

ASEAN Economic Community Legal Framework Analysis and Implementation

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INTRODUCTION

Discussion on the policy of political economy cannot be sufficiently done by merely analyzing texts and considering domestic legal framework. Rather, it is necessary to see its context and link it with the power of political economy which has had strong networking in numerous pacts and syndications, so that the law, in that case, will be the reflection of direction of the pacts and the dominant syndications. The regionalism of political economy in Southeast Asia cannot be separated from such issues.

ASEAN Economic Community or AEC is a discourse of Southeast Asian countries' leaders born in the context of the desire for a stronger regionalism of global political economy. This idea is preceded by ASEAN Leaders Summit in 1997 in Kuala Lumpur, which resolved to bring ASEAN to a stable and prosperous condition to be a region that is able to compete in the context of economic development and to reduce poverty and socioeconomic inequality. The idea of AEC was indeed born in the context of financial crisis that influenced the resolution, until it was finally declared in a summit in Bali in October 2003. In the meeting, it was resolved that its main objective is to strive for regional economic integration (Bali Concord II) in 2020. As the balancing pillars, will also be formed the ASEAN Political-Security Community (APSC) and

the ASEAN Socio-Cultural Community (ASCC) as the other pillars to support the idea of AEC.

This idea is an agenda to strengthen the region from the economic side which has been increasingly globalized in line with technological advancement. The power of global market has determined the formation of configuration of political economy in many parts of the world, including Southeast Asia region. The idea was then reinforced by the ASEAN Economic Ministers Meeting (AEM) held in Kuala Lumpur in 2006 resolving to develop "a single and coherent blueprint for advancing AEC by identifying the characteristics and elements of AEC by 2015, consistent with the Bali Concord II with clear targets and timelines for the implementation of various as well as pre-agreed measures".

Leaders of ASEAN countries once again re-enforced the idea in ASEAN's 12th summit in January 2007 (the 12th ASEAN Summit) to show the strong commitment to accelerate the establishment of ASEAN Community in 2015, as envisaged in ASEAN Vision 2020 and ASEAN Concord II signed as the Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community (2015). Leaders of ASEAN countries agreed that AEC 2015 will transform ASEAN into a region that facilitates free movement of goods, services, investment, skilled labor and free flow of capital.

The idea of AEC has now been increasingly strengthened and consolidated in a number of international agreements and has prompted a number of commitments to make it happen through three important documents, as signed in Singapore on 12 November 2007, namely:

1. Declaration on the ASEAN Economic Community Blueprint;
2. ASEAN Economic Community Blueprint; and
3. Strategic Schedule for ASEAN Economic Community

Based on the development of regionalism in various sectors, it is necessary to understand exactly the current legal framework and how it works, especially for confirming its position and impact on the protection of human rights and

efforts to strengthen wider social justice and economic for the people of Southeast Asia.

The following brief paper is a preliminary study on the framework of Indonesian law and its readiness to protect Indonesian political economic interest so as to be consistent with the efforts of human rights protection, community collective rights protection and ecological and natural resources sustainability guarantee

AEC: A CAPITALISTIC REGIONALISM?

AEC Scheme confirms the existence of integration and its elements and as noted earlier, in the context of anticipating the ASEAN Community, in addition to the pillars of AEC, there are also two other important pillars, namely APSC and ASCC.

Now let us discuss AEC instrument. AEC clearly displays idealism in the context of political economy, which also retains the imagination of Southeast Asia within the framework of policies of elites of the government encouraged by other leaders of ASEAN member countries.

In the document, AEC has core areas of integration as follows:

- Human resource development and capacity building.
- Recognition of professional qualifications
- Closer consultation on macroeconomic and financial policies
- Trade financing measures; enhanced infrastructure and communications connectivity
- Development of electronic transactions through e-ASEAN
- Integrating industries across the region to promote regional sourcing
- Enhancing private sector involvement for AEC

In addition, it should be understood that there are Five Basic Elements of Single Market and Production Base, among others:

- Free flow of goods: removal of tariffs or through removal of non-tariff barriers.

