. However, critiques highly remain. Most human rights activist claims that ADHR contains particularity of human rights. In contrast, I would argue that ADHR cannot be considered containing particularity of human rights and therefore does not abrogate the universality of it. It is indeed a new form of universalism (Rachminawati, 2014). This positive optimism should be build to encourage the full realisation of human rights.

The diversity of the nations contribute to the differences of concepts of human rights as well as the promotion and protection. Diverse perspectives of states on human rights issues affect the procedure of implementation. Human rights conception is also influenced by the attitude and thinking of the nation and its member, hence the concept of particularity of human rights existed. This fact shows the paradox of universal human rights, which is universal in terms of principle, but particular in terms of application (Rachminawati, 2014).

At the same time, world community at large question the role and function of international human rights law regime today. The slow response from the UN and 'big players' countries around the world in cases of Palestinians bombing and invasion by Israel shows that human rights is only a tool for putting pressure on a weaker country by a stronger country with ulterior motives. To conclude, I strongly agree with Baik (2012, 51) that the particularities embedded in the norms are the products of the actual process of norms adoption and tension that exist in each Asian [ASEAN] society today. It is important to appreciate those particularities in the norms in each society without compensating the universal nature of human rights.

3. Margin of Appreciation: A Concrete Form of Particularism in European Region

This part will begin the discussion by giving the definition of margin of appreciation doctrine and its application in several landmark case, before the author will identify the forms of particularism of human rights contained in the doctrine, then conclude it with respected contribution of MoA towards universal human rights enforcement in Europe.

MoA is a doctrine of the European Court of Human Rights (hereinafter ECtHR) to consider whether a member state of the Council of Europe has breached the European Convention on Human Rights (hereinafter ECHR (Greer, 2006, 222). The MoA, typically described as a 'doctrine' rather than a principle, refers to the room for maneuver the Strasbourg institutions are prepared to accord national authorities in fulfilling their Convention obligations (Greer, 2006, 222).

The concept of this doctrine is an original feature of the jurisprudence of the ECtHR, which seeks to balance the primary of domestic implementation with supranational supervision (Baik, 2012, 66). Learning from the case of Hanyside v. United Kingdom (1976), the court applied wide MoA in assessing what measures are necessary to protect moral standards and declare that the interference of public authority is not in breach of article 10 of the convention. Article 10(2) leaves a room for the states margin of appreciation. The court found that there was not a uniform European conception of morals, and that this margin was given both to the domestic legislator and to the bodies, judicial amongst other, that are called upon to interpret and apply the law in force (Handyside v. United Kingdom, 24 ECHR (Ser. A) (1976) para. 43).

Manfred Nowak (63) also calls the doctrine as a limitation human rights clause in the ECHR. At first, I agree with Nowak that this is a limitation clause, but throughout the process, I see that this doctrine is more appropriately a doctrine of limitation clause implementation as enshrined in the ECHR by the ECtHR in many cases.

The background of the doctrine is the difficulty of the state parties in imposing the rule of law set out in the ECHR because the diversity in social, economic, political and cultural aspects. It was recognized by the Europeans themselves that they are heterogeneous. On the contrary, the non-Europeans often think that Europeans are homogeneous. Margin of appreciation will be applicable where there is an absence of a uniform European conception of the implications of the convention (De Schutter, 2010, 447). ECtHR realizes that national authorities are in a better position to obtain and assess local knowledge, which the court may not have either, or the significance of which it may misjudge (Greer, 2006, 224). However, this MoA goes hand-in-hand with a European supervision embracing both the law and the decisions applying it (Greer, 2006, 224).

Member states enjoy a certain MoA in asserting whether and to what extent differences in otherwise similar situations justify different treatments in law. The scope of margin will vary according to circumstances, subject matter, and its background (*Handyside v United Kingdom*, 1984). Necessary conditions for the limitation of Human Rights called MoA are: first is Legality (is measure prescribed by

law?); second, Proportionate to the legitimate aim; third is necessity in a democratic society. What has been always criticized are: Are the measures proportionate? How to define that it is necessary in a democratic society?

Since drawing the line between difference and discrimination involves matters of social policy (which includes cultures, economic, and politics), the width of the MoA 'will vary according to the circumstances, the subject matter and its background' (Greer, 2006, 222). Therefore, there are wide and narrow margin of appreciation.

As Simor and Emmerson show in Steven Geer, the width of the margin of appreciation will vary according to 'such factors as the nature of the Convention right in issue, the importance of the right for the individual, the nature of the activity involved, the extent of the interference, and the nature of the state's justification'. However, it involves weighing difficult and controversial political, rather than judicial, questions (Greer, 2006, 224). I will elaborate more on the following cases. The wide margin of appreciation usually applies in matters of moral, particularly on matter of belief. The national authorities enjoy this wide margin of appreciation to limit their citizen religion and belief pursuant to their specific need as to condition mentioned previously.

