THE DEVELOPMENT OF THE RULE OF LAW IN ASEAN
The State and Regional Integration

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A thesis in fulfilment of the requirements for the award of the Degree of Doctor of Philosophy

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ABSTRACT

The main question in this research project is whether regional integration promotes the rule of law in ASEAN. The thesis has adopted a functional, rather than conceptual, approach to understanding the rule of law and its development in regional integration. While the approach reflects an instrumentalist function of the rule of law, the study provides a holistic and interdisciplinary approach taking account of the legal, institutional, and political processes in the state, the region, and international relations to show the motivations and interests of member states in adopting a peculiar type of regional arrangement. The research project has taken the European Union for comparison, not as a model in the strict sense, to identify the development of legal and institutional processes that build the foundation of the rule of law and the factors that drive the evolution of state-like constitutionalism.

Common legal tradition of the rule of law, leadership role of key member states, and regional institution building – are the main processes in the development of the rule of law in the EU and are either lacking, different, or weak in the context of ASEAN. However, an evolving form of the rule of law exists in ASEAN. The rule of law in ASEAN integration is designed to provide a stable and coherent framework for interstate relations among member states and to achieve effective implementation of the member states’ economic commitments. ASEAN has adopted an instrumentalist conception of the rule of law and one based on ‘thin’ constitutionalism, as reflected in the ASEAN Charter. The features of the rule of law in ASEAN are – state-controlled, limited, evolutionary and resting on soft legal regime.

ASEAN has chosen a different path at regional integration and globalization has offered new techniques of the rule of law. Regionalism in ASEAN remains statist in character and the ASEAN Way is still entrenched. There are significant developments towards adopting a broader basis of regional cooperation and opportunities for developing the rule of law in ASEAN. To broaden the function of the rule of law in regional integration, as a mechanism of accountability and as a form or restraint, ASEAN needs to adopt initiatives aimed at expanding political participation and respect for human rights. The European Union offer points of learning for ASEAN in achieving a broader function for the rule of law in ASEAN integration.

Portions of this thesis were presented at the following international conferences:

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<tr>
<td>ASEAN Charter (The Charter)</td>
<td>ASEAN Civil Society Conference (ACSC)</td>
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<td>ASEAN Community (The Community)</td>
<td>ASEAN Defence Ministers’ Meeting (ADMM)</td>
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<td>ASEAN Economic Community (AEC)</td>
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<td>ASEAN Eminent Persons Group (EPG)</td>
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<td>Cambodia Myanmar Laos PDR Vietnam (CMLV)</td>
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<td>Common Effective Preferential Tariff (CEPT)</td>
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Inter-institutional Agreements (IIAs)
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International Criminal Court (ICC)
International Monetary Fund (IMF)
International Political Economy (IPE)
Malaysia Philippines and Indonesia (MAPHILINDO)
Mercado Comun del Sur (MERCUSOR)
Mutual Recognition Agreements (MRAs)
National Human Rights Commissions (NHRI)
New Economic Policy (NEP)
Non-Government Organizations (NGOs)
North American Free Trade Area (NAFTA)
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Pacific Island Countries Trade Agreement (PICTA)
Pacific Islands Agreement on Closer Economic Relations (PACER)
Permanent Tribunal of Review (PTR)
Solidarity for Asian People’s Advocacy (SAPA)
South Asian Association of Regional Cooperation (SAARC)
Southern African Customs Union (SACU)
Southern African Development Community (SADC)
Treaty of Amity and Cooperation (TAC)
United Malay National Organization (UMNO)
United Nations (UN)
Vientiane Action Program (VAP)
World Bank (WB)
World Trade Organization (WTO)
World War II (WWII)
CHAPTER ONE

Introduction
From ASEAN Way to the ASEAN Charter – towards the Rule of Law?

1. A general background

Studying a highly plural regional organization like the Association of Southeast Asian Nations (ASEAN) is a difficult undertaking. The study is bound to be more complex when the subject is about the rule of law in regional integration where ‘the rule of law’, by itself, is an unsettled concept. This is further complicated by the fact that there are lingering doubts about the very existence of the rule of law in member states of ASEAN. ASEAN faces the same question. Does the rule of law exist in ASEAN regional integration?

The adoption of the ASEAN Charter (The Charter) on 20 November 2007 on the occasion of the Thirteenth ASEAN Summit is expected to turn a new leaf on the forty-year history of ASEAN. It came into force on 15 December 2008 after ratification of its member states. ASEAN is composed of ten countries in Southeast Asia. The five original member countries are Indonesia, Malaysia, the Philippines, Thailand, and Singapore whose foreign ministers signed the two-page ASEAN Declaration (Bangkok Declaration) on 8 August 1967 establishing ASEAN. Brunei Darussalam joined ASEAN in 1984 while Vietnam was admitted in 1995.1 Myanmar (Burma) and Laos PDR joined in 1997 while Cambodia was formally admitted in 1999.

The ASEAN Charter, aimed at giving ASEAN a legal personality and a more rules-based regime, is a historic development for a regional organization better known for its informal and flexible manner of cooperation and a form of decision-making based on musyawarah (consultation) and mufakat (consensus). The ‘ASEAN Way’ not only describes the conduct of relations of member states but sums up the core principles and values of the association which are based on the strict adherence to the principles of national sovereignty and non-intervention. The Charter represents an evolving new

framework for regional cooperation in ASEAN. It came as a consequence of ASEAN’s initiatives in promoting regional integration.

The establishment of the ASEAN Community by 2015, denoted as a sharing and caring Community, is expected to be the culmination of efforts to deepen cooperation among member states in economic, political and security, and socio-cultural dimensions. The ASEAN Community is envisaged as ‘a concert of Southeast Asian nations, bonded together in partnership in dynamic development and in a community of caring societies, committed to upholding cultural diversity and social harmony’. Economic integration is the flagship program of ASEAN integration representing a departure from the highly political basis of regional cooperation in the past.

The shift in ASEAN’s thrust from political to more substantive economic cooperation has opened a range of possibilities and opportunities for change in the region. This includes prospects for the development and the promotion of the rule of law in the processes of regional integration. The adoption of the ASEAN Charter has been hailed by ASEAN state leaders as facilitating the realization of ASEAN Community objectives by investing the organization with legal personality and efficient structures. The ASEAN Charter states adherence to the rule of law, good governance, the principles of democracy and constitutional government as among the key principles to be observed by member states.

ASEAN cooperation had dramatically changed with the onslaught of combined political and economic events in the 90s, in particular the end of the Cold War, the democratization movement, and the Asian financial crisis of 1997 affecting member countries. These episodes caused major transformation in the political and economic arrangements of Southeast Asian countries most notable of which had been the dismantling of authoritarian regimes in the Philippines, Indonesia and Thailand, the resolution of the Cambodia conflict and its democratization, and the embrace by

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3 Cebu Declaration on the Blueprint for an ASEAN Charter, signed by the heads of states of the ASEAN on 13 January 2007; Declaration of Bali Concord II (Bali Concord II) 7 October 2003 signed in Bali, Indonesia, at http://www.aseansec.org/15159.htm, viewed on 15 November 2006.
socialist states, Vietnam and Laos PDR, of the market economy. The millennium has brought about significant events – in particular September 11 and its fall-out and the current economic and financial crisis, highlighting past challenges and giving rise to new ones – such as the emergence of Islamist radicalism and transnational crimes, that prompted state leaders to seek for regional cooperative solutions.

In ASEAN, there was profound rethinking on the part of leaders and elites of ASEAN’s role in the face of internal and external problems. The failure of ASEAN to provide a common front on the Asian financial crisis, particularly as the crisis severely affected many member states, has led to criticisms regarding ASEAN’s continued relevance as a regional organization. At the same time, member states have to face the challenge of increasing competition from other developing economies as economic globalization intensifies. Globalization has affected the internal political and economic processes in member states and this prompted state leaders and elites to make ASEAN responsive to the challenges and benefits of globalization. In particular, the Asian crisis exposed the flaws on Asian values espoused by authoritarian regimes in the region that sought to particularize conceptions of democracy and human rights in a cultural and communitarian contexts. On the part of the peoples of Southeast Asia, the impact of globalization and the idea of a more integrated region have encouraged non-government organizations and other civil society organizations to reconsider ASEAN as a venue for advocating political, economic, and socio-cultural issues.

Like the European Union (EU), ASEAN integration was borne out of the desire for peace and stability in the region through greater economic cooperation. Peace-building in the context of most Southeast Asian societies is however situated in the wider program of nation-state building. As a product of long historical process, the nation-state in Southeast has struggled to achieve internal cohesion and legitimacy placing primacy on social unity, cohesion and order. Regionalism, the broader context to which regional integration is situated, remains anchored on the member state’s efforts at nation-state building. On the other hand, achieving peace in the context of the EU is situated on the context of ending centuries of Pan-European wars and in restraining the

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re-emergence of German hegemony.\textsuperscript{6} This has informed to a large extent the decision among member states to surrender some parts of their sovereignty in favour of a supranational authority responsible in implementing the member states’ obligations in the treaties. The act of delegating or pooling of sovereignty to a supranational body has enabled the European Union to transcend a state-centred approach to international relations and international law and created a model of regional governance that exhibits autonomy from its member states.\textsuperscript{7}

2. The early ASEAN, non-intervention, and the ‘ASEAN Way’

ASEAN started as a regional mechanism to avert major armed conflict in a volatile region. Its two precursors, the MAPHILINDO and ASA (Association of South-East Asia), faltered in the face of interstate conflicts among member states.\textsuperscript{8} The ensuing years have seen the stabilization of the region, understood as the absence of any major armed confrontation among member states. This was attributed by state leaders and officials to the stabilizing effect of the establishment of ASEAN. There is wide agreement among academics that ASEAN was established as a security community, though perhaps in a rather implied and limited manner.\textsuperscript{9} The attainment of ASEAN’s objectives in securing peace and security in the region has been ascribed to the ‘political formula’, the primary basis of cooperation in ASEAN particularly on the first ten years of its existence.\textsuperscript{10}

The primacy of the political agenda of the association is not only implied from the consequential benefit of being free from fear of external threats. It was as much


\textsuperscript{7} Pierre Pescatore, \textit{The Law of Integration, Emergence of a new phenomenon in international relations, based on the experience of the European Communities}, (Leiden, A.W. Sijthoff, 1974), 4-11.

\textsuperscript{8} ASA (composed of Thailand, Malaysia and the Philippines) was formed on 31 July 1961 and MAPHILINDO (which stands for Malaysia, Philippines and Indonesia) on 5 August 1963. These two regional organizations failed because of two major inter-state conflicts in the region: the Konfrontasi or Confrontation declared by Indonesia in January 1963 against the formation of the Federation of Malaysia and the Philippines’ claim over the territory of Sabah which was annexed in the Federation.


dictated by the domestic imperatives of state-building which have preoccupied the member states after the post-colonial era. Political instability was considered the principal threat to the internal security of member states and ethnic secessionist groups and communist insurgents were deemed to be the ‘enemies of the state’. Security threat was expanded to include any opposition to the governments such as political parties, activists and the media. By the late 60s, most states in ASEAN were ruled by authoritarian regimes.

ASEAN has vigorously espoused the principle of national sovereignty and non-intervention. It coincided with the member state’s interests at being left alone to tackle their political and internal security issues without being bothered by any form of interference from its neighbours. The recognition of security threats as the primary source of insecurity was formally recognized in ASEAN when it formally adopted through the Declaration of ASEAN Concord (Bali Concord) the principles of regional and national resilience as key to safeguarding the stability of the member state and the whole region. National resilience is understood as ‘the security of the nation emerging from the strength of national development’ and encompasses all major aspects of nation building. Without having to contend with external interference or pressure, member states could focus on their nation-building objectives which are centred on achieving economic growth and development. Regional resilience could therefore be achieved by enabling the member states attain their respective national resilience. The Bali Concord, which came ten after years the founding of ASEAN, also formally recognized for the first time the political framework of ASEAN cooperation. Political cooperation was stated ahead of economic cooperation, a tacit acknowledgment of ASEAN’s raison d’etat. The instrument lays down the components of political cooperation in ASEAN as:

1. Meeting of the Heads of Government of the member states as and when necessary.

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3. Settlement of intra-regional disputes by peaceful means as soon as possible.

4. Immediate consideration of initial steps towards recognition of and respect for the Zone of Peace, Freedom and Neutrality wherever possible.

5. Improvement of ASEAN machinery to strengthen political cooperation.

6. Study on how to develop judicial cooperation including the possibility of an ASEAN Extradition Treaty.

7. Strengthening of political solidarity by promoting the harmonization of views, coordinating position and, where possible and desirable, taking common actions.13

Implicit in ASEAN’s rationale for cooperation is its aim of strengthening the sovereign capacities of member states. Unlike the European Union where the states agreed to voluntarily surrender certain parts of their sovereignties to a supranational body, member states in ASEAN did not intend to lessen their sovereign powers especially in the context of regional relations. This and the political nature of ASEAN inform the processes of ASEAN cooperation. Regional issues that were inherently political in nature had called for political solutions or approach. Although territorial conflicts between Indonesia and Malaysia involving Pulau Ligitan and Pulau Sipadan Islands in theCelebes Sea and between Malaysia and Singapore over Pedra Branca had been referred to the International Court of Justice for legal adjudication, most other disputes in the region had been dealt with or managed through the traditional method of state diplomacy.14 Building trust and confidence with each other in view of existing intra-state conflicts was a key consideration in developing regional cooperation.

ASEAN became a regional venue for diplomacy where issues that are considered sensitive to tackle regionally are dealt with either through quiet diplomacy or bilateral

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13 Section A, Bali Concord, supra.
14 The Malaysia-Indonesia dispute was decided in 2002 by the ICJ in favour of Malaysia though it left open issues of maritime demarcation that has remained contentious and Indonesia still claiming maritime jurisdiction over Ambalat and East Ambalat. In 23 May 2008, the ICJ ruled in favour of Singapore jurisdiction over the Pedra Branca islet, known as Pulau Batu Puteh in Malaysia. The state parties have so far sufficiently respected and complied with the ruling of the international court. The ASEAN Way which is based on informal and low-key approaches is thought to have managed conflicts but not resolved them as well as lacking clear framework for more effective security management in the region. For further discussion see Yukiko Nishikawa, ‘The “ASEAN Way” and Asian Regional Security’, Politics and Policy, Vol. 35, No. 1 (2007), 42-56.
Issues that are considered for bilateral negotiations range from secessionism, insurgencies, territorial and border disputes, to foreign policies on non-alignment and neutralization and security problems involving foreign powers such as foreign military bases and military cooperation. ASEAN consciously adopted informal and flexible mechanisms as opposed to formal and institutionalized rules. This is evident from the Bangkok Declaration itself where ASEAN is described as an ‘Association for Regional Cooperation’ and consists of ‘the collective will of the nations of Southeast Asia to bind themselves together in friendship and cooperation.’

The legal and institutional mechanisms reflected the modest political aims of ASEAN’s early years. The ASEAN Declaration only provided for four informal and loose institutions - Annual Meeting of Foreign Ministers called the ASEAN Ministerial Meeting (AMM), a Standing committee, under the chairmanship of the Foreign Minister of the host country, Ad-Hoc Committees and Permanent Committees of specialists and officials on specific subjects, and A National Secretariat in each member country. It was only in 1976 that the ASEAN Secretariat was established and convening of the first ASEAN Summit, or meeting of the Heads of States, was made.

ASEAN has developed a mechanism of regional cooperation that state leaders and officials consider to be distinctive of the association. The ‘ASEAN Way’ has generally defined what ASEAN is. ‘ASEAN Way’ has developed as the core principles and norms in ASEAN and consists of both behavioural and procedural elements. The behavioural aspect is comprised of what is collectively known as ‘code of conduct’ to be observed by member states in relation with one another. The Treaty of Amity and Cooperation (TAC) enumerates basic principles of international law that have assumed greater and even peculiar meanings in ASEAN owing to the region’s colonial history and security perceptions. The core principles embodied in the TAC are as follows:

1. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;

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16 The ASEAN Declaration (Bangkok Declaration), Bangkok, Thailand, 8 August 1967.
17 Third paragraph, Bangkok Declaration.
2. The right of every State to lead its national existence free from external interference, subversion or coercion;
3. Non-interference in the internal affairs of one another;
4. Settlement of differences or disputes by peaceful means;
5. Renunciation of the threat or use of force; and
6. Effective cooperation among themselves.¹⁹

These principles are subscribed to by most states and recognized as rational-legal norms of international law. ASEAN has invested peculiar meanings to these concepts. Thus, the principles of respect for national sovereignty and non-intervention have gained specific meanings or expectations of conduct of member states towards each other. Member states are expected to refrain from criticizing the actions and policies of another member state toward its own people such as the treatment of human rights. They are also expected to deny recognition, sanctuary, or other forms of support to any rebel or secessionist group in a member state, or to provide support or material assistance to member states in their campaign against subversive and destabilizing activities.²⁰

The procedural component of ASEAN Way is grounded on the use of informal mechanisms in ASEAN to manage conflicts or to arrive at decisions. Informal means of dispute settlement in ASEAN, which is underpinned by conflict avoidance or containment, is characterized by observance of particular conducts which are outside the formal and institutional mechanisms of the association. They place emphasis on self-restraint, respect and tolerance, acceptance of the processes of *mushawarah* and *mufakat*, use of third-party mediation, agreeing to disagree, and networking. These norms have been collectively referred to as ‘diplomacy of accommodation’ or ASEAN’s intramural approach to dispute settlement.²¹ Formal mechanisms for dispute settlement have been instituted in ASEAN such as the provision for a High Council in the Treaty of Amity and Cooperation and the Protocol for Enhanced Dispute Settlement

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Mechanism and dispute resolution mechanism in other economic agreements but these have not been used by member states in resolving their conflicts.

The ‘ASEAN Way’ on decision making which is centred on consensus building through a process of discussion and consultation has been argued as a prototype of Southeast Asian culture. It is said to reflect the customary way in arriving at decisions in villages and among the elites in Southeast Asia. The process of consultation entails lengthy negotiations and is incremental. Decisions are made only after several behind the scenes or low-key meetings among officials. Leaders may agree to disagree on their positions but disagreements are, more often, not stated publicly. The origins of the ‘ASEAN Way’ have been traced from member states’ nationalist struggle for recognition and security which culminated in ASEAN’s establishment as a Zone of Peace Freedom and Neutrality (ZOPFAN). While there is doubt as to whether ASEAN Way is distinctively Southeast Asian, there is little question that it has crystallized into ASEAN’s diplomatic and security culture and mediated estrangement and insecurity in the region.

The ‘ASEAN Way’ has served the purposes of ASEAN particularly in its formative years. By enabling member states to direct their energies towards domestic problems without fear of intervention or criticisms from neighbouring states, the ‘ASEAN Way’ has performed state-building or regime-maintenance function in member countries. Autonomy, discretion and flexibility have been enhanced in member states through ASEAN’s reliance on its core values based on sovereignty, non-intervention and informality. The ‘ASEAN Way’ has fostered solidarity among leaders of member states and even the maintenance of dictatorships. Informality and flexibility, as salient feature of the ASEAN Way, is not inviolable. The intermittent armed clashes between Thailand and Cambodia over a border issue show non-observance of restraint and non-use of force. Various incidents in the past also show deviation from non-interference such as the Indonesian protests over Malaysian’s expulsion of its Rohingya

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Muslim inhabitants, the giving of sanctuary to Philippine Muslim rebels in Sabah, and Indonesian pressure over the Philippines to ban East Timorese and foreign delegates in attending a conference on East Timor in 1994.\textsuperscript{25}

The adoption of the ASEAN Charter amounts to an implicit recognition of the limits of the ‘ASEAN Way’ as ASEAN embarks on an ambitious plan of building an ASEAN Community. New challenges have emerged that go beyond the traditional conception of security. The ‘new’ ASEAN now recognizes the principle of comprehensive security that extends to all forms of threats such as transnational crimes and trans-boundary challenges that need greater political, security, economic and socio-cultural cooperation.\textsuperscript{26} To bring about economic integration would require clear, stable and predictable rules as well as institutions to implement and enforce agreements. It also demands greater political cooperation of member states requiring more stable and coherent framework for interstate cooperation. The EU experience shows the interdependence of economic and political cooperation and that such interdependence not only enhances economic cooperation but other areas of regional cooperation.

2.1. ASEAN regional integration – a way forward to the rule of law?

Regional integration had been synonymous with the process of building the European Union but the term has now been applied to more than four hundred other regional trade agreements that had been notified to with the World Trade Organization.\textsuperscript{27} The proliferation of projects of regional integration across the globe coincided with increasing globalization and considered as expression of regionalism which in its new wave has been informed by the neo-liberal forces of globalization and the new dynamics in international relations.\textsuperscript{28} Regionalism is understood as a top-down political process imposed and managed by the states for a range of political, security


\textsuperscript{26} Art. 1, Chapter 1, The Charter.

\textsuperscript{27} There were 421 RTAs notified to with the Committee on Regional Trade Agreement of the WTO as of December 2008, of which 230 are in force. It is estimated that there will be around 400 operating RTAs by 2010, at http://www.wto.org/english/tratop_e/tratop_e/region_e/region_e.htm, viewed on 19 January 2009.

\textsuperscript{28} Jens-Uwe Wunderlich, \textit{Regionalism, Globalization and International Order: Europe and Southeast Asia}, (United Kingdom, Ashgate, 2007), 1, 34-6.
and economic cooperation. Regional integration, in its broadest term, could be regarded as a process by which member states agree to form regional institutions that promote the attainment of common goals. It is the formal expression of regionalism where institutions are formed and different parts are brought together.

While regional integration projects in the 90s were considerably motivated by economic objectives, some of them have evolved as political projects of nation-states as greater commercial cooperation becomes an instrument for attaining broader political, social and economic objectives. Globalization is at the heart of regional integration and the latter is regarded as complementary, rather than antagonistic, to multilateralism. Regional integration is generally looked upon with favour as a preparation towards globalization through its preferential incentives to prepare industries to be more competitive and to create larger regional markets.

ASEAN regional integration has globalization as catalyst but member states’ state-building objectives continue to underline broader regional cooperation. Some of the key factors that sparked ASEAN integration initiatives that began with the establishment of the ASEAN Free Trade Area (AFTA), were identified as: ‘(1) growing interdependence triggered by the rise of production networks; (2) regionalism in Europe and the Americas; (3) the loss of momentum in the APEC and the World Trade Organization (WTO); (4) the Asian financial crisis; and the (5) the transformation and resurgence of China.’ However, the enumeration of the first three purposes in the ASEAN Charter reflects the continuing primacy of political and security motivations of ASEAN integration. The purposes of ASEAN are:

1. To maintain and enhance peace, security and stability and further strengthen peace-oriented values in the region;
2. To enhance regional resilience by promoting greater political, security, economic and socio-cultural cooperation;

29 Jens-Uwe Wunderlich, Regionalism, Globalization and International Order: Europe and Southeast Asia, (United Kingdom, Ashgate, 2007), 3-4.
30 Robert Devlin & Antoni Estevadeordal, ‘Regional Integration, Trade and Development’ in Bridges for Development, (Inter American Development Bank, 2003), 4-5.
31 Robert Devlin & Antoni Estevadeordal, ‘Regional Integration, Trade and Development’ in Bridges for Development, (Inter American Development Bank, 2003), 4-5.
3. To preserve Southeast Asia as a Nuclear Weapon-Free Zone and free of all other weapons of mass destruction;[^33]

Regional integration in ASEAN is aimed at taking advantage of the benefits of globalization in a way that should also protect and enhance the sovereignty of the members. It is thus observed that even ASEAN’s adoption of an open and non-exclusive integration, expressed through its ‘ASEAN Plus’ concept, is meant not only to better stimulate trade and investment but also a strategy to lessen the potential for domination of a single foreign power and thus maintain the member states’ sovereign independence.[^34]

With ASEAN’s new broader aspirations, it is time to ask whether the ‘ASEAN Way’ remains relevant or whether there is a need to depart from it. There is overwhelming recognition, even from ASEAN officials themselves, of the inherent limitations that ASEAN Way has in dealing with the more dynamic demands of economic cooperation and thus the need to evolve into a more rules-based regime.[^35] Regional integration in its general sense presupposes more cohesion among member states, not only in the sharing of common ideas of values and ends, but also not least, on the ways and means of achieving them. Regional integration has paved the way for public and private non-state actors to be involved or be affected, directly or indirectly, through its activities and its potential impact on domestic institutions, policies and laws. This study therefore looks at whether current legal and institutional developments in ASEAN have signalled a departure from the ASEAN Way and signified ASEAN’s commitment to observe the rule of law in regional integration.

3. **Exploring the concept of the rule of law and its evolving nature**

The discussion on the rule of law would assume that it is inextricably linked to the concept of sovereignty. As a contested concept, much like the rule of law, sovereignty

represents the central idea of statehood as well as that of international relations. There is a minimally acceptable condition however for the existence of sovereignty – as the ultimate authority or source of decision. Conceptions of the rule of law have developed from the notion of law replacing violence as the primary form of state’s power of coercion to one that is precisely meant to constrain or limit the state’s absolute exercise of authority. From a theoretical perspective, this ratiocination has followed the development of the concept of sovereignty from one that is absolute or without legal and political limits to authority, to a sovereignty that is generated through a form of social contract between the ruler and the ruled. The latter instance presupposes the need to safeguard the governed from abuse of state power through separation of powers and respect for fundamental freedoms. Seen from the context of Western historical tradition, sovereignty as constitutive of the state came about as a process of centralization of political power where law has become the tool of ruling but also as an effective restraint against the tyranny of rule.

The philosophical idea that the state and law are mutually identical has led to a conception of the rule of law as a set of verifiable formal criteria by which a particular state legal system is to be judged. A conception that strives for the rule of law’s universal application without having separate criteria as to the law’s contents, stresses the formal elements that enable the law to be capable of guiding the behaviour of its subjects by allowing them to know and plan in advance the legal implications of their actions. From Hayek, Raz, Fuller, and Unger comes an agreement that the law should possess at least these fundamental characteristics – prospective, general, clear, public, and relatively stable. This conception based on formal legality can be consistent with most regimes regardless of their political systems and is as capable of maintaining authoritarian regimes as sustaining liberal democracies. On the other hand, a thicker conception of the rule of law incorporates, in addition to formal rules, the law’s ‘morality’ which from European tradition has been originally derived from natural law.

This more substantive conception includes values of democracy, justice and human rights which imbue the law with popular legitimacy and ethical standards.

Traditional conception of the rule of law in international relations presupposes the existence of international law as a substitute to power politics – the sovereign powers of states, in some aspects of functional cooperation. In this conception, the dual character of the state’s sovereignty is recognized - its internal or external competence to determine the ultimate validity of the law. The recognition given to international law is said to flow from the voluntary acceptance of the state and from the international community of states as a whole. In this view, the states are still considered the main actors in international law. The notion of state sovereignty as the ultimate source of legal authority in a given territory or jurisdiction has however been increasingly challenged.

Globalization and the emergence of supranational legal order in the European Union have interrogated the two basic tenets of sovereignty - territorial integrity and voluntary principle in international law. New types of law have emerged that no longer depend on voluntary acceptance of states but are imposed for the good of humanity or to avert humanitarian disaster. New sources of law are coming from non-traditional domain of law, the state, but from a range of international organizations or non-state actors. These phenomena are changing the significance of national and international boundaries in general and in particular, the patterns of legal relations. There have been debates as to whether the sovereign authority of the state is weakened as a result of this encroachment on the state’s law-making capacities.

Globalization has brought new forms of the rule of law which challenge even the formal conception of the rule of law. There is an increasing trend towards ‘deformalization’ of international law. This has been brought by an explosion in international rule-making particularly in commercial transactions and the rise of ‘private

41 This portion will be fully explored in Chapter Two.
global authority’ that is increasingly the source of international rules and adjudication.42

The use of these international economic rules however has been based on norms and customs, the ‘merchant law’, which are mostly dependent on their application of informal standards and rules. Problems of consistence, coherence and clarity are evident in the application of economic rules or norms which are applied on ad hoc and individual basis but likewise of international law where interpretation and application could vary from one jurisdiction to another or where, in the case of powerful states, compliance is dependent on expediency.43

The public aspect of the rule of law is also challenged as newer forms of international adjudication, whether judicial or non-judicial, avoids or restricts publicity and therefore raises questions about transparency and accountability of international governance institutions and their activities. Even in the field of human rights where the interpretation and enforcement of international standards have suffered from much deviation or challenge, the use of non-formal and non-judicial mechanisms are increasingly being explored or resorted to in resolving human rights issues.44

In the context of European Union integration, the rule of law has taken a distinctive turn incorporating both aspects of formal legality and substantive values of democracy and human rights. The development of constitutional legal order anchored on the principle of supremacy of Community law enabled the European Union to assume a state-like quality of the rule of law. The discussion in the next chapters will show the construction of the EU as a hybrid polity and thus the remote possibility of reproducing a replica of state rule of law in regional integration. However, the combination of laws and institutions – which are formal or informal, hard or flexible, national or supranational, has made it possible to expand the function of the rule of law from its instrumentalist function at achieving economic integration to a broader function as restraint to EU authorities and as a mechanism for accountability. The EU has

42 Claire Cutler, Virginia Haufler, & Tony Porter, Private Authority and International Affairs, (State University of New York Press, 1999), 4-5. See also Brendan Edgeworth, Law, Modernity, Postmodernity: Legal change in the contracting state, (London, Ashgate Dartmouth, 2003).

43 Brian Tamanaha, On the Rule of Law, History, Politics, Theory, 131.

presented an alternative model of an international society that it is not solely based on the supremacy of the states and thus the guarantee for the autonomy of its institutions. While the process has entailed giving up some aspects of state sovereignty, this has not been regarded as ‘weakening’ of the state. On the contrary, it has been observed that it has been possible for the European Union to enhance the collective action of its members externally but also the strengthening of individual capacities of member states.45

3.1. The rule of law as an aspect of regional governance

The rule of law is now considered as a core principle of ‘good governance.’ An acknowledgment of the rule of law as the foundation of ‘good governance’ at the national and international levels has gained wide acceptance from the governments, private sectors, civil society, and the international financial institutions. According to Tamanaha, no other single political ideal has achieved global endorsement than the rule of law.46 The rule of law has become the staple not only of politics and law but also of economics. Rule of law reforms had their origins after World War II. It came to accompany bureaucratic administration focusing on judicial reforms, as part of the law and development movement in the 70s promoting democracy and economic development with emphasis on the training and education of lawyers, and as a prescriptive tool to manage social, political and economic development goals at the end of the Cold War.47

International financial and aid organizations have particularly promoted the rule of law as part of economic development policies in transitional societies – the newly-liberalizing economies or newly-democratizing states. The aftermath of the 1997 financial crisis proved to be a watershed for the rule of law as the economic backlash in Asian developing countries had been blamed not on economic policies but on


46 Though the nexus between economic development and the rule of law has been found to be week, economists argue that the better the rule of law is, the richer the country, and the reverse is likewise true. For a concise critique of this framework see, ‘Economics and the rule of law, Order in the jungle’, The Economist, 13 March 2008, Economist.com, at http://www.economist.com/PrinterFriendly.cfm?story_id=10849115, viewed on 22 January 2009.

widespread corruption and the weakness of rules and institutions necessary to implement those policies. To the World Bank, the crisis ‘vividly illustrated that economic growth without the firm foundation of effective laws and legal institutions was vulnerable and unsustainable’ and that the ‘lack of the rule of law significantly hinders economic growth.’\(^{48}\) As part of its efforts to establish the rule of law to create the necessary climate of stability and predictability of property, contract and investment relations, the World Bank devised a system or sets of indicators by which to gauge the rule of law as a component of governance in each country and has undertaken rule of law initiatives either as distinct or as complements to economic development programs.

The United Nations and its agencies have also taken up the rule of law first as part of their agenda to assist development in poor countries and promote human rights. The United Nations general membership has given ample recognition to the rule of law as the foundation of an international order based on peaceful coexistence and cooperation among states and equally essential to attaining sustained growth, sustainable development and the eradication of poverty and hunger.\(^{49}\) The rule of law programs by the United Nations, currently run in almost one hundred ten countries, have since evolved as a critical component of their global strategy in tackling a variety of issues arising from globalization, democratization, economic development, conflict and post-conflict peacebuilding, and terrorism.\(^{50}\)

The United Nation’s current definition of the rule of law reflects not only its support for some objective standards of the rule of law that would promote economic development but also a broader commitment to the rule of law as a universal value. It is one that is intertwined with values of democracy and human rights. It has also increasingly recognized the political context of the rule of law and how its success is closely linked with the support and cooperation of all the stakeholders.\(^{51}\)


\(^{49}\) United Nations General Assembly World Summit 2005, Resolution 60/1.


The United Nations thus situates the rule of law –

‘...to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws and are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal supremacy.’

The World Bank’s definition stands in contrast to the above definition which focuses on the formal aspects of the rule of law. The Bank’s definition of the rule of law reflects the fundamentally economic rationale of market liberalism – the need to create a stable and predictable legal environment free from arbitrary government intervention - and stresses certain objective and verifiable standards. It does not enquire about the content of the law itself or the ethics of it. Thus according to its view, the rule of law exists if –

‘(1) the government itself is bound by the law; (2) every person in society is treated equally under the law; (3) the human dignity of each individual is recognized and protected by law; and (4) justice is accessible to all. The rule of law requires transparent legislation, fair laws, predictable enforcement, and accountable governments to maintain order, promote private sector growth, fight poverty and have legitimacy.’

As a key principle of good governance, the rule of law emphasizes certain aspects that could transcend forms of government and therefore relevant to international organization having diverse membership and rule of law practices. These are the elements of equality, fairness, transparency and accountability. Even in its narrow sense, the rule of law has an important role in ensuring both functions of efficiency and

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legitimacy. In the EU, earlier studies were more concerned on the issue of sovereignty and how it functions as formal institution – either as intergovernmental or supranational or the tension between the two but there has recently been a growing interest on the manner by which EU integration is being managed. Governance, which denotes traditionally the existence of legitimate political authority to control and manage societies, has been applied to regional level of governance which uses, in lieu of authority, ‘informal as well as formal steering mechanisms to make demands, frame goals, issue directives, pursue policies, and generate compliance.’

4. The relevance of the rule of law in ASEAN regional integration

The rule of law is a significant element in constructing the European Union and this has been recognized from EU’s inception. Deepening of regional integration has been credited in large part to integration through law, by means of implementing the rules provided in the treaties, the grant of rule-making powers upon competent organs in the Union, and through judicial interpretation and expansion of treaty provisions. An economic union has not only been made possible through the European polity but also established a certain degree of political union among the member states and the expansion of individual human rights protection in the context of a single market. This is a model that, despite its flaws, remains relevant to developing regions like Southeast Asia where the need for peace, prosperity and respect for rights are of pressing concerns for the governments and the peoples.

Regional integration demands the rule of law not only as an instrument to provide stability and predictability in economic relations but likewise as a means to provide a coherent and stable framework for guiding the relations of member states and in resolving their conflicts. Regional integration has also shown the capacity to affect rule of law practices in member states. As will be discussed in succeeding chapters, the EU

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55 Jens-Uwe Wunderlich, *Regionalism, Globalization and International Order: Europe and Southeast Asia*, (United Kingdom, Ashgate, 2007), 30-4.
has made it possible to transmit a type of state rule of law to EU integration, albeit in its modified form, and also for the EU to bring it into its new members with weak rule of law traditions.

ASEAN comprises a region where the rule of law is generally perceived to be weak both in relation to the approaches adopted by the financial institutions and the United Nations. Pursuant to the World Bank criteria which measure the rule of law according to the extent ‘agents have confidence in or abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence’, countries in ASEAN, with an exceptionally compliant Singapore, have scores below the 70th percentile ranking, with six countries like Vietnam, Philippines, Indonesia, Laos, Cambodia and Myanmar falling below the median rank.\(^{58}\) Systemic corruption is a major problem with many countries in the region perceived as among the most corrupt countries in the world.\(^{59}\)

ASEAN states are also continuously cited for failing to protect or inadequately protecting the human rights of their citizens and for their utter contempt or indifference to popular democratic governance.\(^{60}\) Myanmar is the worst example of a state which continuously flouts, by force and violence, the democratic will and fundamental rights of its people. While socialist countries of Vietnam and Laos continue to suppress democracy and human rights activism for being ‘anti-government propaganda’, so are the democratic countries of Thailand, Indonesia, and the Philippines which allow extrajudicial methods to happen in suppressing ethnic dissent or in silencing critics of government. The more affluent countries of Singapore and Malaysia may have uplifted


\(^{59}\) The latest survey of Transparency International (TI) lists Myanmar (1.3) as the second most corrupt, while Thailand (3.5), Vietnam (2.7), Indonesia (2.6), Philippines (2.3), and Laos (2.0) obtaining below the median score in a scale of 1 to 10. Singapore (9.2) and Malaysia (5.1) are considered to have a much better record of corruption, at [http://www.transparency.org/policy_research/surveys_indices/cpi/2008](http://www.transparency.org/policy_research/surveys_indices/cpi/2008), viewed on 12 December 2008.

the living conditions of their people but they have also maintained a select class of persons enjoying economic and political privilege as well as imposed tight security and legal controls on political expression by the broader population.

The manner by which ASEAN states observe the rule of law in varying degrees and shapes speaks volumes about the rule of law itself. The rule of law is not a ‘one-size, fits all’ prescription to all that ails society and one that cannot readily be exported from one ground to another. The concept of the rule of law is as contested as other motherhood concepts like democracy and justice whose meaning depends on what it is meant to do and who controls it. A simple expedient idea that it is aimed at substituting or managing discretionary power with some form of rules is indeed a salutary attribute of the rule of law and one that is desirable especially when seen from the chaos, unpredictability and violence where brute force rules.

Southeast Asia had experienced decades of ruthless rulers, either clothed as democratically elected leaders or military dictatorships, which brutally quashed dissent, impoverished the country and plundered the coffers of the state. This is not to expound further on centuries of oppressive colonization which bred an elite class and gave rise to minority or indigenous conflicts. Burma is one country where the rule of law, whether in its barest essential, is better than not having the rule of law at all. But it is equally desirable in states professing to be ‘democratic’ and yet whose critics end up slain or disappeared without the perpetrators hailed to account for their dastardly acts. It is just as important to have the rule of law applies to all and thus allow everyone the opportunity to partake of the nation’s development based not on one’s position of power or influence. But what is it that makes the rule of law work in one state but not in the other, is a question that needs to be carefully pondered.

The basic precept of the rule of law is that government or state action is subject to law. But while the rule of law is considered essential in taming arbitrary exercise of state power, there is also no illusion that its absence would not work to promote economic development or that its presence would lead inevitably to democracy. An unverifiable connection between the rule of law and development or between the rule of law and democracy has thus created a ‘problem of knowledge’ of strategies promoting
the rule of law.\textsuperscript{61} And here lies the danger of treating the rule of law merely as a set of standards or criteria and devoid of its particular historical and political contexts.

