
Harmonizing Ideological Tension in the Development of the ASEAN Law

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There have been at least twenty Summits among the ASEAN countries. They adopted about twenty basic legal documents. All these are dedicated to realizing the ambitious dream of the ASEAN countries to be developed. However, the facts went opposite. ASEAN cooperation stays slow and reaches a very narrow target. Most ASEAN people feel bored and hopeless over the state of cooperation. The slow and narrow cooperation have disposed the cooperation into a downfall image such as a fiction, or even a utopian. The downfall image could make cooperation even slower or end it altogether, as it commonly drives the belief of the people from trust to distrust and believing into disbelieving. The gap between the 'sollen' and the 'sein' in the cooperation shows a strong influence of undetectable causes. This article applies a law and ideological approach in searching and analyzing the cause of slowness of performance of the cooperation.

I. Introduction

The ideological aspect of law has been studied for hundreds of years, although it was sometimes ignored by legal scholars. Hans Kelsen (1881-1973),¹ a leading legal philosopher, representing the 'Wiener Schule,' through his "Pure Theory of Law (*Reine Rechtslehre*),"² has strictly secured law from any of its non-normative aspects, such as

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¹ Hans Kelsen, born in Prague in 1881, was a legendary legal scholar. For his life and thoughts, see Hans Kelsen, available at http://www.unostamps.nl/person_kelsen.htm (last visited on Nov. 1, 2012)

² For details on *Reine Rechtslehre*, see H. KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 7 (1966); GENERAL THEORY OF LAW AND STATE 39, 61 (1971); and INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 7 (1966). Regarding *Reine Rechtslehre* see L. RASJIDI & I. WYASA, HUKUM SEBAGAI SUATU SISTEM (LAW AS A SYSTEM) 1 (2012); J. STONE, THE PROVINCE AND FUNCTION OF LAW: LAW AS LOGIC JUSTICE AND SOCIAL CONTROL 91-92 (1950); H. HAWTON, PHILOSOPHY

history, ethic, ideology, politics, economy, social, culture, etc. He defined 'law' as merely a norm.³ Since then, the "pure theory of law" predominantly has been influencing contemporary legal thinking and most legal scholars define law from the Kelsenian perspective. The followers of this theory strictly view law as a norm and limit their scientific work to the normative approach of law. They mostly study all kinds of normative problems regarding conflict, which they perform in the validity, consistency and coherency test of norm.⁴ They do not deal with the problems of substance and function of law. That is why some jurists strongly criticize Kelsen's theory, especially when the theory suffers the functions of law in performing its actual task in social life.⁵

The primary task of law is supposed to be to control social changes.⁶ How to realize it, then? This practical question attracted some legal scholars to bring back the complete nature of jurisprudence where the 'sein' shall be open to its empirical and objective facts of law in the actual social life and shall not be surrendered solely to any closed rational or analytical approach.⁷

Law is a transformation of ideology, not only under the idealistic definition by Karl Marx,⁸ but also within its actual existence in the community life.⁹ The community's value and interest which is driven from its ideology or its actual value and interest shall be in conformity with the community's ideology. Law is a result of the response or articulation of the community's expectations by the law-makers. Hence, the function of law needs to be recovered by means of recovering its content.¹⁰

ASEAN law reflects a great harmony of values, interests, and needs of the ASEAN member countries.¹¹ However, it has not supported the actualization of the ASEAN

FOR PLEASURE: AN ADVENTURE IN IDEAS 36 (1956); and R. POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1986).

³ J. HARRIS, LAW AND LEGAL SCIENCE: AN INQUIRY INTO THE CONCEPTS LEGAL RULE AND LEGAL SYSTEM 34 (1982). A norm is a generally accepted standard of social behavior. Kelsen uses the term in his definition of law as "the primary norm that stipulated the sanction." See ZANG WAN HONG & GUO YI, JURISPRUDENCE 20 (2003).

⁴ B. BROUWER ET AL, COHENRENCE AND CONFLICT IN LAW 17, 39 (1992). Cf. A. Peczenik, *A Theory of Legal Doctrine*, 14 RATIO JURIS 84 (2001).

⁵ McDougal criticizes Kelsen's theory as lacking the capacity to explain the actual existence of law as a continuing process of authoritative decisions. See M. McDougal, *Law as a Process of Decision: A policy-Oriented Approach to Legal Study*, 1 NATURAL LAW STUDY 58 (1956). For details on the criticism against the Kelsen's jurisprudence, see J. Priban, *Legal Fictions and the Problem of Scientific Legitimation*, 16 RATIO JURIS 20 (2003); J. Otto, W. Stoter & J. Arnscheidt, *Using Legislative Theory to Improve Law and Development Projects*, 2 JURNAL REGEL MAT AFL. 4 (2004); H. CHAND, MODERN JURISPRUDENCE 105 (1994); and H. KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY xvii (1966).

⁶ Pound, *supra* note 2, at 1.

⁷ *Id.* See also Hawton, *supra* note 2, at 36; A. WHITEHEAD, SCIENCE AND THE MODERN WORLD 200 (1926).

⁸ K. Marx defines ideology as any set of political illusion that has been produced by the social experience of a class. See L. SARGENT, CONTEMPORARY POLITICAL IDEOLOGIES 3 (1981).

⁹ *Id.*

¹⁰ Y. DROR, VENTURE IN POLICY SCIENCES 169 (1977).

¹¹ The harmony among the ASEAN countries has been repeatedly expressed in many ASEAN legal instruments. See, e.g., ASEAN (Bangkok) Declaration 1967, ASEAN Concord 1976, Agreement on ASEAN Preferential Trading