Article 9 ECHR rules about the freedom of thought, conscience and religion. It also contains the limitation of this rights as stated in paragraph 2: **"**Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

In *Vergos versus Greece* case (2004): Vergos wanted to establish a praying house on a land he owned. Greece did not give permission even though it was in its own land and for his religious manifestations. The Court found that there was no violation of Article 9, as states have MoA in matter of town planning. In the *Sahin vs. Turkey* case, a case of headscarf banning in the university or any other public areas in Turkey. The Court found that it was justified because Turkey had proposed to be a secular state (Greer, 2006, 98).

In *Norris* case, the court found that there was no violation of article 8 of the ECHR. Irish government ruled the prohibition against homosexual conduct. Norris thought that Ireland had been intervened against his right to privacy enshrined in article 8 ECHR. Court argued that the intervention was not a violation of Article 8, but was necessary to protect the moral values growing in Ireland (especially Catholics) (Nowak, 65). The court applied narrow MoA in this case. I strongly criticize that the court judgment in *Sahin* and other related cases of manifestation of the religion is not in accordance with the principle of necessity in a democratic society. The judgment in the *Sahin* case could be criticized for having too readily endorsed Turkish fears about Islamic fundamentalism gaining a toehold in national public institutions (Greer, 2006, 98). Pluralism is an indivisible part of a democratic society, so why should it be forced to be homogeny?

On the contrary, the *Lopez Ostra* case, the Court put the protection of individual at the frontier and applied wide MoA (Mowbray, 2004, 183). The court stated that:

> "Having regard to the foregoing, and despite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the town's economic well-being - that of having a waste-treatment plant - and the applicant's effective enjoyment of her right to respect for her home and her private and family life." (*Lopez Ostra v. Spain*, 1994)

There have been certain developments since 1986 in the law of some of the member States of the Council of Europe. However, reports accompanying the resolution adopted by the European Parliament on 12 September and Recommendation 1117 (1989) adopted by the Parliamentary Assembly of the Council of Europe on 29 September 1989—both of which seek to encourage harmonization of laws and practices in this field- reveal, as the Government pointed out, the same diversity of practice. Accordingly, in regard to the existence of no common ground between the member States, this is still an area in which they enjoy a wide margin of appreciation. In particular, it cannot at present be said that a departure from the Court's earlier decision is warranted in order to ensure that the interpretation of Article 8 of ECHR on the point at issue remains in line with present day conditions (Mowbray, 2004, 133).

4. Margin of Appreciation Doctrine: some Lessons Learned for ASEAN in universalizing AHRD

The application of the doctrine of Margin of Appreciation in the cases discussed above shows that the universal values of human rights, enshrined in the ECHR, have nothing in common and no uniformity in terms of its application. Onder Bakircioglu emphasizes that "margin of appreciation" refers to the power of a Contracting State in assessing the factual circumstances, and in applying the provisions envisaged in international human rights instruments (Bakircioglu, 711).

The diversity of application of this doctrin by the ECtHR is a fact that there is no homogenousity among European States (Rachminawati and Syngellakis, 2012, 108). It was designed to provide flexibility in resolving conflicts emerging from diverse social, political, cultural and legal traditions of Contracting States within the European context (Bakircioglu, 711).

The application of human rights under the EctHR, as described in the previous part, clearly shows the application of the concept of particularism from the viewpoint of the Universalist. The ECtHR provides room for States to carry out legitimate human rights restrictions (Legality, proportionate to the legitimate aim, and Necessary in a democratic society) taking into account the social, cultural, economic and political conditions. Those restrictions were then assessed by the Court whether it is just or not, whether there is a violation of the convention or not.

Moreover, ECtHR subjectivity in assessing any justification restrictions, regardless of whether the inconsistency is due to a sharp assessment of any conditions are different for each case or background of political interests or values, - the Margin of Appreciation was never consistent. However, dynamism is a fundamental value of the

law because the law has to grow dynamically pursuant to the development of society (Tümay, 2008, 210).

The application of limitations on human rights is still a contentious issue since the problem is still not being answered. This takes precedence on the right or democracy or human rights principles such as non-discrimination principles, principles of subsidiary, and the principle of proportionality (Nowak, 63) and positive obligation. Steven Greer concludes that the basic principle of human rights is mediate between the 'rights', 'democracy', and 'priority' principles. Furthermore, the principles of proportionality and strict/absolute necessity determine the strength of the 'priority' principle in different contexts. The principles of review, commonality, evolutive, dynamic, and autonomous interpretation derive from the 'rights' principle, while the margin of Appreciation doctrine (strictly interpreted) derives from the 'democracy' principle (Greer, 2006, 213).