5. Statement of the research project and objectives

The research project seeks to explain the dynamics of rule-making in ASEAN and the prospects for the development of the rule of law in the processes of ASEAN integration. This is an exploration rather than a definitive conception of the rule of law. It is an area that has not been fully and systematically explored in the current literature perhaps due to an utter rejection of ASEAN as a loose association operating on informal and non-binding arrangements or because of lack of intensive or inadequate level of cooperation among member states that is founded on more definitive, clear and enforceable agreements. There is however increasing scholarship on the development of the rule of law in the context of individual member states and comparing each other using some criteria of the rule of law.\textsuperscript{62} The shift in ASEAN’s strategic focus to greater economic cooperation has also encouraged scholars to talk about legal developments in ASEAN, most of which are focused on the low/non binding nature of ASEAN economic agreements or the emerging legal framework for regional dispute settlement among member states.\textsuperscript{63}

The rule of law here is conceived not simply as having possession of either formal or substantive elements but one that is rooted in the history and political experiences of ASEAN member states. The rule of law in ASEAN integration is likewise to be viewed


\textsuperscript{62} See for example Randall Peerenboom, Asian Discourses of Rule of Law: Theories and implementation of rule of law in twelve Asian countries, France and the U.S., (London, Routledge Curzon, 2004), which compares rule of law based on the thin and thick conception representing the formalistic or substantive theories of the rule of law.

from its wider context, of regionalism and globalization, but also to be considered from the internal political dynamics in member states which are brought to bear in the processes of regional integration. However, references to ‘thin or thick’, ‘formal or substantive’ is useful to denote general characteristics or features of rule of law practices and will be used throughout this thesis.

To elucidate the objectives of this research, four main questions will be discussed throughout the paper:

1. Does regional integration promote the development of the rule of law? Is the rule of law essential for regional integration? If so, what is the function and nature of the rule of law in regional integration?

To give explanation to these questions, this research project explores the conditions which give rise to the formation of regional integration. This involves exploring the domestic causes or interests of member states and external factors. The mixture of these factors produces variations in the nature and institutional forms of different regional projects. This paper through Chapter II will investigate the impact of globalization in the formation of regional integration on member states’ motives for integration. It also looks into how globalization has brought about contradictory processes and generated new techniques at developing the rule of law in regional integration.

2. Under what conditions would the rule of law build in regional integration? Is it possible to adopt a type of state rule of law to regional integration?

What are the factors that make it possible for the rule of law to develop in the context of regional integration and how do they interact with legal and institutional mechanisms of integration? The question brings this research to explain through Chapter Two the origins of the rule of law, as a theoretical construct and as a historic experience, and how this is evolving in the context of globalization and regional integration. In Chapter Three, the research explores the development of a state-like rule of law in European Union integration through its constitutional developments and
hybrid institutional arrangement. The chapter also tackles the limits and challenges of EU regional rule of law and the way it has coped with issues of compliance, sovereignty claims, and enlargement. It also looks into how EU has ‘transplanted’ its type of rule of law to new members with weak traditions of democracy and the rule of law and how other regional projects of integration have adopted similar features of EU integration.

3. Is there a particular type or model of the rule of law that is most appropriate to regional integration? In this sense, is the European Union, the most advanced form of regional integration, a relevant and viable model for other regional projects particularly to regional groupings of developing countries?

The different economic and political conditions that underlie the formation of regional integration preclude a uniform conception of a regional rule of law. As a political project, member states still exert primary influence, if not control, of the processes of regional integration. Chapter Four and Chapter Five will show that rule of law traditions bear heavily on the character of regional rule of law, especially in the context of ASEAN and its member states. Locating the rule of law from the practices of ASEAN member states is thus an important part of this research and Chapter Four discusses the divergence and convergence of ideas and practices of the rule of law in the five founding member countries. Any reference thus to member states in ASEAN will primarily pertain to the countries of Indonesia, the Philippines, Thailand, Singapore and Malaysia. The diversity of rule of law practices also suggests the formation of a rule of law forged through consensus and accommodation of different rule of law practices.

Chapter Three will show that the EU, despite its contemporary difficulties and issues, is a dynamic model whose technique of combining varied legal and institutional forms could be useful in other regional groups. Despite different historical, economic and political orientation of different regional projects, this thesis finds that they share similar issues and challenges, although in varying degrees and importance. Other projects of regional integration like SADC and MERCUSOR have adopted certain features of EU integration and presented both possibilities and limits of adoption. This thesis finds that the EU is still a relevant model for ASEAN. This thesis finds that there
are key aspects of the rule of law – laws, institutions, and agents, which may coincide with social and political processes and show the potential to transform social relations.

4. What is the nature and function of the rule of law in ASEAN’s legal and institutional framework? Did the ASEAN Charter usher the development of the rule of law and does it depart from ASEAN Way?

This question will be explored from recent developments in ASEAN particularly the adoption of the ASEAN Charter and possible adoption of a regional human rights body. It will also be seen from the perspective of increasing civil society activism in the region and how they may help influence the process of developing the rule of law in ASEAN integration. Are there such opportunities for the relaxation of sovereignty principle in ASEAN and pave the way for broader or more inclusive participation in regional integration processes? This paper argues that ASEAN integration breaks ground in opening up spaces for the rule of law to grow. The legal and institutional framework brought about by the ASEAN Charter and other instruments has ushered in institution-building, rule-creation, and a more stable and coherent framework for regional cooperation. Other opportunities for the rule of law have opened limited though to its instrumentalist function, repetitive compliance with soft legal obligations, some opportunities for non-state actors and civil society to participate and influence its processes, and the prospects of bringing about human rights into the agenda of ASEAN.

This paper posits that the inviolability of state sovereignty has remained the overarching framework of ASEAN integration. Regional integration in ASEAN in its current form does not deviate substantially from the statist model in international relations. Globalization has driven initiatives of regional integration but state-building and threats to political stability remain the core basis of regional cooperation. The persistence of traditional security issues and emergence of new internal and external challenges are encouraging a shift towards a more comprehensive approach to security. This has accordingly encouraged the pursuit of broader forms of cooperation through the establishment of the ASEAN Community accompanied with the adoption of the ASEAN Charter and the taking up of human rights in the regional agenda. The rule of law has been instituted in ASEAN but it is limited and constrained by current legal,
institutional, and structural foundation of regional integration. To expand the function of the rule of law would require a loosening up of sovereign absolutism in ASEAN and embracing the values of democracy and human rights in regional integration.
CHAPTER TWO

Globalization, Regional Integration and the Rule of Law

1. Introduction

The rule of law is one area where globalization has touched upon but whose effects remain ambiguous. Globalization has challenged traditional conceptions of the rule of law and sovereignty. The concepts of territoriality and state’s monopoly of law-making authority – the cornerstone of sovereign statehood under the classical view, have come under scrutiny as globalization ushered the proliferation of norms and standards that defy territorial jurisdictions and the emergence of organizations and private entities with authority to issue persuasive, if not binding, rules.

Are these developments beneficial to the development of the rule of law – as a bulwark against arbitrary rule and as a core value of good governance? Or are they a potential threat to the rule of law? Globalization is perceived as a contradictory process that carries both conservative and transformative capacities. It could push the rule of law in either direction. Given the different values attached and greater diversity in the practices of the rule of law in ASEAN member states, globalization has the capacity to enhance embedded state practices or change them. This distinction is especially important where weak or ineffective controls on state power have assisted oppressive and corrupt regimes in Southeast Asia.

Regional integration is acknowledged as a driver of the rule of law, at least in the context of the European Union. A state-like quality of the rule of law has been instituted in the European Union based on the supremacy of Community law, the principle of checks and balance, and respect for fundamental values of democracy, the rule of law and human rights. Through the rule of law, regional integration in the European Union had ceased to be a purely inter-state regional organization but one that guarantees the autonomy of regional institutions and the rights of individuals.
This chapter takes a brief look at the processes of globalization and regional integration, and the way they impact on the rule of law. What are the conditions or factors in globalization and regional integration that generate the rule of law or a particular type of the rule of law? How is the rule of law formed in these two processes? This chapter examines existing theoretical constructs used to describe globalization and regional integration as two distinct concepts. It looks at how the nature and capacities of the state are affected by the processes of globalization and regional integration and whether each is distinctive or complementary with each other. This chapter attempts to place the ‘meaning’ of the rule of law in ASEAN integration through an understanding of the ‘particularities’ of regional integration. This chapter likewise serves as a brief survey on existing works that deal with or are relevant to the study of the rule of law in regional integration in ASEAN.

2. The relationship between globalization and regional integration

Globalization has been identified with the rapid expansion of international trade and investment transcending territorial and ideological boundaries. Globalization has become a highly contested concept and is popularly understood as the process of integration of national economies through the global markets. There are two main perspectives in explaining the emergence of globalization. One is from a purely economic view that traces the rise of globalization from the rapid changes in technology and the internationalization of business structure. Globalization was observed to be triggered by economic pressures, primarily the demand by businesses for efficient production and decreasing economies of scale. Advances in technology, transportation and communication have greatly contributed in facilitating new business processes such as the rise of multinational companies that reorganized the structure of production and management beyond the territorial sites of business organizations.

Globalization is also viewed from the wider context of global historical and political processes. The advent of globalization emerged from the adoption of policies by Western countries at the end of World War II (WWII) to increase the flow of international trade as a means to revive Western economies destroyed by war and to

strengthen Western political and military alliance.\textsuperscript{65} The United States played a pivotal role in the global rearrangement as the leading economic and military power. It spearheaded major international economic institutions such as the International Monetary Fund (IMF), the World Bank and the then International Trade Organization to regulate international trade, finance and investments.\textsuperscript{66} The creation of an open, dynamic and competitive world economic system has become the medium through which international economic institutions are to perform. The new trading arrangement would require from the states, the abolition of national protectionist measures by reducing and ultimately eliminating barriers to trade such as tariffs, quota, and other forms of trade discrimination. The principle of non-discrimination became the cornerstone of post-war international trading system which was subsequently enshrined under the new multilateral agreement, the General Agreement on Tariffs and Trade (GATT). The GATT has been superseded by the World Trade Organization (WTO) which came into force in 1995.

Globalization has a profound impact upon society and has the ability to create or transform social relations.\textsuperscript{67} The compression of time and space in social relations succinctly sums up globalization as a pervasive phenomenon.\textsuperscript{68} These attributes have allowed for the integration of goods, services, capital and to some extent, of labour, in the global scale but also of political, social and cultural relations and their interpenetration. Because these effects are far-ranging and accompanied by institution-building, globalization has become a long-term or even ‘fixed’, phenomenon. Globalization is regarded as some form of a global ideology, an inevitable fact that needs to be embraced.\textsuperscript{69} Hence, even states that have been prejudiced by detrimental consequences of globalization have found ‘more globalization’, than a retreat from it, as the solution to the structural imbalance created by globalization.

\textsuperscript{66} Michael Sanson, \textit{International Trade Law, 2nd ed.}, (Australia, Cavendish, 2005), 12-3.
Globalization has the capacity to bring about contradictory processes. It could break down barriers and the promotion of cooperative behaviour in a global scale but could also produce opposite effects. Multilateralism, or generally a form of international governance composed of states, developed at about the push of globalization after the war and is thought to have been accelerated by globalization. Multilateralism is underpinned by the idea that international conflicts and common interests could be effectively managed through international cooperation representing a broad consensus of states in the international community. It has become a norm of post WWII international relations particularly with the establishment of the United Nations and its agencies, the WTO and other international regulatory mechanisms. Multilateralism, as a form of global governance, has been endorsed as a first best option of solving and managing international issues. The membership of most states to the WTO is deemed a tacit acceptance of the salience of multilateralism, at least from the perspective of international economic cooperation.

Globalization is perceived to have also stymied multilateralism as it ushered the proliferation of regional integration and bilateral arrangements. The continued failure of the Doha Round negotiations to strike a compromise on contentious issues, most notably in agriculture and market access, is considered a sign of declining multilateralism. Both developed and developing countries are now vigorously pursuing regional and bilateral agreements partly because they are easier to negotiate and could lay the groundwork for broader accords in the future. On the political front, the actions of the United States to pursue unilateral or bilateral actions on the war on terror and its refusal to cooperate on broad environmental strategy particularly on climate change have undermined multilateralism as an ideal form of international cooperation.

Regional integration arrangements, mostly characterized as free trade agreements, were observed to have increased in the 80s. This is the period of the ‘new regionalism’ where new regional projects have been characterized by deeper forms of integration with the building of new forms of institutions and by their broader political,

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social and cultural objectives. The most notable regional projects that have been formed during the period include the deepening of European integration through the formation of the Single European Market, the creation of the North American Free Trade Area (NAFTA), the establishment of MERCUSOR in Latin America and the formation of the Asia-Pacific Economic Cooperation (APEC).

In Southeast Asia, the response to regional integration had been slow in the beginning and was perceived to exist only on paper. This is partly owed to the fact that Asian countries have long benefited from open multilateral trading system rather than inter-regional trade, and partly to the diversity in the political and economic situation of countries. The only regional trading arrangement formed in Asia was the ASEAN Preferential Trading Area in 1977 which had remained dormant until the revitalization of economic cooperation in ASEAN after the financial crisis in 1997-1998. The after-crisis saw the formation of the ASEAN Free Trade Area (AFTA), the East Asia Free Trade Area (EAFTA), the South Asian Association of Regional Cooperation (SAARC) and other subregional groups like the Greater Mekong Area and (GMA) and growth triangles or regions formed among states in Southeast Asia. The African continent is also no stranger to regional integration initiatives having initiated eight regional groupings that are ultimately envisaged to establish a pan-African community, the African Economic Community, by 2028. In the Pacific, countries have signed on to the Pacific Island Countries Trade Agreement (PICTA) and the Pacific Islands Agreement on Closer Economic Relations (PACER).

2.1. Locating regional integration within globalization and regionalism

Globalization has influenced the formation of regional integration initiatives. However, the relationship between globalization and regional integration underscores

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73 These are: Arab Maghreb Union (AMU), Economic Community of West African States (ECOWAS), Economic Community of Central African States (ECCAS), Common Market for East and Southern Africa (COMESA), Southern African Development Community (SDAC), Intergovernmental Authority for Development (IGAD), Community of Sahelo-Saharan States (CEN-SAD), and East African Community (EAC).
the contradiction inherent in the processes of globalization. The relationship between globalization and regional integration is ambiguous, even from a strictly economic perspective. One view looks at regional integration to be consistent with globalization owing to its capacity to foster deeper liberalization, expand markets and prepare domestic corporations for global competition. The WTO has recognized the coherence of regional trading arrangements to multilateralism. It has allowed the formation of free trade areas and customs union in trade in goods and trade in services as well as the formation of preferential trading area among developing member countries. Regional integration, as part of the broader process of regionalism, is seen as a strategy to ensure greater participation by developing countries in the world trading system through the adoption of neo-liberal economic policies that opens up domestic markets.

The other view sees regional integration being contradictory to globalization and to its multilateral arrangement. Regionalism has been perceived as a reaction against the excesses or uncertainty of globalization. The failure of the multilateral trading system to level the playing field among the participating countries was cited as important reason for the proliferation of various regional projects. Regionalism or regional integration seeks to mediate the dialectical relationship of national and global processes and structures through a strategy that minimizes the negative impact of globalization and maximizes its benefits, as well as brings forth domestic interests into the regional agenda. Regionalism reflects the paradox of globalization as it ‘both shields domestic society from and integrates it into the global division of labor.’ Most developing countries which are at the periphery of the international trading system face up to the dilemma of joining a multilateral trading system dominated by developed

76 Pars. 4-10, Art. XXIV GATT; Par. 1, Art. V GATS (General Agreement on Trade in Services); Enabling Clause, Decision of 8 November 1979 (L/4903).
countries, the centre. Regional integration partly shields them from this undue competition. In recent years however, competition has also come from other developing nations as foreign direct investments become the common strategy for achieving economic development.

This paper supports the view that the phenomenon of regional integration is an outcome of globalization. It exhibits many features of the latter, particularly the economic arrangement of free trade and, as demonstrated in latter chapters, aspects of legal and institutional arrangements. Regional integration is also to be considered as a form of reaction from member states. It is a mechanism to defend their position in the international trading system against other countries or regional groups but also a way to defend the position of dominant groups within the member states. Global competition could be detrimental to domestic interests particularly where states practice a strong interventionist approach to managing their economies. It seems that even the shift from economic interventionism to market liberalism would not prevent the role of the state in a market-led economy. Many ASEAN states for instance exert strong interventionist role owing to the structure of their economies dominated by powerful family conglomerates or oligopolies.

As a ‘group’ reaction to globalization, regional integration is constructed from the wider process of regionalism. Regionalism denotes a state-led process of cooperation resulting from treaties or international agreements or as a political project suggesting aspirations of community building.\(^{81}\) It is used interchangeably with the term ‘regionalization’, but the latter suggests a greater role of non-state actors and an uncoordinated process of economic integration.\(^{82}\) The ‘region’ gains significance in regionalism and highlights the identity of a region. Regions are ‘a group of countries markedly interdependent over a wide range of different dimensions’ and are socially constructed through politics.\(^{83}\) While geographic proximity and shared language, culture and race enhance the capacity of countries for interaction or integration, it is shared

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\(^{83}\) Peter Katzenstein, ‘Regionalism and Asia,’ New Political Economy, Vol. 5, No. 3 (November 2000), 354.
patterns of economic and political transactions and social communications that define the identity of a region and set it apart from the others. Both the state and the region are being brought forward in the process of regionalism.

Regionalism or regional integration generates structures and institutions which correspond to the nature and extent of cooperation. There is no identity of projects of regional integration and thus each project represents its own characteristics and strategy. While economic objectives are the main purposes of regional integration, most regional projects treat economic goals as the means to achieve broader political objectives such as the attainment of peace and security. The European Union and ASEAN are examples of projects of regional integration with multi-dimensional goals and processes. The inter-relationship between the political and economic, or the extent to which one is important in achieving the other, determines the depth and mechanisms of integration. Many projects of regional integration have recognized political cooperation as a parallel goal to enhance economic cooperation but it is only the EU that has so far achieved deep political cooperation through legal integration and observance of the rule of law.

ASEAN integration is a regional project borne out as a response by member states to globalization. But ASEAN itself is a product of a long historical and political process that aims to enhance and complement the state-building purposes of member states. In response to particular challenges, ASEAN has devised its own peculiar mechanisms and institutions to which its members have been socialized with in the process. ASEAN has acquired its own identity, the ‘ASEAN Way’, which has defined the region and made it ‘different’ from the rest. The ‘ASEAN Way’ through years of socialization by leaders and officials in Southeast Asia has been crystallized into ASEAN’s collective culture. Its loose, informal and flexible attributes are in ways incompatible with the elements of determinacy, stability and predictability of the rule of law. Is globalization or regional integration capable of bringing about change in ASEAN’s culture and to what extent?
2.2. Theoretical approaches to regional integration: the EU and ASEAN compared

The discourse in regional integration started with conceptual tools to describe and explain the development of the European Union in its early stages. Two main theoretical currents were developed to explain the processes of European integration largely from the perspective of governmental efforts at economic cooperation to end the war and bring about lasting peace among rival states in Western Europe. In the 1950s, functionalism was conceived from the assumption that promoting functional cooperation in non-contentious sectors, the economy, could avert the possibility of war by managing competition among states for scarce economic resources. It follows the logic of inducing cooperation, instead of promoting isolation, as a means to enable nation states to transcend their domestic interests and allow the technocrats, rather than the politicians, to manage functionally-specific sectors through supranational institutions.

The neo-functionalist theory gained currency in the late 50s following the move from sector-specific European Coal and Steel Community (ECSC) to a broader economic cooperation through the European Community. Pioneered by Ernest Haas, neo-functionalism proceeds from the same premise as the functionalist approach but asserts the non-unitary character of the state and stresses the major role of economic and political elites in the process.84 Neo-functionalism sees integration as a process of spill-over effect from one economic or technical sector to areas of political significance and involves the process of gradual reduction of authority of national governments in favour of supranational institutions. The stagnation in European integration in the 70s however caused adherents of neo-functionalism to question its relevance and brought back the centrality of the states in regional integration. Ernest Haas even officially announced its obsolescence in 1975 observing that an incremental logic of spill-over had ceased to describe decision-making choices of regional actors as well as regional policy outcomes owing to what he described as a ‘condition of turbulence’ in world politics.85

84 In Ernest Haas, Beyond the Nation State (Stanford University Press, California, 1964).
The post-mortem to neo-functionalism heralded not only the refocusing on the state as the key regional actor but acknowledged the importance of external influences in shaping regional integration. Neo-functionalism is critiqued from being narrowly-focused on non-political motives for decision-making. It fails to account for other motives and interests of decision-makers as well as its over-reliance on supranational agencies as the primary initiators of integration. The concept neglects the continued domination of nation-states in key decision-making processes.86

Stagnation of integration initiatives in the 70s and the reassertion of state power in Community decision-making culminating in the adoption of the so-called ‘Luxembourg veto’ gave rise to a neo-realist account of regional integration. Prominent in this discourse is the concept of ‘intergovernmentalism’ which emphasizes the states, than supranational institutions, as key instigator of regional integration. This theory is premised on the assumption of the centrality of states as actors in international relations, the indivisibility of national interests and the relative gains of states proceeding from their preferences or choices in pursuing their own interests.87 It gained prominence during the period of renewed dynamics of deeper integration in the 80s which featured the adoption of the Single European Act in 1986 and the holding of the Intergovernmental Conferences (IGCs) until the ratification of the Maastricht Treaty in 1993.

The ‘interdependence’ school was conceived to highlight the fragmented nature of the state and the fact that states are not the sole actor in international relations.88 It also observed the failure of intergovernmentalism to systematically analyse the domestic sources of the state’s motivations in regional integration and hence the linkage between domestic and regional politics.89 The international political economy (IPE) approach also gained currency in European regionalist discussion emphasizing the development of the global economy as a major force in European integration.

In the 80s, the dominance of supranationalism and intergovernmentalism as the focus of studying regional integration has been questioned and challenged by new schools of thought. One of which is interested in describing the existence of the European Union as a system of ‘multilevel governance’ than in explaining the dynamics of the integration process. The institutionalist is focused more on the institutions of governance and a wider range of actors involved at all levels of law-making and decision-making. Another strand of thought is between the competing rationalist and constructivist approaches, the former seeing decision-making being impelled by the pursuit of interests by the primary actors while the latter stresses emphasis on the effect of norms, ideas and values in the process of regional integration.\(^9\)

Game theory is also explored as an alternative account to explain regional integration in the European Union whose basic assumption is that the existence of conflict is usually due to the desire of both players to acquire an advantage (gain) to the detriment (loss) of another given limited resources (or options) available. In an organizational setting, game theory is used to explain the motivation of the members in joining the group, their behaviour in relation to each other and to the group as a whole to attain their individual objectives, and their corresponding decision to stay or leave the organization. For example, the concept of nested game is used to explain the European integration from the perspective that decision makers pursue domestic interests through regional agreements that satisfy demands of domestic elites to guarantee the political survival of the decision maker.\(^9\) It starts with the premise that decision-makers are actually engaged in two interlinked sets of negotiations or games in the domestic and regional levels. An attempt to use the game model to account for the political and economic aspects of European integration used the concept of ‘institutional binding’ in arguing that European integration was achieved by creating institutions whose features produce contingent gains and exit penalties that make opting out of membership very costly thereby reducing the possibility of conflict among the members.\(^9\) At the core of

the European integration project is a goal of binding Germany and without this goal, patterns of institutional cooperation in Europe would have taken a different course.

An important aspect of EU integration where game theory was applied in was to explain the process of legal integration. Drawing from the framework of ‘exit’ and ‘voice’ as a recovery mechanism for states, firms and organizations in state of decline,93 Weiler investigates the evolving nature of the relationship between the Community and its member states.94 Exit represents the mechanism of organizational abandonment in the face of unsatisfactory performance while voice represents the mechanism of intra-organizational correction and recuperation. It is proposed that a stronger ‘outlet’ for voice reduces pressure on the exit option resulting in more sophisticated processes of self-correction. On the other hand, the closure of exit leads to demands for enhanced voice.95 Total exit is foreclosed because of the ‘high enmeshment’ of the members and the potential for political and economic losses of the withdrawing state. Two processes were identified to have foreclosed exit - the constitutionalization of the Community legal structure and the system of legal and judicial guarantees.96 However, as the exit option was foreclosed, voice correspondingly increased. This was observed in the events of the 70s when member states took control of the decision-making process in the Community. It is important to note here that an important element in development of the legal process in the EU was the role of the European Court of Justice (ECJ) in taking an active role in pursuing integration during the period of disintegration and slackening in the formative period of the EU.

In Southeast Asia, the discourse on regional integration is a recent phenomenon having taken off only after the Asian financial crisis in 1997. Regional integration in this sense is to mean deeper commitment of member states to a range of economic, political and social issues that demand greater institutionalization of cooperative behaviour. As mentioned in Chapter One, ASEAN regionalism has been fundamentally a state-led political project since its inauguration in 1967 where internal security and political stability as a pre-requisite to state-building has been the common interest and

the rationale for regional cooperation. Regional economic cooperation had been minimal until the 1990s. The confluence of national, regional, and international factors brought forth the process of regional integration in ASEAN.

The end of the Cold War, the expansion of ASEAN’s membership to the rest of the countries in Southeast Asia, the democratization movement in Indonesia, Philippines, and Thailand, and the aftermath of the financial crisis have all contributed in shaping up the new regionalism, in the form of regional integration. Moreover, the dynamics of the balance of power among the superpowers in the region – most notably the United States, China, and Japan, and the current threat of global energy, oil, food crisis and financial crisis continue to impinge on the economic and political security of member countries and influence regional relations and strategies. A parallel movement among NGOs and civil society after the Asian financial crisis has also developed that challenges traditional ASEAN values and practices and assists in transforming the regional landscape.

The idea of regional integration in the context of ASEAN only surfaced when the ASEAN Free Trade Area (AFTA) was established, providing the springboard for new discussion on enhanced regional cooperation. The economists were the first to mention ‘integration’ borne out of frustration over the ineffective implementation of past economic agreements such as the ASEAN Preferential Trading Area (ASEAN PTA) through the organization’s trademark, the ‘ASEAN Way’. They advocated the need for comprehensive regional trade agreement and the necessity for binding rules and formal institutions. The social and political consequences of the Asian crisis in ASEAN member states exposed the limits and eroded the salience of the ‘ASEAN Way’ as the underlying principle of ASEAN regionalism.

The regionalism that emerged in the 90s was marked by ASEAN initiatives aimed at strengthening intraregional economic cooperation by enhancing AFTA mechanisms and its implementation in member countries. ‘ASEAN Way’ was enhanced by adopting institutional mechanisms such as strengthening the ASEAN Secretariat and the adoption

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of the ASEAN Protocol on Dispute Resolution Mechanism in 1996. The new millennium however marks a distinctive phase in ASEAN characterized by greater institutionalization of regional arrangement and willingness to explore other modes of regional interaction beyond the ‘ASEAN Way’. The decision by state leaders to pursue regional integration by building an ASEAN Community has greatly expanded the coverage of regional cooperation and considered other areas or subjects that were ‘off-limits’ in the past. These include human rights, civil society participation, and cooperation in dealing with vulnerable sectors in society such as the migrants and women and children.

Unlike the EU, early attempts at analysing ASEAN did not favour ‘integration’ but used the concept of ‘cooperation’ due to ineffective functional cooperation and notably the absence of binding rules and formal regional institutions. A study questions the suitability of applying the concept of integration to an area ‘which is not, as yet, historically delineated, and does not exhibit large-scale interdependence in many areas of mutual concern.’

Solidum was the first scholar to explore the concept of functionalism to determine whether functional cooperation in ASEAN may lead to incremental effects leading to integration. Also rejecting integration, Solidum suggested cooperation as the appropriate framework to describe and explain the motivations of political elites in Southeast Asia in establishing ASEAN.

The loose and flexible organizational set-up in ASEAN pursuant to the Bangkok Declaration of 1967 clearly manifests that ‘ASEAN is an instrument for cooperation, not integration.’ However Solidum believes that if integration involves in the final phase, the sharing of values, habits, and expectations among peoples of discrete units, in such a way that social and psychological foundation is built for a transnational society, then cooperation could contribute to the building of mutual understanding and confidence until the peoples involved in the integration process can share the same

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100 Estrella Solidum, *Towards a Southeast Asian Community* (University of the Philippines Press, 1974).
institutions and values in a political community.\textsuperscript{102} Solidum’s work has been a strong influence among state leaders, policy-makers and the academe particularly about the importance of sharing of norms, values and practices and socialization of leaders and elites as the strategy in providing the building blocks for deeper cooperation among member states.

Discussion on Southeast Asian regionalism however has been dominated by three theoretical streams – neo-realism, international political economy (IPE) and institutionalism/constructivism.\textsuperscript{103} The neo-realist approach has its starting point in the development of Southeast Asian regionalism from the history of nation-building in member states and in particular the period of anti-colonialism. In IPE, Southeast Asian states are viewed as part of the overall global network of political and economic domination. A strong institutionalist/constructivist current is particularly strong in regional security studies.\textsuperscript{104} For instance, Acharya likened regions to nation-states as imagined communities and that the history of ASEAN regionalism has been a quest for regional identity.\textsuperscript{105} The establishment of ASEAN, underpinned by the development of nationalism in the member countries and influenced, at the same time, by external pressures, reflects a quest for regional autonomy. Southeast Asian leaders saw ASEAN as a framework for providing ‘regional solutions to regional problems’ borne out of fear that regional conflicts unmanaged at the regional level would invite intervention by outside powers that could aggravate intra-regional conflicts and polarization.\textsuperscript{106} Socialization and sharing of common values and norms are favoured over legalism and formal structures and considered to play an important function in the development of Southeast Asian regionalism.

There is a thin dividing line however between the institutionalists and functionalists in ASEAN studies. Both studies highlight the distinctive character of

\textsuperscript{102} Estrella Solidum, \textit{The Politics of ASEAN: an Introduction to Southeast Asian Regionalism}, 2.
\textsuperscript{103} Eero Palmujoki, \textit{Regionalism and Globalism in Southeast Asia} (Palgrave, New York, 2001), 4-5; See also Alan Chong, ‘Southeast Asia: theory between modernization and tradition,’ International Relations of the Asia-Pacific, Vol. 7 (2007), 391-425, for an extensive discussion on the dominance of Western approaches to studying international relations in Southeast Asia most of which are framed along modernization.
\textsuperscript{105} Acharya, Amitav, \textit{The Quest for Identity}, \textit{International Relations of Southeast Asia} (Oxford University Press, 2000), 11.
\textsuperscript{106} Acharya, Amitav, \textit{The Quest for Identity}, \textit{International Relations of Southeast Asia}, 99.
ASEAN regionalism based on consensus and informality rather than the presence of binding rules and formal institutions characteristic of European regionalism. As discussion in Chapter Five will show, informal and flexible rules and arrangement still predominate in the ‘new’ ASEAN. The ‘ASEAN Way’, as the collective term to describe the so-called distinctive norms, rules and values that ASEAN leaders observe in their relations, became the defining characteristic of the organization. The ‘Asian values’ discourse also began to take shape and passionately articulated by ASEAN leaders which tended to particularize certain principles such as human rights and democracy in the context of the member states’ claim to peculiar historical, economic, political and cultural conditions. Thus, the ideas of supranationalism, federalism and development of formal regional institutions and laws had been absent, obscured or rejected in both academic discussions and regional actors’ discourse or rhetoric.\(^\text{107}\)

While legal integration in the European Union is an integral component of regional integration, the concept has been absent in ASEAN. There were attempts though to provide a framework for ASEAN legal cooperation.\(^\text{108}\) As stated in Chapter One, there is increasing interest to examine ASEAN’s legal development but it is mainly concerned with testing the binding nature of ASEAN’s legal agreements and the new regional dispute mechanism. Integration, in general, has been defined as a process by which national states transfer parts of their autonomy to a common institutional framework in order to allow for common rules or policies.\(^\text{109}\) Legal integration, from the point of view of the European Union, is the process by which a binding supranational system of the rule of law has been established among the members of the union.\(^\text{110}\) These definitions clearly put legal integration in the context of the EU which implies a voluntary transfer of aspects of sovereignty to a supranational institution. In ASEAN, the idea of legal integration is virtually absent owing to the absence of binding rules and agreements. Formal binding rules have only played a minimal role in the development of ASEAN despite greater initiatives at increased economic


As will be discussed at length in later chapters, the development of more precise and detailed language and mechanisms is gaining ground in ASEAN economic integration. The adoption of the ASEAN Charter should start a vigorous discussion on ASEAN’s capacity for legal integration.

There have been two main strands in the study of law in ASEAN. A theme in ASEAN legal study has culture as the basis for explaining ASEAN’s propensity for loose and informal mechanisms. ASEAN’s aversion to legal formalism is traced from Asian traditional values of collectivism or communitarian behaviour and preference for informal dispute resolution methods as a means to preserve peace and harmony even in times of conflicts. This cultural element has pervaded ASEAN legal integration with the organization’s preference for resolving disputes through informal and bilateral negotiations. There is no common formal legal culture among the member countries owing to the differences in legal systems brought by different colonial influences and pluralism of indigenous customs and practices. However, a collectivist culture is said to be present among member states which serves as the basis of cohesion among an otherwise diverse group of nations and is reflected in the mechanisms of ASEAN. The cultural factor in ASEAN has found compelling expressions in the official personages in the organization such as Singapore’s Lee Kuan Yew and Malaysia’s Mahathir Mohammad articulated as ‘Asian values.’ The conservative and reductionist undercurrent of cultural relativism in the context of ASEAN has become the banner through which member states attempted to challenge Western conception of liberal democracy and human rights.

The inability of ASEAN to adopt formal and binding rules has also been blamed mainly on the strong adherence of member states to the principle of national sovereignty. Most of the views however present a statist perspective to regional law development in Southeast Asia and tend to downplay the pressures from non-state

112 Nobuyuki Yasuda, ‘Law, Legal Culture and Regional Integration: Asian Perspectives (APEC Study Center, Graduate School of International Development, Nagoya University, Japan, March 1996), 1-21.
actors and external factors. This conception presents one important explanation for ASEAN’s reluctance to adopt formal legalism in intra-regional relations. But viewed in isolation from its historical and political contexts, the concept has unintentionally reinforced the developmental law model of the 60s and 70s where laws are seen as products of social engineering pursued to achieve rapid industrialization in developing countries. The law and development model, which lost steam due to unsustained and unequal economic growth of many developing states, places major responsibility upon the state to import and introduce modern economic laws for development objectives. While it is acknowledged that ASEAN is still a state-led regional project, an increasing variety of internal and external influences are placing challenges and pressures on ASEAN’s statist regional law regime.

The developments in ASEAN from the 90s onwards aimed at building an ASEAN Community show the necessity for exploring the dynamics of European integration and the theoretical frameworks that underpinned the early stages of its development. The neo-functionalist framework could provide a fresh perspective in looking at current developments in ASEAN such as the adoption of the ASEAN Charter, enhancement of regional mechanisms, legalization of economic relations, and efforts to extend the scope of regional integration to social, political and security cooperation and in particular to certain contentious issues such as human rights. The drive towards economic integration points to a spill-over effect in establishing regional institutions and increasing legalization particularly the creation of depoliticized dispute settlement mechanisms.

Aspects of globalization, as the main push for ASEAN integration, are relevant benchmarks in examining the development of the legal regime or legal integration especially where a ‘rules-based’ regime in ASEAN takes the form of a soft legal framework. Moreover, it is worth assessing the impact of globalization as it continues to open up markets and borders in Southeast Asia and to the opportunities for a range of non-state actors to interact with each other and with governments and ASEAN and how these developments affect, if at all, the patterns of regional governance.
Recent developments in ASEAN may have dented the erstwhile dominance of the realist framework in studying ASEAN regionalism but the salience of states in ASEAN continues to resonate in all aspects and processes of regional integration. It is apparent that ASEAN’s economic initiatives at regional integration as the means to establish a peaceful, progressive and secured regional community and the way domestic politics performs a defining function in shaping this community still lend credence to a neo-realist perspective. While there are strategic interests at play in the choice of decision-making and dispute resolution in ASEAN, the primacy still given by ASEAN leaders to consensus-building, negotiation and socialization points to the continuing pursuit of regional identity and harmonious regional community in ASEAN. Constructivism remains a relevant approach in explaining the distinct pattern of interaction among state leaders and officials.

As to whether the dichotomy of supranational-intergovernmental approach would figure out in ASEAN integration, the current trend points to the development of primarily intergovernmental approach through deeper institutionalization of regional intergovernmental mechanisms. The supranational approach has not gained acceptance from the governments as the creation of such body was expressly excluded from the ASEAN Charter; nor is this approach actively pushed as an option by civil society advocates. Economic cooperation could however intensify in the future and there is some possibility for creating regional independent institutions to manage, at least some technical aspects of cooperation. Intergovernmentalism is a feature of many multilateral and regional organizations and even institutions in the European Union are at various times being pushed in the intergovernmental or in the supranational direction. The choice of establishing supranational institutions in regional integration appears to be a difficult but decisive policy choice of states in the EU and in a few projects of regional integration like the SACU and SADC in Africa which adopted some aspects of supranationalism.

3. The role of the rule of law in regional integration

A principle of adherence to the rule of law has become a staple for regional integration. The experiences of the EU as well as of multilateral agreements such as the
WTO have shown that independent enforcement mechanisms have partially addressed the commitment problem inherent in international agreements involving states.\(^{115}\) Owing to the capacity for deeper commitment among member states in a range of subjects, regional integration has increasingly employed the rule of law as the backbone of regional interstate relations – as a means to enhance enforcement and compliance of obligations, to provide predictability and stability to member states’ actions, and to regulate the relationship of regional organs or institutions.

The rule of the law in the EU has gone beyond the instrumentalist function of regulating the economic relations of member states. EU’s observance of the rule of law in regional integration is an aberration when considered from the point of view of classical international law which is based on the principle of voluntarism. For example, submission to the jurisdiction of the International Court of Justice (ICJ) depends on the voluntary submission of states to the court’s jurisdiction. As will be fully discussed in the next chapter, the rule of law in the context of the EU assumes a quality practiced in individual states where law, particularly constitutional law, is considered supreme and by its existence, should be obeyed by member states. Its non-obedience could start a process of judicial enforcement and thus the consequences of ‘punishment’ in the form of sanctions and damages. Thus in contrast to classical international law, EU law is autonomous possessing a coercive character which does not depend on selective submission or acceptance of member states. Moreover, individuals, not merely states, could directly invoke EU law and bring cases before the ECJ through their local courts.

The rule of the law in the EU has subsequently influenced the development of the rule of law in multilateral forums, such as those in other projects of regional integration. Forms of the rule of law among regional integration initiatives however show great variation - as do the rule of law traditions in Western countries.\(^{116}\) Where the EU observes a rule of law that embodies both its so-called formal and substantive attributes providing an effective limiting function on sovereign discretion and thus ensuring


deeper regional integration – achieving the aims and purposes of economic integration and expanding the scope of integration into the political and security aspects of cooperation by member states, other regional integration projects have observed a thinner or lesser form of the rule of law. For example, SADC, Mercusor and NAFTA have sought adherence to the rule of law which range from adoption of highly precise formal integration rules - the hard law, to the establishment of independent enforcement mechanisms or independent regional courts or tribunals.

ASEAN could be considered a ‘late-comer’, compared with the mentioned regional integration projects, in the observance of the rule of law. However, ASEAN has, from its inception, declared adherence to the rule of law. In fact, the Bangkok Declaration, the original instrument constituting ASEAN, provides that the association aims ‘to promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries in the region and adherence to the principles of the United Nations Charter’. The Treaty of Amity and Cooperation reiterates the association’s avowed promotion of regional peace and stability through abiding respect for justice and the rule or law and enhancing regional resilience in their relations. The adoption of the ASEAN Charter has created expectations to bring ASEAN closer to the rule of law.

Variation in the practices of the rule of law in regional integration shows the particular responses of member states to the challenges of globalization and to overall objectives of regional cooperation. It reflects the mechanism considered appropriate in managing particular projects of regional integration. The way to look at the rule of law is to examine it from its wider function in regional integration and how regional integration confronts domestic, regional, and international issues - rather than simply looking at it from its conceptual meaning. The concept of the rule of law is itself not only continuously contested but is evolving from the combination of practices that develop in the context of interaction between local and global phenomena. The rule of law in the EU perhaps represents an ‘ideal’ model but it also reminds the reader that first, it bears witness to a peculiar historical and political environment.