- Free flow of services: No substantial restriction to ASEAN service suppliers within the ASEAN subject to domestic regulations.
- Free flow of investment: To Enhance ASEAN's competitiveness in attracting foreign direct investments as well as intra-ASEAN investments to promote and ensure the dynamic development of the ASEAN economies.
- Freer flow of capital: To Strengthen ASEAN capital market development and integration, and allow greater movement of capital.
- Free flow of skilled labor: To allow managed mobility and entry for the movement of people engaged in goods, services and investment.

Based on the key areas in terms of integration and principal elements of the effort to establish AEC, it is clear that the commitment of political economy to be built is redirected to strengthen economic regionalism and orientation to facilities for capital investment, exchange of services and trade traffic. Such political economy discourse can be referred to as "capitalistic regionalism".

Being aware that the strategy of strengthening regionalism capitalistic cannot run on its own, ASEAN establishes its political economy by balancing its strategies in the field of socio-cultural (ASCC) and politics and security (APSC).

The following schemes are the three pillars.

ASEAN Social Cultural Community	Asean Economic Community	Asean Political Security Community
<ul style="list-style-type: none"> • Human resources development • Provide adequate social welfares and services • Social rights and justice • Environmental sustainability • Asean Identity • The narrowing of developmental gap between member states 	<ul style="list-style-type: none"> • Common market and shared base of production • Competitive with other regions • A region that is integrated and yet able to retain its own momentum in moving forward external economic relations 	<ul style="list-style-type: none"> • Rules based community • Peaceful, evolutionary, shared-sense of responsibility, and possessing comprehensive security • Dynamic, supports efforts to form a global outreach and mutual interdependence • Promotion and protection of human rights

What is the meaning of ASCC and APSC in AEC strategy?

First, when discussing regionalism, it is impossible to bring it into a separate confinement by putting geo-political position of Southeast Asia in the middle of global political economic order including the dominance and strategy of security for more comfortable international relations for the strategy.

Secondly, geo-politics dictate many things, one of which is the sustainability of economic growth in the region. Political balance in international relations is the bargaining power of regionalism. It confirms not only intra-region interaction, but also its position and relations with other countries and regions.

Thirdly, discussion on the universalism of human rights becomes inevitable in encouraging a platform of regionalism. We must be well aware that the public will accept the agenda when populist agendas such as human and social development, human rights, gender justice and respect for fundamental freedoms are inserted.

Fourthly all three of AEC, ASCC, and APSC are common scenarios in the development of programs in order to make it an "elite-controlled regionalism". The aim is to ensure that the processes of capitalist regionalism will run more smoothly and mutually beneficial.

The big question is for whom is this capitalistic regionalism? If considered mutually beneficial, who will benefit from it? Is there a party that would be burdened or even harmed due to capital expansion?

In order to answer such questions, discussion on the legal framework of AEC becomes very fundamental as the legal and political policies that support it are its instruments and operation of political economy.

LEGAL FRAMEWORK: BETWEEN JUSTIFICATION AND INSTRUMENTS OF POLITICAL ECONOMY

As previously discussed, AEC 'legal framework' does not stand alone. It becomes a package of regionalism policy in the same context. The economic cooperation in ASEAN strategies has traces that must be understood. Understanding AEC's efforts means that we will understand the crystallization of political economy ideas cultivated in a number of agreement between ASEAN countries. For example, the ease of trading transactions as one of the supporting elements of AEC is nothing new. Such important steps were taken more than 20 years ago in the 4th ASEAN Summit in 1992 in Singapore and have encouraged the policy to agree on ASEAN Free Trade Area or AFTA. The idea of forming a free trade area in ASEAN is an important step that urges ASEAN to prioritize issues of peace and stability towards economic expansion and improvement of cooperation.