Mahoney in Steven Greer deems that the margin of appreciation provides the appropriate degree of judicial restraint. However, it contributes a lot to bridge and apply the convention (Greer, 2006, 214) since the principle of proportionality has also been read into the obligation undertaken by states in Article 3 of Protocol No. 1 to hold free elections (Greer, 2006, 217). It is for the Court to assess whether the States in doing such action is proportional or not.

Similar to Mahoney that the Margin of Appreciation will help the enforcement and implementation of the convention. Why so? Since in many cases, the Court uses the doctrine of margin of appreciation and the principle of proportionality to resolve conflicts between rights written in the Convention and between the 'European rights' and 'national rights, though there is no real scope for discretion on the part of national non-judicial authorities during and in the drafting of the convention (Greer, 2006, 220).

Accordingly, it is no longer appropriate to conflict universalism and particularism of human rights. The presence of the bridging margin of appreciation is a universal value. However, it is also a relative implementation and ideal concept in the protection and enforcement of human rights in Europe. What actually more important in the enforcement of human rights is the implementation of the principle of proportionality rather than absolute enforcement of universal human rights. The absolute enforcement of universal human rights would be counter-productive and the imposition and application of it are forms of the real human rights violations.

Despite its contribution, the shortcomings of the doctrine of Margin of Appreciation have still remained. The need for the articulation of solid and foreseeable criteria is not only crucial for the future existence of the doctrine, but also for the legal certainty as well. Without it, the confidence in European Convention system cannot be maintained. However, it should be kept in mind that States Parties have increasingly incorporated the European Convention into their domestic legal systems, i.e., a more harmonized judicial system will prevail in the near future among the Member States. In other words, the MoA doctrine, to a certain extent, might lose its importance in the near future, for the absence of a European common ground in certain areas will no longer be an obstacle for the Court to exercise its supervisory function effectively.

Nevertheless, today the doctrine can be used as an effective tool for the better enforcement of Convention rights, since the rich legal and cultural traditions of the Member States of Council of Europe present considerable difficulties in the harmonious application of the Convention rights. It has been enriched with the participation of former socialist countries (Bakircioglu, 732).

As frequently stated in this paper, ECtHR relies on the fact that national authorities are in a better position to obtain and assess local knowledge, which the court may either lack, or the significance of which it may misjudge (Greer, 2006, 213). However, this MoA goes hand in hand with a European supervision embracing both the law and the decisions applying it (De Schutter, 2010, 334).

In response to those theses above, ASEAN needs to have an ASEAN Human Rights Court (Rachminawati and Syngellakis, 2012, 121) whose jurisdiction is to assess whether member states apply the Asian values enshrined in the ADHR proportionately pursuant to international human rights law. Judges of ASEAN Court of Human Rights are required to have a broad knowledge concerning the condition of each member states economically, socially, politically and culturally. AICHR does not seem to be able to play this function and role respectively (Rachminawati, 2014).

Asia [including ASEAN countries) is the only area in the world that does not have a human rights court, despite the potential human rights system is indeed emerging (Baik, 2012, 1). European countries have showed that their human regional system have developed its aim to supplement global human rights institution (Baik, 2012, 1). The expansion of regional human rights system is largerly based on the impressive performance demonstrated by the institution in Europe and in the Americas (Baik, 2012, 2).

As in Europe with its margin of appreciation, Asian values to be developed by the ASEAN Court of Human Rights is considered an influential source of law. It concludes that the experience of Europe has proved that regional institution can promote and protect human rights with higher standards than the global system do (Baik, 2012, 2). The promotion and the protection of human rights in European region could not be separated from the application of human rights by the Court. Margin of appreciation doctrine is believed as an important element in realization and effectiveness of human rights. Europe makes available flexible remedy measures and enhanced implementation of the norms when domestic institutions violate or neglect human rights (Baik, 2012, 2).

5. Conclusion

I believe the successful experience in European system with its margin of appreciation negates the presumption that the recognition of particularity of human rights will harm the universality of human rights. This optimism, however, must be accompanied with the establishment of human rights mechanism including the human rights court.

This paper concludes and reiterates that human rights should be universally accepted. However, to avoid the reluctance of this universal value of human rights in South East Asian region, the incremental acceptance of the principle is needed – its particularity of human rights; particular in terms of application. The acceptance of Asian values in

ADHR could bridge the reluctances. As in the Europe, ASEAN could also put international human rights standard in their region.

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