117 The ASEAN Declaration (Bangkok Declaration).
118 Treaty of Amity and Cooperation (TAC), Indonesia, 24 February 1976.
The particularities of how regional integration is constituted are determinative of the forms of the rule of law but also suggestive of how it can be brought closer to the ideal. Despite differences in their composition and purposes, regional integration projects share similar issues that need the rule of law. Foremost is the objective of achieving economic efficiency by solving the problem of compliance and providing a neutral mechanism for dispute settlement. Regional integration as mentioned involves some forms of penetration or intrusion into domestic affairs, policies, laws, institutions – and possibly even social structures. It therefore needs wider basis of support and the function of legitimacy of the rule of law assumes greater significance especially since states are still seen as dominant actors in international relations. Integrity and credibility, not only of the regional collective but those of individual states, also plays an important function in regional integration and show the increasing importance that the international community places on international law and principles as basic norms that must be adhered to by all states. These are the broader factors that now impinge on regional integration.

3.1. The classical view of the rule of law – maintaining its relevance in regional integration

A normative conception of the rule of law merely considers law as a set of rules satisfying some formal conditions and that these rules are obeyed. From the viewpoint of liberal democratic practices, the rule of law has long been considered to be an important component of democracy emphasizing the virtuousness of ‘government of law not of men’ and the ‘supremacy of law’. Contemporary Western conceptions of the rule of law have been locked between the formal and substantive definitions. The formal conception pertains to the process and procedure by which law is promulgated and are not concerned with the content or morality of the law. Raz considers the rule of law as only one of the virtues of a legal system by which it is to be judged and not by such norms as democracy, justice, equality before the law or human rights. The main aspect of this conception is certainty and predictability of state actions through law which individuals can take as guides in planning their future actions.

There are certain requirements which are prescribed in order to judge the validity of the law. Fuller listed eight attributes such as generality, clarity, promulgation, consistency, non-retroactivity, non-contradictory rules, and not requiring impossible conditions.\textsuperscript{121} Raz identified attributes of law to be considered valid and also its institutional aspects that guarantee the independence of the judiciary, as well as compliance with the principles of natural justice such as being public, a fair hearing, judicial review and accessibility, and limits on the discretionary powers of the prosecution.\textsuperscript{122} The role of the judiciary is deemed particularly significant to ensure that government institutions act within the bounds of their authorities. To better serve its function, the judiciary ought to be guaranteed judicial independence and power to review actions of other institutions of state.\textsuperscript{123} The formal conception however has been criticized for perpetuating inequalities in power not only between the state and its citizens but also among the different institutional loci of the state. This conception which is based on generality, autonomy, and predictability of legal norms has the tendency to legitimize and perpetuate existing power relations by making it appear that laws are impersonal.\textsuperscript{124}

The substantive conception of the rule of law also recognizes that the formal aspects must be satisfied. Certain values or principles are considered to be part, if not essential attributes of the rule of law, and by which laws should comply. Contents of the law must be looked at in order to determine whether they satisfy the rule of law. Dworkin made a distinction between the ‘rights conception’ from the ‘rule book conception’ of the rule of law, the latter being similar to the formal conception.\textsuperscript{125} However, Dworkin posits that those same formal rules and procedure should be made to enforce moral rights. The rights conception presupposes the existence of certain moral and political rights which the state has to respect and recognize into positive law to enable the citizens through the courts or other judicial institutions to claim or enforce those rights.\textsuperscript{126} Dworkin’s conception signifies the paramount importance of adjudication in the rule of law and consequently how judicial institutions could take

\textsuperscript{121} In Lon Fuller, \textit{The Morality of Law}, (Yale University Press, 1969), chapter 2.
\textsuperscript{124} In R.M. Unger, \textit{Law in Modern Society} (Free Press, 1976).
\textsuperscript{126} Ronald Dworkin, \textit{A Matter of Principle}, 11.
account of substantive norms in cases of adjudication in accordance with the ‘best theory of justice’.

The ambiguities in the conceptual meaning of the rule of law and difficulties in ascribing it to different types of political systems have thus led to such recent categorization as ‘thin rule of law’ and ‘thick rule of law’. A thin conception generally puts stress on the formal or instrumental aspects, or features that any legal system must possess to function effectively as a system of laws regardless of whether the legal system is democratic, non-democratic, capitalist or liberal state. On the one hand, a thick rule of law incorporates the former conception but includes other elements such as economic arrangements, forms of government and conceptions of human rights. The thin-thick rule of law dichotomy is useful as a framework for describing a range or combination of rule of law practices in different political systems and is closer to a contextual understanding of the rule of law.

3.1.1. Restraint on power as the essence of the rule of law

The underlying assumption behind these different conceptions of the rule of law however is the notion of restraint or limitations upon those who hold public power which includes those who implement and make laws. Restraint on state power requires that arbitrary government action is prevented. The rule of law tames this so-called ‘brute power’. The foundation of the rule of law therefore under the classical liberal view is that sovereign powers are circumscribed. There are many states which claim to uphold the rule of law but exercise un-circumscribed governmental powers. The ‘rule of law’, whose nature and meanings have often been debated with much vigour, has found universal appeal in almost all shades and forms of political systems – from liberal democracy to communism and dictatorships. Even Nazi Germany may qualify to have been governed through Rechtsstaat, the term given to ‘a state subjected to the laws’ which came to be known to be rule by law referring to those states and state actors which rely on laws to govern but are not restrained by the laws themselves.

130 Jose Maria Maravall & A. Przeworski, Democracy and the Rule of Law, 10.
A conceptual meaning of the rule of law is as relevant in both state and inter-state systems. In contemporary world order, there is much pluralism of states and states interests but also pluralism in terms of individual ethnicity, value systems, religions, and ideas. The need to foster order and peaceful co-existence in a pluralist society and at the same time to give respect and tolerance to different or conflicting views has never been such an enormous challenge as in the contemporary period. Third world countries have been more vulnerable to this challenge not only because many governments have turned to repression or authoritarian rule to impose order and control dissent but also the pressures of economic underdevelopment and political marginalization have also bred violent counter-movements of insurgency, terrorism and religious fanaticism. Thus, the utter brutality of unfettered rule and the consequential horrors of xenophobic despotism in the past world wars have shown the necessity of restraining sovereign powers and of empowering and capacitating individuals as deterrents to tyrannical rulers or charismatic zealots.

Law as constraints to discretionary rule ensures that both the subjects and rulers are subject to law and that the law’s stability and public character ensures that individuals are able to prepare their future actions in relation to those rules or norms that proscribe certain behaviour. Legal equality and legal certainty are the rule of law’s basic precepts that guarantees that similar cases would be treated alike and that rules do not depend on the lawmaker’s whim or discretion. The judiciary has been an important element in the rule of law as an impartial and final arbiter of disputes and most important, as ultimate interpreter of the law. But the deprivation of fundamental freedoms of individuals living in states which profess to observe the rule of law but use the law as a form of control means that law has to respond to the ‘substantive’ virtues of the law. The rule of law therefore could be just as effective instrument of oppression and injustices in society. There is no contradiction however between the formal and substantive aspects of the rule of law. Both components are indeed desirable in achieving the objectives of the rule of law.  

131 Substantive contents of the law such as protection of fundamental rights can only be made enforceable through effective rules and procedures that guarantee access and fair dealing to the individual. The procedural

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component thus becomes as much as an element of the substantive rights themselves, the two attributes being mutually reinforcing.

Restraint on government power is and should be the foundation for the rule of law. It should be the basic criterion through which an effective and meaningful state of the rule of law could be presumed to exist. Without legal constraints, a monopoly and perpetuation of power in the hands of a few could result - which by itself is not bad theoretically. But logic shows that concentration of powers has a tendency to corrupt absolutely and history is replete with examples of how absolutism generated oppression and division in society. A regime of fear and violence does not only disturb societal balance and stability but it also has far-reaching consequences on regional and international peace. The Burmese issue for example has displaced thousands of its peoples and caused massive humanitarian crisis beyond its own territorial borders. They now live as refugees on the Thai borders – considered and treated as ‘stateless’ persons having very limited rights. And so was the Pol Pot regime in Cambodia which sent a million people to death but also courted military intervention from its neighbour and upsetting the balance of power in the region.

Other examples of ‘abuse of power’ in Southeast Asian states may not come close to humanitarian crisis and genocide. However current problems of member states in the region such as rampant corruption, poverty, frequent constitutional and political crises, and flagrant human rights violations - to name a few, are either symptoms or manifestations of absolute exercise of power or the weakness of institutions that support the rule of law. These issues, discussed in detail in Chapter Four, have spawned or exacerbated equally complex problems such as insurgency, separatism, and terrorism that have generated regional repercussions. Other problems such as illegal migration may have started as a local concern but its reach and consequential solution has now demanded regional or international cooperation. The principle of non-intervention in international relations has been the bulwark of voluntarism in international relations and for so long framed the practice of self-determination in ASEAN states. While bitter memories of colonization and the Cold War may have underpinned a zealous adherence to the principle, the realities and challenges of the new millennium therefore call for the re-examination of principle as the foundation of regional integration.
3.1.2. The rule of law in international relations

Owing to anarchy in international relations, that is, recognizing the status of sovereign states as the primary actors in the international arena, there had been traditionally a perceived divide between law and international relations. Propounded by realism, this view sees law not as constraint or limitation upon the behaviour of the states in their relations with one another. A general acceptance of international law is seen as primarily ‘consensual’ or one that is based on tacit acceptance by member states of practice or as custom. As such, international law is only considered ‘epiphenomenal’, a causal phenomenon from international politics that had been relegated to a distinct field of study from international relations.132 Moreover, the international regime is perceived to be lacking or having weak coercive mechanisms to enforce compliance of international law. In the absence of superior authority to back law, compliance depends on the cooperation of states. It is from the perspective that legal constraints against the states are non-existent, or at best minimal, that sceptics doubt the possibility of law beyond the nation-state or of nation-states and international organizations created by them being subject to the full rigours of the law.

Contemporary conceptions have expanded the understanding of international law and seek to locate them side by side or as mutual complement of each other. For one, liberal institutionalists acknowledge the centrality of states but treat law as being created and maintained by states in furtherance of their interests.133 This view argues that laws and institutions are beneficial to the states because they lower transaction costs and the risks of breaches on international agreements and negotiations and so abide by these rules. Further, it is argued that liberal democracies prefer the rule of law in international relations because it is consistent with their adherence to such value. Social constructivists likewise acknowledge anarchy in international systems but state that countries are not only concerned with security and survival but also in promoting other values such as the rule of law and human rights that enhance their capacities.134

According to this view, the states’ self-interests are socially constructed and so are the rules or norms that may subsequently influence upon those interests.

Legal theorists, with the exception of the legal positivists, go beyond the state-centric approach of the realists and constructivists. The policy-oriented jurisprudence, while recognizing the power imbalances in international system, situates the law and the way it is created, changed, adhered to and violated in a socio-political context. This approach considers not only the existence of formal rules as do legal positivists, but also other relevant processes where decisions are made and taking account of various actors involved in the process. Focus on socialization of law is how the transnational legal process theory accounts for the emergence of the rule of law in international context. In this formulation, states and various non-state actors interact to make, interpret, enforce and internalize rules of international law. The most important dimensions of this approach are on the aspects of interaction, interpretation and internalization of rules among the various actors in the international system. These latter approaches show the dynamics of the diffusion of the sources of law and how norms are being developed and continuously shaped by actors and factors that go beyond the confines of the nation-state. The pervasiveness of state interdependence and pluralism of values and interests existing in national and international spheres have continuously influenced, perhaps in equal measure, the development of international norms and their reception across states through non-formal or ‘soft’ processes and mechanisms.

The practice of international law has certainly gone beyond classical international law or international relations and is evolving. International organizations are increasingly under pressure to adequately respond to the complex challenges in international affairs in a way that is not entirely dependent on the political decisions of states or a widespread recognition that certain subjects could no longer be left solely on politics. The human devastation caused by armed conflicts has led to redefinition and expansion of international humanitarian law and consequently the establishment of the International Criminal Court (ICC) having compulsory jurisdiction over state leaders.

committing acts constituting crimes against humanity. While actions of UN organs are still beyond judicial review, the UN has permitted individuals and non-government organizations (NGOs) to access its mechanisms through its various organs and special committees. This development is again a departure from the earlier state-centric focus of UN processes and proceedings. Thus, certain international human rights standards that have been ratified to by states could now be accessed by individuals through shadow reporting or through its complaints mechanism.\[138\]

International organizations are increasingly performing functions that affect states and their peoples, directly or indirectly, and thus the demand for greater representation and participation from other sectors and groups that are not considered part of the state system. These organizations are no longer mere ‘meeting places’ for state leaders but are increasingly involved in making decisions and rules and implementing them. Values that are only said to operate within the bounds of state – democracy and accountability, are becoming important parameters of international governance.\[139\] Thus, the legitimacy of international organizations has also become more and more dependent on the observance of these virtues.

The problem of compliance in international economic law has been aided in part by depoliticization of dispute settlement which gives a degree of assurance that obligations will be complied because of the possibility of sanction in case of non-compliance. However, the threat of sanction has not been completely heeded where it is not for the best interests of more powerful states to comply or where sanction would be rendered inutile in favour of weaker states.\[140\] Law as self-enforcing because of the threat of sanction, even granting the existence of an effective enforcement mechanism, does not ensure the rule of law. A focus on compliance as the cornerstone of the international rule of law is narrow and has limited efficacy. Addressing problems of deficits in democracy and legitimacy of international institutions has become as much as a necessary complement of the rule of law.

\[138\] An example is the Convention on the Elimination of Discrimination against Women (CEDAW).
\[140\] Powerful countries such as the United States and the EU had on certain occasions disregarded the rulings of the WTO while smaller states are not in a position to enforce trade sanctions such as termination of trade concessions against a developed country when they are dependent on trade for their economic survival.
3.2. Achieving democracy and legitimacy through the rule of law

One argument for the desirability of the rule of law is its capacity to promote democracy. On the other hand, democracy provides the legitimacy for state rule or governance through ‘consent’ – particularly on one based on popular legitimacy or direct consent of the governed. Despite various constructions of legitimacy, legitimacy through consent is particularly important in a pluralistic society where people share dissimilar values and interests and thus some form of consent is necessary among those subjected to governance.\(^{141}\) However, a ‘democracy crisis’ often punctuates political conflicts in ASEAN states - be it in Thailand showing a clash between those advocating for populist democracy or a royalist or elite democracy, in the Philippines for its patronage politics and elite factionalism, to a total absence of democratic representation such as the military dictatorship in Burma.

Issues of democracy are no longer confined to nation-states. International organizations which are responsible in creating rules and decisions that affect policies of member states have been criticized of falling short of democratic accountability.\(^{142}\) For instance, the WTO by promoting an international liberal trade regime under a normative framework is said to impinge on democratic accountability in two senses. One, the WTO regime erodes popular sovereignty where the people as the ultimate repository of sovereignty are unable to exercise direct or indirect supervision to representatives of states and secondly, by its capacity to impose international obligations which are not actually preferred by domestic constituencies.\(^{143}\) As will be discussed lengthily in Chapter Three, the existence of ‘democracy deficit’ in the EU, understood generally as seeming absence of transparency and accountability of un-elected bureaucrats empowered to make policy decisions has led to questions about the legitimacy of regional institutions but also to a re-examination of the nature of EU constitutionalization. Democratic participation is to be considered non-existent in ASEAN where decision-making is still by consensus and individual or group


participation are excluded in key aspects of regional governance which remains the monopoly of state executives under the newly-ratified ASEAN Charter.

Like the rule of law, democracy considered a ‘public good’ by ancient philosophers, has assumed varied, sometimes clearly distorted, meanings. The great number of countries – 120 out of 190 as of 1999, committed to holding periodic, open and multi-party elections is said to be an unprecedented endorsement of at least an electoral democracy. But democratic practices in contemporary regimes not only differ in practice but show that more often democracy has come to be known more for its formal processes – the holding of open and competitive elections, rather than real participatory democracy. Democracy has been turned as much as an instrument of oppression, the tyranny of the majority or of a few. In the guise of majority rule, democracy became a license to suppress political opposition and to disempower minority groups. As such, forms of governments that are otherwise democratic have the tendency to turn themselves into ‘illiberal democracies’ – those that have practiced tyrannies or dictatorships or repression of fundamental freedoms - having derived the legitimacy of their rule by virtue of being elected by the majority.

Loosely and narrowly understood as majoritarian rule, democracy particularly in a pluralist society, should aim in what Dahl terms as ‘political equality’. Political equality as the foundation for democracy consists not only in terms of how political decisions are taken. It also presupposes equality in the outcomes of the decisions. Political equality necessarily has to include economic and social equality and the exercise of each has been linked with the other. While universal suffrage has been recognized in most ASEAN states, political inequality is widespread in those states and is the unequivocal cause of continued political strife and violence. The ongoing political turmoil in Thailand is broadly articulated as a fight between democracy represented by poor and ‘ignorant’ rural red shirts and the excesses of democracy.

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represented by urban affluent and educated yellow shirts. Such deep polarization however underlies deep-seated issue of political inequality that has pervaded Thai society for decades and that such polarization actually cuts across classes and sectors.¹⁴⁸

3.2.1. Interdependence of democracy and the rule of law

Democracy and the rule of law may be inherently at odds with each other if seen as two separate and unrelated concepts. Democracy is geared towards accumulating sovereign power while the rule of law limits such power.¹⁴⁹ In fact, as will be described in Chapter Four, democracy had been viewed by many regimes as an anti-thesis to the rule of law. In particular, populist democracy has been regarded as undermining order and thus the primacy of states given to the institution of political stability and inculcation of prescribed societal values. In this sense, the rule of law is over and above all political practices that underpin democracy.

Pursuant to the view taken by the legal positivists or those which see an absolute identification between state and law, law on its own could thus confer legitimacy on the state – its legal legitimacy. Law is essentially the command of the sovereign according to John Austin.¹⁵⁰ Law itself is autonomous with its own set of rules and by itself makes significant claim to authority.¹⁵¹ Not only has legal positivism or the state’s claim to ultimate legal authority been found wanting in contemporary national and international settings, a rule-based conception of sovereignty is unable to account for the existence of co-existing or contradictory norms in institutions and state systems.¹⁵² This is all the more true in international relations where ironically, the external aspect of state sovereignty is expressed through the independence of a nation-state in relation to

another. Consequential to this formulation comes the classical view of international law as law among equal sovereign states.

That democracy is still relevant to many, and that legal legitimacy is inadequate to secure consent, is manifested not only by states holding or promising elections even by countries under military or autocratic rule. The people themselves are in fact demanding observance of democracy by their governments. In the context of Southeast Asia, democratization in the 80s was swept by a movement of civil society pressing for a return to democracy from authoritarianism through People Power and constitutional reform advocacies. International institutions like the United Nations are likewise not spared from the continuous clamour for democracy, either in the sense of representative democracy or through mechanisms of accountability.

Within the nation-state, the rule of law provides the normative framework through which democratic governance could thus function. The rule of law is not for suppressing the ‘political’ but in providing a legal framework through which democracy could be meaningfully expressed. There is no conflict between democracy and the rule of law where the function of the latter is merely to tame or transform brute power. The rule of law imposes sanction or punishment on those who breach the rules of the game – in the same fashion that democracy does. The system of accountability consists of two dimensions which show the synergy between the rule of law and democracy. First is direct or popular accountability through regular and free elections or other modes of direct citizen participation such as recall and referendum which allow citizens to either elect or dismiss their representatives and to either affirm or reject major policy decisions of the government. Second is through institutional accountability through state institutions which check on the exercise of authority by other institutions. The court through its power of judicial review and interpretation is deemed the ultimate

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154 People Power is the term given to spontaneous mass movements through massive street protests and demonstrations that swept through first in the Philippines and then Thailand and Indonesia in the 80s to the 90s.
internal control. Other institutional checks have also been developed through regulatory and administrative mechanisms to secure accountability of state officials. The institution of the rule of law likewise provides the mechanisms for the excluded or marginalized to seek recourse through the courts or other institutions to enforce their rights or to seek redress for the excesses of state authority.

As mentioned, the exercise of democracy in many states has become more formal than real – and this is all the more true in international organizations where the unitary character of states is still assumed in most respects. Mechanisms of accountability have been routinely abused or coerced to favour state or elite interests. As will be discussed in Chapter Four, the judiciary in Southeast Asian states, as the most visible manifestation of the rule of law has suffered from diminished credibility as an impartial guardian of the law but also from a host of other problems such as inefficiency and corruption. Other innovative institutions to enhance accountability and representation have as easily been coopted or weakened by powerful interests, such as the party-list system and institution of recall as practiced in the Philippines. This goes to show that politics still underlie democratic and rule of law practices and thus the need to equally identify both the location of power and informal processes where reforms will have their most impact on.

The need to enhance ‘participation’ particularly when direct democracy is limited or constrained - like international institutions where officials are not subject to democratic election, has become increasingly important. Broadly, political participation affords citizens to communicate information about their preferences and needs to policy-makers and to create pressures on them to change or create policies. But participation to be effective, and thus an essential element of political equality, should be an activity that has intent or effect of influencing government action. Participation, both at the level of the individual and group, is only feasible however where the right to participate and other rights necessary to ensure participation is assured. Fundamental rights, which secure the autonomy and dignity of individuals, are

157 Jose Maria Maravall & Adam Przeworski, eds., Democracy and the Rule of Law, 9-10.
indispensable to exercising political participation and therefore as essential to substantive functioning of democracy and the rule of law.

3.2.2. Establishing the rule of law through constitutionalization and securing fundamental freedoms

Through the process of constitutionalization, the rule of law could elevate and insulate democratic institutions and fundamental rights from the caprices of the rule of the majority by allocating power among state institutions and placing certain individual rights above secondary legislation or at least imposing extraordinary conditions for their derogation. A constitution has been generally understood as providing the legal framework for the exercise of state power by delineating the scope of government institutions. This is the sense of the thin constitution outlined by Raz whose function is mainly to regulate and define the powers of the main organs of government and thus provide a stable framework of public power.\textsuperscript{159} The thick conception adds such requirements as being constitutive, stable, written, a superior law, justiciable and entrenched. On the other hand, the concept of \textit{constitutionalism} or \textit{constitutionalization} expresses the basic idea of the rule of law as legal constraint on government power and therefore embodies precept of separation of powers, questions of legitimacy and authoritativeness as well as values of good governance, accountability and human rights.\textsuperscript{160} This is the feature of liberal constitutional democracy practiced mostly by Western countries but is shunned or paid lip-service to by many states in Southeast Asia.

Most ASEAN states have in fact formally adopted elements of a thick constitution by providing in their constitutions the principle of separation of powers and the sanctity of fundamental freedoms. However, constitutionalism expressing the idea of restraint on state power is either absent or weak through constitutional provisions that prohibit judicial review of certain government actions, ease of effecting constitutional


amendments and exceptions or limitations to exercise of human rights. In certain countries like the Philippines and Indonesia, constitutionalism has been formally entrenched through populist constitutional reforms but is continuously frustrated by elite factionalism and rivalry, informal personality-based networks, weak institutions of justice and systemic corruption. In Thailand, the succession of constitutions parallels the succession of military coups or uprisings and the shifting of conservative and liberal constitutions. While there are variations in constitutional practices among ASEAN states - the outcome has been similar, the emergence of strong executives enjoying preponderant authority in relation to other state institutions.

A constitution is therefore not only constitutive of public power but reflects the form of state rule in general and its underlying political dynamics. As such, the ‘supremacy of constitution’ is not only a legal fiction but one that is subject to the vagaries of power politics and thus shows what Loughlin terms as the ‘relational character of sovereignty’. A constitution provides not only the framework of state governance but also underlies the capacities of the real sovereign – the people, to claim or reclaim their rights and entitlements. The development of constitutionalism in the EU has shown the congruence of attitudes among national and regional institutions and the peoples of Europe to the idea of the rule of law as a restraint on supranational institutions and state sovereignties and their preference to a legal solution, rather than political, in resolving inter-state conflicts. In the state as in regional integration, the significant role of individuals in the development of constitutionalism through their continuous use and demand for the mechanisms of the rule of law is clearly unmistakable.

4. The impact of globalization on the rule of law

As globalization has substantially influenced the formation of projects of regional integration, it is important to examine its effects on the development of the rule of law. Undoubtedly, the modern era of globalization has ushered an explosion of law both at

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161 See Martin Loughlin, The Idea of Public Law, (London, Oxford University Press, 2003). Relational sovereignty refers to the expression of the quality of political relationship formed between the state and the people and expressed as a relationship between political sovereignty resting on the people and legal sovereignty which rests on the exercise of government power.
the national and international domains. This is particularly discernible in the economic area where various forms of rules and norms occur that range from state-sponsored statutes, obligatory rules and court decisions to international norms such as model laws, international standards drawn by private organizations, and rulings from international judicial or non-judicial tribunals. As a fairly recent scholarship, law and globalization has largely emerged out of the need to facilitate and regulate commercial relations as well as adjudicate disputes arising from a plethora of economic activities.  

Teubner describes the development of ‘global law’ in the economic sphere as having been created through the diffusion of law-making process in multiple sectors of society which are independent of nation-states and grown out of transglobal commercial contracts or the lex mercatoria. As explained in Chapter One, this process has brought forth the role of private authorities and a host of international organizations that have capacity to formulate rules and standards and implement them beyond the borders of states.

Globalization of law is not however equivalent to globalization of the rule of law; in this latter area there is yet an emerging consensus. The effect on the rule of law by globalization is largely seen from the perspective of globalization’s impact on state sovereignty where the rule of law has found expression. Under the classical conception at least in the tradition of Western modern states, Weber identifies the state to be in possession of certain characteristics among which are: claim to monopoly of legitimate use of force within a territory, centralization of rule, administrative staff or rational bureaucracy, a legal order binding on the citizens, and regulation of the competition for political offices. In his treatise on the rise of nation-states, Poggi also identified salient attributes constituting a state - unity of state’s territory bounded as much as possible by a continuous geographical frontier and militarily defensible, a single currency and unified fiscal system, generally a single ‘national’ language which is often artificially superimposed upon a variety of local languages and dialects, and a unified

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legal system that allows alternative juridical traditions to maintain validity only in peripheral areas for limited purposes.\textsuperscript{165}

Conceiving the state as essentially appropriating for itself the business of rule over a defined territory, Poggi thus identified two key attributes of the modern state - its possession of bounded territory and the degree to which it is operated through law. These characteristics define the state and set it apart from other systems of rule. The signing of the Treaty of Westphalia in the 16\textsuperscript{th} century among warring fiefdoms in Western Europe elevated the ‘reason of the state’ over interstate rivalry and allowed the monarchs to exercise their authority over a well-defined territory free from encroachment from other states. In the process, the formation of the state allowed them to consolidate their powers from other competing forms of political authority including that of the church. Political power came to be centralized in the hands of one person or institution claiming final and unchallenged jurisdiction over persons and activities within a particular territorial boundary. The exercise of state authority came to be known as ‘sovereignty’ and depended on the mutual recognition of other states. In state formation, law became a function of the state’s exercise of power.\textsuperscript{166} The advent of the modern state system saw law displacing violence as the principal means of enforcing state authority, though it is necessarily backed by coercive power. The identification of law with the state enabled the latter to act not primarily through force but through law. A state can thus be visualized as a ‘legally arranged set of organs for the framing, application, and enforcement of laws.’\textsuperscript{167} Also, an attribute flowing from the state’s claim to authority over a definable territory is the state’s freedom from interference from other states.

The above historical genesis of the state clearly notes the centralizing function of state sovereignty and the law’s function in forming and sustaining a centralized public authority. Although the normative character of the state has been much emphasized particularly in the context of Western countries, an understanding of the state’s centralizing function situates the rule of law in a more concrete and broader perspective.

The centralizing function of the law accounts for a great deal of variance in the practice of the rule of law in Southeast Asian states with liberal democratic states in the West. Cohesion and strengthening of institutions of power underlie rule of law practices in ASEAN states as will be discussed at length in Chapter Four. In contrast, limits on and fragmentation of state power generally characterize Western states. A shift from this centralizing theme towards restraint on state powers has proven to be a daunting test for newly liberalizing states in Southeast Asia and has generated mixed results and sometimes polarizing effects. Factors affecting the re-orientation of Southeast Asian state towards a ‘limited state’ show that these are both externally and internally driven.

4.1. Perspectives on globalization and the state

Views on the impact on the rule of law by globalization are mostly centred on the way state is transformed in the new global environment. Has the state, traditionally considered as the central object of international legal order, been strengthened or diminished by globalization? Given its function in defining the role and legitimacy of modern state, the concept of sovereignty is examined in the light of globalization’s widening reach. Consequently, traditional conception of law as the exclusive prerogative of the state in the exercise of its sovereignty assumes new meaning and conversely interrogates the state’s monolithic character in a polity. As contemporary legal order reveals, the concept of state-law identity maintained by the legal positivists is increasingly being undermined. The emergence of supranational legal regime in the European Union and the progressive expansion of economic areas regulated or controlled by non-state institutions have all presented a vigorous challenge as well as an opportunity to re-examine traditional conceptions of the rule of law in the context of a fast globalizing world.

One proposition about the impact of globalization on the nation-state is the apparent decline of sovereignty particularly concerning economic activities taking place within and without the traditional state borders. This conception directly negates the basic tenet that state sovereignty is unitary and absolute, in so far within its own territory. Globalization’s theory of diminishing relevance of the state challenges the essential components of statehood: exercise of its sovereign authority within its territory.
and monopoly over law-making. In this account, the logic of commerce and capital is driving the political obsolescence of the state as global economy is becoming less tied and reliant upon territorial borders within which to conduct their activities and the states losing their ability to control or regulate these activities.\textsuperscript{168} The ‘hyperglobalists’, the term given to those who predict the ultimate demise of the state, see globalization as heralding a new period of history driven by free movement of capital and the inevitable rise of a world civilization.

The second view maintains the centrality of the state. Called the ‘sceptics’, this view argues that there is nothing exceptional about the current levels of interdependence at the global level and maintains the primacy of states as political and economic actors in international relations. Sassen for example maintains that the state remains the ‘ultimate guarantor of the rights of global capital, that is, the protection of contracts and property rights.’\textsuperscript{169} It is opined that -

‘Even though transnationalism and deregulation have reduced the role of the state in the governance of economic processes, the state remains as the ultimate guarantor of the rights of capital whether national or foreign. Firms operating transnationally want to ensure the functions traditionally exercised by the state in the national realm of the economy, notably guaranteeing property rights and contracts. The state here can be conceived as representing technical administrative capacity which cannot be replicated at this time by any other institutional arrangement; further, this is a capacity backed by military power.’\textsuperscript{170}

Sassen argues that even when states deregulate to accommodate the influx of multinationals corporations and financial services, the state continues to guarantee the sanctity of private contracts and property rights. Thus, economic globalization is not simply a matter of space economy extending beyond the borders of the state but also with the ‘formation and legitimation of transnational legal regimes that are operative in national territories’ and in this, the state continues to play an important function in generating legitimacy of new forms of economic activity.\textsuperscript{171} By effecting deregulation and other policies that tend to de-territorialize national territory such as setting up of

\textsuperscript{168} See for example, Susan Strange, \textit{The Retreat of the State} (United Kingdom, Cambridge University Press, 1996) who observes, taking the global financial economy in particular, the increasing power of non-political actors in the global system which have diminished the state’s responsibilities and capacity in the market economy.
\textsuperscript{170} Saskia Sassen, \textit{Globalization and its Discontents}, 199.
\textsuperscript{171} Saskia Sassen, \textit{Globalization and its Discontents}, 199-200.
export processing zones that provides various exemptions and reduction of obligation by companies to national state, the state is seen as guaranteeing a wider range of rights to national and foreign capital. Viewed from this perspective, globalization does not seem to erode the significance of states but remain essential to the expansion of global economic and political system.

The third category of globalization theorists acknowledges the unprecedented change caused by globalization but unlike the hyperglobalists, they assert that the process remains uncertain and contested. The ‘transformationalists’ do not believe that the state would be rendered obsolete but doubt, at the same time, whether the states would remain as strong as ever. This category posits that globalization is continuously transforming state sovereignty in relation to a globalizing world economy.\textsuperscript{172} For one, it is observed that a consequence of this sovereignty transformation has caused a shift in the ‘dispersion and dissolution of powers of governance in institutions in civil society as well as the economy’ or ‘a move away from government to governance.’\textsuperscript{173} To Jayasuriya, this transformation is ushering a transition from political constitutionalism to a kind of economic constitutionalism which sees sovereignty increasingly being fragmented and distributed across a range of non-political institutions. Jayasuriya’s framework has been drawn from the tremendous growth of private international authority such as international standards associations, rapid growth of arbitration and increasing importance of trade associations – which all impinge on the traditional legal domain of the states.\textsuperscript{174} On the domestic front, there is a rise in domestic regulatory agencies such as relatively autonomous central banks and domestic trade associations which are also linked with international bodies.

Another impact of structural transformation of the state under globalization is the challenge on the nation-state as democracy’s dominant institutional form.\textsuperscript{175} Habermas not only identifies three basic characteristics of the nation-state such as being an

\textsuperscript{172} In David Held, Anthony Megrew, David Goldblatt, & Jonathan Perraton, \textit{Global Transformations} (Stanford University Press, 1999), 1-8.


administrative system of rule, territoriality which serves as the focus of state sovereignty and national identity, but also added ‘democratic legitimacy’ constituted by civil, political and social rights.\textsuperscript{176} As states become more interdependent, strong fiscal pressures are exerted upon the states to deregulate their financial and capital markets which are mostly instigated by international financial institutions. The proliferation of international organizations with decision-making or regulatory powers such as international arbitration centres and the World Trade Organization (WTO) has not only undermined traditional locus of state legal authority but also extended the reach of such international regulations beyond territorial borders of the states. Globalization has also put pressures on national identity by simultaneously fomenting integration and fragmentation of social relations. This is made manifest in the rise of cultural or religious conservatism which felt threatened by the homogenizing effect of globalization as well as the spread of material culture of capitalism.

It has been pointed that the most important challenge to democratic legitimacy lies in the insidious influence of transnational markets which are not accountable to domestic authorities and thereby limit the capacity of governments to regulate their own economies.\textsuperscript{177} This has significant repercussions on democratic governance where major economic policies escape the reach of democratic procedures and of market forces superseding politics. In Jayasuriya’s words, a form of economic constitutionalism is evolving which, with the ‘increasingly juridical nature of international trade and financial institutions, reflects attempts to constitutionalize the market while simultaneously depoliticizing a range of economic activities’.\textsuperscript{178}

Globalization based on neo-liberal policies is threatening the capacity of nation-states to secure the rights of its citizens. It is not merely the capacities of states to make its own policies that are increasingly compromised by globalization. In many developing countries where ‘output legitimacy’ rather than democratic legitimacy has increasingly become the barometer of regime survival, economic globalization is posing a threat to fundamental rights. The increasing power and influence of huge

\textsuperscript{176} Jurgen Habermas, \textit{The Postnational Constellation}, 62-4.
multinational corporations is putting governments in intense competition with one another resulting in huge concessions for corporations to put up their businesses in a more attractive location. These concessions are not only in the form of economic benefits such as tax breaks and suitable premises known as economic zones but also diminishing labour rights such as lower wages, curtailment of bargaining rights and inadequate health and safety standards in the workplace.\textsuperscript{179} Minority groups, particularly indigenous peoples, have been displaced from their traditional lands usually without their effective consent and through coercion, due to the active promotion of their governments of their lands as investment destinations.\textsuperscript{180} Such disregard or violation of individual rights has an inhibiting effect on the rule of law and the institutions through which it is anchored. Where the power of corporations may have seemed to ‘weaken’ the states in relation to the latter’s domestic policy choices and decisions, the state may be actually gaining ‘strength’ in relation to its citizens.

Thus, it can be said that globalization simultaneously impacts on states, the global and regional order, and the individual. At each level, two or more spheres could potentially interact and produce varying results. The dynamics of globalization presupposes complex and sometimes contradictory processes and outcomes. The way globalization affects some aspects of the state does not necessarily mean the same or similar effect on other aspects or that on the peoples. De Souza Santos has noted the complex relationships brought about by globalization and distinguished two types of phenomena associated with globalization – ‘globalized localism’ or when a local phenomenon becomes global and ‘localized globalism’ or when local conditions and structures have to adapt in response to transnational influences.\textsuperscript{181} The advent of regional integration adds a new layer to the relationship. Regional integration could cushion the negative or weakening impact of globalization on the state or advance local or national interests in the regional agenda.

\textsuperscript{179} Like the discovery of proliferation of sweatshops in the garments and shoe industry in Thailand.
\textsuperscript{180} Such as the promotion of the mining industry in the Philippines which displaced indigenous peoples from their ancestral domains or the forced dislocation of indigenous peoples in Burma to allow the extraction of oil and gas resources.
4.2. Enhancement or deterioration of the rule of law under globalization

Whether globalization tends to weaken, strengthen or transform the state, the salient question is how the rule of law is correspondingly changed or affected in the process. The three dominant themes analysing the impact of globalization on state sovereignty show that the main focus is on the law-making capacities of the state. This does not offer a concrete and overall pattern of the development of the rule of law under globalization or an explanation on how either weakening or strengthening of the state could possibly transform the rule of law either in the context of the state or the international legal order. Thus if the state is weakened or transformed by globalization, does it follow that the rule of law is likewise enhanced or has an opposite effect, that is, weakened? And how could it possibly affect the practice of the rule of law of ‘weakened states’ in international organizations?

There are two main propositions however describing general trends on the impact of globalization on the rule of law. One view sees globalization and the rule of law sharing an ‘elective affinity’, meaning that globalization does encourage adoption of stable and predictable rules necessary for enforcement of contracts and the protection of property rights.\textsuperscript{182} It suggests an unwavering faith that globalization encourages the spill-over and eventual strengthening of the rule of law in other spheres of private and public life. Hayek’s influential economic and political treatise which inspired the theoretical underpinnings of the formation of European Union is grounded on the inter-relationship between the attainment of regional peace, opening up of markets and creation of a political union which can be created through an international regime of law which is a ‘necessary complements and logical consummations’ of an interstate federalism.\textsuperscript{183} Adherents of this view point to the movement towards cogency, generality, and homogenization of rules in many areas of business transactions such as in shipping, air transport, telecommunications, and intellectual property throughout the capitalist countries of the world.\textsuperscript{184} The observance of the rule of law in the economic

\textsuperscript{183} See Friedrich Hayek, ‘The Economic Conditions of Interstate Federalism’ (1999).
sphere is believed to expand, by the force of logic of legal reasoning, to social and political rights as happened in the case of the United States and the European Union.185

The opposite view asserts that the rule of law has not been helped by globalization. The spill-over hoped for arising from the intensification of the use of rules in the economic domain into the public sphere has so far been confined into the experiences of Western developed countries.186 The expansion of legal reasoning into other areas of law has been ‘blocked’ by the absence of or limited constitutional space that would guarantee the autonomy of judicial authority and thus suggests the role played by political factors that would allow the development of the rule of law.