AFTA is inspired by neoliberal political economy. AFTA does not seem different from global trade liberalization promoted by the WTO; it is even a complement to it. The main objective of AFTA is to increase the competitiveness of ASEAN as a production base geared for the world market. An important step towards this direction is trade liberalization in the region through the elimination of intra-regional tariffs and non-tariff barriers. This will have the effect of making ASEAN's manufacturing sector more efficient and competitive in the global

market. At the same time, consumers will explore the potential of trade in goods from manufacturers more efficiently within ASEAN thus expanding intra-ASEAN trade.

The establishment of AEC in 2015 is similar to the decision to establish AFTA in 1992. According to sociologist of globalization Walden Bello, the formation of AEC was driven by the fear that Asean may be marginalized by APEC, meaning that the formation of AEC in 2007 was triggered by the fear of emergence of two giants, namely China and India (Bello, 2014). Therefore, AEC may reasonably be regarded as "AFTA Plus".

Therefore, the law that supports it cannot be separated, let alone released from the context and history of previous ASEAN policies to allow us to understand the legal framework of AEC, not only based on the text but also by imagining it as a game strategy with its own rules to demonstrate and determine whether or not a strategy is good.

What about the citizens and policies on the people of Southeast Asia? Participation of the people of Southeast Asia may be absent or limited as they are never invited to discuss the strategy and rule of the game. It is possible that they will never be involved in the game, let alone participating.

Let us see one by one the following questions:

- What will be the form and / or type of AEC's law?
- Will it require ratification to make it binding or will it be merely 'morally binding' ?
- Has the Indonesian government, at the domestic level, prepared a specific legal framework for AEC?
- If yes, what sectors have been prepared? If not, which law discourse is the dominant one?

We then undoubtedly need straightforward answers primarily associated with the rights of citizens of ASEAN,

- What would be the impact of the implementation of AEC for Indonesia?
- Will it legally sufficient provide protection to the people of Indonesia?

ASEAN way

ASEAN development is marked by a number of characterized cooperation which is commonly referred to as the "ASEAN way". The aforementioned cooperation is colored by informal discussions and diplomatic consensus rather than serious works to create binding legal products such as legislations that bind the top to the bottom.

There are two factors that can explain the ASEAN way: Firstly, Asian culture that is often touted as a culture that is full of harmony and always avoids confrontation; Secondly, most of member countries of ASEAN are newly established countries resulted from colonialism in the past, so that the imagination of "national sovereignty" is more focused for building cooperation based on the normative regulation in the name of ASEAN Charter which expressly states that, "decision-making is based on consultation and consensus" (Article 20) and pragmatic approach under the formula "flexible participation" in case of consensus (Article 21 paragraph 2).

In the context of human rights, we can easily and clearly show that ASEAN member countries are very resistant towards and have not supported the progressive efforts to advance the protection of human rights for the citizens of ASEAN. Disablement and non-support for citizenship policy at domestic level have shown very similar. Authoritarian regimes were once very strong and bring legacy or inheritance that cannot be broken easily.

ROUTE OF DOMESTICATION OF AEC LAW: INSTRUMENTALIZATION TO OPERATIONALIZATION

Under the ASEAN way, it is not so surprising that the legal framework built will be based on agreements, which formally do not automatically become parts of national or domestic law. 'Domestication of law' resulted from international treaties in the context of Indonesian law is done based on the approval of the parliament, as defined in article 11 of the 1945 Constitution of the Republic of Indonesia.

- 1) The President with the approval of the House of Representatives shall declare war, make peace and agreements with other countries.
- 2) The President in making other international agreements causing broad and fundamental impacts to the life of the people associated with the financial burden of the state, and / or which require changes or establishment of legislations must be approved by the House of Representatives.

In conclusion, any form of products of international agreements, when determined to be binding through the scenario of domestication of law, according to state administration, shall bear the legal form of laws. Consequently, any international treaties mandate the house of representative or the parliament to be involved in escorting or controlling the agreement.

So far, there has been no law in the form of a Law specified in the framework of 'domestication of law' in order to ensure the instrumentalization and operationalization of AEC in Indonesia.