Instead, economic globalization is observed to exhibit an overwhelmingly ‘ad hoc, discretionary, closed and non-transparent legal forms fundamentally inconsistent with a minimally defensible conception of the rule of law.’187 Scheuerman argues that a relatively discretionary, informal and open-ended system of law is developing in the economic areas such as taxation, international banking and finance, and dispute resolution in both national and international levels. This trend has favoured and is being preferred by international businesses. He argues that there is little evidence to suggest that internationalization of capital is strengthening traditional conception of the rule of law. On the contrary, he argues, the evolving informal and discretionary legal regime erodes the classical notion of the rule of law which is grounded on such normative rules as being general, public, prospective and stable. A growing body of economic rules is shunning the formal, public, predictable and stable systems of law in favour of discretionary and flexible private self-regulation.188

The preference given to the use of soft laws in international relations would seem to support the lesser optimistic view on globalization’s impact on the rule of law. Soft laws which are characterized by lesser degree of obligation, precision and delegation tend to preserve the sovereignty of member states. Through its non-binding and flexible

185 This is the view subscribed to by economists and policymakers in international financial institutions like the World Bank and other academics and non-government organizations, in Gordon Silverstein, ‘Globalization and the rule of law: “A Machine that runs itself?”’, I.CON, Vol. 1, No. 3 (2003), 428-9.
nature, soft law allows states to weaken their commitments and thus their compliance under the treaties or agreements. Where states ardently guard their sovereign powers, soft laws provide the tool through which states could commit to agreements and lessen sovereignty costs through forms that are nonbinding, imprecise or do not delegate extensive powers.\(^{189}\) It is in the area of delegation, either of decision-making or enforcement, which provides the greatest source of ‘unanticipated sovereignty costs’ and where states hesitate to give in particularly where they assert ultimate control over legal authority in the courts and domestic institutions.\(^{190}\)

However, the use of soft laws should not in itself be regarded as entirely undesirable, even with respect to the development of the rule of law in international or regional relations. Not only does it have the capacity to be a springboard for the development of formal, precise and enforceable law through repetitive practices and socialization, soft law offers many benefits of its own.\(^{191}\) It presents an attractive option for states who are reluctant to diminish their sovereign powers or unwilling to take ‘uncertainties’ that high obligation, precision and delegation could bring into domestic policies and issues. For international organizations with varying values and interests and degrees of power among member states, soft law affords member states to forge more acceptable agreement or compromise especially along politically sensitive issues. Another advantage of softer law regime is its capacity to facilitate ‘learning’ of matters that are new or alien to the organization or its members. Over time, soft law may evolve into harder law although this may not necessarily be the case all the time. In many instances in international relations however, softer law can have powerful effect or even be superior and desirable to hard law.\(^{192}\)

Although states are given room to manoeuvre or even the opportunity to resist compliance, softer law nevertheless provides opportunities for private non-state actors particularly non-government organizations to invoke ‘non-legally binding but highly

\(^{189}\) Kenneth Abbot and Duncan Snidal, ‘Hard and Soft Law in International Governance,’ International Organization, Vol. 54, No. 3 (Summer 2000), 436-41.

\(^{190}\) Kenneth Abbot and Duncan Snidal, ‘Hard and Soft Law in International Governance,’ 438.

\(^{191}\) Kenneth Abbot and Duncan Snidal, ‘Hard and Soft Law in International Governance,’ 434-8.

\(^{192}\) Kenneth Abbot and Duncan Snidal, ‘Hard and Soft Law in International Governance,’ 447-8, 451-2, citing the Helsinki process forged between Western Europe and the United States on one side and the Soviet Union on the other, over the latter’s desire to stabilize military and political relations with the former and thus establish economic relations with the former.
elaborated’ documents to demand compliance from governments. Several issues involving human rights and in recent years, the environment, have been constituted in soft forms due to their high sensitivity for and unwillingness or reluctance of states and other private non-state actors to turn commitments into hard obligations. Some of these loose declarations have been developed into hard treaties or conventions or have become valuable tools for advocacies. Soft law may not be invoked as ‘law’ but it still supports similar normative discourse and legitimizes the issues raised in the instruments and could become the basis of initiating change in the political processes.

Human rights which has the inherent effect of constraining government action, is one area where the impact of globalization and the rule of law is much more complex. Elements of certainty and determinacy as well as the principle of equality afford protection of human rights under the canvass of the rule of law. Indeed, it has been recognized that widespread and flagrant human rights violations in Asia occur under the ‘prevailing breakdown’ of the rule of law. As pointed out, globalization’s contradictory processes have also generated contradictory trends in human rights – increasing threat to human rights brought by heightened competition of states and corporations in international trade but also a growing body of international standards protecting a range of rights and international, regional and national mechanisms affording protection and promotion of these rights. The internationalization of human rights standards however have not been ‘globalized’ as states practice differ on account of distinct political or cultural environment but also that most human rights instruments also allow states to take exception or reservation from certain standards by reason of or in the guise of protecting public interest, morals, health and security.

The fact that human rights remains contested in nature, content and implementation and that every legal order is contingent on politics means that the role that the rule of law plays in terms of safeguarding human rights is likewise to be

193 Kenneth Abbot and Duncan Snidal, ‘Hard and Soft Law in International Governance,’ 452.
194 Kenneth Abbot and Duncan Snidal, ‘Hard and Soft Law in International Governance,’ ibid.
dependent on the dynamics created by these factors. The function that the rule of law provides in promoting ‘standardization’ of human rights and thus promotes their universality, has been limited to selected areas while enforcement remains weak and often mainly grounded on states’ political decisions. However, globalization has created new constellations that enable various opportunities for other transnational actors in developing international norms and the enforcement of human rights standards and norms through non-judicial mechanisms. While many recent human rights instruments have emerged in soft forms that are mainly voluntary and non-binding such as codes of conduct and guidelines, these are increasingly becoming ‘tools’ for accountability of violations of human rights committed by states as well as by non-state actors violating human rights who are still not strictly accountable to international human rights law. Indeed, soft forms may have the tendency to dilute the responsibilities of states and non-state actors under international human rights standards but they may also become the springboard for advocacy and discussion of issues in the absence of ‘legally-binding’ rules.

Various United Nations mechanisms have also been created which do not carry ‘coercive sanctions’ but are increasingly putting pressure and influence on the conduct and behaviour of states in terms of their compliance with their international human rights commitments. Similarly as in the economic sphere, non-state actors such as corporations, private groups and non-government organizations are increasingly engaged in norm-creation. The emergence of transnational civil society is actively challenging the monopoly of states in the production and implementation of human rights norms. In particular, non-government organizations are playing an increasing role in shaping international human rights doctrine and practices. This ranges from efforts at information gathering aimed at exposing violations to lobbying and advocacy on national governments and international organizations in order to influence policies

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198 Such as the very limited accountability under national and international law of human rights violations committed by corporations.
199 The UN has established various reporting mechanisms and individual complaints procedures in its various treaty bodies which are ‘non-legally binding’ but carries influence or suasion upon member states to change its policies or respond to issues raised by pertinent committees or civil society groups.
and by cooperating with governments in framing international law and enforcement mechanisms.\(^{201}\)

These developments have shown that assessing the impact of globalization on the rule of law has now to take into account the role that non-state actors and informal or unofficial processes are playing in decision-making, rule-making, and implementation in international or regional domains. The focus of the study should not be confined to how states are strengthened, weakened or transformed, but equally so on how and the means through which states are made to respond to various external and internal challenges. Of particular significance to Southeast Asian states pertains to the way states respond to challenges to its authority or legitimacy and how and to what extent they respond to challenges of individuals and civil society groups which present opposing or alternative views of state governance. To what extent has globalization aided in galvanizing or suppressing public discourse or articulation of new ideas that unsettles official state ‘ideology’ and how do states take measure at the level of state and regional governance, are crucial questions that have become significant for the rule of law.

4.3. **Legal pluralism and hybridization under globalization**

The above discussion indicates that an examination of the effects of globalization on the rule of law could no longer be confined to the traditional domain of law-making capacity of the state and its formal processes. International law and norms abound in varied forms and the movers of this legal development consist of states and non-state actors. ‘Legal’ instruments of varying forms have been mostly noted in the economic area but also different kinds of international instruments are increasingly being adopted in the fields of human rights, the environment and climate change, and in the sphere of political and security cooperation among states. While states remain to be the pivotal actor in international relations and thus most significant international agreements still depend on the states for recognition and enforcement, rule-making and norm creation as well as their enforcement are continuously influenced by internal and external processes that operate outside the official framework of the state.

The concept of pluralism has been acknowledged to be a feature of any legal system but globalization has brought it into sharp focus and thus central to understanding of law in contemporary period.²⁰² It has increasingly become a useful concept to describe the complex relationship between state and regional legal orders in the European Union.²⁰³ Globalization is seeing not only the emergence and diffusion of new forms of laws but also the increasing interaction of old and new, official and unofficial, and formal and informal laws operating at various levels of the local, national, regional and global producing mixed or hybrid institutions and legal systems. For example a seemingly local issue of ‘illegal recruitment of workers’ could be dealt with under the broader issue of migration where a range of laws, policies and remedies could be found at various levels and even applied simultaneously. Santos articulated the ‘concept of interlegality’ to denote not only the contradiction of co-existing legal processes but also the range of complementary relationships – and consequently of a range of remedies, created by the interaction and interpenetration of these processes.²⁰⁴

The existence of legal pluralism therefore points to various sites through which the rule of law could be ‘located’, particularly at the transnational level. States remain to be the ultimate guarantor allowing other forms of law to function or in Chiba’s formulation, from which these other sources of law ultimately derive their authority from.²⁰⁵ However, it has also become apparent that the dynamism of globalization is re-orienting the processes in traditional international relations towards transnational relations which allow for non-state participation but also for other ‘non-binding’ practices to flourish and influence the outcomes of state decisions or obligations. As much as the monopoly of states in international rule-making is being challenged, there is now a growing consideration of the individuals and civil society not merely as passive objects but active drivers and demanders of the rule of law. The following

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chapter will discuss in detail how individuals have become an indispensable pillar of the rule of law in European integration.

5. Conclusion: understanding the rule of law in ASEAN integration

Regionalism in Southeast Asia started off and continues to be an integral process of state-building. Initiatives at regional integration in ASEAN has been influenced by the processes of globalization but its main goals remain no different than it was formed forty years ago – the peace, prosperity, security and stability of its members and the region as a whole. The focus on the economic aspect, the creation of single market and production base, means that ‘legalization and a more rules-based’ regime is to be the framework of a legal order in ASEAN. The adoption of the ASEAN Charter represents the most significant instrument to date that would institute this legal framework. In essence, The Charter has provided for greater institutionalization of inter-governmental cooperation, establishment of a soft legal regime particularly in the economic sector of integration, and hortatory declarations of commitment towards the attainment of democracy, the rule of law and respect for human rights.

Understanding the rule of law in the context of ASEAN has to take the broader dimension of regionalism – the inherent political motivation for regional integration by member states but also both the internal and external forces that drive its processes. A spill-over effect from the economic to the political sphere has encouraged the development of the rule of law in European Union integration but even this phenomenon has suggested that it is politically contingent on the states and on the capacities of supranational actors and institutions and of individuals in pushing a regime of the rule of law in regional integration. The context of European Union integration also indicates that the formal aspects of the rule of law – formal, general, stable, and predictable, necessarily have to be complemented by their substantive aspects – of greater participation by individuals and respect of their fundamental freedoms, and greater representation in regional processes.

The formal aspects of the rule of law have become as challenged as its substantive dimensions at the international domain. Globalization has engendered the existence of
various forms of law such as the proliferation of soft laws that are low in obligation, precision and enforcement and that tend to diminish the formal conception of the rule of law. It has also generated or brought to the fore other sources of laws or rules that exist outside of the traditional framework of state law at both the domestic or international levels. This seems to challenge the exclusive capacity of ‘state’ for rule-making and decision-making and also on the state’s privilege of determining compliance of international obligations. Globalization seems to have ‘lessened’ salient element of state authority, its weakening or transformation. However, this does not necessarily translate to ‘weakening’ of state in relation to its peoples, as seen from the context of Southeast Asian states.

The basic notion of the rule of law as limit on state authority signifies that the state remains to be the significant locus of the rule of law – at the state, regional and global levels. The idea of restraint remains to be the conceptual ideal of the rule of law. But state-building in Southeast Asia has been dominated by elitist patrimonial view of establishing order that suppresses all forms of opposition or challenge to state authority. Order, in place of restraint, has become the function of the rule of law in most Southeast Asian regimes since the post-colonial period and aided the establishment of authoritarian regimes in the region. The democratization process – brought mainly by the emergence of civil society bonded by the common cause of fighting the excesses of authoritarianism and elite factionalism, has started to re-orient the Southeast Asian state to the ideal of the rule of law through constitutionalism and building of institutions. Rule of law building has been a daunting challenge for democratizing state and generated mixed results. It shows that the rule of law needs to consider the dimension of power politics that either support or reject the development of the rule of law.

Globalization tends to have an ambiguous effect on the rule of law. There are various threats to the rule of law under globalization – such as lessening the ‘binding’ character of international law and standards, intensified economic competition that pit states against states and lower standards of protection for the people, as well as decreasing independent judicial authority in favour of private and *ad hoc* adjudication or administrative regulation. The absence of judicial scrutiny particularly of human rights violations has become increasingly scarce in the context of regional economic
integration.\textsuperscript{206} Free trade agreements also show this blindness to individual responsibility and recourse to judicial authority for redress of violations. This would tend to reinforce practices or inhibit the development in countries or regions where judicial independence, as a bulwark against excessive state power, is either weak or lacking.

On the other hand, globalization has generated alternative processes that could promote the rule of law. International organizations are increasingly recognizing legitimacy, accountability and democracy as important elements of international governance promoted through the observance of the rule of law. New relations, processes and mechanisms that are unofficial, informal and non-binding have become ‘sites of struggle’ to articulate and legitimate issues, influence the creation of international law or standards, or to demand accountability for violations or commitments. Globalization, through the process of intensified interaction and communication, has also made it possible to obtain and exchange information and the emergence of transnational civil society promoting solidarity and engagement with other transnational actors. Thus individuals and civil society organizations are increasingly recognized as participants in international processes that are otherwise the exclusive preserve of states.\textsuperscript{207} However, civil society as a pillar for the rule of law is still limited and presupposes that groups and individuals are given the capacity to participate through rights that ensure expression. In societies where fundamental freedoms are subject to derogation, substantive participation is either constrained or restricted within a narrow constitutional space and thus restrictive of substantive discourse.

To what extent do the processes of globalization impact on regional integration and the rule of law, is to be gauged from the overall objectives of regionalism but also from the specific interests of member states, including especially their own rule of law practices. ASEAN, which had practiced its own brand of inter-state relations, is no longer insulated from global developments of the rule of law. In fact, its revitalization


\textsuperscript{207} Even the WTO has now recognized the submission of amicus curiae briefs from pertinent groups or individuals in exceptional circumstances.
has been brought in great measure by the adverse effects of globalization and the need to strengthen regional cooperation in meeting both its challenges and opportunities. The principles of democracy, the rule of law and human rights – all inter-related and necessary for each other’s attainment, and recognized as indispensable elements of good governance, have found their way into The Charter, a form of a nascent constitution, as commitment of member states to their peoples.

ASEAN however holds itself out as an ‘intergovernmental organization’ and signifies that states, as the primary actors of integration, still exert absolute control of its processes and mechanisms. The existence of legal pluralism in ASEAN with the predominance of soft laws tends to show that member states are still unwilling to part with some aspects of their sovereignty. As a regional organization with a weak tradition of the rule of law, the institutionalization created by The Charter, the commitment of member states to principles of democracy, the rule of law and human rights, as well as the existence of informal processes and mechanisms - become important sites for the development of the rule of law. An important lesson learned from the experience of the European Union and is relevant to ASEAN is how domestic and regional institutions, the individuals and civil society could be harnessed as a pillar for the rule of law.
CHAPTER THREE

The European Union Regional Integration: A model or merely inspiration?

1. Introduction

From a trade regime with a political objective of ending decades of war among neighbours, the European Union has come a distance. It is now an almost fully integrated regional project that transcends the intergovernmental structure common among multilateral organizations. The European Union\textsuperscript{208} has gone beyond interstate trade relations and now involves the civil society in the development, change and transformation of the European polity not solely on the basis of economic ties but on shared values based on respect for human rights, the rule of law and democratic principles. Yet, the European Union is not without its own faults or pitfalls. Slump in economic growth in member countries, disparities in economic and social development, erosion of cultural identity and the seeming undemocratic regional governance are only among the significant issues confronting the future direction of the European Union.

Questions about the European Union’s legitimacy and continuing relevance to the European public have been brought into focus with the resounding defeat in France and the Netherlands in 2005 of the Constitutional Treaty, which was designed as a blueprint for further integration.\textsuperscript{209} The launch of the ratification for the constitution was hailed by leaders as a process to make the European Union ‘more democratic, more transparent and more efficient’ but its opponents saw it as an enlargement towards a European ‘superstate’ that threatens member states’ sovereignty. Others see the rejection as a counter-response by ordinary citizens towards a regional project and bureaucracy that have become ‘elitist’ and marginalized the public in the region’s decision-making process.\textsuperscript{210} The Treaty of Lisbon was meant to replace the constitution process and

\textsuperscript{208} The term ‘European Union’ will be hereafter referred to interchangeably as ‘the Union’ or ‘EU’.

\textsuperscript{209} The defeat of the constitution in France was deemed particularly significant coming as it was from a key founding member and staunch supporter of deeper integration.

respond to some of the issues that caused its rejection. The defeat of the Lisbon Treaty in the Irish referendum in 2008 again signalled deep-seated frustration with the pan-European project and highlighted the issue of democracy and legitimacy – which is essentially about how peoples’ voices are heard on major policy decisions. While the recent European Parliament elections brought back the coalition of conservatives which are seen as generally supportive of the European project, the low voter turn-out could signify an increasing disinterest or disenchantment of ordinary people with the regional process. These developments not only raise doubts about the long-term direction of European regional integration but also questions on whether it remains to be an ‘ideal’ model of regional integration for other regional projects in other parts of the world.

This chapter discusses that the European model of regional integration remains relevant for other regional projects. Whether the EU is to be seen as the model for others, is however another matter. The significance of the European Union to other projects of regional integration rests not so much on what it has achieved measured by the objectives of the treaties but on the processes, institutions, and values that have developed in the course of its evolution as an autonomous legal order. The rule of law through the process of constitutionalization has deepened integration and consequently achieving the aims of the treaties. But the process has also generated conflicts and contradictions within the supranational order and in the institutional and political processes within each member states. Other projects of regional integration could learn not only from the successes of the EU but likewise from how it responds to problems


212 See ‘Ireland rejects EU reform treaty,’ BBC News, 13 June 2008, at http://news.bbc.co.uk/2/hi/europe/7453560.stm, viewed on 6 June 2009. Ireland is the only country which requires ratification for all treaties or major treaty amendments in the EU after the 1987 Supreme Court ruling stating that any major amendment to an EU treaty entails and amendment to the Irish Constitution. Except for Sinn Fein, all other major political parties in Ireland supported the Lisbon Treaty. However, a new round of referendum will be held in Ireland on the Treaty of Lisbon in November 2009 following a compromise that would respect its traditional sovereign stance on neutrality, legislation on tax, labour rights, health care, and ban on abortion among others. It is expected that Ireland will ratify the treaty on this compromise. See ‘EU Hopeful for Lisbon Treaty Compromise with Ireland by June’, Sofia News Agency, 19 May 2009 at http://www.novinite.com/view_news.php?id=103744, viewed on 9 June 2009.

and issues that are faced in common – compliance of treaty obligations, claims of sovereignty from member states, pluralism and heterogeneity, and popular demands for democracy. This chapter will show that the rule of law has provided a framework to manage the challenges of regional integration.

The chapter aims to describe the function and type of the rule of law operating in the European Union through the institutional and legal arrangements and the factors responsible for the development of the rule of law in the context of integration. The second is to show the problems or issues facing the rule of law in European regional integration and the way it interacts with the other side – the political, flexible and soft side of the Union that challenges and influences the evolution of legal institutions and rules. The way the EU responds to the challenges at the supranational, national, local and global levels with a combination of approaches and institutional mechanisms is of great importance to other projects of regional integration. Regional integration in the European Union was a powerful incentive for achieving radical transformations in Eastern and Central European countries in terms of achieving political stability through the adoption of liberal democracy, the rule of law and respect for human rights.\textsuperscript{214} On the other hand, enlargement created greater variety and pluralism and the need to further evolve the processes and institutions of the Union. To other regional projects in the third world where the quest for democracy, the rule of law and human rights has been elusive, the EU approach to enlargement offers ideas and insights. Thus the third part of this chapter shows how other projects in Africa and Latin America have used or modified aspects of the EU in their own path to foster economic and political integration.

1.1. A brief review of the evolution of rule of law in Western Europe

As stated in the previous chapters, a consensual and general understanding of the rule of law is premised on its function as constraints or limitations on state power. It is a peculiar Western concept having evolved particular historical and institutional conditions. The concept of the rule of law has its early origins from the common law as a counterbalance against English monarchical absolutism and later against the absolute

sovereignty of the parliament. Law is derived from ‘right of reason’, the basis of the common law. Albert Dicey provided an influential definition of the rule of law which consists of three main aspects - the supremacy of law contra arbitrary power, equality of all subjects before the law, and power of the courts to determine individual legal rights.\textsuperscript{215} This definition acknowledged the supremacy of the parliament as the highest and unlimited source of law but that law itself consists of rules that are not only part of a constitutional code but also the consequence of the rights of the individuals as determined by the courts.\textsuperscript{216}

In France, the concept of the \textit{Regne de la Loi} came out of the French Revolution in the 18\textsuperscript{th} century. It heralds the demise of the \textit{Ancien Regime} based on absolutist discretionary power and the appearance of a state and all its institutions subject to and bound by law. The Declaration of the Rights of Man and Citizen of 1789 captures the essence of this law-state: the subordination of the entire state apparatus to abstract legal norms enacted by the Assembly representing the will of the people and the statutes hence the only source of legitimate power, the purpose of the law being the protection of individual liberty and therefore the state’s responsibility to protect individual rights and freedom, particularly contract and property rights.\textsuperscript{217} It is only by and through the statutes that individual freedom maybe limited or regulated by legitimate means. The principle of the \textit{Regne de la Loi} has been linked to the establishment of the bill of rights and the birth of constitutionalism.\textsuperscript{218} State power under the new regime has for its intrinsic limitations the catalogue of individual rights which are considered to be natural and pre-existing. Constitutionalism under the \textit{Regne de la Loi} represents the limits of state power, its adherence to the rule of law and protection of fundamental rights.\textsuperscript{219}

The rule of law is often equated or compared with \textit{Rechsstaat}, a concept of German origin and generally means a ‘law-bound’ state. The concept has its early origins in the 19\textsuperscript{th} century as the German monarchies began to codify statutes but

\begin{footnotes}
\item[218] Maria Luisa Fernandez Esteban, \textit{The Rule of Law in the European Constitution}, 80-81.
\item[219] Maria Luisa Fernandez Esteban, \textit{The Rule of Law in the European Constitution}, 80.
\end{footnotes}
retained its power of absolute veto over their enactment. The German *Rechtsstaat* operates on the principle of legality which primarily served the administration of public power. This instrumentalist conception of the rule of law seeks to regulate the exercise of public authority in its tasks of protecting public order and dispensing services for the common good. The form of an administrative state came about which, though bound by law and law becoming its very structure, is not limited by it. The state is not constrained by law but rather the form of the state.\(^{220}\) Administrative power is a creation of legislation which is in turn enacted by the parliaments. In this sense, legislation is the highest and exclusive source of law which best serves the needs of the state to operate precisely and subject to fixed mechanisms and pre-determined rules.\(^{221}\) The recognition of the priority of legislation in *Rechtsstaat* drains law of its substantive norms, where legislation may recognize and protect individual rights but are not above it. Under the separation of powers, the judiciary is duty-bound to respect the legislative will and recognize the law no matter how harsh the law is. The principle of legality subordinates the state to the law as enacted by the parliament which operates not only to formally limit state powers but also as a means of legitimation.

In the 20\(^{th}\) century however, there has been a convergence between the English and Continental Europe’s conceptions of the rule of law which has been started by the movement towards constitutionalization. The idea of the rule of law as a limit to government power has been expressed in the nation-state through the constitution which is to provide a stable framework for the exercise of public power. This process was marked by embodying fundamental rights, separation of powers, principles of democracy and human rights, as well as of good governance and accountability in the constitution - values that are supreme or at least on a par with parliamentary legislation.\(^{222}\) The way the rule of law in EU regional integration has developed show the various tendencies of the rule of law traditions in member states. In particular, the tension between *Rechstaat* and common law is evident in the development of EU rule of


\(^{221}\) Gianluigi Palombella, ‘The Rule of Law and its Core’, paper presented at the UNSW Faculty of Law, November 2007, 3-4, citing F.J. Stahl, the German theorist.

law. The former is seen from EU’s early development of hard binding legislation and preference for institutional order. Flexibility is increasingly becoming a value in the EU particularly as broader political discussion is being demanded from its citizens and greater diversity exists among member states. The trend towards the common law is increasingly sought which places value on flexibility and case-to-case approach to rule-making.

2. The development of the rule of law in European regional integration

Since the formation of the earliest institution for regional integration, the European Coal and Steel Community (ECSC), the rule of law has been expressly enshrined as the foundation of European integration. The European Court of Justice is mandated to ‘ensure that in the interpretation and application of this Treaty, and of the rules laid down for the implementation thereof, the law is observed.’ This has become a sacrosanct provision which has been carried over faithfully to the establishment of the European Economic Community and succeeding foundation treaties. It is now prominently displayed in the preamble of the treaty creating the European Union: ‘The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.’ The Treaty of Lisbon, which could come into force after ratification by all twenty-seven member states of the European Union, has amplified these values to honor diversity, national identity and pluralism -

‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the

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225 Art. 6, TEU.
Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.\textsuperscript{226}

The assumption that these principles are shared in common by member states is secured for new member states or for those states wishing to become part of the Union. An adherence to a common legal tradition is fostered among all member states. A strict observance of these values, the political criteria, is required for an applicant state and a condition \textit{sine qua non} for the European Council to open negotiations.\textsuperscript{227} The Accession criteria mandate that ‘the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure of market forces within the Union’ and the ability to take on obligations of membership including adherence to the aims of political, economic and monetary union.\textsuperscript{228} The Madrid European Council 1995 further requires structural adjustments in the fulfilment of these conditions such as appropriate administrative and judicial structures.\textsuperscript{229} The Treaty of Accession for new member states binds the applicant to the provisions and conditions of the Constitution of the European Union, the European Atomic Energy Community Treaty, and practically on all other acts adopted by the Union prior to accession.\textsuperscript{230}

More than the written declarations, it is the development of the rule of law in practice that has guided and steered deeper regional integration. An initial commitment to the rule of law has been expressed by member states in the treaty but an abiding respect to the rule of law developed as a consequence of institutional strengthening of key organs in the Union. The rule of law has acted as the glue holding the regional construct together. The level of legal integration that has been achieved could only be made possible by recognition and adherence of the member states of the primacy of

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Community law and principles as well as the integrity of its institutions. Indeed, the member states acknowledge that the European Union ‘shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the acquis communitaire.’\textsuperscript{231} Despite the failure of formal constitutionalization, the European Court of Justice (ECJ) has consistently spoken of the Treaties as the basic constitutional charter of the Community. The Community is characterized as one ‘based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty’.\textsuperscript{232}

The European Union has a supranational framework of governance which is divided into four major institutions - the European Council, European Commission, European Parliament and the European Court of Justice, each with their own areas of competence representing the executive, legislative and judicial powers similar to that in democratic nation-states. There are also other independent institutions such as the Court of Auditors which serves as financial fiscalizer of the Community and an Ombudsman which is empowered to deal with complaints by individuals against regional organs and member states. Each institution is bound by the terms of the Treaties and by the body of rules developed through the years through case laws and administrative regulations. It is through the power of judicial review that Community acts or measures are made and exercised within the bounds of law. While there is no strict separation of powers provided by the treaties, regional institutions function in such a way as to observe the principle of checks and balance. The co-decision powers among the institutions not only operate to promote cooperation or sharing of powers but also provide immediate checking function upon the other institution. For example, the European Parliament exercises co-decision power with the European Council on legislative and budgetary matters and exercise functions of political control and consultation.\textsuperscript{233} While the European Parliament cannot propose legislation on its own,

\textsuperscript{231} Art. 3, TEU.
\textsuperscript{233} Art. 14, TEU; Arts. 137(1) & 251, EC Treaty, as amended by Maastricht Treaty and Nice Treaty.
it possesses effectively a veto power when no agreement is reached between it and the Council at the Conciliation Committee.

The institutional mechanisms of the Union reflect that member states no longer own or control the main organs and processes of the Union. The current reforms in the Union, either in response to the ratification backlash and clamor for ‘more democracy’ or a mere gesture at appeasing populist outcry, show a genuine shift in focus from the member states to the peoples. Thus the Lisbon Treaty announced ‘a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.’

The principal aim of the Union is to promote peace, its values and the well-being of its peoples. Regional mechanisms in the Union have long departed from purely ‘intergovernmental’ by constituting not only independent supranational organs such as an independent judiciary but also by direct representation through the European Parliament through universal suffrage. There exists an accessible mechanism for the citizens to seek redress for breaches or enforce rights and obligations under the treaties through the courts and mechanisms for direct participation such as the right to petition the European Parliament to consider matters within the fields of activity of the Commission that affect the citizen and also to bring complaints for investigation by the Ombudsman or the Committee of Inquiry. The Treaty of Lisbon has introduced amendments to the treaties that would enable national parliaments in member states to take part in Union processes and activities particularly a role in the adoption of Union legislations and revisions of treaties.

One of the far-reaching developments in the Union has been the constitutionalization of the fundamental freedoms of individuals by recognizing their existence in the treaties as general principles of Community law. ‘The Union shall respect fundamental rights as guaranteed by the European Convention on the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from constitutional traditions common to the Member States, as general

234 Art. 1, Consolidated Version on Treaty on EU (ex Art. 1 TEU).
235 Art. 3, Consolidated Version on Treaty on EU (ex Art. 2 TEU).
238 Art. 12, Consolidated Version on Treaty on EU.
principles of Community Law’.

The Union went further in protecting these individual rights as the underlying principle on Union citizenship established under Section 8, Part Two of the Treaty of the European Union. The Union sets itself ‘to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union’.

On 7 December 2000 the Charter of Fundamental Rights of the European Union was unanimously adopted. The Charter marks another milestone in human rights protection by making those rights more visible through the Charter and codifies all the rights resulting from constitutional traditions, the European Convention on Human Rights, and international obligations of member states. It also significantly affirms the commitment of the Union to place the individual at the heart of its activities by establishing the citizenship of the Union and creation of an area of freedom, security and justice. The Charter does not only affirm the basic rights of individuals contained in previous rights instruments but also expands its coverage to include those rights that are necessary to achieve the objectives of the treaties. These rights include political, social, cultural, economic, consumer, environmental rights as well as the rights of citizens to enable them to participate actively and responsibly in the affairs of the Community. The Treaty of Lisbon makes the Charter a legally-binding instrument by declaring it to be of ‘the same legal value as the Treaties’ and ‘shall constitute general principles of the Union’s law.’

2.1. From the rule of the market to the rule of law

As a well-entrenched value in the Community legal order, the rule of law has evolved into leaps and bounds when considered from its modest origins. The function of the rule of law in the European Union was conceived from an instrumentalist viewpoint, as a tool for achieving the economic objectives of the Community which is

239 Art. F (2), TEU.
242 These rights are divided into six sections: dignity, freedoms, equality, equality, solidarity, citizen’s rights, and justice. Art. 27-46 of the Charter enumerate the different rights that individuals enjoy and can enforce to ensure their effective participation in the Union.
243 Art. 6(1) and Art. 6(3), Consolidated Version on Treaty on EU (ex Art. 6 TEU). There is however a caveat in the provision stating that the Charter does not extend the competences of the Union.
the creation of a common market through the establishment of a customs union and freedom of movement of goods, services, persons and capital. The economic aims however of European integration were the means through which interstate rivalry and wars could be ended. From its early beginnings, the European Union was founded on strong supranational institutions with the end view of achieving, in the most efficient manner, the economic and commercial objectives first of the European Coal and Steel Community (ECSC) and subsequently the European Economic Community (EEC). In fact, there was no explicit mention of observance of the rule of law in the foundation treaties. It was through the development of a wide body of case law delineating the relationship of Community institutions, the public regional authorities, the member states and individuals which established the foundations of the rule of law. The rule of law’s function was to ensure that Community measures and Community powers are exercised within the bounds of the law, the treaties, and that member states respect and comply with their treaty obligations. It fell upon an independent court, the European Court of Justice, that law is applied in Community relations and hence to ensure that in the interpretation and application of the treaty the law is observed.

Regional integration in the European Union has been characterized as a progressive process of development from ‘negative integration’, or the abolition of all barriers to integration to ‘positive integration’, or the formulation of rules and regulations guided by general principles of Community law. The early case laws of the European Court of Justice dealt with measures or acts by member states that have the effect of impeding the attainment of the objective of regional integration which is the creation of a single market through the freedom of movement of all factors of production and trade. Market forces are to be the principal determinant of Community economic rules and policies and competition rules remain even to this day, the main regulator of a fully functioning market economy. Cases that were handed down from the 60’s to 70’s concern prohibitive and discriminatory measures by governments that restrict or hinder intra-Community trade and thus were stricken down by the Court.

The case of _Van Gend en Loos v. Nederlandse Administratie der Belastingen_, the earliest and single most important jurisprudence on the direct effect and supremacy of

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244 Art. 2 and 3, EEC Treaty.
245 Art. 19, TEU.
Community law, was a challenge against a Dutch customs authority’s imposition of tariffs on imports. Trade protectionist measures of governments on such grounds as public health and safety, trading arrangements, and other such measures which are capable of hindering, directly or indirectly, actually or potentially, intra-regional trade were struck down as constituting trade restrictions. Since governments were hesitant to implement the terms of the treaties, the European Court of Justice took the cudgels for integration through expansive interpretation of treaty provisions and developing Community principles that could be invoked against the member state not only by the Commission but also by private companies and individuals. For instance, Article 28 on quantitative restrictions on imports was extensively developed by the Court to implement freedom of movement of goods despite member states’ opposition.

From the economic case laws, the European Court of Justice has progressively fashioned general principles of law that henceforth constituted the legal foundation of the Union. The two most important principles are the doctrines on direct effect and supremacy. Direct effect provides direct applicability of treaty provisions to individuals and member states without the necessity for domestic legislation or harmonization while supremacy provided unity and stability in the Community system that prevented member states from using their sovereign discretion to enact contradictory domestic laws and regulations that could defeat the objectives of the treaties. These two doctrines, which will be discussed in greater detail in the succeeding sections, have enabled the recognition and reception of Union law directly into the national legal systems and made possible the development of norms that became fundamental and inviolable in the Community system.

246 Van Gend en Loos v. Nederlandse Administratie der Belastingen (hereafter ‘Van Gend en Loos’), Case 26/62, [1963] ECR 1. The petitioner company made a preliminary reference to the Dutch national court which in turn made the referral to the ECJ over the imposition of custom authority’s tariff on the import of urea-formaldehyde from Germany.


Community principles such as proportionality and non-discrimination have been developed through the Court’s jurisprudence that enabled the ‘judicialization’ not only of matters involving trade but also of politics. The principle of proportionality which is now formally enshrined in the treaties was first developed as a general principle of Community law but through its expansive application has likewise led the Court to elaborate on other Community principles such as the recognition of fundamental rights as general principle of law.\(^{250}\) It was initially used to test the legality of or challenge a Community or member state action based on whether the measure is suitable or necessary to achieve the desired end and whether it imposes a burden on individual that is disproportionate to the objectives sought to be achieved.\(^{251}\) Proportionality was first enunciated in relation to a claim of violation of fundamental rights by a Community measure where it was stated that a public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure.\(^{252}\) Through progressive articulation, the principle has been applied to test the legality of restrictions by member states on the free movement of persons, services or goods by reasons of public policy, public health and other limits recognized by the treaties. The principle of subsidiarity which was formally provided in the treaty as a boundary or limit on the Union’s competence has to be construed in relation to the principle of proportionality.\(^{253}\)

Non-discrimination or equality is one principle that has gained general applicability through judicial interpretation and has also become a fundamental principle for rights protection in the context of European integration. Although the principle was set out in specific texts in the early Community treaty such as in relation to nationality, agriculture and taxation, non-discrimination was elaborated by the Court as a general principle of law that underpins the whole Union legal order.\(^{254}\) The principle became a key standard in the operation of the internal market and has been

\(^{250}\) Art. 3b EC Treaty states that an action of the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.


\(^{253}\) Ex Art. 5, EC Treaty states the principle of subsidiarity, now Art. 5 Consolidated Version on TEU. It is now a cornerstone of structural reforms in the EU as contained in the Lisbon Treaty.

elaborated by the ECJ in determining direct and indirect forms of discrimination based on nationality and gender. The principle is now recognized in its wider social dimension to include non-discrimination based on race, ethnicity, disability, religion, age, and sexual orientation and prohibits acts of discrimination as well as empowers the Union to take action against discrimination in its various forms.\textsuperscript{255}

The development of general principles of Community Law was therefore a significant development in establishing the rule of law in regional integration. They function as guides for interpreting treaty provisions and as grounds for judicial review on acts of the Union or that of member states that fall within the scope of Union law. Violations of these principles could lead to invalidation or declaration of illegality of a measure and a ground for an action for damages.\textsuperscript{256} These principles guide the relationship of Union institutions and member states and protect the individuals from the exercise of public authority.\textsuperscript{257} Thus the treaties which are otherwise in the nature of international law have assumed a new characterization in the EU context whose meanings, interpretation and applicability no longer solely depend on the will of member states. The relations of member states which are inherently political in nature have acquired a high degree of legal certainty or predictability through the judicialization of Community relations.

General principles of law have established guidelines on prohibitions on national measures and engendered the protection or generation of other rights that can be used to protect the individual from the acts of the Union or its member states or from the excesses of market forces. For instance, the Court will not sustain a challenge to a measure by member state infringing on the freedom to provide services if such freedom would infringe on public policy which is constitutionally protected.\textsuperscript{258} Environmental protection has also been elucidated by the Court from the general principles of proportionality and subsidiarity and through jurisprudence that has established

\textsuperscript{255} Arts. 19(1) and 19(2), Consolidated Version of the Treaty on the Functioning of the EU (ex Art. 13 EC Treaty).
\textsuperscript{256} Paul Craig and Grainne de Burca, \textit{EU Law: text cases, and materials}, 4\textsuperscript{th} ed., (United States, Oxford University Press, 2007), 544.
\textsuperscript{258} Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, Case C-36/02 (‘Omega’), [2004] ECR I-9609, a case on the use of laserbeam for gaming purposes that ‘simulate homicide’ and considered as an affront to human dignity.
environmental protection as one of the Union’s essential objectives. In the Danish Bottles case, the Court went to declare that protection of the environment is a mandatory requirement which may, in certain circumstances, limit the free flow of trade. Indeed, Community institutions and member states have followed from the footsteps of the European Court of Justice adopting measures and regulations strengthening protection for individual human rights. There could be no better affirmation of the work of the ECJ than the adoption of the Charter of Fundamental Rights. The rule of law has been a means and an outcome of this process.

2.2. The development of the European Union as a constitutional order and the supremacy doctrine

The failure to ratify the Constitutional Treaty is deemed to have dealt a blow to constitutionalize the European Union and the Treaty of Lisbon, the reform treaty, seems to confirm a view of ‘de-constitutionalization’. References to a ‘constitution’ as well as symbols of the EU such as its flag and national anthem had been deliberately omitted from the Treaty of Lisbon which should legitimately suggest that there was at least, a retreat from formal constitutionalization process. The principle of supremacy which would have been codified in the Constitutional Treaty had been entirely omitted from the reform treaty. The rejection of the Constitutional Treaty has indeed profound implications on the overall nature and pace of European integration which includes particularly the initiatives at providing a formal constitutional framework for the Union. But it is not at all settled whether the defeat signals an opposition to constitutionalism per se or an opposition to the broader objectives and processes of integration itself which is perceived generally to have expanded market liberalization over social protection or the increasing disconnect between elite support for deeper integration and public discontent or alienation over the integration project. It shows for certain that genuine reforms intended at providing greater democratic participation by the public at

large and their representatives as well as strengthened and expanded rights protection failed to assuage the opposition.

The voice of the opposing public may have put a brake on the process of constitutionalism which is a pivotal feature of the Constitutional Treaty but it cannot be doubted that achievement by the Union towards that goal – though rather incomplete and uncertain, has been entrenched in the European Union. A lesser optimistic view about constitutionalism in the EU points to its ‘unbalanced’ character which is limited to judicial review, the lack of clear-cut separation of powers, and a narrow focus or scope of its goals which is mainly in the area of economic transactions and related issues. Despite the setback to EU’s formal constitutionalization, the Treaty of Lisbon does not in any way repudiate the principle of supremacy which is a key attribute of state-based constitutionalism. A declaration attached to the treaty, and thus forming part of the instrument, acknowledges that pursuant to the Court’s jurisprudence, the treaties and law adopted by the Union have primacy over the law of member states and which is inherent in the nature of EC law.

From a treaty-based international organization, the European Union is considered to have been transformed into a constitutional legal order. The existing legal arrangement in the Union confers rights and obligations upon member states, the regional organs, and that of individuals. It provides for both legal and democratic controls on the exercise of public power similar to that of liberal democracies and guarantees protection of fundamental rights. While it cannot be regarded as a state of its own, the European Union has emerged into a unique polity that has achieved a level of integration similar to that found only in full-fledged federal states. Measured by Raz’ conception of a ‘constitution’ there is little room to doubt EU’s constitutionalization either in its thin or thick sense or an idea of constitutionalism that embodies precepts of separation of powers, democracy, accountability and human rights.

264 Declaration No. 17 on primacy (formerly No. 27) of the Treaty of Lisbon.
The supremacy doctrine developed by the European Court of Justice has underpinned the development of a constitutional order in Europe. It has been the Court’s handiwork which fuelled this transformation. As mentioned, Van Gend en Loos laid down the premise for the establishment of the supremacy doctrine by articulating the doctrine of direct effect. As one of the most important decisions in EU law history, the Court, deriving from the ‘spirit, the general scheme and the wording of the treaty,’ construes the EEC Treaty not merely as creating an agreement between contracting states but also one that concerns the peoples. As a consequence, certain provisions of the treaty could produce direct effects and create individual rights which national courts must protect.

‘The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.’

The construction of the Community as a new legal order of international law has made Community law an integral part of the member states’ national legal systems without the need for domestic legislation or harmonization. The spirit of the treaty therefore requires all member states not to defeat the aims of the treaty through refusal to give effect to Community law by enacting prior or subsequent national legislation. It follows from this reasoning that conflicts between national and Community laws must be assessed and decided in favour of the latter.

The principle of direct effect also marks a distinctive turn for EU law from classical international law which resulted in ‘disaggregating’ both the state and the individual. While international law had long recognized self-executing treaties and provision for recognition of individual rights in domestic legal system, the duty of

obedience exhorted by the ECJ from member states directly drafts state institutions into the immediate service of the Community without being mediated by national political institutions, national laws or constitutions. This is in stark contrast with international law where even in cases of adjudication between states and individuals, the outcome of judgment or remedy is directed at the state in its corporate capacity. The ECJ opinion makes a direct communication to a domestic institution, the local court, to implement treaty provisions. On the other hand, the principle disaggregates the individual from their member state by being able to directly utilize treaty provisions or directly seek remedies before their domestic courts.269

The doctrine of supremacy comes as a logical conclusion of direct effect. Though an *obiter dictum* in *Costa v ENEL* the European Court of Justice further clarified the supremacy doctrine by emphasizing the special character of the treaty.

‘The transfer by the States from their domestic legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail. Consequently Article 177 is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise.’270

Through the supremacy doctrine, the Community legal order has achieved its unity and coherence. By allowing Community laws to take precedence over national laws or measures and regardless of their fundamental or constitutional nature271, the principle ensured the integrity of the whole EU order by preventing national laws from undermining Community law. The principle is sweeping enough to allow national courts to disregard their jurisdictional or constitutional constraints and apply Community law without waiting for rulings from national constitutional courts.272 As a consequence of the supremacy of Community law, the treaty came to be regarded as the Constitutional Charter of the Community based on the rule of law.273

269 Daniel Halberstam, ibid.
270 Flaminiano Costa v ENEL, Case 6/64, [1964] ECR 585.
doctrine and subsequent *de facto* constitutionalization of the EU came to tame the brute force inherent in the exercise of sovereignty. The experience of the EU shows that member states are still primarily motivated by their self-interests and if left to their own devices, will find ways and means to protect their interests. Having erected the barrier of primacy of Community law, the Court has prevented member states from defeating the purposes of the treaties.

### 2.2.1. Recognition, limits and challenges to EU’s constitutional legal order

Even as the challenge to the supremacy doctrine has ebbed with its ‘conditional’ acceptance by member states, the enlargement of the European Union has exposed the strains of the delicate balance of Community competences and national prerogatives. The complex process of the evolution of the supremacy doctrine shows the conflict and competition between Community and national legal processes and interests. Precisely, the earlier challenges to supremacy came from the member states’ assertion of their ultimate exercise of review powers based on their constitutions. This is undoubtedly rooted in the member states’ exercise of sovereign powers. In particular, the German constitutional court asserted its ultimate review powers involving issues affecting fundamental rights. So did other constitutional courts in Italy, France and Denmark which unanimously resisted an outright surrender of national legal sovereignties and asserted their role as the final arbiter of further transfer of powers from the member states to the Community.\(^\text{274}\) The supremacy doctrine therefore rests not only on the Court’s having elaborated the principle but more so with the acceptance of member states.

While the constitutional courts in member states may have finally conceded the primacy of Community law, their acceptance was not unconditional but rather flows from authorization of their national constitutions. The German constitutional court’s ultimate acceptance of the supremacy of Community norms was conditioned upon the Community’s achievement of sufficient level of protection for individual rights. The Court’s fashioning of the fundamental rights jurisprudence may have partly contributed

\(^\text{274}\) Paul Craig & Grainne de Burca, *EU Law Text Cases and Materials*, 3\textsuperscript{rd} ed., (New York, Oxford University Press, 2003), 283-313.
to the acceptance of the principle. The ‘quiet revolution’\textsuperscript{275} of national courts was also accompanied on the other hand by the national governments’ assertion of control in the decision-making processes of Community institutions. This was initially provoked by increasing strength of supranational elements in the decision-making processes particularly that of the Commission which gained substantial executive and legislative powers.\textsuperscript{276} The increasing centralization of decision-making powers in the hands of Union institutions not only provoked a reaction from member states but also created a feeling of alienation from the people. The supremacy doctrine, and consequently that of ‘constitutionalization’, has become the ‘arena of struggle’ between the competing processes in the local, national and Community levels.

The reforms in the Union, particularly that of the Constitutional Treaty and the Treaty of Lisbon, underscore the limits of the current form of constitutionalism, in particular about its sustainability and continued relevance in the light of old and new challenges. In view of the claim of hierarchy and exclusivity inherent in the doctrine of primacy, the past challenge was centred on the issue of competence, or the areas on which the Union may or may not exercise its authority. The principle of supremacy has functioned as a unifying and integrating force in the Union architecture and its capacity to undermine traditional areas of state authority. One solution had been to elaborate on general principles in order to temper the almost over-arching consequences of the doctrine and accommodate the prerogatives as well as sensibilities of member states.

The principle of subsidiarity has been deliberately erected in the Maastricht Treaty as a checking mechanism against the Union’s creeping competences and allows member states sufficient leeway to deal with problems not falling within the powers of the Community. Under this principle, the Union is only allowed to take action whenever such action cannot be sufficiently undertaken by member states and that whenever such action is taken, such should not be more than necessary to achieve the objectives of the treaty, in accordance with the principle of proportionality.\textsuperscript{277} However, the textual formula has been perceived as ambiguous as to provide a reasonable guideline and also


\textsuperscript{277} Article 5 (ex 3b), EC Treaty.
narrow in its application by addressing only the two main levels of authority, the Union and member states.

The subsequent reformulation of subsidiarity in the Treaty of Amsterdam shows a more expansive application of the principle as a means to address appropriate levels of decision-making and its outcomes. Since the amendment, subsidiarity has been put in place in two main areas - the area of legislation-making and the use where possible of ‘soft laws’ or less binding measures in order to give member states and institutions more flexibility in implementing Community measures and to ensure that rule-making process takes account of the principle. As a mechanism to respond to the growing challenge from the ground, the mechanism of subsidiarity aims to bring the principle into a fuller context, so-called ‘democratic subsidiarity’, in order to bring decision-making ‘as closely as possible to the citizen’.

The Treaty of Lisbon further underscores the political significance of the principle of subsidiarity which is to rein in the exercise and sphere of Union power by strengthening the principle of conferral as the basis of Union’s competence and subjecting the exercise of such competence to the principles of subsidiarity and proportionality. This is evident from the restrictive wordings of the provisions.

‘The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principle of subsidiarity and proportionality.’

‘Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.’ (italics supplied)

A noticeable innovation in the Treaty of Lisbon is the introduction of the role of national parliaments in ensuring compliance with subsidiarity. ‘National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure

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279 Art. 1, TEU; Protocol on the application of the principles of subsidiarity and proportionality.
280 Art. 5(1)(2), Consolidated Version, on the Treaty on EU.
set out in that Protocol.\textsuperscript{281} Under the Protocol on the Amsterdam Treaty, all draft legislations are required to justify compliance with the principle and to transmit them to national parliaments which could then scrutinize and provide a reasoned opinion that a proposed legislation is not compliant. The Protocol attached to the Treaty of Lisbon provides for an early warning mechanism through a procedure known as a ‘yellow card’ or an ‘orange card’ that could trigger a review of the proposal.\textsuperscript{282} This procedure has been criticized for being insubstantial as to effectively impose democratic controls since the threshold to trigger the procedure is too high and that the final decision to consider the proposal still rests with the Union institutions.\textsuperscript{283}

However, this mechanism despite its current limitations or perception of being superficial has the potential to change the dynamics of the exercise of Union authority by adding a political layer or level through which decisions or rules are made in the context of deeper integration. Given the increasing voice of opposition from the grassroots which is being translated into rejecting major policy initiatives at the polls, EU institutions are morally bound to consider objections from national parliaments regardless of the legal requirement. On top of being a subsidiarity watchdog, national parliaments are also given the power of veto within six months over treaty amendments made through the use of simplified revision procedures.\textsuperscript{284}

There are fears that the principle of subsidiarity which is now couched in a language that asserts the nation-states as the ‘masters of the Treaty’ could potentially erode the Union’s constitutional legal order or sway it back towards the direction of classical international law. It is the member states’ intent to inhere the principle with national supremacy as shown in the Declaration by Germany, Austria and Belgium emphasizing that the principle applies not only to member states but also to Union

\textsuperscript{281} Art. 5(3), Consolidated Version, on the Treaty on EU.
\textsuperscript{282} A ‘yellow card’ refers to the procedure where on a vote of 1/3 in a national parliament, the Commission has to make a review of the proposed legislation. Under the ‘orange card’, a simple majority vote by national parliament on a draft proposal on a co-decision and qualified majority voting by the EU institutions, the draft legislation would be rejected if 55\% of members of the Council or majority of the EP concludes that the bill does not comply with the principle of subsidiarity.
\textsuperscript{284} Art. 48(7), Consolidated Version on TEU. The simplified procedure allows changes to legislation without the need for a full-blown treaty amendment.
entities ‘to the extent that they have their own law-making powers conferred on them under national constitutional law.’ However, the European Parliament, as a political body directly elected by the people, has declared its position against any attempt to use the principle as a pretext to undermine the Community legal order or obstruct the powers of its institutions and affirmed the binding and constitutional nature of the principle which is subject to the Court’s justiciability. These contradictory claims should provide a much needed balance to competing forces in the Union and the addition of the national parliaments in the formal institutional arrangement in the treaty should serve in addressing the escalating problem of democratic legitimacy and in achieving institutional balance.

Another challenge to EU’s existing constitutional order comes as a contradictory outcome of expansion. The contest on the doctrine of supremacy appears to be the most likely arena for the new member states’ resistance to the Community’s integrating forces. Countries from the Central and Eastern European (CEE) countries had enthusiastically welcomed the Union’s invitation to become part of the pan-European community after the collapse of the Berlin wall. To the Union, enlargement was foremost a political and security strategy against the re-appearance of communist dictatorship and Soviet hegemony in that region while the applicant states were hopeful of the prospects of economic and political stability that Union membership could offer. From the start, there was a dissonance between the Union and the new members’ motivations.

It was noted that the objectives of new states joining the European Union was based on ‘a Europe from the past rather than the present.’ The transition to liberal market economy and adoption of the acquis communautaire or the body of EU legislation, practices, principles and objectives accepted by member states was a

relatively rapid process that brought considerable benefits, changes and reforms in CEE countries. But it is an entirely different matter to relinquish national sovereignty, which most of the CEE countries had so painfully struggled for decades to achieve, in favor of a supranational entity. The present EU has certainly evolved towards a more politically integrated polity where the political aims are as equally important as its economic purposes. The response of some of the CEE’s countries on the supremacy principle is emblematic of the complexity arising from this divergence which is now affecting the process of further integration.

Constitutional courts in Czechoslovakia, Hungary and Poland have all pronounced the unconditional supremacy of Community law by asserting their role as final arbiter over the limits of transfer of powers to the Community and upholding the supremacy of their constitutions in their national legal orders. The reasoning of the constitutional courts belies the constitutional and fundamental rights justification used in asserting their judicial prerogatives and is rather perceived as attempt to thwart the seamless integration of Community norms into national legal systems. The consolidation of democracy and the rule of law is one of the rationales for joining the EU and the Union is seen as the vehicle in promoting those values. Ironically, this is the same rationale which was used by the constitutional courts in expressing their caveats to the supremacy doctrine. The Polish constitutional court even went further as to deny the Community its supranational identity and regarded it rather as an international organization in a traditional way since neither the treaty nor the Polish Constitution characterized it as such. The retreat from formal constitutionalization in the Union could be interpreted in these countries as reinforcing the view on the

291 Poland and Czechoslovakia are, along with Ireland, the only remaining countries in the EU that have not ratified the Lisbon Treaty.
ultimate supremacy of national constitutional courts in determining Union law and the autonomy of Union legal order in general.

3. The judiciary as the pillar of the rule of law in European integration

An independent judiciary is an indispensable attribute of the rule of law. It goes without saying that the court and the rule of law go hand in hand. In the absence of an independent judicial institution, the determination of the law is bound to be discretionary and subject to capture by powerful interest groups. The emergence of the European Court of Justice as an autonomous institution with compulsory and binding jurisdiction demonstrates its importance as the final arbiter of the law and its role in promoting the objectives of regional integration. As such, the European Court of Justice has been rightly hailed ‘the motor’ of regional integration. An economic court by its original conception, the Court was transformed into a court of general jurisdiction on all issues involving and relating to the interpretation of the economic pillar of the Community. Its jurisdiction, rather than delimited, was expanded through subsequent treaty amendments to include certain matters under the other two pillars of the Union.

Yet the Court was initially conceived as an administrative ‘checking’ mechanism – an industrial court, to guard against the possible excesses of the High Authority in the ECSC as well as to prevent such authority from encroaching on the sovereignties of member states. The judicial powers of the Court was initially simple and consisted of a handful of provisions under the ECSC mainly derived from its authority to ensure ‘that in the interpretation and application of this Treaty, and rules laid down for the implementation thereof, the law is observed.’ Only one article expressly confers jurisdiction upon the Court for actions brought by member states or the Council against the acts or measures by the High Authority ‘on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.’ Limited action may

297 Art. 31, ECSC Treaty.
298 Art. 33, ECSC Treaty.
only be brought by undertakings or associations whose rights may be violated by misuse of powers by the Authority. The establishment of the European Economic Community in 1957 essentially reproduced the provisions in the ECSC on judicial powers. ‘The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed.’

A significant provision, Article 234 (ex Art 177) in the EC Treaty, opened the floodgates for numerous actions brought by national courts and thus enabled the ECJ to develop a large body of case laws that generated general principles of law for the Community and to interpret the various provisions of the treaty. It was through the bulk of case laws from this procedure that has generated the ‘better part’ of Community law. Known as the ‘preliminary reference procedure’, Article 177 allows any court or tribunal in member states to suspend proceedings and to seek an advice from the Court if the case raises questions of interpretation of Union law. This provision fits neatly with the powers conferred on the ECJ to give ‘preliminary rulings’ involving the interpretation of the treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. This provision was only intended by the EC Treaty to enable the Court to aid national court in resolving its cases through the former's interpretation of Community law. Yet, the article became a powerful mechanism through which national and Community legal systems have become integrated into a single unified system by ensuring the correct and uniform application of Community law on the courts of member states.

Through the use of a method of judicial reasoning, the Court developed general community principles of law that lay the foundation of an autonomous constitutional order. De facto constitutionalization had been the outcome but it was through the Court’s recourse to purposive interpretation of treaties particularly at the earlier stages of integration that was the means to achieve that result. While other modes of interpretation were also used in its case laws, the Court has frequently resorted to a

299 Art. 164, EEC Treaty.
301 Art. 267 (ex 234 EC Treaty), Consolidated Version of the Treaty on the Functioning of the EU.
method of judicial construction, known generally as ‘teleological interpretation’, that allows a provision to be construed in the light of the purpose or the spirit for which the provision or the treaty was made. 303 A frequent recourse by the Court to this dynamic mode of interpretation particularly in articulating landmark decisions such as those in Van Gend en Loos, Costa and Le Verts, has promoted a transformation of Community law and in so doing also pursue a Community project. 304 In a sense, the evolution of a distinct form of constitutionalism in the EU was a logical consequence of purposive construction of the foundational treaties as the ‘constitution’.

Precisely, the Court’s ‘unorthodox’ judicial reasoning invited multifarious criticisms. One of ECJ’s fiercest critics labeled the Court’s decisions as a form of judicial activism that amounts to ‘usurpation of power’, to a process of expanding its jurisdiction, ‘creeping competencies’, and thus arrogated upon itself the function of ‘Community courtroom government.’ 305 Perhaps there was a semblance of truth to that observation especially considering that the important conclusions reached by the Court could not be found in specific textual meaning of the treaties. However, there is little room to doubt that the present level of European integration has been owed in great measure from the works of the ECJ.

‘The Courts of Justice’s judicial activity has been of the most fundamental importance to the development of the Communities. It is the Communities, now the European Union, the full rigours of rule of law has been established at a community level, as have been a number of principles of fundamental importance to the citizens whilst a high degree of unity and coherence in the interpretation and application of Community law throughout the European Union has, for the most part, been assured. Furthermore, the authority of the Court of Justice in Community law matters is now unconditionally recognized, or at least seems to be so to a very high degree, by courts of the Member States.’ 306

Indeed, the court rulings could be rendered ineffectual had not the member states themselves respected and adhered to the decisions. There are various explanations

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305 Hjalte Rasmussen, On Law and Policy in the European Court of Justice, 14, 62.
given for member states’ acceptance of the Court’s decisions but it suffices to mention here that the integrating quality of those decisions has also served the interests of member states by promoting the objectives of the treaties, providing credibility to the common market, and solving the enforcement problem inherent in classical international law.\textsuperscript{307} As noted earlier, such acceptance was also conditioned by the strengthening of decision-making powers of member states in relation to other community institutions. Even the United Kingdom, which is reticent about further integration let alone judicial integration, has shown general acceptance and obedience of Community law.\textsuperscript{308} Despite the criticisms mentioned above and the initial opposition of member states, the Court’s authority has not been seriously challenged or its decisions blatantly disregarded as to greatly diminish its role in the Union processes.

The ECJ is still viewed largely with respect and admiration and has so far been insulated from political criticisms. It is one Union institution which has received very little accusation of democracy deficit despite its apparent lack of accountability. This is not the same as saying however that the Court operates in a political vacuum. In fact, the Court was observed to be very mindful of the political environment on which it operates largely behaving as a ‘political actor’ through an incremental and seemingly non-political confrontation with member states in its decisions to engaging in public relations activities of its own.\textsuperscript{309}

As mentioned in previous sections, it was the highest or constitutional courts that adopted a more confrontational stance with the ECJ. The highest courts in France, Germany and Denmark, and recently in Poland, Hungary and Czechoslovakia, put up resistance to the Court’s rulings on direct effect and supremacy. It was only in 1989 or after more than twenty years from the formulation of supremacy doctrine that France through its \textit{Conseil d’Etat} finally relented in accepting the supremacy of Community law.\textsuperscript{310} At the bottom of member states’ reluctance to fully embrace Community

\textsuperscript{307} Renaud Dehousse, \textit{The European Court of Justice}, 142-5.
\textsuperscript{309} Renaud Dehousse, \textit{The European Court of Justice}, 139-40.
\textsuperscript{310} Karen Alter, \textit{Establishing the Supremacy of the European Law} (New York, Oxford University Press, 2001), 156. For many years prior to 1989, France had been in direct confrontation with the ECJ even
doctrines lie the eminent fear of relinquishing sovereignty and the potential threat of undermining the national constitutional order of member states. While Germany was the first to recognize the supremacy of European law over subsequent national law enactments, it has also remained the staunchest advocate for putting restraints or limits on the Court’s seemingly uncontrollable exercise of judicial expansion. The German Constitutional Court has become the proponent of national constitutional court’s judicial review of Community laws and regulations and has encouraged other national jurisdictions to assert their own review powers.311

In the *Maastricht* case312, the German Constitutional Court upheld the treaty but also warned at the same time against any judicial expansion of the ECJ that goes beyond the limits conferred by the German Constitution and that any excesses will not be binding on Germany. In the same constitutional challenge involving the ratification of the Maastricht Treaty in Denmark, the Danish Supreme Court also asserted its judicial prerogative to determine whether a Community measure has exceeded the transfer of sovereignty and declared that it retains the ultimate power of constitutional review over Community acts.313

The Court however has not been impervious to criticisms or to possible adverse political repercussions of its decisions. The Court’s acknowledgment of the national court’s essential prerogatives may have partly impelled the articulation of the doctrine of ‘*acte clair*’ where national courts may refrain from referring cases to the ECJ in circumstances where the national court ‘has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt.’314 The doctrine of *acte clair* which was enunciated in CILFIT case is perceived to be part of the necessary dialogue between the Court and national courts on a ‘give and take’ basis with the latter being able to exercise its own rendering decisions that are incompatible with treaty provision or in repudiation of the direct effect of directives.

313 Carlsen v Prime Minister, [1999] 3 CMLR 854.
judicial prerogatives in matters of EU law but also within the parameters laid down by the Court.315

However, the acceptability of the Court’s authority and decisions also proceeds from its own inherent quality. Considering its power to intrude upon the member states’ executive, legislature and national courts, the Court itself must possess a quality of respectability, trustworthiness and credibility. This is assured by their position of independence. The judicial independence of the ECJ had been written in the treaties from the very start, which means that member states themselves assured the Court’s independence. Thus although Judges of the ECJ have to be appointed by the governments of member states, they are ‘chosen from persons whose independence is beyond doubt and who possess the qualifications required for the highest judicial offices in their respective countries or who are jurisconsults of recognized competence’.316 The case laws of the Community would show that regardless of its membership, the Court has always championed the Community interests, that is, the objectives of the treaties, rather than a particular interest of member country. While the Court may have been initially thought of as a creation of the states, its authority has been sufficiently institutionalized to embark on the path of judicial legislation and enforcement unconstrained by a veto power. The fact that member states themselves are increasingly trying to place restraint on judicial power or restrict its competence has in many ways confirms its independent institutional powers.317

Successive treaty revisions have seen both expansion and limitation of the Court’s authority. The Court’s judicial review powers are now fully entrenched in the treaty having the power to examine the legality of Union legislation and of acts of Union institutions, bodies, offices or agencies which are intended to produce legal effects with respect to third parties and to declare such action void,318 the legality of an act adopted by the European Council or the Council with respect to findings of serious breach of

318 Art. 263 and 264 (ex Art. 230 and 231, TEC), Consolidated Version of Treaty of the Functioning of the EU.
Union values by a member state,\textsuperscript{319} and measures adopted by the European Investment Bank and the European Central Bank.\textsuperscript{320} The Court has power to hear infringement or non-compliance suits by member states or Union institutions and to impose penalties or damages,\textsuperscript{321} and the Treaty of Lisbon has also strengthened the power of the Court to impose sanctions in the form of ‘lumpsum or penalty payment’ against member states for non-compliance of treaty obligations.\textsuperscript{322} It has likewise powers to hear disputes involving the Union and its staff, give judgment on a Union arbitration clause and disputes arising from treaties creating European intellectual property rights, and also the authority to provide interim measures.\textsuperscript{323}

Reforms had been introduced in the court system in the EU in order to cope with the growing caseload of the ECJ and likewise to handle specialized areas. A court of first instance, the CFI, (now renamed as General Court under the Treaty of Lisbon), introduced by the Single European Act of 1986 was meant as an inferior court attached to the ECJ but also handles special areas of concern like competition and administrative law. However, it seems that the current set-up also indicates a trend towards a shift from a referral system to a hierarchical model of court system where the ECJ is at the apex handling the more significant cases and acting as a limited appellate court. Thus the General Court shall have jurisdiction to hear and determine at first instance actions or proceedings in Articles 263 (on legality of legislation and acts of Union institutions), 265 (infringement proceedings), 268 (compensation for damages), 270 (staff cases) and 272 (arbitration clause involving Union contracts) and also to act as appellate court on decisions made by specialized courts.\textsuperscript{324} It has also been given jurisdiction over issues referred for preliminary ruling under Article 267.\textsuperscript{325} The Court is given appellate review of the decisions of the General Court ‘on points of law only’ on matters falling under Article 256(1) and exceptional review on decisions taken on appeal from specialized courts and preliminary rulings. The ECJ may only take this exceptional

\textsuperscript{319} Art. 269, Consolidated Version of Treaty of the Functioning of the EU.
\textsuperscript{320} Art. 271 (ex Art. 237, TEC), Consolidated Version of Treaty of the Functioning of the EU.
\textsuperscript{321} Art. 258, 259, 260 (ex Art. 226, 227, 228, TEC), Consolidated Version of Treaty of the Functioning of the EU.
\textsuperscript{322} Art. 260, Consolidated Version of the TEU.
\textsuperscript{323} Art. 270 (ex Art 236), Art. 262 (ex Art 229), Art. 278, 279 (ex Art. 242, 243, TEC), Consolidated Version of Treaty of the Functioning of the EU.
\textsuperscript{324} Art. 256(1)(2) (ex Art. 225 TEC), Consolidated Version of Treaty of the Functioning of the EU.
\textsuperscript{325} Art. 256(3), Consolidated Version of Treaty of the Functioning of the EU.
review ‘where there is a serious risk of the unity or consistency of Union law being affected.’ 326

There are obviously certain measures that have the potential to limit the authority of the Court or at least change the dynamics of judicial process that had since been established. The preliminary reference procedure has now been amended such that a national court or tribunal may only refer the issue to the ECJ ‘if it considers that a decision on the question is necessary to enable it to give judgment’ and that there is ‘no judicial remedy under national law.’ 327 These provisions may have been intended to filter the referral to those cases that require the Court’s utmost determination of issues and reduce its case backlogs but also enable national courts the discretion whether or not to directly apply Union law. However, the narrowing of this provision that has for decades fuelled the development of an autonomous legal order could reduce not only the volume of review but likewise affect the unity and consistency of application of Union law as well curb the Court’s capacity to pronounce important principles or doctrines of law. 328 The General Court’s acquiring jurisdiction to give preliminary rulings may indeed reduce the Court’s caseload but this reinforces the reduction of opportunity for elaborating on Union principles.

The expansion of Union competence to the areas of common foreign and security policy (CFSP) and of freedom, security and justice (FSJ) has shown a disproportionate increase in the powers of Union institutions – at least from the side of the Court. These two areas which had previously formed separate pillars in the Union shall be managed and decided primarily through the two intergovernmental organs in the Union - the European Council and the Council while the Parliament is given limited consultative function in CFSP and to share legislative competence with the Commission and consultative function in FSJ. 329 The Treaty of Lisbon has explicitly ousted the Court from the area of the CFSP with only very limited exceptions. One concerns jurisdiction to monitor compliance with Article 40 of the Treaty on European Union which refer to the categories and areas of Union competences vis-à-vis that of member states’ while

326 Art. 256, Consolidated Version of Treaty of the Functioning of the EU.
327 Art. 267, paragraphs 2 and 3, Consolidated Version of Treaty of the Functioning of the EU.
328 Martin Shapiro, ‘The European Court of Justice’, 297-8.
329 Chapter 2, Consolidated Version on the TEU, Title V, Part Three, Consolidated Version on the Functioning of the TEU.
the second is the power to review the legality of decisions providing for restrictive measures against natural and legal persons adopted by the Council on the basis of Chapter 2, Title V of the Treaty of the European Union. On the area of FSJ, the Court shall have general jurisdiction but is expressly excluded from exercising jurisdiction on the ‘validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.’

Essentially, the Court’s jurisdiction under the expanded competence of the Union would be limited to issues that affect or infringe upon the basic rights of individuals in the matter of border checks, immigration, asylum, policing and criminal justice. It seems that it is the intention of member states, the negotiators of the treaty, to prevent the development of Union laws and principles that are deemed to be still within the prerogatives of member states and their own national judicial processes. This is clear from the form of cooperation for example in the area of FSJ where preference was made towards judicial cooperation through the principle of mutual recognition of judgments and decisions in extrajudicial cases. It is doubtful however if the exclusionary provisions would be effective to prevent the Court from assuming jurisdiction on the excluded areas since police and security measures are most often directed at rights limitations on individuals. But then, it will also depend on whether the Court would exercise its activism as it used to be.

3.1. The national courts as ‘co-integrators’

If the ECJ had been the motor of integration, then national courts in member states were the fuel that fed the Court with important case laws. Without the enthusiastic use of preliminary reference procedure, the Court would not have as much opportunity to develop its jurisprudence establishing the Union’s general principles. The role that national courts have played in the development of the Community legal system underscores the importance of domestic institutions in European integration processes.

331 Art. 276, Consolidated Version on the Functioning of the TEU.
332 Chapter 3, 4, and 5 of Title V, Consolidated Version on the Functioning of the TEU.
Legal integration facilitated regional integration in the EU and national courts were instrumental in directly receiving Community law in national jurisdictions and in formulating a more or less uniform interpretation of treaty provisions among member states. The process circumscribed traditional procedures in member states for receiving international law through enabling legislation or administrative action and thus prevented government action to delay or deny the applicability of the treaties in domestic jurisdictions.

The ECJ has relied heavily on national courts to refer cases. Preliminary references from member countries account for the bulk of cases submitted before the Court for ruling. Most of these preliminary reference cases involve individual litigants who invoked the applicability of some treaty provisions which member states violate by adopting contrary national measures or by delaying their implementation. In an empirical study concerning ECJ cases from the period 1961-1993, the increase of preliminary references was observed to have initially occurred with the ECJ’s promulgation of decisions in direct effect and supremacy in the early 60s through early 70s. Progressive increment of these cases was also found to have a close correlation with increasing intra-regional trade with the bigger member countries (Germany, France, Italy, Netherlands, Belgium and United Kingdom) having the most number of referred cases. However, others observed that domestic interest groups have also increasingly used the preliminary mechanism and the EU legal system as a whole in order to push for their own domestic interests rather than point to the inconsistency of national law to Community law. While the activities of national courts’ participation vary in member states, there is wide agreement that the lower courts, more than the

333 Karen Alter, ‘The European Union’s Legal System and Domestic Policy: Spillover or Backlash?’, International Organization, Vol. 54, No. 3 (Summer 2000), 489-518. Art 244 EC provides that the judgments of the ECJ shall be enforceable under the conditions laid down in Art 256 EC in accordance with national law of the Member State in which the judgment is carried out.
highest courts in member states, were more receptive to Community law and more active in case referral.  

Effective implementation and enforcement of treaty obligations was the positive offshoot of the reference procedure especially when considered from the fact that foundation treaties have very limited provisions for enforcement of Community obligations as has been the case with other international agreements. In the EEC Treaty, a member state may bring an action against another to enforce fulfilment of the latter’s obligations under the treaty before the Court but the matter has to be brought first before the Commission. This remedy had only been used very rarely by member states. An infringement suit may also be brought by the Commission against a member state which does not comply with its obligations in the treaty. Enforcement of decision against a member state is not only vague but suffers from lack of clear procedures in imposing the sanction. ‘If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.’ On the other hand, decisions of the Council or Commission which carries pecuniary obligation may be enforced by bringing the matter directly before the competent authority of the member state where it is sought to be enforced and in accordance with the rules of civil procedure of the said member state.

The cumbersome enforcement procedures in the treaty were therefore circumscribed by the process of direct access to the Court. National courts in member states became the direct enforcers of treaty obligations of member states and thus creating expectations of undesirable consequences for violating treaty obligations. It took the Single European Act to introduce substantive amendments to judicial enforcement of financial liability incurred by member states and allowed individual

339 Article 170, EEC Treaty.
341 Article 169, EEC Treaty.
342 Article 171, EEC Treaty.
343 Article 192, EEC Treaty.
actions for such claims.\textsuperscript{345} The Lisbon Treaty has also introduced an amendment that provides a shorter procedure for bringing in infringement suits that imposes fines or pecuniary damages against the member state.\textsuperscript{346}

The peculiar relationship between the Court and national courts has served to insulate the Court and national governments from any political backlash that may arise from some of the decisions.\textsuperscript{347} It makes a huge difference that it is the national court which seeks the preliminary reference and ultimately uses the ECJ decision in its final ruling. The ‘compliance pull’ for the decisions is stronger as national governments find it hard to disobey the rulings of their own courts rather than an international court or tribunal. When an issue is brought before its own national court, the government is forced to justify its action in the judicial forum through legal reasoning rather than diplomatic or political argumentation and is consequently bound to respect and obey its own court’s decisions.\textsuperscript{348}

A mutually beneficial relationship has been developed between the Court and national courts through the system of referral. The relation is described as an ‘inter-judicial dialogue’, which is perceived to have been instrumental in developing and nurturing the Union legal system. This dialogue takes place as national courts first determine an issue of EC law which is necessary in resolving a dispute, brings a referral to the Court and the Court in turn gives back its opinion on the matter. In order to encourage national courts, the ECJ engaged them in a discourse of comity, cooperation and mutual respect.\textsuperscript{349} It was not only through the cases but continuous social activities such as seminars, community visits and even dinners that the Court has engaged institutional linkages with national courts of member states.\textsuperscript{350} National courts, particularly lower courts, have not been merely fuelling cases or as passive recipients of

\textsuperscript{345} Article 188, EC Treaty.
\textsuperscript{348} Joseph H. Weiler, ‘A Quiet Revolution, The European Court of Justice and Its Interlocutors’, 519.
the Court’s rulings but have also developed a practice of articulating their position on issues by sending pre-emptive opinions together with the preliminary references.\textsuperscript{351}

An overall strengthening of domestic judicial processes which served to boost the independence and competence of ordinary courts has resulted from inter-judicial dialogue. Judicial empowerment is understood as the increase of powers by national courts over other domestic actors.\textsuperscript{352} It comes in the context of their ability to review national legislation or measure in relation to Union law where such review is perceived to be under the exclusive purview of higher administrative or constitutional courts of member states. Due to stricter constitutional and procedural controls, amendment or nullification of national laws is extremely burdensome in traditional domestic legal setting. Since the preliminary reference provision does not specify or limit the type or level of court or tribunal which can bring issues of European law to the Court, even the lowest level of judicial courts in member countries can technically pass on the legality of domestic legislation upon receipt of preliminary ruling from the ECJ though they may not be allowed to do so under their own national laws. Through this process, it lies with the national courts rather than the ECJ, which has no formal hierarchy or power to order enforcement on the former, to invalidate national policies that conflict with Community law. National courts therefore took on the role of enforcing compliance of Community law by national governments.

Empowerment of national courts had undoubtedly been a consequence of the reference process but they must have also enjoyed increasing independence from other national authorities to be able to refer cases directly to the ECJ. Legal culture of judicial independence from European countries and the presence of large organized groups actively seeking for judicial resolution of issues has been observed to be present in major referring countries such as Germany, Italy, France and the United Kingdom.\textsuperscript{353} While judicial independence has been further enhanced through the use of the reference procedure, national courts are however noted to be more often likely to directly apply

\textsuperscript{352} Vivien Ann Schmidt, Democracy in Europe: the EU and national polities, (UK, Oxford University Press, 2006), 70-1.
\textsuperscript{353} Vivien Ann Schmidt, Democracy in Europe: the EU and national polities, (UK, Oxford University Press, 2006), 70-1.
EU law by direct reference to EU treaties, directives or regulations in their cases and without resorting to preliminary procedure. In a study on Spanish courts, ECJ decisions have been used or discussed as a precedent wherever difficult questions of Community law appears in particular cases even without referring them to the ECJ.

The expansion of competence of the Court to the area of FSJ has also allowed the use of preliminary procedure and thus also given additional powers to the national courts. The conditional requirement introduced through the amendment on the second paragraph of Article 267 may further increase the likelihood of confining the interpretation of EU law in national court systems. On the other hand, the exhaustion of judicial remedies referred to in the third paragraph should serve to give the highest courts the opportunity to assert their authority in the interpretation of Union law which, given their perceived resistance to the supremacy doctrine, could increasingly undermine the unity and consistency of Union constitutional order.

3.2. Access to Union law and the demand by individuals for the rule of law

There is much to be said about the inadequate participation by individuals in the main forum of policy making in the Union that accounts in large part to the problem of democracy deficit and on the overall issue of legitimacy of Union governance. On the other hand, the provision for access to the Court particularly through preliminary reference has allowed the individuals to become part of an autonomous rule-generation process of the Union legal system. That process in turn supplied the Union with its legitimacy, at least in its formal sense and during the Union’s formative periods. The individual’s access to this Union process, and their increasing demand for more effective rights protection and towards more participation, has helped transformed the subject and objective of the treaties from the states and economic development to the individuals and enhancement of their autonomy and fundamental rights.

In the context of the European Union, procedural justice expressed particularly through access to the courts demonstrates the importance of formal rule of law in checking the powers of supranational institutions as well as that of member states in regional governance. When used as a means, rather than as an end in itself, procedural rule of law can have far-reaching impact such as the means to protect and further develop individual rights and achieve the purposes of integration. Thus, it may not be at all surprising that European citizens rank such procedural rights as equality before the law and right to legal protection against discrimination above the right to vote. It is posited that regional integration, in particular legal integration, ‘is a response to the demands of those individuals and companies who need European rules, and those who are advantaged by European law and practices.’ In legal integration, a sector which claims to be neutral and operating on a non-political level or at least partly insulated from political influences, the institutionalization of Community rules is perceived to have produced a self-sustaining and self-organizing system that spawns more rules and socializes more individuals and actors into using the Community legal system.

But until the Van Gend Loos decision came in 1963, there was a slim chance that private litigants can obtain any remedy from the Court. In the earlier days, the Court had prohibited private litigants from annulling measures by the Council or the Commission for exceeding their authority based on the provisions of Article 173 EEC Treaty. Under the said provision, an individual or legal entity may institute an action against a Council or Commission decision which is of direct and individual applicability to the petitioner. Subsequently, the Court provided a narrow interpretation to the provision wherein private parties can only avail of the remedy under the strictest conditions. As previously discussed, the expansive interpretation of the treaty as to confer legal standing upon the individual and claim direct applicability of treaty

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provisions opened the door wide for ordinary citizens to come into Community processes. The result, as many say, is history. The direct access to court via the preliminary reference ruling is credited to have acted as catalyst for the flood of individual suits that expanded the scope of the Court’s review powers from economic provisions of the treaties to violation of human rights.