Nevertheless, it is interesting to see that the instrumentalization and operationalization of AEC in Indonesia has been prepared by sectors, at least in certain issues or sectors. It is possible that sectoral policies, through relevant ministries, never coordinate with other related department that should be interrelated. In this context, this paper recommends the need to further analyze the mechanism of sectoral ministerial bureaucracy in making its own policy and strategy to start the instrumentalization and operationalization strategy.

Within the framework of AEC, the product of policies or laws that responds AEC is Presidential Decree No. 10 of 2014 on Ratification of Protocol to change certain ASEAN economic agreements related to trade in goods. This policy is a representation of the affirmation of elements of AEC, namely free flow of goods: removal of tariffs or through removal of non-tariff barriers.

Formally, a product of international treaty law is a protocol. With regard to the example, a protocol has been ratified to become part of the national legal system through a Presidential Decree even though this is contrary to the 1945

Constitution of Republic of Indonesia at least from the side of formality. An international treaty as a constitutional norm needs legal political action called ratification.

Apart from that, Former President Susilo Bambang Yudhoyono had set up a special committee to complete the instrumentalization and operationalization strategies in the form of institutionalization by establishing the National Committee for the Preparation of Implementation of the ASEAN Economic Community (vide: Presidential Decree No. 37 of 2014 dated 1 September 2014).

It is clearly stated in Presidential Decree No. 37 of 2014 in the Considering part as follows:

- a) that within the framework of the implementation of the ASEAN Economic Community that will commence in late 2015, integrated and comprehensive preparation needs to be done so that the implementation of the ASEAN Economic Community can provide the maximum benefit for the national interest;
- b) that the preparation and implementation of the ASEAN Economic Community as referred to in paragraph a shall be conducted by a national committee;
- c) Based on the considerations referred to in paragraphs a and b, it is necessary to stipulate Presidential Decree concerning the National Committee for the Preparation of Implementation of the ASEAN Economic Community;

The National Committee is chaired by the Coordinating Minister for Economic Affairs with the mandate or assignment as stated in Article 2 of the Presidential Decree, namely:

".... shall have the following tasks:

1. To coordinate the preparation of the implementation of the Economic Community of the Association of Southeast Asian Nations (ASEAN);
2. To coordinate the acceleration of national competitiveness within the framework of the implementation of the ASEAN Economic Community;

3. To take steps to settle obstacles and problems in the preparation and implementation of the ASEAN Economic Community as well as the improvement of national competitiveness;
4. To coordinate the implementation of dissemination to all stakeholders with regard to the preparation and implementation of the ASEAN Economic Community and improvement of national competitiveness.

The aforementioned measurement with the establishment of the National Committee shows the position of the Indonesian government that is preparing a specific legal framework to respond to AEC.

As stated above, AEC will strive to strengthen a "capitalistic regionalism" and the dominant sector to be built will deal with investment and capital in the context economic development. Protection, particularly towards investment and capital, is strengthened to support the traffic of trade and regional economic growth.

For example, the ASEAN Comprehensive Investment Agreement (ACIA) took effect on 29 March 2012. ACIA has been the cornerstone of cooperation of member countries to deal with AEC. ACIA is formed as a strategy for strengthening investment competitiveness especially in competition with other regional cooperation.

As quoted from Hukum Online (01/22/2015), it is stated that "... ACIA raises concerns about the fate of 26 bilateral investment agreements signed between member states. ACIA does not mention explicitly whether its enforceability will render bilateral investment treaties null and void. This opens up the possibility of dualism in the legal framework of investment protection between member states. "For investors, they will choose the most beneficial one. Meanwhile, the government in fact will see that bilateral agreements and ACIA are in accordance with their domestic legal regulations", said researcher of Centre for International Law at National University of Singapore, J. James Sejong. He notes that the enforceability of ACIA has brought changes to member states as so far, most member countries make bilateral investment treaty by adopting models commonly used in the world, including the model of bilateral

investment treaty used the United States and Canada namely the North American Free Trade Agreement (NAFTA) model, or the United Nations Conference on Trade and Development (UNCTAD) model. He concludes that the applicability of AICA will not affect international treaties on investments entered into by Indonesia. He notes that the government can impose both the legal frameworks simultaneously. However, he is worried such dualism will confuse investors and the government itself".