It is observed that the Court in fact encouraged the indirect access mechanism for individuals rather than the direct route provided under Articles 230 and 232 of the EC Treaty providing for individual standing to initiate suits against Community institutions or member states to challenge the legality of Community acts or member state’s policies that infringe treaty obligations. Litigation under these two articles impose stricter criteria for individuals, especially when compared to the right of standing of member states or Community institutions which are allowed to intervene in proceedings of third parties before the Courts. The criteria which require that challenges are restricted to ‘decisions’ and that such decision is of direct and individual effect to the individual, are said to be even narrower than the ones imposed by member states in their domestic jurisdictions. This restriction for direct action in the ECJ is however being tempered or relaxed through the national reference process in which national law, rather than Community law, governs rules on individual standing. The Court’s strategy to encourage indirect access has been significant in the sense that it will be the national courts, rather than the Court itself, which is directly responsible for allowing individual actions and make member states directly account for their actions before their own constituencies and domestic institutions.

One of the spill-over effects of increased individual litigation in the EU and development of Community principles has been to encourage the proliferation of transnational activities of non-state actors seeking rights advocacy and advancing policy reforms for their domestic agenda. While litigation, including subsequent judicial

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360 (Ex Art. 173 & 175, EEC Treaty), now Art. 263 & 265, Consolidated Version on the Functioning of the EU.
decision, may not necessarily lead to policy changes, the strategy of accessing the supranational court has helped in mobilizing interest or marginalized groups in advancing political agenda through the judicial process. New rules that are generated from court decisions are in turn being used for greater mobilization and wider forms of advocacy. This is exemplified by the proliferation of gender equality and environmental cases in the European Union which resulted in greater rights protection and the expansion of rights movement on these and other sectors across Europe.

Recognizing individual standing before a regional judicial body and for the individual to directly invoke Union law before their domestic legal system have remarkably changed the face of treaty or international law in the EU – making the individuals not merely passive objects but one that could actively claim for their rights and entitlements from these instruments. Individual access to judicial process however is in the nature of ‘post facto’ institutional control. Access to justice as a form of individual participation in the Union process is not only limited, in terms of procedural and substantive requirements, but also as to outcomes since cases are mostly decided on the particular facts of the case. There is no doctrine of precedent in the Union judicial system and it falls mostly on national courts to directly apply Union law or make preliminary reference to the Court. In fact, the practice of referral has varied in each member state and shows that domestic political factors determine to a large extent the decision to refer. For example, courts in the United Kingdom were not predisposed on referring cases despite its size and modern legal system, especially when compared to smaller states such as Belgium and the Netherlands. But on anti-discrimination where there is strong domestic institutional support coming from the trade unions and the Equal Opportunities Commission, the United Kingdom was found to have referred the most number of cases. Enforcement of EU law through national courts also has to contend with socio-legal factors in order to be effective. In short, if citizen

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participation in the Union process should be encouraged, the same should not be confined to the tedious, narrow and often expensive judicial litigation.

The move towards a more democratic Europe, beyond the Court and the Parliament, is hoped to make the individual, the citizen of Europe, the ‘real authors’ of the treaty. Since the early 90’s, the Union in particular through the Commission, has increasingly responded to the issue of lack of citizen participation in the decision-making process which is dominated by intergovernmental institutions, the Commission and Council, and the member states. Civil society participation in the institutional processes of the Union has been given due recognition which culminated in the adoption of the White Paper on European Governance in 2001. The White Paper was largely in response to the perception of democracy deficit in the Union which was accentuated by the ‘Irish no’ vote of the Maastricht Treaty in 1992.

Acknowledging the widening gulf between the Union and the people it serves - where many people are losing confidence in a poorly understood and complex system to deliver the policies they want and that the Union is often seen as remote and at the same time too intrusive, the Commission has drawn up a program for civil society participation which aimed at ensuring wide participation throughout the policy chain.368 Prior to the White Paper, the Commission had existing policy of consultation with interested parties through various instruments such as the Green and White Papers, communications, advisory committees, business test panels and ad hoc consultation. The White Paper seeks to involve civil society through more effective and transparent consultation at the heart of EU policy making through such measures as adopting a reinforced culture of consultation and dialogue, a code of conduct of consultation that sets minimum standards and developing extensive partnership arrangements.369

Whether the White Paper program was effective in stimulating civic participation in European governance, the continuing rejection, apathy, or scepticism of the people towards the European integration project could at least imply that it did not adequately address its core objective of establishing a ‘more democratic governance.’ It seems that

the form of participation envisaged in the program remains to be complex and elitist in practice given that only those citizens who possess intellectual and financial resources have the capacity to influence European policies.\textsuperscript{370} The Lisbon Treaty promises to further enhance citizen participation in Union governance by announcing that -

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‘Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.’\textsuperscript{371}
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\end{quote}

4. **The European Union as a hybrid and challenges to the rule of law**

The discussion in the previous sections points to key processes or features of the rule of law in European integration that enabled the development of an autonomous legal order in the Union. The Union ‘constitutional’ order that has been forged through the rule of law combines with traditional member states prerogatives and constitutes a peculiar arrangement that is now considered to be that of a unique polity. The Union has evolved from a diplomatic forum for interstate bargaining to a political entity whose institutions enjoy relative autonomy and the power to bind member states to its decisions and extend treaty rights to individuals but also allows member states to continue to wield control over major policy decisions in the Union through treaty revisions and intergovernmental conferences (IGC). The interaction between these two forces has been primarily responsible in generating contradictions in the relationship among Union institutions and between the Union and member states.

The tensions generated by a mixed architecture have been expressed by the continuing struggle between intergovernmental and supranational, of centralization and decentralization, diversity and uniformity, and co-existence of the *acquis communautaire* and politics. But while intergovernmentalism and supranationalism are traditionally perceived as the driving force of regional integration, the forces from below – the individuals and domestic actors - are increasingly exerting pressure on the legitimacy of Union authority, the ‘balance of power’ among Union institutions, and the overall future


\textsuperscript{371} Art. 10(3), Consolidated Version of the TEU.
of European integration. This suggests that further deepening of the Union needs to confront the increasing political challenge of integration and shows the limits of the rule of law, expressed mainly through constitutionalism, as a method of ascribing legitimacy to the Union.

The current Union structure represents a hybrid polity, one that is not as yet fully conceptualized. It is in the hybrid nature of the Union where the most pressing challenge of the Union inheres, the sovereignty claim of member states and democratic legitimacy – but also in the variable and often highly complex nature of its processes and institutions. The Union clearly exhibits a state-like quality due to the presence of institutional division of powers that correspond to a parliamentary system of government. But apart from the absence of any clear separation of powers between the executive and the legislative institutions and limited application of majority voting in most areas of decision-making, the Union is perceived to be particularly lacking its own demos consisting either of citizens owing allegiance or a sense of being a nation which is an important element of statehood but also a pre-requisite of legitimate democratic governance.

The Union also resembles or exhibits features of confederal and consociational models of governance. The first model represents the merger of different state systems into a union but retaining their own national identity or individual sovereignty and highlights the intergovernmental character of the Union. On the other hand, the consociational model displays element of a ‘cartel of elite’ bargaining taking place in an institutional setting and by-passing of elements of majoritarian rule in order to achieve stability and functionality of fragmented segments, which in the case of the Union, the member states and political groups. Successive treaty amendments also show measures to strengthen co-decision and the principles of subsidiarity and proportionality that serve to accommodate a federal model of Union governance which ensures greater

373 See Mette Jolly, The European Union and the People, (United Kingdom, Oxford University Press, 2007), 61-3.
political union but respecting the autonomy of the national or local units. Precisely, a large part of the rejection of the Constitutional Treaty was attributed to its federalist logic which also shows that federalism needs a European *demos* for its support.

There exist multiple spheres in Europe where authority is being exercised – the supranational, national, regional, and local, such that it is now increasingly becoming difficult to conceive of sovereignty as the exclusive attribute of statehood but to consider the possibility of shared and divided sovereignty. The Union possesses exclusive competence in many areas in the economic sphere but shares competence with member states in the areas of CFSP and FSJ. The extent to which Union law has penetrated national jurisdictions, estimated at almost 75% of laws in member states, is suggestive of the depth of integration but also the blurring of domains between the national and supranational and the various loci where authority is exercised on specific areas of laws.

The different levels by which authority is exercised by who and for what have given rise to issues of competition among institutions and actors in the Union but also in the variety of ways by which tension and cooperation could be managed. While departing from the classical approach and eschewing the sovereignty issue, the term ‘multilevel governance’ or ‘the existence of overlapping competencies among multiple levels of governance and the interaction of political actors across those levels’ is used to capture the overlapping and crosscutting layers of decision-making in the Union in horizontal and vertical dimensions exercised by supranational, national and regional, or by public and private, authorities. This approach elucidates the role of non-state and private actors in the regional process but maintains the salient, if altered, role of member states.

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Union governance manifested in the key areas of policy making, decision making and implementation are shared by different institutions in complex mechanisms of co-decision, co-operation and consultation. The Parliament which is directly elected through universal suffrage jointly exercises legislative and budgetary functions with the Council and exercises functions of political control and consultation.\textsuperscript{380} It shall also have the power to elect the President of the Commission and exercise political oversight to the Commission by voting on a motion of censure or to set up a Committee of Inquiry to investigate alleged contravention or maladministration of Union law or to require the Commission to answer questions.\textsuperscript{381} The Commission, an independent body whose membership is appointed by member states, is by treaty, the only institution to initiate legislative proposals.\textsuperscript{382} However, both the Council and the Parliament have the power to request the Commission to undertake any studies which are desirable in attaining the objectives of the treaties and to submit appropriate proposals.\textsuperscript{383} In reality, a significant number of initiatives originate in the Parliament and Council but also from the Economic and Social Committee, the Committee of Regions and other local subnational authorities, private interest groups and expert groups. Member states and other Unions institutions such as the Court the European Central Bank can also make proposals for the adoption of legislation.

As the executive arm of the Union, the Commission exercises coordinating, executive and management functions and with the exception of the CFSP, ensures the Union’s external representation.\textsuperscript{384} The Commission implements Union policies with national governments\textsuperscript{385} and with sub-local authorities and other interests groups and since the 1980s have cooperated with the Council in this function. The Council, a body whose members are likewise appointed by member states, is the final authority in passing Union legislation. This power has been increasingly limited by co-operation and consultation procedures with the Parliament through the latter’s power to hold a second reading on legislative proposals concerned with internal markets, regional

\textsuperscript{380} Art. 14, Consolidated Version of the TEU.
\textsuperscript{381} Art. 17(7)(8), Consolidated Version of the TEU; Art. 226 (ex Art 193 TEC), Art. 230 (ex Art 197, TEC), Consolidated Version of the Functioning of the TEU.
\textsuperscript{382} Art. 17(2), Consolidated Version of the TEU.
\textsuperscript{383} Art. 241 (ex Art 208 TEC), Art. 225 (ex Art 192 TEC), Consolidated Version of the Functioning of the TEU.
\textsuperscript{384} Art. 17, Consolidated Version of the TEU.
\textsuperscript{385} Art. 291, Consolidated Version of the Functioning of the TEU provides that member states adopt measures of national law to implement legally binding acts.
development, social policy and research but also the power to reject the Council’s position and the formation of a conciliation committee in such an event.\footnote{Art. 294 (ex 251 TEC), Consolidated Version of the Functioning of the TEU.} Moreover, consultation among the three institutions has been formally provided in the treaties that would allow common agreements or arrangements and to conclude ‘inter-institutional agreements’ (IIAs) which could be of binding nature.\footnote{Art. 295, Consolidated Version of the Functioning of the TEU.}

The Treaty of Lisbon seeks to further strengthen multilevel governance in the Union in response to growing opposition to ‘over-centralization’ of policies in the hands of supranational institutions and a trend toward ‘renationalization’. As already mentioned, the principle of subsidiarity has been enhanced and national parliaments are given an important role to ensure the observance of this principle. A consultation mechanism with the Committees was institutionalized in previous treaty reforms through which the Parliament, Council and Commission would consult with civil society representatives and with other local officials in member states. The Economic and Social Committee (ESC) composed of representatives of organizations of employers and employees and other parties representative of civil society in socio-economic, civil, professional and cultural areas, and the Committee of Regions (CoR), composed of regional or local accountable officials shall assist the three institutions by exercising advisory functions.\footnote{Art. 300-307, Consolidated Version of the Functioning of the TEU.} Under Lisbon, the three institutions are particularly mandated to consult with CoR particularly in the area of cross-border cooperation.\footnote{Art. 307, Consolidated Version of the Functioning of the TEU.}

\textbf{4.1. Flexibility and informality as a feature of the European Union}

The hybrid nature of the Union, in terms of its institutional structure and governance is underlined by a pluralist legal order. The first three sections of the chapter points to the rule-based regime in the Union which was driven by the institution of the judicial process. Another side of the Union operates through ‘politics’ which is driven by the intergovernmental dimension of cooperation and by its complex institutional arrangements. The European Union is being brought closer by formal and legal commitments; it is also accompanied by a process that shows heterogeneity not only in terms of member state participation but even as to the impact and outcomes of
common policies. The differences in the capacities and status of member states, particularly brought about by enlargement, have brought about strategies that could promote ‘Unity in diversity’ in the Union. Flexibility has been in the nature of European integration which came to the fore with Eastern enlargement.

‘Differentiated integration’ has been the strategy employed to solve the problem of deadlock inherent in heterogeneous membership and the pursuit of deeper integration. The term has been applied to the variable participation in time, space, and subject matter of member states in European integration and corresponds to such forms of integration as ‘multi-speed’, ‘variable geometry’, and ‘a la carte.’ Multi-speed integration refers to the agreement of member states to pursue common policies and actions but not simultaneously while variable geometry pertains to a mode of integration which allows permanent separation of a core of countries within an integrative unit. The first is illustrated by the allowance of temporary derogations in the treaties by new member states in the internal market or the allowance of timeframe in attaining the convergence criteria for the Economic and Monetary Union (EMU). The second form is shown in the area of defense, peace-keeping and crisis management where some member states are allowed to participate in deeper forms of integration. By contrast to the two variable forms of integration, a la carte allows member states permanent derogations from specific policy areas by allowing them to ‘opt out’ in particular areas such as the EMU, Schengen, social policy and defense for such countries like the United Kingdom and Denmark.

The Maastricht Treaty started to formally embody differentiated integration in the areas of EMU, defense and social policy but succeeding treaty revisions highlighted the centrality of the issue - in fact of the highest importance for the future path of Union integration. At the 1997 IGC, there was acknowledgment among member states of

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391 Jan-Emmanuel De Neve, ‘The European Onion? How Differentiated Integration is Reshaping the EU,’ European Integration, Vol. 29, No. 4, (September 2007), 1-504-8.
393 Angelos Sepos, ‘Differentiated Integration in the EU: The Position of Small Member States,’ 4-5.
394 Angelos Sepos, ‘Differentiated Integration in the EU: The Position of Small Member States,’ 5.
the different status and capacities of member states and particularly the effect this will have on the future direction of integration. There exists however wide divergence among member states and also between Union institutions of the appropriate strategy or form of differentiated integration.\textsuperscript{396} The debate ranges from those who are supportive of a move by a group of countries, the core or pioneer group, extending integration to new policy areas and those who are cautious about such cooperation extending to foreign policy or the risk of the emergence of a ‘directoire’ dominating an enlarged Union. The other side of the debate focuses on whether differentiation should be made outside or within the framework with most member states favoring the latter solution.\textsuperscript{397}

The Treaty of Amsterdam introduced the concept of ‘enhanced cooperation’ that would allow interested member states to proceed within the institutional structure in the single market and in justice and home affairs but only under the strictest circumstance – as measure of last resort to be authorized by the Council when it can be established that the objectives of such cooperation cannot be attained within a reasonable period by the Union and on the unanimous vote of member states. A modification in Nice was made extending enhanced cooperation to foreign policy and allowed eight members to enter into enhanced cooperation with the approval of qualified majority vote. Lisbon has brought the number of participating states to nine representing one-thirds of Union-27 and that the acts adopted under the framework will be binding on participating member states and shall not be regarded as part of the \textit{acquis}.\textsuperscript{398} Moreover, a framework for ‘permanent structured cooperation’ has also been authorized to enable those member states which have higher military capabilities to establish closer defense and military cooperation.\textsuperscript{399}

Informality and consensus are equally important aspects of EU policy-making and decision-making. Consensus has been the rule than the exception in the history of Community decision-making and data on legislation-making from 1994 to 2002 shows that eighty-one percent (81\%) of legislation were passed through informal consensus.\textsuperscript{400}

\textsuperscript{398} Art. 20, Provisions on Enhanced Cooperation, Consolidated Version of the TEU.
\textsuperscript{399} A. 42(6)
As already mentioned, major policy reforms are deliberated and negotiated by member states through the IGCs and the practice started with the adoption of the Single European Act in 1986.\textsuperscript{401} Secret meetings and deliberations are a feature of the IGCs through which member states negotiate for revisions to the treaties. As a venue for political bargaining among member states, the IGC has now been formalized into two modes of revision.

Under the ‘ordinary revision procedure’ the proposal could serve to either increase or reduce Union competence while the ‘simplified revision procedure’ allows amendment to the internal policies and action but shall not increase the competence of the Union.\textsuperscript{402} The process has been reformed to be more transparent and participatory having given the Parliament and the Commission the right to propose amendments and to be consulted by the European Council. Although Parliament may oppose approval of the second revision procedure, the member states or through the heads of states in the European Council remain to be the decision-making body on treaty revision.\textsuperscript{403} Given the political nature of revisions, political practices of member states and of participating institutions would be part and parcel of the process. Moreover, the mechanism for drawing up inter-institutional agreements has become a prominent feature of Union governance and is primarily based on informality and consensus-making.\textsuperscript{404}

One of the defining features of informal arrangement in the EU is the ‘jungle of committees’ that is responsible in drafting, adopting and implementing Union legislation. The Union has been described, as to some extent, a ‘governance of committees’ because of the proliferation of committees, advisory groups and experts that are in fact responsible in doing the works of Union institutions in almost all areas of policy-making.\textsuperscript{405} ‘Comitology’ of committees formally denotes the procedure in the Commission for drawing up measures in the implementation of legislative acts which

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  \item \textsuperscript{401} Also known as the Treaty Establishing the European Community (TEC), the first major treaty revision since the Treaty of Rome1957.
  \item \textsuperscript{402} Arts. 48(2)(6), Consolidated Version of the TEU.
  \item \textsuperscript{403} Art. 48(3)(4)(7), Consolidated Version of the TEU.
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\end{flushright}
consists of discussion forums by representatives of national governments. An informal procedure that begun in the 60’s to efficiently manage delegation of implementation of agricultural policy but also ensure control by member states, comitology has expanded to many sectors of Union policy-making.\footnote{Thomas Christiansen and Beatrice Vaccari, ‘The 2006 Reform of Comitology: Problem Solved or Dispute Postponed?’, EIPASCOPE 2006/3, at http://www.eipa.nl/cms/repository/eipascope/Scop06_3_2.pdf, viewed on 7 July 2009.} The term has been broadly used however to describe other processes whereby committees and experts assist the workings of Union institutions from the drafting of legislation proposals to adoption and implementation of Union legislative acts.\footnote{Lobbying the Union Committee, Briefing Paper, Corporate Europe Observatory, July 2007, at http://archive.corporateeurope.org/lobbyingbycommittee.html, viewed on 7 July 2009, 1-8.} Under the treaty, COREPER or the committee of permanent representatives prepares the work of the Council and are mainly responsible in the proposal and adoption phase in the Council.\footnote{Art. 240(1), Consolidated Version of the TEU.} In the Commission, there are four categories of specialized committees – advisory, management, regulatory, and regulatory with scrutiny.\footnote{Comitology, Europa Glossary, at http://europa.eu/scadplus/glossary/comitology_en.htm, viewed on 7 July 2009.} The committees, estimated to be more than 2000, are run by the Commission but whose membership is named by member states. As of 2003, it is estimated that more than 50000 people are involved in the Commission’s expert groups which are mainly responsible in drafting policies and legislation and increasingly the Commission’s frequently used mode of consultation.\footnote{Lobbying the Union Committee, Briefing Paper, Corporate Europe Observatory, July 2007, 1; Brussels to name advisers on ‘expert groups’, ALTER-EU, 25 march 2008, at http://www.alter-eu.org/en/media/2008/03/25/brussels-name-advisers-%E2%80%98expert-groups%E2%80%99/brussels-name-advisers-%E2%80%98expert-groups%E2%80%99, viewed on 7 July 2009.}

The system of comitology is said to be responsible for the efficiency of Union governance having been responsible for finalizing most proposals without the need for ministerial negotiations. But its complexity and the expertise required for membership makes it a highly bureaucratic and technocratic mechanism which is only accessible to a few. Prior to some recent reforms, the work of the committees had been shrouded in utmost secrecy, the committees were unknown and the areas they work on and mostly informally formed, and the names of members in the committees were kept confidential.\footnote{Lobbying the Union Committee, Briefing Paper, Corporate Europe Observatory, July 2007, 2-8.} In response to demands for transparency and accountability, the Commission has allowed the publication of committee documents and created a
registrar for committees and expert groups for the general public to access, the Comitology Register\textsuperscript{412}, as well as a promise for the release of names of experts and their qualifications, particularly after it was accused by civil society groups of bias to industry groups and experts.\textsuperscript{413}

Pressures from Parliament have also given way to more transparency but also a form of recognition as a co-equal legislator with the Council by allowing a ‘blocking’ power over the Commission’s implementing measures on areas under co-decision procedure and the right to scrutinize all other draft delegated measures.\textsuperscript{414} Viewed as more cumbersome and lengthy than the old comitology procedure, this process has given form to a new category of Union act, the ‘quasi-legislative’ measure, an outcome that reflects frequent contestation and accommodation among Union institutions. Further, the Treaty of Lisbon has formalized this inter-institutional arrangement and provides specific provisions for the Commission’s exercise of its delegated powers. Thus, it is so provided that the Commission may adopt non-legislative acts to supplement or amend certain non-essential elements of the legislative act, the legislative act to lay down the conditions for the delegation and that either the Parliament or the Council may decide to revoke the delegation.\textsuperscript{415}

Flexible arrangement therefore is an outcome of the multi-dimensional modality in the Union that interacts with the autonomous legal field. Largely, it seeks to resolve ‘sovereignty claims’ of member states\textsuperscript{416} vis-à-vis a centralized supranational legal authority steering integration but also to address competing visions of those who favor deeper integration and those espousing a more restrained or limited form. Flexibility which favours less formal mechanisms has tended to privilege the intergovernmental

\textsuperscript{415} Art. 290, Consolidated Version of the Functioning of the TEU.
and executive powers which caused institutional imbalance at the expense of the Parliament but also exacerbated problems of democratic control and accountability. Thus, informal and consensus-decision making in the Union had previously tended to escape democratic controls from the Parliament but also deprived national parliaments and other private actors from deliberating on important Union measures.\(^\text{417}\) Flexibility, which is rooted in discretion than on stability and predictability, has the capacity to undermine the constitutional or normative character of the EU brought about by the instability and continuous shifting of institutional mechanisms resulting from such practices.\(^\text{418}\)

The use of informal soft mechanisms in the EU has implications for the development of the rule of law in new member states which are in the process of transition toward law-based regimes. With enlargement, secret negotiations have also been instrumental in assessing compliance with the accession criteria of new member states. In the context of CEE countries, the use of informal regulation could reinforce the pattern of informal operations existing in these societies borne out by decades of mistrust to public authorities.\(^\text{419}\) But as the issues that have been generated by flexibility have shown, law has to come inevitably to manage or contain the issues of institutional imbalance but also to give form to expressions of popular democracy.

4.2. The co-existence of soft law and hard law in the EU legal system

Another feature of the Union as a hybrid system is the use of soft law. In areas where member states are unable to agree on the use of hard law or where the Union lacks competence to adopt legally binding measures, soft law has been deployed particularly in the fields of social policy, employment, and gender equality where member states want more flexibility in attaining policy objectives. Soft law in the EU is shown in the extensive use in the Commission of ‘action programmes’ to promote gender equality in the workplace, through the open method of coordination (OMC) to implement the European Employment Strategy (EES), and adoption of non-legally


\(^{419}\) Adam Czarnota, ‘Barbarians Ante Portas or the Post-Communist Rule of Law’, 296.
binding Community Charter of the Fundamental Rights of Workers of 1989 but also mirrored in the use of such other mechanisms as codes of conduct, frameworks, resolutions, communications, declarations, guidance notes and circulars.  

The use of soft law in the EU is a fairly recent phenomenon influenced by developments in international relations but has been increasingly explored and experimented on for a wide area of Union governance. Soft law is at the core of promoting ‘social Europe’ formalized during the 2000 Lisbon Summit through the adoption of the OMC in social policy and specifying the strategy towards its implementation – fixing guidelines for the Union combined with timetables, agreeing to quantitative and qualitative indicators and benchmarks, drawing national and regional action plans, and periodic peer review organized as mutual learning processes. As a strategy to improve convergence processes and work on areas where Union competence is not authorized, it is principally a voluntary intergovernmental method of coordination that involves decentralized approach to be in line with the principle of subsidiarity and to involve the active participation of social partners and civil society.

While the OMC was not itself formalized in the treaty, Lisbon made an implicit acknowledgment of its growing function in the Union and possible extension of the method to wider areas by providing that a directive, though legally binding ‘shall leave to the national authorities the choice and form and methods’ of its implementation. Formalizing the use of ‘framework directives’ in the Treaty of Lisbon aims to attain a solution to the inherent contradictions of the use of soft law. The provision attempts to ‘harden’ soft law while retaining its flexible nature. As a middle ground between the two forms of law, the provision also recognizes the capacity for soft law and hard law to co-exist and affect similar domains and actors.

423 Art. 288, Consolidated Version of the Functioning of the EU.
Whether Lisbon resolves the issue of the use of soft law through the middle ground, the use of soft law in the Union has its apparent vices and virtues and therefore a divided constituency. For its critics, soft law could undermine or weaken the constitutional legal system and the authoritative institutions, the Commission and the ECJ, safeguarding its coherence. The Commission itself has expressed grave reservations over its effectiveness and incompatibility of OMC with Community method. A more specific objection is focused on its ambiguous effectiveness on social policy particularly on such areas as poverty reduction and social exclusion which are crucial issues for new member states in Eastern Europe. For its proponents, soft law has been an effective innovation in dealing with areas where member states are still unwilling to constrain their prerogatives or where significant diversity in member states exists. For instance, it has been acknowledged that the hard task of ‘Europeanising’ the domestic laws of member states has been achieved in large measure through the use of soft law.

Given the rigorous procedure of accession and the enormous pressure it brings in transposing a huge body of Union law, the use of soft law in approximating the acquis is considered a ‘necessary evil’ that enabled the EU to maintain its own governance system but also maintain stability in CEE countries. The use of soft laws offers many benefits that makes it an attractive policy preference and not merely as a second-best option for hard law. It brings about efficiency as complex legislation is avoided, affords flexibility in changing circumstances, and promotes mutual learning of norms where internalization of hard law may be difficult. Since the case of the adoption of the Community Charter on social rights, member states have been forced to adopt directives which might not have been contemplated in the first place. The ECJ has also dealt with soft law in such a way that though unenforceable and could not generate rights and obligations in judicial proceedings could nevertheless be used as supplementary aid to

the interpretation of hard law. Soft laws while not legally-binding carries persuasive force that could influence member states to voluntarily do things that they might not do if in the form of hard obligation.

The evolving function of soft law and that of flexibility in the EU certainly poses a challenge to the classical conception of the rule of law that is essentially based on aspects of generality, predictability, clarity and certainty. The discussion on the first three sections has clearly pointed to the development of the European legal order along the classical line and how it has in fact deepened and broadened Union integration especially in its formative periods. The hybrid nature of the European polity however points to a different face of the EU, the soft part, which is driven by the demands of politics – at the level of member states and also increasingly by its citizens. There are certainly many benefits of the use of soft law including the possibility to address democratic deficit in the Union through mechanisms that engender meaningful deliberation and consultation. The combination and co-existence of these seeming contradictory features of the Union point to a different and evolving form of the rule of law in the European Union that has critical relevance to other projects of regional integration.

5. A soft solution to democracy deficit challenge in the EU

The tension that runs through the constitutional and political, the hard and soft core of the EU, is confounded by the problem of democratic deficit which is inexorably interlinked with legitimacy. The enlargement fatigue and successive rejection of major treaty amendments in Netherlands, Ireland, and France have sent a strong signal on the political ‘disconnect’ between the European citizens and the EU and the limits of normative legitimacy achieved through the Union’s autonomous legal order. Not only has the future of further integration come under intense scrutiny but so are the traditional institutions of Union governance. With economic difficulties experienced in most countries in the Union, the challenge to EU’s legitimacy could only heighten. Recent reforms and treaty amendments have meant to provide political solutions which

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could potentially improve democracy but clash with the established constitutional autonomy in the Union.

The debate over what ‘democracy deficit’ means particularly so when there is no agreement in the first place about what democracy is in the peculiar political environment in the Union has not been settled\(^\text{431}\) and also whether such deficit exists at all. On the negative view, the perception of democratic deficit merely arises when the Union is seen as an entity different from an intergovernmental organization. There is deficit precisely because of the intergovernmental character of the Union itself which was never intended to be democratic and works primarily through intergovernmental institutions but under direct or indirect democratic control of member states’ citizens\(^\text{432}\) or that the regulatory technocratic nature of EU does not necessarily have to conform to democratic standards.\(^\text{433}\) On the other hand, democracy deficit came about as a consequence of the equilibrium achieved in the foundation period of the Union when member states asserted their decision-making authority in response to the development of constitutionalizing norms in the Community.\(^\text{434}\) The ‘standard version’ of democracy deficit is focused on the institutional aspect that points to the increase in executive powers and corresponding loss of control by national parliaments as a result of the transfer of competencies to the Union. The reduction of national parliamentary control has not been adequately compensated by the authority of the European Parliament whose powers remain relatively weaker in relation to other Union institutions.\(^\text{435}\) Another source of the deficit is traced from the functioning of Union institutions like the secretive and non-deliberative procedures in the Council or the Commission or from the lack of information and excess of delegation\(^\text{436}\) which raises questions of transparency, accountability and legitimacy of supranational institutions.

Democracy deficit has likewise been sourced from the breakdown of ‘permissive consensus’ or general public support in the EU which became evident in the 90s following the Danish rejection of the Maastricht Treaty in 1992, the petit oui in France, the low voter turnout in 1994 European elections, and public dissatisfaction with difficulties associated with EMU convergence in 1996.\(^{437}\) The socio-cultural dimension of lack of democracy in the Union is premised from the lack of European-wide demos, European electorate and public sphere.\(^{438}\) In this view, the Union has grown without due regard to the democratic substructure that underlines a democratic polity. The Union is seen as lacking significant European-wide discourse, being too distant from the people, and that lacking demos the legitimacy of the Union will remain contested.\(^{439}\)

The various solutions proposed to improve democracy and polity building in the Union have therefore corresponded to many of the aspects of democracy deficit discussed above. It is clear however that a political agenda has emerged in the Treaty of Lisbon that seeks to address both the institutional and social bases of democratic deficit through a strategy that reclaims influence of representative political institutions in the Union and providing greater political role for the citizens. Lisbon declares to ‘enhance further the democratic and efficient functioning of the institutions so as to enable them to better carry out, within a single institutional framework, the tasks entrusted to them’\(^{440}\) and devotes an entire title to promoting democratic principles.\(^{441}\) Institutional solutions are aimed at improving the powers of the Parliament such as the election of the Commission President,\(^{442}\) expansion of its co-decision procedure and consultative role for the internal market but also for the area of FSJ,\(^{443}\) as well as to increasing

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440 Preamble, Consolidated Version of the TEU.
441 Title II, Provisions on Democratic Principles, Consolidate Version of the TEU.
442 Art. 17(7), Consolidated Version of the TEU.
443 Ex. Art. 75 on terrorism measures, Art. 78 on asylum measure, and Art. 78, on immigration policy, Consolidated Version of the Functioning of the TEU; Arts. 70, 71, and 74 on the right to be informed or consulted.
transparency and accountability of the functions of Union institutions like the Council meeting in public in performing its legislative function.

The principle of subsidiarity has been given expansive reach that would also underlie the Union’s policy to meet the democracy challenge. National parliaments have now an institutional function in the treaties by ensuring the observance of the principle of subsidiarity by Union actions but also in taking part in revising the treaty and in inter-parliamentary cooperation.444 Direct and indirect forms of political participation are guaranteed to citizens of the Union through its various institutions and also through initiatives aimed at improving the quality of discourse and representation of European political parties and elections.445 Giving the Charter of Fundamental Rights a legal value in the Treaty of Lisbon, albeit with the exception of domestic courts in the United Kingdom and Poland,446 will give more protection and rights to individuals in the EU against excessive use of Union and member states’ powers and could therefore enhance the Union’s popular legitimacy.

The Treaty of Lisbon itself is not a product of political deliberation by the broader population but one that involves member states’ statesmen trying to salvage the fiasco created by the popular rejection of the Constitutional Treaty. As a form of amendment to the existing treaties, Lisbon does not simplify the labyrinthine treaty provisions and deliberative procedures at the supranational, national and local levels only add to the complexity which makes it still as distant to the peoples of Europe as the previous treaty amendments. The Irish rejection has been attributed in large part to the inaccessibility of the treaty to ordinary voters – lack of understanding and poor information campaign, despite the support given by most of the county’s political parties.447 If there were a crucial lesson to be learned from this experience, it is that the narrowing of the gap between the EU and its citizens demands a firmer basis of political discourse at the grassroots.

444 Art. 12, Consolidated Version of the TEU.
445 Arts. 9 and 10, Consolidated Version of the TEU.
446 Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.
It seems that Lisbon has failed to resolve the issue of democracy deficit but shows the preservation of the hybrid nature of the Union with member states or intergovernmental institutions still dominating the organs and processes of the Union.448 The German constitutional court may have rejected the legal challenge to the Treaty of Lisbon brought on the grounds of democracy deficit but it also brought the issue to new heights. The Court’s finding’s of absence of democracy deficit is premised on the nature of the EU as an ‘association of sovereign states’, not a state, and therefore it can only have broad democratic principles but not one based on state-level democratic strictures.449 Based on this ruling, the deficit is not cured by the enhanced powers of the Parliament because for one it is not a representative body of a sovereign European people having been elected not on the principle of electoral equality. As a consequence, Germany’s national parliaments should exercise greater oversight over the exercise of Union competences and actions but also that the constitutional court will also keep watch that the Union will not exceed the competences conferred to it.450 This lack of state-like democratic features of the Union will only serve to reinforce the growing demand to limit the competency but also the constitutional autonomy of the Union.

6. The European Union as a benchmark for other models of regional integration?

The above sections discussed the achievements of the European Union in fostering the rule of law and in making the rule of law, through the process of constitutionalization, the foundation of regional integration. The European constitutional order is also a work in progress and shows that it is shaped and reshaped by competing political forces throughout the Union but also from the pressures of globalization. With the endless debate about its nature explained by diverse theories, the rule of law in the Union defies fixed categorization and therefore ‘modelling’. But EU’s success and challenges have come to be a ‘wealth of learning’ for other models of regional integration. The following discussion briefly shows certain aspects of EU rule of law – that of supranationalism and independent judicial or quasi-judicial institutions,

that have influenced other projects of regional integration in the developing world in promoting economic integration and values of democracy and human rights.

6.1. SADC: An attempt at supranationalism and a judicial regime in Africa’s regional integration

In Africa, there are at least three regional groups - Southern African Customs Union (SACU), Common Market for Eastern and Southern Africa (COMESA), and Southern African Development Community (SADC) which all aim to stimulate economic development in the continent through the creation of intra-regional free trade and customs union among the member states.\textsuperscript{451} Post-apartheid era has brought about institutional and policy strategy reforms with all three embracing open regionalism and market liberalization. Among the three, SACU is the oldest and most advanced regional integration project in Africa with customs union put in place since 1910 and has a working monetary union among its members.\textsuperscript{452} Its creation was regarded as a post-colonial and apartheid-era instrument to foster political and economic dependence of southern African countries to South Africa and support the latter’s white minority rule.\textsuperscript{453} After the dismantling of the apartheid regime, South Africa embarked on correcting the lopsided trade agreement it had with its neighbours and signed the new SACU Agreement of 2002. Article 2 of the said agreement affirms the previous commitment to facilitate cross-border movement of goods and attempts to correct the historical imbalance and injustice through the equitable sharing of revenue arising from customs duties.

A new path-breaking objective is the creation of ‘effective, transparent and democratic institutions which will ensure equitable trade benefits to Member States’, an objective which manifests the democratization efforts begun in South Africa in 1994. Institutional reforms were undertaken among which was the establishment of regional bodies such as the Commission and Secretariat which are responsible in implementing the agreement. The new agreement also heralds the creation of independent bodies such

\textsuperscript{452} Its members are South Africa, Botswana, Lesotho and Swaziland or the BLS countries in Southern Africa.
as the Tariff Board, National Bodies and Tribunal. The SACU Tribunal which is in the process of being constituted and to be operational by 2009\textsuperscript{454}, is an \textit{ad hoc} tribunal which will have jurisdiction on any issue concerning the application or interpretation of the SACU Agreement or of any dispute arising from it under the request of the Council and its determinations will be final and binding among the parties.\textsuperscript{455}

SADC was originally formed in 1980 as a counter-balance to South Africa’s economic hegemony in the region and had initially rejected economic integration based on market liberalization and free trade principle preferring a balance trade strategy based on technical and economic co-operation.\textsuperscript{456} Since its re-establishment in 1992, SADC has committed itself to the values of human rights, democracy and the rule of law. It has embarked on institutional reforms taking account of inadequate mechanisms of the past structure in order to put into action their objectives in building a Community. The SADC has now emphasized its transition into a ‘Community’ and though still constituted as an inter-governmental organization, provides for a more active and expansive role of the Secretariat among the most important of which are the implementation of decisions of the Summit and Council and promotion and harmonization of policies and strategies of member states.\textsuperscript{457}

A commitment to develop the rule of law in Southern African integration has resulted in a milestone for SADC. On 18 August 2005 in Windhoek, Namibia the SADC Tribunal was inaugurated. The Tribunal was established in accordance with the mandate of the SADC Treaty whose primary function is ‘to ensure the adherence to law in the interpretation and application of the Treaty’.\textsuperscript{458} A Protocol on Tribunal and the Rules of Procedure Thereof has been adopted spelling out the details of jurisdiction, rights of the parties and procedures. In many respects, the SADC Tribunal has been patterned before the ECJ. The Tribunal is composed of ten members nominated by member states and appointed by the Summit, five of which will be designated as regular

\textsuperscript{454} www.sacu.int/about.php?include=about/institutions.html, viewed 17 April 2008.
\textsuperscript{455} http://www.sacu.int/main.php?include=about/tribunal.html, viewed 17 April 2008.
\textsuperscript{456} G.G. Maasdorp, ‘Economic and Political Aspects of Regional Cooperation in Southern Africa’, at http://ideas.repec.org, viewed on 18 April 2009. SADC’s forerunner was Southern African Development Co-ordination Conference (SADCC) with original nine members, Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia, and Zimbabwe, and now includes South Africa.
\textsuperscript{458} Art. 16, SADC Treaty.
members while the rest will constitute a pool from which a member will be invited in case of absence or incapacity of one regular member.\textsuperscript{459} Judicial independence is guaranteed for the functioning of the SADC Tribunal by giving the members the privilege of immunity in the performance of their duties, appointment to a fixed term, a procedure for removal, as well as a requirement for the members to take a solemn oath to fulfil their functions, independently, impartially, and conscientiously.\textsuperscript{460}

The jurisdiction of the SADC Tribunal is comprehensive. It shall extend to ‘all disputes and all applications referred to it in accordance with the treaty and this Protocol’ which relate to: (a) the interpretation and application of the Treaty, (b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community, and (c) all matters specifically provided for in any other agreements that States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.\textsuperscript{461} The jurisdiction of the SADC Tribunal covers not only disputes between the states but also those disputes between individuals and member states and between individuals and the Community.\textsuperscript{462} In the case of controversy between natural or legal persons and a member state, the principle of exhaustion of remedies in domestic jurisdiction has to be complied with before the individual can proceed against the state.\textsuperscript{463} The Protocol also provides for a preliminary reference procedure for a national court or tribunal to request the Tribunal to give preliminary rulings in cases where a question is raised concerning the application or interpretation of the Treaty or its Protocols, directives or decisions of the Community or its Institutions and such court or tribunal considers that a ruling is necessary to enable it to give judgment.\textsuperscript{464} In the second instance, the court or tribunal where a case is pending before it may also request for a preliminary ruling where there are no judicial remedies under national laws.\textsuperscript{465} The provisions are almost textual reproduction of the preliminary ruling provisions under Article 177 EEC Treaty.

\textsuperscript{459} Art. 3, Protocol on Tribunal and the Rules of Procedure Thereof.
\textsuperscript{460} Arts. 5-10, SADC Protocol on Tribunal and the Rules of Procedure Thereof.
\textsuperscript{461} Art. 14, Protocol on Tribunal and the Rules of Procedure Thereof.
\textsuperscript{462} Art. 15 and Article 18, Protocol on Tribunal and the Rules of Procedure Thereof.
\textsuperscript{463} Art. 15, Protocol on Tribunal and the Rules of Procedure Thereof.
\textsuperscript{464} Art. 75(1), Protocol on Tribunal and the Rules of Procedure Thereof.
\textsuperscript{465} Art. 75(2), Protocol on Tribunal and the Rules of Procedure Thereof.
Since its constitution in 2005, the SADC Tribunal has received a few cases that tested its integrity and effectiveness.\textsuperscript{466} The first case involved a labor complaint against the SADC Secretariat itself which was dismissed in favor of the latter.\textsuperscript{467} The second case dealt with a controversial and highly political issue of Zimbabwe’s national policy of expropriating lands owned by its white population. The interlocutory decision handed down by the Tribunal and the attendant reaction of Zimbabwe to the ruling shows hope but also pitfalls of the rule of law in regions where sovereignty reigns untrammelled and values of human rights, democracy, and the rule of law can be given lip-service by member states. In \textit{Mike Campbell (PVT) Limited and William Michael Campbell v The Republic of Zimbabwe}\textsuperscript{468}, the SADC Tribunal granted an interlocutory relief to the private applicant to prevent the Government of Zimbabwe from evicting the landowner from his agricultural land pending the determination of the main issue with the regional court.

The decision marks a historic step for the development of the rule of law in Southern Africa and shows, as in the EU, how an impartial judicial body can give life and meaning to the textual provisions in the treaty. The Tribunal not only affirms its jurisdiction over disputes brought by private individuals against their member states but also significantly the Tribunal’s power to interpret broad provision of the treaty on human rights, democracy and the rule of law for the benefit of SADC citizens.\textsuperscript{469}

‘This means that SADC as a collectivity and as individual member States are under a legal obligation to respect and protect human rights of SADC citizens. They also have to ensure that there is democracy and the rule of law within the region. The matter before the Tribunal involves an agricultural land, which the applicants allege that it has been acquired and that their property rights over that piece of land have thereby been infringed. This is a matter that requires interpretation and application of the treaty thus conferring jurisdiction on the Tribunal.’

\textsuperscript{466} For a complete list of SADC cases, http://www.sadc-tribunal.org/docs/CaseReport.pdf, viewed on 13 July 2009.
\textsuperscript{469} Case No. SADCT: 2/07, \textit{Mike Campbell (PVT) Limited and William Michael Campbell v The Republic of Zimbabwe}, 3.
The Tribunal brushed aside Zimbabwe’s issue of lack of exhaustion of local remedies as being irrelevant to an application for interim measure stating further that ‘there is a prima facie right that is sought to be protected, which involves the right to peaceful occupation and use of the land; and there is anticipated or threatened interference with that right; and the applicants do not appear to have any alternative remedy thereby titling the balance of convenience in their favour’. While it is still premature to make hasty opinion on the court’s rulings on the main issue, the court’s granting of temporarily relief seems to hint also a prima facie recognition of property right or peaceful enjoyment of such right as human right. The Tribunal’s dispatch in making the ruling is likewise to be commended especially when one considers the delaying tactics employed by the defense from a faulty fax machine to the unavailability of its chief defense counsel on the hearing date. On 28 March 2008, the SADC Tribunal handed its second ruling allowing the intervention of some other seventy-seven farmers based on the Campbell decision.

Enforcement however frustrated the Campbell ruling which shows that without an independent enforcement mechanism or independent national courts, judicial decisions could be easily frustrated by government action. In SADC’s case, enforcement and execution of judgment is through the procedures existing in the member state where judgment is to be executed and failing that, the Tribunal can refer the non-compliance to the Summit, the heads of member states. Zimbabwe was found to be in breach of its obligations and in contempt of the Tribunal’s orders but the government of Zimbabwe made an open defiance of the judgment by prosecuting and evicting the applicant. On 5 June 2009, another ruling was made by the Tribunal holding Zimbabwe in breach of its obligations and referring the matter to the Summit to take appropriate action. The order cited Zimbabwe government’s position that the Tribunal lacked jurisdiction and President Robert Mugabe’s statements that the decision is ‘nonsense and of no

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471 Consolidated Ruling delivered in Open Court on 28 March 2008, in Case No. SADC (T) 02/08, Case No. SADC (T) 03/08, Case No. SADC (T) 04/04, and Case No. SADC (T) 06/08, at http://www.sadc.int/news/news_details.php?news_id=1169, viewed on 18 April 2008.
472 Art. 10, SADC Treaty.
consequence.\textsuperscript{474}

The SADC Tribunal’s ruling on the Campbell case shows the promise but also the limits of developing the rule of law in regional integration in Africa. Both the SADC and the EU have shown that the rule of law depends on the respect that other institutions have on the rule of law and judicial authority and the willingness of governments in member states to conform to and uphold the rule of law in their relations with one another.

6.2. MERCUSOR: An evolving regional integration law

In Latin America, a trend towards judicial or quasi-judicial adjudication of intra-state dispute is likewise evolving. The Mercado Comun del Sur or MERCUSOR\textsuperscript{475} is an intergovernmental organization where flexibility and consensus is the mode of decision-making and policy-making. However, the lack of independent bodies has been blamed for the difficulties of drawing up common policies, the low level of implementation of policies and weakness of dispute resolution.\textsuperscript{476} In recent years however, norm creation has been increasingly supplemented by the operation of neutral dispute resolution mechanism.

MERCUSOR’s dispute mechanism as provided for in the Treaty of Asuncion 1991 provides for three steps: direct negotiations of the parties, intervention of the Common Market Group, if agreed by the parties or requested by a third state, and intervention of an ad-hoc arbitral tribunal or the Tribunal Permanente de Revision (Permanent Tribunal of Review or PTR). The PTR was established pursuant to the Protocol of Olivos 2002 and formally established in 2004 with its seat at Asuncion, Paraguay. It is the highest adjudicatory organ in MERCUSOR and its decision is binding upon the parties and can be accessed either as a court of appeal from the awards of the ad-hoc arbitral tribunal or on the first instance upon the agreement of the


\textsuperscript{475} MERCOSUR’s membership includes Argentina, Brazil, Paraguay, Uruguay, and Venezuela with Bolivia applying for full membership.

The PTR’s primary function is very similar with that of the ECJ which is to ensure the uniform interpretation and application of MERCUSOR law but its nature is strikingly different. Although denominated as a ‘Tribunal’, it is an arbitral tribunal composed of arbitrators not judges and its rulings are in the nature of arbitral awards rather than decisions. It is likewise not a regular tribunal but operates on ad-hoc basis. The Tribunal’s jurisdiction can only be accessed by the member states to the exclusion of individuals and its preliminary reference can only be made by the Supreme Court of member states.

The first case to be decided by the PTR is not only a landmark for its being first but for the far-reaching implications its ruling has on the character of MERCUSOR law and its future development and application. The principles elucidated in Laudo 1/2005, 8 December 2005 and Laudo Complementario, 13 January 2006, are regarded as having the potential to develop into fundamental principles of MERCUSOR similar to the development of the EC Treaty. The resolution of the case was made even significant by the fact that it was aided by reference to ECJ jurisprudence. In the said award, the PTR clarified the nature of MERCUSOR law as integration law and as a consequence of which it is supreme over international law in the resolution of disputes. The characterization of MERCUSOR law as integration law opens wide prospects for development stating that integration law ‘has and needs to have sufficient autonomy in relation to other branches of law’, as this autonomy favours the integration process.

‘The characterization of MERCUSOR law as integration law and not as community law is based on the fact that MERCOSUR as an institution still lacks supranationality. At the same time, the PTR pointed out that MERCUSOR law ‘aspires to develop into community law’. The latter statement is of considerable importance for the future application and

479 Both arbitral awards pertain to the dispute between Uruguay and Argentina, ‘Prohibicion De Importacion De Neumaticos Remoldeados Procedentes Del Uruguay’.
interpretation of MERCUSOR law as it leaves the door open for further development in order to reach its full effect. The process of development of MERCUSOR by the PTR might proceed along similar lines as that of EC law carried out by the ECJ.’

7. Conclusion: The EU as a point for learning for the rule of law in regional integration

The history of the EU is also a history of the development of the rule of law. Though incapable of fixed categorization, the rule of law in the EU has provided a solution to the problems of compliance and enforcement that eluded classical international law but also provided an effective restraint to the exercise of Union powers. With the development of general principles of law that constituted an autonomous constitutional order, the rule of law in the context of regional integration has also come to act as a limit to member states’ sovereign authority and generated greater protection for individual rights. There are limits however to constitutionalization and this is shown in the two-fold resistance to Union authority – from the member states which see an erosion to their sovereign powers and from the European citizens themselves who perceive the Union as a remote and complex entity. The CEE enlargement which added greater diversity and pluralism in the Union has brought into sharp focus the tension between the constitutional legal regime and political expression of sovereignty and popular democracy.

The issue of democracy in the EU, or lack it, underscores the limitation of the rule of law and the interconnection of democracy and the rule of law and the need to reinforce each other in satisfying the legitimacy demands of an ever closer Union. Building the rule of law from economic integration has provided the foundation of the Union; the present issues point to the task of building democracy. The question at hand is whether the EU itself could be a model of an ‘international democracy’ consistent with the rule of law. Current reforms in the treaties seeks to introduce more political and flexible measures employing the approach of re-nationalization and decentralization to rein in over-centralization and Union competence as well as of flexibility, soft law, and consultation as a means of giving form to demands for more politics. This strategy is in contrast and could be in conflict with established hard, clear and binding norms.
developed in the Union.

On the institutional level, reforms are meant to enhance the powers of the political representatives – the European Parliament and national parliaments, but not a corresponding expansion of the function of the Court which had been the driver of regional integration. National governments are perceived to be the winners of the institutional re-arrangement and expansion of Union competence but greater political oversight at the national level and increasing consultation with social partners and civil society as well as some forms of direct democracy could provide the necessary counter-weight. But states, given its monopoly of legitimate coercion, have always wielded more power in relation to its citizens. In this regard, the Court and national courts are duty-bound to step in and to provide concrete protection to individual rights which are now entrenched in the Charter of Fundamental Rights. The rule of law still has to ‘manage’ the uncertainty of flexibility and soft law and for this, institutional and other forms of alternative arrangement has to be made to cope with this challenge.

Given the unique history and distinctive political conditions in the EU, it is hard to make a hasty conclusion that the Union is or has to be a model for other projects of regional integration. SADC and MERCUSOR, again two distinctive programs of regional integration, show that political conditions dictate to a great extent the nature of development of the rule of law. However it also shows that the rule of law, even within its constraints, could offer a potential for change. The rule of law, though still conditioned by politics, has the capacity to generate new rules, mechanisms and institutions - as well as new behaviour. The ‘EU model’ of the rule of law has shown this capacity for generation and more often, with unintended consequences. This model has been built on the basis of the autonomy of its institutions but also that these institutions are able to function with flexibility through various informal and soft mechanisms that co-exist with hard and rigid rules. There are various aspects of the hybrid character of the EU that could serve as model or points of learning to other projects of regional integration.

Regional integration is a condition that presents similar challenges to all other programs, though perhaps in varying degrees and importance for others. These are the
issues of compliance and enforcement of international obligations, sovereignty claims of member states, diversity and pluralism, and democracy. The EU model has shown the capacity of the rule of law to manage these integration problems through its willingness to respond to these challenges and experiment on different institutional and legal mechanisms. The relative success of integrating the CEE countries into the Union through the combination of authoritative legal measures and flexibility and socialization shows the capacity of developing the rule of law in jurisdictions having very little rule of law traditions. Diversity presents an immense obstacle to regional integration but the EU model has shown that a combination of legal, institutional and political criteria could potentially narrow the discrepancy of rule of law practices in member countries.

For ASEAN, the main challenge is how to build the integrity of its institutions. ASEAN was built on a foundation of loose institutions and developed a culture in regional relations that is not based on hard and enforceable commitments, which only tend to reinforce the former. Given that it has shown its dislike to supranational and judicial bodies, ASEAN has to work within the narrow confines of its legal and institutional framework. Is it then possible to strengthen ASEAN’s intergovernmental institutions? The answer is yes. It means that ASEAN has to go beyond the ‘ASEAN Way’. First it has to trust its own institutions by using them. The only way to raise the prestige of ASEAN institutions is to use them and to make these institutions actually work.

Taking a lesson from the EU, institutions should be guaranteed their autonomy. The creation of independent institutions is one possible area that can be accommodated within the governmental structure and independent bodies have been adopted in national jurisdictions in member states in ASEAN. There are a range of areas in the economic sphere particularly involving technical matters that ASEAN could initially work out. Committees in the EU were particularly efficient bodies and the use of experts was proven effective in drafting policy and implementing guidelines. The system of co-decision and co-operation can also be explored to give particular institutions with rule-making or decision making authorities, a system that does not imply eroding ASEAN governments’ desire for control over regional institutions. Adoption of formal rules can be made in combination with soft laws, again respecting the demand for flexibility.
by member states or of soft laws with clearer guidelines and timelines such as the use of the mechanism of OMC that addresses both flexibility and demand for greater deliberation and participation by non-state actors. As the EU experience shows, the use of soft laws is accompanied by strong institutions at the regional level.

There are many other areas in EU’s hybrid system that could be explored to tailor to ASEAN’s diversity or its core value of sovereignty, at least in addressing ASEAN’s commitment problem in the sphere of economic cooperation. The bottomline is whether member states are indeed willing to enter into deeper regional cooperation that would stimulate more cooperative activities that would in turn provide conditions for the establishment of regional mechanisms and institutions. This is the basic commitment that member states in ASEAN have to resolve – their political will to pursue regional integration.
CHAPTER FOUR

Retracing the Rule of Law in ASEAN: state, politics and constitutionalism in Southeast Asia

1. Introduction

Western historical conception of the rule of law is premised on the superior force of the sovereign authority and the necessity to tame this power. In this sense, law operates as an exercise of state power but also as a meaningful restraint upon that authority and on the institutions or agents conferred with state powers. A corollary attribute of the rule of law is that institutions are able to exercise their autonomy from the state, from elite capture or from particularistic interests. Judicial independence is a salient feature of the rule of law in ensuring the principle of equality so that no one, including the state, is above the law. Other institutions however are as important in safeguarding the rule of law. In liberal democracy, be it parliamentary or representative, the independence of law-making authority is assured through the principle of separation of powers or a system of checks and balance. The rule of law in this sense not only restricts state powers but also manages political conflicts that underlie state institutions. Accountability, be it in its popular or institutional aspect, has also become a crucial function of the rule of law such that institutions or individuals are made to fully account for their actions in exercising their authority.

This chapter is an attempt to investigate the development of the rule of law in ASEAN regional integration from the individual contexts of member states and to show the particularity and diversity of rule of law practices in Southeast Asia. Regional integration in Southeast Asia is a by-product of global influences but ASEAN cooperation itself is built around the convergence of member states’ interests that is mainly responsible in shaping the contours of institutional and legal processes of regional cooperation. This is particularly so with the development of the regional rule of law which is but the expression of the competing functions of the rule of law in individual member states. A key aspect of the rule of law in the European Union is the presence of the rule of law in member states, though existing in varying degrees. One of the key lessons from European integration is the functioning of autonomous
institutions both in the Union and in member states that fuels the demand and respect for the rule of law.

The prospects of developing the rule of law in ASEAN integration hinge to a great extent on the practices of the rule of law in member countries. The EU experience shows the mutuality of regional and national practices of the rule of law but also how, in the context of enlargement, a combination of ‘transplantation’ and socialization of the rule of law in the Union has been instrumental in generating observance of the rule of law in newly-democratizing CEE countries. An examination of rule of law practices in ASEAN states should allow us to map out the nature and function of the rule of law in each member state. This will enable us to identify the differences but also the convergence of the rule of law in member states and how this could be explored in the context of building the rule of law in regional integration. To do this will require an examination of the development of the state system in Southeast Asia – why it is different from Western states and how peculiar historical and political conditions have produced distinctive rule of law practices, in the form of constitutional arrangement, in member states.

The chapter hopes to show that the dynamics of political practices have impinged on the rule of law in member states in ASEAN. Contending forces of the political elites and civil society, of unity and plurality, of status quo and reform, of authoritarianism and democratization – reflect on the development, changes or crises of constitutionalization. These are rooted in the particular historical and socio-political processes that informed the development of the nation-state in Southeast Asia but also in the way the state and society have responded to past and contemporary challenges to nation-state building. However, the development of institutional and legal mechanisms shows the potential to transform, or at least manage destructive political practices that further endanger societal peace and stability, promote intolerance for political pluralism, and foment disregard for human rights. Pressures of democratization and globalization are changing the dynamics of political relations and causing change or innovation of the state and the rule of law in Southeast Asia. These could be translated into the regional processes in ASEAN.
2. Pre-colonial and post-colonial origins of the rule of law in Southeast Asia

One of the assumptions in this chapter is that the development of the state system in Southeast Asia was conditioned by the process of nation and state-building in the post-colonial era. The state had been formally constituted after colonialism in terms of territorial boundedness and centralized authority but the idea of nationhood, the sense of belonging and identification with an ‘imagined community’, was largely innocuous at post-colonial era in most Southeast Asian states. This was because of artificially-constructed territories carved out from colonial occupation but also that colonial administration through indirect rule preserved and enhanced differentiation of diverse social, ethnic, cultural and religious practices of groups of people. The post-colonial state became therefore the principal driver of nationhood in a highly diverse society, ‘by far the most important unifying force within them.’

An important function therefore of the state in Southeast Asia is in fostering nationalism through traditional culture and religion or state-sponsored ideology. The development of the rule of law has followed this unifying and centralizing function.

An endogenous state system had evolved in Southeast Asia prior to the advent of colonialism that began in earnest in the 17th century. Great kingdoms were in existence as early as the second century A.D. in the Mekong and its delta and in the northern parts of the Malay Peninsula. Early civilizations that flourished in Southeast Asia were ruled by rulers whose authority was founded on both secular and cosmic powers and depended on the shifting allegiance of other rulers and people living outside of the centre of authority. Religion, like Hinduism, Buddhism, and Islam, was a major ‘state-forming’ influence and reflected on the way ideas of royalty and authority of rulers were conceived. For instance, the influence of Hindu is observed to be particularly influential in developing notions of political authority with its emphasis on

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devotion and personal relation with god personified through the ‘men of prowess’, or those men having the ability to recruit followers and alliances. 486

The state in pre-colonial times is a loosely organized unit without any clearly defined territorial boundary. Authority radiated outward from the capital and rarely achieved firm control over outlying areas. 487 Certain state constructs had focused on culture or charisma in shaping political relations in Southeast Asia. For example, the concept of the ‘theatre state’ in Bali was formed from the idea of a divine king who sat not only at the apex of the hierarchical order but also the centre of sacred space. In this view, the king governs through rituals and symbols other than force and that the aim of higher politics was to construct a state by constructing a king. 488 On the other hand, the mandala constructs a system of overlapping concentric circles or a diffused form of political authority where there is no definable or fixed geographic border and small centres look at all directions for authority. 489 This is similar in substance to the concept of ‘galactic polity’ constructed out of the Buddhist kingdoms in Thailand which were not centralized states but organized around a king only having control over a central zone while provinces and districts were largely autonomous replicating the centre in authority and functions. 490

But lest a generalized and romanticized prototype of early Southeast Asian statehood is painted, increasing trade and wealth creation as well as wars and conquests all played significant role in evolving more politically complex societies in pre-colonial period. 491 Kings or rulers were in constant challenge from other autonomous rulers or families within their realms and from other dynasties such as the inter-territorial contests between the Burmese, Thai, Khmer and Vietnamese kingdoms. 492 ‘Fluid’,

487 David Joel Steinberg, In Search of Southeast Asia, revised ed., (Sydney, Allen and Unwin, 1987), 4-5.
489 In Oliver W. Wolters, History, Culture and Religion in Southeast Asian Perspectives, (Singapore, Institute of Southeast Asian Studies, 1982).
492 Ken Young, ‘State Formation in Southeast Asia, 76-7.
rather than absolute, seems to be a more appropriate description of the state system in
pre-colonial Southeast Asia. It is being defined as the ‘dynamic interaction of families,
ancestor spirits and kings in creating a complex, state-forming historical agent.’

Kinship and family ties, which are a feature of contemporary Southeast Asian politics,
were an important equation in power relations which could make or unmake kingdoms
and dynasties. Social stratification was already observable in these societies even
before the coming of foreign influences such as the sakdina system in Thailand
which divided the population between the nobility and peasants with the former being
assigned a number of the labour class in accordance with the their grade or rank. The
system had evolved into an institutionalized inequality through the codification of the 3-
seal Code under Rama I and though officially abolished, has remained in certain
practices in parts of the country. Social differentiation was also evident in pre-
colonial Philippines based on wealth, political influence and social privileges and
society was classed among the datu (chieftain) and his clan called maginoo, as the
ruling class, the timaua or and maharlika, the free people or subjects, and the lowest
class being the alipin or people who are bound to serve other classes.

Pre-colonial societies were in no way static and this evolution was also seen in the
development of elaborate system of taxation, labour and trade that were administered by
the centre. But what can be deduced from the above discussions is that in nascent state
system in pre-colonial Southeast Asia political rule depended as much on symbols,
religious rituals, and personal loyalties as on other element as ‘monopoly’ of violence or
coercion and bureaucratic administration. Despite the increasingly complex
development of mechanisms of rule, pre-colonial state systems still had low level of
dependence on more formal institutions than through informal and personal ties.
Already evolving into hierarchical societies, deference to authority and premium on

493 Tony Day, ‘Ties that (Un)Bind: Families and States in Premodern Southeast Asia,’ The Journal of
495 Dougald O’Reilly, Early Civilizations of Southeast Asia, (United Kingdom, Altamira Press, 2007),
180-4.
496 Mark Tamthai, ‘Thailand: Sakdina System and Promotion of Human Rights and Democracy,’ 21
Swaeng Boonchalermvips, ‘The Thai Legal History,’ paper presented in Development of Legal System
in Asia: Experiences of Japan and Thailand, Bangkok, Thailand, 6-7 November 1997.
497 See Vicente Rafael, Contracting Colonialism, Translation and Christian Conversion in Tagalog
Society Under Early Spanish Rule, (US, Duke University Press, 1993), 138-9; Also Teodoro Agoncillo
social status and prestige were significant societal values which are reflected in the patterns of behaviour and language in the region.\textsuperscript{498} Deference to ancestors or ancestral worship, familial duties and sense of indebtedness were part and parcel of the power relations and structure in pre-colonial Southeast Asia.\textsuperscript{499} The form of ‘indirect rule’ that rulers had on outlying provinces and villages also means that these areas had retained their social, cultural and political autonomy. For instance, the Javanese kingdoms in pre-colonial Indonesia had relied on local rulers called the \textit{priyayi} in imposing their rule and levying taxes on the people. This class enjoyed considerable autonomy from and had supported the rulers from the produce of their lands or trade monopolies.\textsuperscript{500}

Villages were said to be more stable than most courts or bureaucracies in pre-colonial period and used their own custom in ordering relations and settling conflicts in the community.\textsuperscript{501} This is widely observed in many villages in Southeast Asia most notably shown in Malay \textit{adat} in the countries of Malaysia and Indonesia, which is generally a form of unwritten local customary law which governs all aspects of conduct in the life and death of a person.\textsuperscript{502} \textit{Adat}, which varies in every community and has undergone transformation with Islam and colonial influence, underlies the pluralism of pre-colonial societies and accounts for legal pluralism that pervades the modern states in Southeast Asia. Indeed, Southeast Asia was, and remains to be, characterized as a plural society populated by diverse ethnic groups having their own language, traditions and culture who were relatively integrated into the pre-colonial polity.\textsuperscript{503}

The pre-existing social, cultural and political conditions had served the commercial or exploitative interests of European imperial order. But the advent of colonial rule would also be the force that would heighten and transform these relations and would become basis for the formation of substructure of the emerging modern state system in Southeast Asia.

\textsuperscript{498} David Joel Steinberg, \textit{In Search of Southeast Asia}, revised ed., 18-9.
\textsuperscript{499} Tony Day, ‘Ties that (Un)Bind: Families and States in Premodern Southeast Asia,’ 387-402.
\textsuperscript{500} Ken Young, ‘State Formation in Southeast Asia,’ 79-81.
\textsuperscript{501} David Joel Steinberg, \textit{In Search of Southeast Asia}, revised ed., 20.
2.1. Colonialism as the decisive factor in Southeast Asian state formation and the process of transplanting and transforming the rule of law

Colonialism had a profound influence and was the decisive factor in bringing forth the modern state system in Southeast Asia. All states in the region had been subjected to European colonial rule or influence, in one form or another. Even Thailand, whose sovereignty was respected by the European powers as a ‘buffer zone’ in Indo-China was subjected to varied forms of direct and indirect intervention such as the imposition of extra-territorial rights and trade concessions.\(^504\) Territoriality, centralization and bureaucratic administration, and progressive introduction of law – key ingredients for European statehood, were introduced into the region. These changes, combined with increasing population and economic expansion, disrupted and at the same time transformed the social, cultural and political conditions of pre-colonial societies. The impact of colonial rule however had neither been uniform nor consistent within and among the states.\(^505\) The contradictions generated by colonial rule would become a powerful incentive in galvanizing anti-colonial sentiments and thus of nationalism among the peoples in the region.

The colonial era, which lasted well into the early twentieth century, brought about the consolidation of territories among Western colonizing powers in the region. Newly fixed territories were carved out of the colonizers’ ‘sphere of influence’ which contradicted pre-colonial concept of territoriality based on loyalties and ethnicity.\(^506\) The creation of Singapore state is a classic example of an artificially constructed territory. It was a sparsely populated abutment in peninsular Malaysia which was ‘ceded’ to British East India Company by the Temenggong of Johore in 1819.\(^507\) In another instance, accommodation or agreement among the colonial powers determined the boundaries such as the ‘formal’ incorporation of the Malay-Muslim in South of Thailand, the Patani region, which was concluded with the signing of the Anglo-


Siamese Treaty of 1909. The disjunctive demarcation of territories based on colonial rule would become the territorial framework for establishing nationhood but it would likewise create persistent ethnic conflicts in almost all newly-formed states.

Indonesia, whose territorial demarcation resulted from Dutch occupation, suffers from several ethnic conflicts which range from sectarian violence to armed separatist movements. Despite this however, Indonesia has established a firm central state authority based on the ideology of Pancasila which fosters religious pluralism and rejection of the establishment of Islamic state. Ethnic violence also erupted in Malaysia which would become the basis of its social compact enshrined in the constitution and state policies. Ethnic-religious conflicts involving the Muslim population in the region would not only create long-running separatist or independence movements such as the Bangsamoro struggle waged in Southern Philippines, the Malay-Muslim separatism in Thailand, and the Free Aceh Movement (GAM) in Indonesia. New radical groups would emerge in the 90s and particularly in the aftermath of September 11 bombing with established links with other radical groups in Indonesia or Malaysia.

Indeed, the territorial disjunction in Southeast Asia would become one of the most sensitive issues in regional relations, particularly in ASEAN. Many of the lingering disputes in ASEAN involve contentious territorial claims among its members. The Philippine claim over Sabah against Malaysia had nearly escalated into full-blown military confrontation and suspended the operation of the ASEAN in 1968. Malaysia and Singapore have been engaged in a dispute over three rocky islets strategically located in the shipping lane of both countries but finally agreed to bring the matter for

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509 These conflicts are both ethnic and religious in nature and located in such areas as Kalimantan, Sulawesi, Aceh, Maluku, Flores, and West Papua (Irian Jaya). For extensive reading see Jacques Bertrand, Nationalism and Ethnic Conflict in Indonesia, (UK, Cambridge University Press, 2004).
510 ‘Bangsamoro’ means Muslim nation.
512 Such as the Abbu Sayyaf group in Mindanao, Philippines having external link with the Jemaah Islamiyah (JI), seen as a regional terrorist network.
resolution before the ICJ in 2003.\textsuperscript{514} Malaysia and Indonesia still have unresolved contest over an oil-rich area, the Ambalat block off the coast of Borneo in the Celebes Sea, which continues to stir up tension and hostilities between the two countries especially when domestic pressures are up.\textsuperscript{515} The dispute over the Sipadan-Ligitan islands was brought to the ICJ in 1998 and the decision which was handed down in favour of Malaysia in 2002 was the first territorial dispute judicially settled in Southeast Asia.\textsuperscript{516} Thailand and Cambodia are still locked in stalemate on dispute over the area surrounding the temple of Preah Vihear which was awarded by the ICJ in 1968 to Cambodia.\textsuperscript{517}

With territorialisation, centralization of colonial administration was made progressively and more effectively. Both ‘direct rule’ and ‘indirect rule’ were used in effecting colonial administration. Indonesia manifested the most elaborate form of indirect rule elsewhere in Southeast Asia which also facilitated racial segregation. Indirect rule was established with the adoption of the dual policy of \textit{intergentiel recht} (or \textit{hokum antargolongan} in Indonesian), or inter-ethnic law and \textit{adatrechtspolitiek}.\textsuperscript{518}

The Netherland’s colonial administration assumes a plural legal order which is therefore to be governed by plural sets of laws applicable to each racial group, and a dual bureaucracy and judicial system. The Indonesian side of the legal order was always ultimately subjected to the ‘superior’ Dutch system. Under the inter-ethnic law policy, each of the racial group – the Europeans, foreign orientals and natives, is subjected to their own laws except in commercial, political and criminal matters that affect colonial rule where Dutch law was to be applied.\textsuperscript{519} The preservation and continued application of local customs was the rationale behind \textit{adatrecht}. The policy may have been

\textsuperscript{514} Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Summary of Judgment, 23 March 2008, at http://www.icj-cij.org/docket/files/130/14506.pdf, viewed on 22 July 2009. The ICJ awarded sovereignty of the main island to Singapore, the Middle Rocks to Malaysia while the South Ledge would be determined by locating the territorial waters to which the islet belongs.

\textsuperscript{515} Indonesia, Malaysia: Rising Tensions over Disputed Waters, STRATFOR, 8 June 2009, at http://www.stratfor.com/analysis/20090608_indonesia_malaysia_rising_tensions_over_disputed_waters, viewed on 22 July 2009.


\textsuperscript{519} Sudargo Gautama & Robert Hornick, \textit{An Introduction to Indonesian Law: Unity in Diversity}, (Bandung, Indonesia, Alumni Press, 1976), 4-5.
motivated by an altruistic desire to promote and respect local customs but its effects had been unmistakably to make Dutch commercial exploitation efficient. At the end of the colonial period, a bifurcated legal system of European law and native law had emerged, the former the superior one and the latter codified and restructured by the colonialists but administered by the natives themselves, the pangreh praja.

The practice of colonial administration had varied from each territory. The British had increasingly imposed direct bureaucratic control especially with the introduction of federated system or federation in the twentieth century eroding the powers of the Sultans who enjoyed relative autonomy under the British Residency system. Centralized colonial administration was so well-entrenched that there were only a handful of colonial administrators or bureaucrats as administration in the provinces was carried out by the natives themselves, particularly the traditional leaders or elites. A description of bureaucratic administration in the Netherlands Indies in 1865 listed only one hundred seventy European officials as Indies BB or internal administrators. In comparison, centralization in the Philippines under the Spain is perceived to be a fiction. The centralizing function of the Spanish colonial administration was performed by Spanish friar missionaries who were sometimes the only Spanish representative in the provinces. As in any Spanish colony, colonial administration, except in the un-colonized areas in Muslim Mindanao, was performed by both the clergy and civil authority. Owing to the scarcity and concentration of civilian administration in Manila, the Spanish priest performs both clerical and secular functions with pre-colonial Filipino chieftains performing the task of local administration and tax collection.

Thailand, as the only non-colony in the region, deserves special discussion on administrative centralization. The first Thai kingdom of Sukhothai established in 1238 had fostered a paternal king who was considered the father to his people. Owing to the early Thai kingdom’s vulnerability to conflicts with neighbouring kingdoms such as the

Khmer and Burmese, its administration had acquired a strong military character. The first attempt at centralization had begun during the Ayuthaya period (1350-1767 A.D.) where hereditary governorship was abolished and control over provinces were tightened by sending sons and close relatives to govern outlying areas. Modern form of administration as a technique for establishing a unitary state was however introduced during King Mongkut’s reign in mid-nineteenth century as a way to forestall any excuse for colonial intervention. The abolition of absolutism and revival of paternal kingship accompanied by a centralized Western-style administrative government, modern education system, and a merit-based civil service were rapidly implemented in Thailand from late nineteenth century until 1928. The reforms introduced in this era had formed the Thai bureaucracy which would be maintained and to remain stable despite succeeding turbulent political changes in Thailand.

Thailand would become the most ‘bureaucratized’ state in the region by the end of the colonial era and it would be the promoters composed of higher civil servants and military officers who led the coup d’etat in 1932 abolishing absolute monarchy. At the same time, the quest for the establishment of central authority undermined the tributary states in the Muslim principalities which had enjoyed autonomy to conduct their own affairs. The implementation of a single Thai legal system by abolishing the Shar’ia and Adat Melayu or Malay customary law accompanied the forced integration policy adopted by the state such as the imposition of secular education and conversion to Buddhism which will mark the beginning of long history of revolt in the south.

Modernization, through the introduction of bureaucratic administration and laws by the colonial powers had contradictory impact on the emerging colonial states in Southeast Asia. Elsewhere in the region, colonial offices became symbols of status and prestige especially for pre-colonial elites. The consequence of elite accommodation was the tendency to form ‘clans’ within the modernizing bureaucracy and to replicate

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traditional conception of the bureaucracy as status and wealth-conferring.\textsuperscript{528} The bureaucracy became a contested space through which pre-colonial bureaucratic formations were accommodated or allowed to co-exist with modern rational values of legality and efficiency. For people in the lower social strata, colonial bureaucracy became a focal symbol of colonial powers’ oppressive and discriminatory rule but also represented the preservation of the old hierarchical order.\textsuperscript{529} Nationalist movements in the region had rejected the model of colonial bureaucracy but at the same time it also held appeal among the ‘status-hungry, hierarchical Southeast Asia.’\textsuperscript{530} The rapid bureaucratization in Southeast Asia in the 1870s would mark the beginning of period of unrest and struggle for independence in the region.

Colonialism had claimed for its \textit{raison d’etre} the duty to ‘civilize’ the natives to ‘modernity’ or to wean them away from ‘pagan’ beliefs. In Southeast Asia, these were merely the pretext for one or a combination of purposes - dominating the extremely profitable maritime trade that existed in port city-states in Southeast Asia catering to foreign traders from China and the Far East for centuries, exploiting the region’s rich natural and agricultural resources, and securing strategic maritime routes for other colonial possessions and commercial interests.\textsuperscript{531} Colonial ‘rational’ laws were introduced accompanied by coercive might of European firepower to achieve these goals. This would entail foremost a means to rationalize relations between colonial authority, the European settlers and native inhabitants. With very few colonial personnel, the use of law was an extremely important component of colonial rule and for the first time, a comprehensive use of a ‘single’ authoritative legal system was used and superimposed on pre-existing indigenous laws and traditions. Law thus became both a symbol of colonial authority, a form of social control particularly in preventing resistance to foreign rule, and as a means to regulate plural societies.

The United Kingdom showed the most judicious use of legal instruments in entrenching colonialism. Using as pretext to intervene in the Malay ruler’s

\begin{thebibliography}{99}
\bibitem{529} Tony Day, \textit{Fluid Iron, State Formation in Southeast Asia}, 213.
\bibitem{531} See extensive discussion on Southeast Asian commercial history in Anthony Reid, \textit{Southeast Asia in the Age of Commerce, 1450-1680}, (US, Yale University Press, 1990); also see Hideo Yamada, ‘British Colonization of Malaya with Special Reference to its Tin,’ \textit{The Developing Economies}, Vol. 9, No. 3 (September 1971), 225-45.
\end{thebibliography}
mismanagement of their states, Britain forced the acceptance of the Pangkor Agreement in 1874 into the Malay Sultans and created the protectorate or residency system whereby British Residents would function as the primary economic and administrative ‘advisors’ of the Malay sultanate except in matters of Malay religion and custom.\textsuperscript{532} The ‘agreement’ was a deceptive veil for the imposition of British indirect rule which allowed the continuance of the \textit{Shari’a} and recognition of the sovereignty of Malay rulers over their states and non-Malay inhabitants.\textsuperscript{533} In the Straits Settlement which comprised Singapore, direct and absolute control was imposed and English civil, commercial and criminal laws were adopted. In practice, British colonial advisors had sought to exercise direct and total control provoking resistance from Malay Sultans such as the violent suppression of rebellion of the Sultan of Perak in 1875. By the 1920’s total control and centralization over all Malay states was achieved through various constitutional and administrative arrangements that gave colonial administrators power over public order, administration, and religion.\textsuperscript{534} In conducting its affairs, the British brought with them civil servants from its other colonial possessions in India and Ceylon but also the Chinese who were preferred to perform financial tasks and as labourers in the lucrative tin mining - which would become the basis of a differentiated plural society in post-colonial Malaysia and Singapore.\textsuperscript{535}

By contrast, the almost three hundred year Spanish colonization of the Philippines was facilitated less by law and bureaucratic administration than through the process of conversion to Catholicism. The Spanish crown had ruled the colony through Royal Decrees and later on the reception of Spanish civil and criminal codes to be implemented by the Spanish civilian authority. Rule through laws however was not effective as the Spanish friars were more obeyed in local government matters than the \textit{alcalde mayor} or Filipino local administrator. The friars were so powerful in the Philippines, regarded as being ‘more absolute than the king himself’, that even reform-minded Governor-Generals who tried to introduce reforms to ecclesiastical authority

\textsuperscript{533} A.J. Stockwell, ‘The Historiography of Malaysia: Recent writings in English on the History of the area since 1874,’ \textit{The Journal of Imperial and Commonwealth History}, Vol. 5, No. 1 (October 1976), 82-5.  
\textsuperscript{534} Vidhu Verma, \textit{Malaysia, State and Civil Society in Transition}, 27.  
\textsuperscript{535} See accounts on people employed under the residency system in Frank Athelstane Swettenham, \textit{British Malaya: An Account of the Origin and Progress of British Influence in Malaya}, (London, John Lane, 1907), 229-48.
and its widespread abuses had either met the fate of imprisonment, excommunication or murder.\textsuperscript{536} It is therefore no coincidence that widespread nationalist stirrings in the Philippines would be directed at friar abuses and discrimination led no less by Filipino priests seeking equal recognition of their status with Spanish priests.\textsuperscript{537} In fact, the religious element would become a constant feature of mass protests and movements in the Philippines including the people power revolutions in the 80s and 90s.