ENTERING THE "GATE" OF AEC AND BREAKING ITS LOCK: A CLOSING NOTE

When a capitalistic regionalism building is prepared in the framework of AEC, it is necessary for us to analyze the impact or consequences of the implementation of AEC, at least in the context of Indonesia and will it provide sufficient protection to the people of Indonesia?

AEC is obviously not problem-free as a consequence of being the way for bringing strategies of capitalism under the scheme of neo-liberalism in Southeast Asia.

As noted by Bello one year ago (2014), there are many influential figures who say their countries are not ready for AEC. One of them is Mahathir Mohamad, who is one of the key promoters of ASEAN integration when he served as the Prime Minister of Malaysia. He once said that only Singapore is ready to face AEC because Singapore has been reliable to run its core business in the commercial sector. In addition a lot of experts also noted that Indonesia and the Philippines have not been ready to face AEC.

According to Bello's analysis, trade liberalization has destroyed the manufacturing and agricultural sectors. Almost all industrial sectors, from textiles to the beverage industry as well as from petrochemicals to the ceramic industry are hit by cheap imports with many of them are subsidized. Since joining the WTO in 1995, the Philippine's experience shows that it has shifted from an exporting country to be a net importer of agricultural products.

It is interesting to analyze who actually is working for the instrumentalization and operationalization of AEC? AEC has indeed become a reality and will bring us towards the "economic gate" of Southeast Asia while in fact, people of Southeast Asia will enter the gate, and on the other hand, most of the problems that are and will be settled are rather seen as government projects and a number of interest groups are concerned that AEC will result in loss of domestic markets and strengthen groups of foreign investors.

According to Bello (2014), AEC Blueprint is the bias of business elites. It actually does not provide protection for workers and positive protection to ensure that economic growth will be equally distributed. On one hand, it will promote free flow of goods and capital and will follow the WTO neoliberal bias that does not promote a free flow of labor. It is important to criticize that it will ignite human trafficking in the ASEAN. He later comments that AEC Blueprint is almost completely deaf when it comes to promoting sustainable development in the ASEAN region. AEC merely supports sustainability with relaxed rules in the area of environmental protection, which is obviously unacceptable in the midst of desperate solution to the dangers of climate change.

In conclusion, the legal framework of AEC is like a sort of doorstep under the control of business elites which brings investment and capital in traffic of trade that actually does not really care about social protection (people's rights to natural resources) and environmental and ecological issues. Legal certainty in the context of legal framework managed by technocrat government, will likely be directed to support the interests of business elites, so instead of seeking settlement of disputes or conflicts over natural resources at the domestic level, AEC will actually worsen the conflict and perpetuate the grabbing of natural resources in the name of investment and imaginative interests of the region.

In summary, inequality in the agrarian and natural resources sector has now been increasingly challenged by political and legal consolidation wearing the mask of regional economic development.

References

- Bello, Walden. 2014 *Asean Economic Community: A Critical Perspective*. Presentation at the University of the Philippines, Los Banos, February 14, 2014.
- Hukum Online. 2015. Lindungi Investor Asing, Indonesia Diminta Akhiri Perjanjian Investasi, Negara anggota ASEAN perlu memastikan satu kerangka hukum untuk melindungi investor asing dan membantu pemerintah lebih fokus dalam mendefinisikan kebijakan investasi. <http://www.hukumonline.com/berita/baca/lt54c0a0aacc0fd/lindungi-investor-asing-indonesia-diminta-akhiri-perjanjian-investasi>, Thursday, 22 January 2015 (accessed on 15 June 2015).

Paper for Regional Workshop, Protection of People's Right to Land and Natural Resources in Facing the Wave of ASEAN Economic Integration, Bali 23-24 November 2015.