There is no doubt that colonialism brought forth about the seeds of modern state system in Southeast Asia and correspondingly an evolving notion of the rule of law that was also in the process of development in the Western world. As shown in the above discussion, the colonial ‘rule of law’ in Southeast Asia assumed the function of consolidating colonial authority and administration. In the case of British colonial rule, law was imposed on the three main areas of stability and order, tax revenue, and the flow of commerce. The use of law is a carefully laid out strategy which would promote stability rather than undermine social order with the fundamental change in the colony’s social and cultural foundations and hence the adoption of the policy of respecting indigenous customs and religions in its colonies.\textsuperscript{538}

Other than its instrumentalist role however, the early development of the rule of law in the region also shows how law and institutional arrangements transformed existing social and political relations or create new ones, manage conflicts or give rise to new problems, establish the authority of state and its actors or encourage challenges to authority. For instance, the residency system might have eroded the power of the Sultans but it also ‘legitimized’ their autonomy over matters of custom and religion that increasingly allowed them to foster identification of Malay with Islam. This will have the effect of awakening nationalism in the Malays and together with the perceived structural economic imbalance created during the colonial period, the privileging of Malay race or ‘bumiputera’ in terms of economic, educational and government service

\textsuperscript{536} D.G.E Hall, A History of Southeast Asia, 709-12.
\textsuperscript{537} Revolts had been widespread against Spanish rule in the Philippines but 1896 marked the year of nationalist explosion which was triggered by the execution of three Filipino priests who advocated greater secularization of the clergy.
opportunities under the New Economic Policy (NEP) would be a salient component of the restructured social compact of post-colonial Malaysia.

Colonial experience shows the relationship between power and law but also between socio-cultural relations and law. Force has made it possible to transplant new laws and institutions but the purposes for transplantation and its agents – the colonial administrators and local elites, changed the complexion of those laws and institutions. Social and cultural practices had been transformed by modernity but they also conditioned the way laws and institutions were to operate within local conditions. Tradition and modernity do not seem to be antithetical and the processes of accommodation, mediation, and transformation had been clearly at work in shaping states in the region. Laws, institutions, and agents – they are the main characters of the evolving rule of law in Southeast Asia that played within the currents of changing political and social relations – not to mention shifting relations in the international arena, at the dawn of the colonial period. The emerging state system and the rule of law in Southeast Asia, a product of this historical process, would certainly be its own. Nationalism, perhaps unintended but consequential to colonialism, would be the driving force but also the catalyst for distinct processes of statehood in Southeast Asia. The rule of law is as much influenced by this.

3. The emergence of the modern state and ‘rule by law’ in Southeast Asia

The post-colonial period saw massive projects of state construction and except for a brief period until the 60’s, the rise of authoritarian regimes in the region. In general, the modern nation-states that emerged from the abyss of colonialism have, in varying shapes and degrees, professed adherence to constitutional democracy that enshrines the principle of separation of powers, popular democracy and respect for fundamental freedoms. In reality, most regimes in the region operate through an underlying state ideology that prioritizes ‘communal goals’ – the imperatives of unity and social order, over values of inclusive political discourse and participation and unfettered exercise of political rights. This is translated into a practice of formal democracy characterized by an ascendance or dominance of a single party and a strong executive virtually
‘unrestrained’ by law and other state institutions backed by repressive security or military apparatus.

The re-appearance of authoritarianism in modern state system in Southeast Asia has been mostly explained from the political and economic legacies of the colonial era. The emerging state is seen as inheriting the bad features of pre-colonial and colonial values and institutions. ‘Institutional continuity’ is a recurrent theme in most literature which either emphasizes the continuance of either or both traditional and colonial practices and structures. For example, the weakness of the judicial institution in Indonesia has been traced from the inferior Indonesian side of the system, the *Laandrad*, which was mostly staffed with untrained personnel and local elites and operated through informal procedures and customs. Thus it is observed that it was even easier to make a criminal conviction under the Indonesian side of court administration which provided for simpler procedure and fewer protections against the authorities. The British Residency system is also observed to be the precursor of the development of strong executive in Malaysia where the State Council acting as the legislature was a mere rubber-stamp for it was the British Attorney General who drafted legislation and later approved by the Resident-General and Governor.

The concept of ‘patron-client’ relationship has been developed however in the 60’s to explain the patterns of inter-personal relationship present in the politics and bureaucracies in Southeast Asia. Other variants have followed. This informal relationship which is based on unequal exchange relation in favour of the patron is marked by an ‘imbalance in exchange between the two partners which expresses and reflects the disparity in their relative wealth, power, and status.’ A patrimonial state originated by Weber to describe a state organized around the concept of a family ruled by a father has been used to define states in the region. This type is characterized by the

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543 James Scott, ‘Patron-Client Politics and Political Change in Southeast Asia,’ 93.
predominance of personal connections rather than rational-legal rule, values of particularism over universalism, and the blurring of lines between private and public spheres of authority. The Philippines, where bureaucratic centralization was relatively undeveloped in the colonial period compared with other states in the region, exemplifies the model of patrimonial state where personal and informal relations permeate all political as well as legal institutions. In the economic sphere, the Philippines and Indonesia have both developed a form of patronage capitalism known as ‘crony capitalism’ which cultivated a clique of business elites, usually by politically-connected families, having close relationship with state leaders.

Patrimonial bureaucracy is used to highlight the dominance of bureaucratic elite as the dominant social force and relative weakness of countervailing social forces such as Thailand between 1932 and 1973 and the New Order Regime under Suharto in Indonesia while patrimonial oligarchy underscores the existence of powerful oligarchy independent of but preys upon the state to accumulate wealth and power as in the case of the Philippine state. On the other hand, Singapore is said to exhibit dominant features of ‘corporatism’, a state which is characterized as comprising an organic community but dominated by bureaucrats and technocrats acting for the state’s interests rather than promoting a particular class interest.

Post-colonial construction of state in Southeast Asia discussed above thus exhibits certain common features which have implications for the rule of law. It is elite-dominated either in terms of state institutions and bureaucracy or in electoral politics. With the exception of Singapore, movements of marginalized sectors have sprouted to challenge, protest or overthrow elite domination. Southeast Asian states however

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548 One of these is the peasant struggle across Southeast Asia at post-independence with many of them forming the communist movement and with the Philippines having the longest-running peasant-based communist insurrection. For more discussion see Michael Adas, ‘From Avoidance to Confrontation: Peasant Protest in Precolonial and Colonial Southeast Asia,’ Comparative Studies in Society and History, Vol. 23, No. (April 1981), 217-47.
have shown its resilience by its continued assertion of its autonomy from the broader society. In Singapore however which achieved single-party domination, the state has succeeded in blurring the lines between state and society with the state, holding itself out as an impartial and rational entity, as the representation of the best interest of society or the common good.  

In patrimonial states, the separation or wide gap between state and society has made it possible for particularistic elite interests to oppose reforms, weaken political and judicial institutions that are constitutive of constitutional democracy. This has the effect of lessening predictability and certainty of politics but also in muting the opposition. Thailand, prior to the return of civilian democracy in the 90s, exemplifies state contestation among competing bureaucratic and military elites through succession of mostly bloodless coups – without or with marginal involvement of ordinary people. The coup plotters have remained unaccountable to the ‘people’ or to institutions designed to settle political conflicts. The ‘static’ character however of elite-dominated Thai politics has been profoundly changed during the Democratic Movement in the 90s and awakening of populism at the rural level with the emergence of a populist party in power.

Colonial structures were indeed designed to impose authoritarian rule and indeed ‘unsuitable’ to emerging democratic nation-states. But as manifested in direct transplantation of American democratic institutions into the Philippines which only strengthened the power of the ilustrados and hacenderos, the succeeding state elites have different conceptions of a democratic state system dictated either by particularistic interests or by reference to distinct nationalist goals. The Philippine case likewise demonstrates that with weak central authority and loose institutions inherited from Spanish colonization, the policy of ‘benevolent assimilation’ and democratic institutions introduced by American rule which are meant to empower people at self-government especially at the local level could have the disastrous result of being an easy prey for particularistic elite capture.

550 The ‘ilustrados’ are wealthy native or mixed-race educated elites and ‘hacenderos’ refer to landlords with huge landholdings that emerged during Spanish colonization in the Philippines.
The development of patrimonial elites in modern state systems in post-colonial Southeast Asia has profound consequences on the legal and institutional arrangements that support the rule of law. The paternalistic relation - the other side of authoritarianism that permeates the Indonesian state during both Sukarno’s Guided Democracy and Suharto’s Pancasila Democracy reflected in the kinship analogy, is akin to a father-child relationship, between the state and its leaders towards its people. Suharto declared himself *Bapak Pembangunan Nasional* – Father of National Development. The manner kinship relation has penetrated the state which remained so after Suharto’s fall in 1998 is shown in the way the term *bapak* has evolved as a form of deference towards elders to an expression of power-relations involving any holder of a position of authority with his subordinate, the former ‘able to intercede with the state or other institutions, disregarding the law, in favour of a subordinate considered as his ‘beloved child’.’

The judicial system, the ultimate institution to uphold the rule of law is an obvious casualty of patrimonial rule. Its integrity depends as much on the respect and autonomy that other state institutions are willing to confer it with. Assertion of judicial independence seems to be on the rise when parliaments likewise show relative independence with respect to the executive. During a brief period in Indonesia’s post-colonial period, some judicial personnel asserted their independence when the parliament was supportive of such initiative but vanished as soon as parliamentary order collapsed. A reassertion of judicial independence has increasingly been shown by the Philippine Supreme Court after the fall of dictatorship under Marcos. It thus observed that –

‘Particularistic considerations also penetrate the judicial systems in patrimonial states. The scales of justice tip heavily in favor of those with the requisite connections and wealth. The rule of law ends up perverted and corrupted by the personal connections to which it is supposed to turn a blind eye. As with the legislature, the judicial branch in the patrimonial state abdicates its role of check on the power of the executive branch, and lacks institutional accountability.’

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555 Eric Budd, ‘Whither the Patrimonial State in the Age of Globalization?’, 42.
3.1. Nationalism, religion and ethnicity, and the emergence of ‘strong’ states

Elite rule and patronage politics alone however are inadequate to account for distinctive institutional forms evolved by each Southeast Asian state. Nationalism is a powerful social movement spawned by colonialism and responsible in shaping ideas of nation-statehood by emerging national elites. The nationalist movement was so powerful that after World War II there was no option left for foreign powers but to relinquish colonial rule. Only Netherlands tried to stem the tide back through negotiations and force only to be thwarted by Indonesian nationalist resistance, opposition by other colonial powers, as well as the mediation of other states. Nationalism was formed out of consciousness of local elites based on their perception of unequal status and condition with respect to their colonizers, on growing awareness of their distant past, on increasing access to education and higher learning, and also on the propagation of modern ideas of liberty, equality, and democracy that were developing in the Western world. They also became aware of external movements happening in other colonies such as the Filipino nationalist revolution against Spanish rule in 1898, other social movements that engulfed China and Russia in the early twentieth century, but also the rising influence of Japan representing Asian might and power. Throughout the colonies, students would inspire nationalist stirrings such as the Filipino Jose Rizal or become leaders of nationalist and liberation movements like Sukarno of Indonesia.

The formation of separate identities in the colonies was intertwined with the issue of religion and ethnicity but also, as in the Malay states, defined according to the transformation of authority by traditional rulers in the face of British intervention. These issues, particularly of religion and ethnicity, would persist at post-colonial states in Southeast Asia and re-emerge in national discourse on central-regional/local relation or in the re-appearance of tensions or conflicts among different ethnic or religious groups. The issue of multi-ethnicity has been confronted by Southeast Asian states

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within the prism of varying nationalist conceptions, the idea of nationhood as the umbrella by which different groups are subsumed or integrated into a coherent whole.

In the condition of heterogeneity and artificially-constructed territories prevailing in post-colonial Southeast Asia, the state assumed a homogenizing function by building political cohesion and order, and equally important, through the appropriation of ‘dominant’ indigenous or traditional ideas, symbols or rituals that have been incorporated into national ideologies. In post-colonial Southeast Asia, the ‘nation’ did not immediately coincide with the idea of a nation as an ‘imagined community’ or the existence of shared community of interests such as language, ethnicity, culture or religion. Nationalism, which has been largely fuelled by common experience of colonial oppression, needs to galvanize the idea of belongingness and identity to a particular community. With the end of colonial rule, the state has to anchor its legitimacy in the identity of a nation and thus also the function of fostering nationhood.

The nation becomes the framework of organizing the state but also in turn becomes a political project. Central to the project is the process of consolidation of state authority through the monopolization of legitimate control over the means of violence within the newly-constructed territory. But as ‘nationhood’ becomes a contested process, it has produced and built on inequalities which are reproduced on state institutions and bureaucracy. The rule of law in Southeast Asia has developed along the particular vision of a new polity and in responding to the competing forces of nation-state building. But the manner by which the rule of law has been embraced accounts in large measure the degree of cohesion and stability achieved and the capacity of the state and society to respond to major crises.

Like most Southeast Asian states where plural societies exist, Indonesia and Malaysia present contrasting methods in managing their societies and the use of the rule of law. Indonesia however begins with a different historical perspective. The majority of its various ethnic groups, and mostly spousing different religious practices, are

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endogenous to the regions or existing prior to Western colonialism. At the close of
Japanese invasion, other island regions were anxious about joining the formation of a
Republic of Indonesia due to fears of Javanese or Islamic domination such as in Bali
and Ambon which have Hindu and Christian majority or that the new country is not
Islamic enough as advocated by Darul Islam movement in West Java, Aceh and South
Sulawesi.561 Since the proclamation of independence in 1954 and until 1958, the new
republic had to deal with tensions between central government and the regions and the
various rebellions from these regions which had advocated for greater autonomy or
separation.

The beginnings of nationalism in Indonesia were expressed along religious line
through the formation of social organizations particularly the Muhammadiyah
established in 1912 which promoted mass education and whose adherents transcended
ethnic particularism and local variants of Islam.562 The first mass nationalist movement
was traced from Sarekat Islam founded by the same urban reform Islam which started as
a campaign against perceived Chinese dominance in economic activities. It spread into
a wider movement for change and would eventually include adherents of socialism that
became popular among trade unions.563 The ideological differences and competition
between Islam and communism were brought to the fore during the Sukarno regime.
This would eventually culminate in one of the deadliest pogroms in history, the violent
killing of between five hundred thousand to a million suspected communists – ‘one of
the worst mass murders of the 20th century.’ 564 This occurred mostly in Java and in
Bali and mostly against Chinese, after Suharto’s ‘counter-coup’ in 1965 suggesting that
the massacre had taken on both ideological and ethnic dimensions encouraged by the
new regime showing its ruthless capacity for violence in the name of establishing order.

The state of rule by terror or coercion, not even approximating ‘rule by law’ that
attended particularly the early years of Suharto had been well laid by the form of state
established at post-colonial era. The oppressive character of Dutch colonial rule led to

561 Graham Brown, ‘The Formation and Management of Political Identities: Indonesia and Malaysia
Compared,’ 15.
562 David Joel Steinberg, In Search of Southeast Asia, 300-11.
563 D.G.E. Hall, A History of Southeast Asia, 752-3; David Joel Steinberg, In Search of Southeast Asia, 306-7.
564 See interview with Filmmaker Chris Hilton on the Anti-Communist Purges in Indonesia in 1965-66,
the rejection of ‘bureaucratic rationality’ that led intellectuals to revisit traditional forms of authority as the foundation of the emerging nation-state. Post-colonial legal debates were thus centred between the establishment of negara hukom (law state) or the integral state representing two dominant pressures on the state-building processes in Indonesia. The first advocated a return to the glorious past and its symbols in reaction to centuries of foreign domination and the second clamoured the institution of modern rational-legal rule as the means to attaining social, political and religious equality. The legal debate at independence paralleled the discourse on the establishment of either a Islamic state or a secular one based on the philosophy of Pancasila which is not only an ideology to foster a political compromise among various religious, ethnic and ideological groups but also an ideological expression of Indonesian culture and personality.

Ironically, the integral state instituted under the Indonesian Constitution of 1945 is said to echo Germany’s Nazi regime and Japan’s Dai Nippon state from which Raden Soepomo, an expert in customary law, had regarded as being consistent with Indonesia’s indigenous form of government. The integral state assumes an organic relationship between state and society emphasizing the values of harmony and cohesion and the rediscovery of the revolution as the basis for all political action and policies. It emphasized collectivism instead of individual rights where decision-making is conducted through bermusyawarah and mufakat (consultation and consensus) and that the people and leader are united by the spirit of gotong royong and kekeluargaan (family spirit). The Indonesian concept of decision-making, thought to be common in villages in Southeast Asia, would later on become the cornerstone of ASEAN diplomacy and would also underscore the leadership position that Indonesia assumed in the association. This consensual diplomacy however stands in sharp contrast to the early years of Indonesian foreign policy where, with the confluence of

ideological – anti-colonialist and nationalist ambitions, as well as political (internal political chaos) factors, adopted a policy of diplomatic and armed confrontation with Malaysia called the konfrontasi.\(^{570}\)

Soepomo thus explained the nature of Indonesia’s unitary state as –

‘…based on an integralist state philosophy, on the idea of a state which is united with all its people, which transcends all groups in every field…The state is nothing but the entire society…According to the integralist view as a nation in its ordered aspect, as a united people in its structured aspect, there is basically no dualism of state and the individual, no conflict between the state organization on the one hand and the legal order of individuals on the other…’\(^{571}\)

With a fractious political party system, rebellious regions, weak civil bureaucracy and a highly politicized population resulting from the revolutionary struggle,\(^{572}\) the model of the integral state became the perfect vehicle, or perhaps an excuse, for the gradual establishment of a strong government in Indonesia. With a strong backing by the military and replacement of parliamentary democracy, Guided Democracy was enforced where Sukarno virtually possessed, as the highest leader, all of the state’s highest institutions – the DAP (Supreme Advisory Council), MA (Supreme Court), DPR (Parliament), and ABRI (Armed Forces). By Law No. 19 of 1964 and Law 3 of 1965, Sukarno was given authority to intervene in the judiciary if necessary to protect national interests or when security of the state is threatened.\(^{573}\) The same state structure prevailed in the Suharto era guided by the resurrected Pancasila Democracy with a stronger military at its core.\(^{574}\) State domination became the hallmark of Suharto regime and having embarked on systematic depoliticization by treating the population

\(^{570}\) Konfrontasi was largely understood as Indonesian (with Philippine support) opposition to the formation of the Federation of Malaysia and was mainly domestic-driven. However, there is evidence to show of explicit British involvement that provoked Indonesia’s response under Sukarno. See for example, Greg Poulgrain, *The Genesis of Konfrontasi, Malaysia Brunei Indonesia 1945-1965*, (United Kingdom, C. Hurst and Co. Publishers, 1998).


\(^{573}\) Kanishka Jayasuriya, ‘Corporatism and judicial independence within statist legal institutions in East Asia,’ 190.

as a ‘floating mass’ whose only political activity is to vote at regular elections, the state
penetrated even further into the everyday life of the people.575

Malaysia, by comparison, started as a consociational democracy576 guided by the ‘Independence Bargain’ negotiated among its main racial groups in peninsular Malaysia – the Malays, Chinese, and Indians. Composed largely of alien immigrants brought about by British colonial economic policy of developing an extractive industry through alien labour, these two latter groups had more education as well as more commercial and financial interests than the Malays by the end of the colonial period. By 1931, the overall population in Malay states showed Malays at only 44.7% followed closely by the Chinese at 39% and the Indians at 14.2%.577 The 1957 Malaysian Constitution was initially thought of as a social compact among the main ethnic groups with the understanding that the Malays in exchange for the recognition of Malaysian citizenship to non-Malays, the bumiputeras or sons of the soil, would be entitled to political and administrative supremacy while the economic activities of the others would not be interfered with.578 Under this arrangement, a federal system of government was instituted rather than a unitary state proposed by the British, the institution of the Yang di-Pertuan Agong or the institution of Malay Rulers as ceremonial rulers within the modern constitutional system,579 the establishment of Islamic law and Shari’a courts that would only apply to Malays, and the propagation of Malay as the national language.

The other two states in Borneo, Sarawak and Sabah, which finally joined the federation in 1963 were likewise the products of negotiation enshrined in the constitution. Their incorporation into the Malaysian Federation was both opposed by

576 Lijphart described it as government by elite cartel designed to manage a fragmented political structure based on plural society into a stable democracy. See for example M. Sami Denker, ‘The Plural Society and Consociational Democracy Theory: Malaysia’s Case,’ in http://sbe.dpu.edu.tr/17/139-156.pdf, viewed on 7 August 2009.
577 J.R.E. Waddell, An Introduction to Southeast Asian Politics, (Sydney, John Wiley and Sons, 1972), 136.
579 The system is said to have been derived from the pre-colonial state of Negeri Sembilan in Andrew Harding, Law, Government, and Constitution in Malaysia, (London, Kluwer Law International, 1996), 10-5.
Indonesia and the Philippines but also that the inhabitants and multi-racial elites had been at first reluctant. These two outlying states are ethnically and religiously distinct from peninsular Malaysia and are less economically developed despite the abundance of natural resources. However, joining the federation had seemed to be the only feasible alternative in view of Britain’s policy to withdraw from colonial territories. It was also a fitting solution to the dilemma faced by peninsular Malaya over a Chinese-dominated Singapore becoming part of the federation as well as a way to contain the influence of communism which had become influential particularly in Sarawak. As a result, special guarantees and concessions were given to the two states among which are in the area of education, language, ethnic composition of the civil service, and restraint on immigration of Malays.

The Malaysian nation-state came about as a result of multi-ethnic compromises among the major racial groups. The origin of Malaysian nationalism, though still intensely debated, has been largely traced from British efforts at decolonization after the war. It was expressed as a reassertion of Malay’s birthright and therefore Malay’s pre-eminence but also developed to be an inclusionary multi-ethnic nationalism. The rejection of British proposal for a ‘Malayan Union’ granting equal citizenship to all racial groups had fully awakened Malay consciousness but it also had to confront a fundamental ‘changed circumstance’ and therefore the necessity for promoting inter-racial harmony and cooperation. This multi-ethnic nationalism would be underscored by the formation of the Alliance Party (renamed Barisan Nasional or BN) among the three major political parties representing the three major ethnic groups in Malaysia – United Malay National Organization (UMNO), Malayan Chinese Association (MCA), and Malayan Indian Congress (MIC).

The persistent tension between the all-inclusive Malay nationalism and Malay dominance would become a feature of Malaysian politics that would be resolved

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increasingly in favour of the latter in the aftermath of the 13 May 1969 race riots. The riots began on 13 May 1969 started by demonstrations and counter-demonstrations of supporters of race-based political parties culminating in four days of communal violence in Kuala Lumpur and neighbouring areas.

This event would be followed by the imposition of the national emergency, the establishment of the NEP, and most important the passing of constitutional amendments in 1971 which barred from public debate, and making it seditious, the issue of the position of Malay rulers and the special rights of the Malays. The government found the demonstrations as a rude criticism of the pre-independence compact but also a perfect opportunity and rationale for the launching of NEP as the keystone for the Malaysian drive to modernization and economic development.

The basis of government’s manipulation of constitutional or legislative passages had been through Barisan’s two-thirds parliamentary dominance since independence that was only reduced to majority in the 1969 elections leading to the riots. The 8 March 2008 elections however ended Barisan’s almost 50-year invincibility having lost its two-thirds majority in the federal parliament and the majority in the five states in the 2008 General Elections. The elections, which saw both ethnic Malays and non-Malays supporting the opposition, are touted as a watershed in Malaysian politics which could pave the way for a non-communal politics and a healthy multi-party contests. While the 2008 elections is seen to further democratization, it is also observed that the results could pave the way for re-radicalization of Barisan’s component parties dominated by Malay nationalists to restore support among its constituent ethnic groups.

Perceived as unprecedented in the history of Malaysian communal politics, the setback of the ruling party had been attributed to several factors:

584 The riots began on 13 May 1969 started by demonstrations and counter-demonstrations of supporters of race-based political parties culminating in four days of communal violence in Kuala Lumpur and neighbouring areas.


‘the ineffectual fight against corruption, deteriorating interreligious relations, the high crime rate, increased consumer prices, and the provocative confirmation of Malay rights by UMNO politicians…the efficient cooperation between civil society and the political opposition since 2004, which was partly facilitated by the use of new media…”’

Elsewhere in Southeast Asia, newly-formed governments embarked on the project of nationalism which also became the rationale for distinct ‘un-Western’ processes of state-building. Singapore adopted a state ideology of ‘survival’ as key to overcoming chronic poverty and underdevelopment in the midst of economic and political expulsion from Malaysia in August 1965. This entailed promoting Singapore as an ideal foreign investments destination enjoying political stability, and the absence of dissent and pliant labour force. Once Lee Kuan Yew’s People’s Action Party (PAP) gained the upper-hand in the internal struggle in the party in 1961, a de facto one-party system was evolved achieved by enacting successive legislation aimed at wiping out the opposition, detaining key opposition figures at indefinite periods of time, and bringing the media under the control of the state. Singapore’s economic success and political stability has been flaunted as an alternative model of governance to developing countries. It has been anchored on its disdain of Western-style liberal democracy to a performance-based regime calling itself, ‘soft authoritarianism’, or ‘illiberal democracy’ to others and rediscovery of Confucianism which is reflected in the espousal of an ‘Asian values’.

Until the onslaught of the democratization movement in the 80s, most states in Southeast Asia had tended to subscribe to a form of the rule of law which accompanies distinct processes at nation-state building. It has been observed that the more the governments become more authoritarian, the more they had used nationalism to consolidate the regime instead of building the nation-state. Conditioned by different historical and political circumstances, Southeast Asian states developed a rule of law

591 See Harold Crouch, Domestic Political Structures and Regional Economic Cooperation, (Singapore, Institute of Southeast Asian Studies, 1984), 14; Also Chan Heng Chee, The Dynamics of One Party Dominance, (Singapore, Singapore University Press, 1976), 205-6.
593 Nicolas Tarling, Nationalism in Southeast Asia, If the people are with us,’ 195-6.
which tended to establish state autonomy, lesser or inexistent legal and institutional constraints to state authority, the privileging of dominant ethnic group as a way to foster territorial and social unity, the primacy of communal interests over individual rights, and the suppression or regulation of an independent civil society. These relationships would not remain to be static but in constant tension and contestation as the region faces internal and external challenges.

Before discussing the individual state of the rule of law in the five original member countries of ASEAN, the following two sections briefly discuss two issues that pose significant challenges to nation-state building and the rule of law in Southeast Asia in contemporary period. These issues are vestiges of the colonial past but also show how the processes of nation-state building could exacerbate or galvanize extreme forms of reaction to real or perceived marginalization and injustices. These two issues likewise show the confluence of internal and external factors and thus the necessity for cooperative and comprehensive action at the regional or international level. Consequently, the rule of law is not insulated from these changes or influences.

3.2. Defending the integrity and unity of the nation-state against the emergence of Islamist radicalism

At the extreme, the racial problem in Southeast Asia has galvanized the emergence of radical and violent forms of protests. Radical groups have sprouted in the five countries and are said to have developed links with each other. They either advocate the formation of separatist state or the overthrow of current state to be replaced by more conservative Islamic state. The rise of conservatives and radicals espousing terror and violence to achieve their political goals is threatening even non-traditional Muslim conflict country like Singapore.594 The Islamist movement in the region is either classified as ‘terrorist’ or insurgency groups although the lines are becoming blurred, has long historical roots predating al-Qaeda and September 11, and is underlined by fundamental grievances of a political, economic and social nature.595

595 Andrew Tian Huat Tan, A Handbook of Terrorism and Insurgency in Southeast Asia, 3-24.
The radical Islamist movements across the region are increasingly perceived as a threat to the cohesion and security but also present an enduring and continuing challenge to the legitimacy of the nation-state.\(^{596}\) As violence escalated in various forms – not only against the states and their agents but also increasingly targeting the civilians and foreign nationals, increasing pressure is placed upon the states to adopt tougher policies or measures which are already on top of existing restrictions to individual freedoms. On the other hand, the issue is being used by competing national elites to advance particular or nationalist interests. The Muslim insurgency in Thailand and the Philippines shows examples of historical grievance being transformed into broader social, political, and economic issues within the nation-state. Their cases also show how central government policies and politics have contributed to their increasing radicalization.

The Malay-Muslim issue in South Thailand has spawned the longest running insurgency movement that started initially as a form of protest against their incorporation into the Thai state and to the central government’s policy of integration and assimilation adopted until the 70s that seeks to channel Muslim allegiance into the Thai ‘nation, religion (Buddhism), and monarchy.’\(^{597}\) The policy of accommodation providing for greater social, religious and political autonomy implemented in the 80s had pacified the situation in the region. Marginalized and comprising the poorest regions in Thailand, the old separatist movement in the 60s in the region, has been revived into newer radical Muslim insurgency under the government of Thaksin Shinawatra.\(^{598}\) By most accounts, the revival of the insurgency was traced immediately from the dismantling of two institutions established in the 80s which were used as mechanisms to discuss grievances and promote cooperation between state authorities and Muslim-Malay inhabitants.\(^{599}\)

It seems that with ineffective legal and institutional mechanisms to manage conflicts or the absence of meaningful political discussion, armed option follows as a


\(^{599}\) These are the: Southern Border Provinces Administrative Centre (SBPAC) and the Civilian-Police-Military Task Force 43 (CPM-43).
matter of course. With the loss of mechanism of conflict management, armed violence was launched in 2004 in the south where Thaksin responded with even more military and state-sanctioned violence and the imposition of martial law in the region. Even with the change of government and restoration of grievance mechanism, the escalation of conflict has not abated. This is largely attributed to the failure to address substantive issues such as education, past atrocities and human rights violations, economic development and issue of local and regional governance.\textsuperscript{600} Serious political discussion on the conflict has yet to emerge on central government leadership while ‘draconian laws’ remain in place – martial law, the Executive Decree on Public Administration in Emergency Situations, and the Internal Security Act. The existence of these laws has caused serious violations of human rights and continued insecurity by the Malay-Muslim and only serves to empower the military and security apparatus in the region.\textsuperscript{601}

A fragmented political environment with ineffective and political institutions to manage the Muslim insurgency problem has the tendency to result in policy missteps. Again, the handling of the Malay-Muslim issue in Thailand reflects how political exigencies could jeopardize an already fragile situation. The re-emergence of conflict in the south is seen as a consequence to Thaksin’s nationalist and populist policies adopted to bolster the regime.\textsuperscript{602} The campaign on the south was initially carried out as a ‘war on drugs’ which resulted in the summary executions of more than two thousand people, with a number of Malay-Muslim being killed. But it was also seen as a deliberate policy designed to ‘reorganize’ politics in the south which is a bastion of Thai Rak Thai’s opponent, the Democratic Action Party (DAP).\textsuperscript{603}

Similarly in the Philippines, politics either derails or advances the process of peace settlement with the insurgent groups - depending on what coalition of elites is in power. While in the Thailand the lack of serious political discussion inhibits the comprehensive settlement of the conflict, government policy in the Philippines has also

\textsuperscript{601} International Crisis Group, ‘Thailand: Political Turmoil and the Southern Insurgency,’12-5.
\textsuperscript{602} Thitinan Pongsudhirak, ‘The Malay-Muslim insurgency in Southern Thailand,’ 269-71.
changed with the fluid political environment. Negotiated settlements with the Muslim insurgent groups have been made since the Marcos regime which resulted in the signing of major accords – the Tripoli Agreement in 1976 under the mediation of the Government of Libya and the Peace Agreement in 1996 under the Ramos administration. The first was not implemented which led to escalation of conflict. The 1996 agreement led to a brief respite of violence and the institution of the Autonomous Region of Muslim Mindanao (ARMM) only to break down in 2001 on charges of mismanagement and corruption levelled against the leader (and former governor of the ARMM) of the major Muslim insurgency group, the Moro National Liberation Front (MNLF). This will have a repercussion in the formation of several splinter groups fighting against the government particularly the Moro Islamic Liberation Front (MILF), the Raja Soliman Group (RSG) and the Abu Sayyaf, the latter being engaged not only in violence but also kidnapping and extortionist activities.

Like the Thai situation, the Philippine policy on Muslim insurgency has been driven on various occasions by populist politics which only led to greater violence on both sides, and increasing alienation and insecurity by the minorities. The Estrada administration’s policy on all-out war (total war) policy in Southern Mindanao was also in part a product of a political strategy to gain popular support in the face of brewing challenges to his government. The aftermath of that policy, which was mainly based on military approach, was the displacement of hundreds of thousands of Muslim people from their homes and the military becoming a virtual ‘occupation force’ in Mindanao. The current Arroyo government negotiated a peace agreement with the MILF known as the Memorandum of Agreement on Ancestral Domain (MOA) to be signed on August 2008 in Kuala Lumpur.

The MOA has its merits and based on the recognition of the Moro people’s historic fight for freedom from colonial rule, their right to practice their own culture and

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606 Abu Sayyaf means, ‘bearer of the sword’, is notorious for undertaking kidnap-for-ransom activities the most famous of which are those in 2001 involving 30 people, many were foreigners, in a resort in Palawan Island and recently in July 2009 of three personnel from the Red Cross.
religion, and right to manage their natural resources. But it was negotiated in utmost secrecy and is perceived by some quarters as a pretext to the regime’s persistent initiatives at amending the democratic Constitution of 1986 and extending the term of the president. Before it could be signed, the MOA was leaked in the media. With the expected outrage by Christian politicians, the MOA was challenged in the Supreme Court which issued a temporary restraining order and thereafter the agreement was scuttled by the government. The Supreme Court, on occasional show of judicial independence, disposed the case on the merits by declaring the agreement unconstitutional on the ground that the government negotiating panel failed to carry out their duty of public consultation with local government units and communities but also construing that the entity envisaged in the agreement amounts to a state entity which could be on its way to independence.

Governments in the region are increasingly recognizing the need to address the underlying causes of terrorism and the necessity for comprehensive approach to the problem. However, there is also growing consensus that the fight against terrorism is increasingly being employed as a pretext not only in going after the terrorists but also even against Muslim reformists, activists and the opposition in general. New terrorism legislation such as the Philippine Human Security Act 2007 (HSA), Thailand’s Executive Decrees passed on 11 August 2003 and Indonesian legislation on March 2003 gave broad discretionary powers to government to arrest and detain suspects indefinitely without the benefit of trial and allow commission of torture and other barbaric means of extracting confession or evidence in view of the laws’ vague definition of the crime and fewer, if not absent, institutional protection against abuses. In the Philippines particularly, the HSA sends an even chilling signal to the critics of the government in view of the spate of extra-judicial killings perpetrated against suspected communist


insurgents and against civil society activists and journalists. 610 It is likewise feared that the use of old repressive security measures such as the Internal Security Act (ISA) in Singapore and Malaysia to combat communist insurgency in the past has been revived with much gusto by the governments against other enemies of the state. 611

Despite its somewhat ‘illiberal’ approach, Singapore’s comprehensive strategy at countering the issue of terrorism is becoming a model to other countries in the region. Its policy is not only grounded on ‘hard’ approach consisting of tough military and surveillance measures but also on acknowledging that the problem is rooted in domestic conditions as shown by the discovery of its ‘self-radicalized’ terrorists. 612 Its apparent success in managing its multi-racial society since its formation has been attributed in large part to its official policy of multiculturalism. It is a state-managed approach that promotes and protects racial and cultural identity among its various racial groups (under the CMIO – Chinese, Malay, Indian and Others, category) within the rubric of shared national consciousness. 613 This very same policy accentuated racial differentiation and may have resulted in radicalization of certain individuals. But by complementing its hard approach with new and innovative multiracial policy that seeks to address the issue on the ground by creating institutional mechanisms that promote a broader sense of community and solidarity among the various groups, 614 Singapore has been relatively successful in preventing the occurrence of violent confrontation and bloodshed arising from ethnic or religious differences that have attended its neighbours in the region.

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614 Various social and educational programs have been implemented complementing its old policy of multiculturalism such as Inter-Racial Confidence Circles (IRCCs) and Community Engagement Program (CEP) also in Norman Vasu, ‘(En)Countering Terrorism: Multiculturalism, Social Resilience and Singapore,’ 11-20.
3.3. The persistence of military influence in the state and its ‘role’ as final arbiter of political conflicts

Western traditional role assigned to security forces – comprising the military, police and intelligence agencies, is in securing the state from external threats and in conducting internal peacekeeping. The military is supposed to be under civilian control and accountable to civilian authority. However, the military in Southeast Asia has performed various roles beyond their traditional role and are not strictly based on the separation of civilian and military relations.615 In Indonesia, the military or ABRI (Angkatan Bersenjata Republik Indonesia) played an important role in the revolutionary struggle for independence and their post-independence role in politics was recognized as an embodiment of Indonesian nationalism.616

The military’s influence in politics is traced from post-colonial rule having emerged as the most cohesive force in society and in view of weak civilian political institutions and fragmentation of political parties and elites.617 With their possession of means of coercion and established nationwide bureaucratic networks, the military in Southeast Asian states developed a developmental role in the political, social and economic sectors.618 Their role was even more expanded as they become indispensable in the counter-insurgency drive against the threat of communism. The Philippine military is a prime example of a military establishment that was transformed from a professional corps performing traditional peacekeeping function to an essential tool for counter-insurgency drive of the government in the 50s and thereafter a vital component of repression of Martial Law under Marcos.619

The prominence of the military in Southeast Asian states reached its height during the Cold War era. ASEAN itself had been organized to confront the security issue

618 Mark Beeson and Alex Bellamy, ‘Taming the tigers? Reforming the security sector in Southeast Asia,’ 456.
619 Nicholas Tarling, The Cambridge History of Southeast Asia, (United Kingdom, Cambridge University Press, 1999), 100.
presented by the spread of communism in Indo-China. Thus by the time of the formation of ASEAN in 1967, the military had seized power in Indonesia in 1965 through a bloody counter-coup led by General Suharto. Thailand was likewise under a military regime. The Philippines would soon be under Martial Law in 1972 while progressive trend towards authoritarian rule were developing in Singapore and Malaysia.

Singapore however is largely regarded as observing the principle of civilian supremacy with civil authority being in firm control over the affairs of the military. As is the civil service, there exists however functional integration between political and military personnel. It is observed that this integration is rather a ‘fusion’ than imposition of civilian supremacy. As part of government policy to recruit the best and the brightest in the military and send them to the best schools in the world, the military has in fact become the breeding-ground for the country’s top leaders. There seems to be little doubt however that the existing civilian-military relationship has promoted stability nor resulted in military intervention in civilian politics. The case however of Singapore cannot be oversimplified as to be a model to other states in the region where civilian-military cooperation in the political sphere is similarly entrenched or fused. Moreover, it is observed that the tight civilian control in the 80s is being eroded by the extensive presence of former military officers holding high positions in government.

The military’s influence in the political process, particularly in the three states of Thailand, the Philippines and Indonesia, has been one of the most serious obstacles to democratic transition and in establishing the rule of law in the region. Some have

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620 See for example David Martin Jones and Michael Lawrence Rowan Smith, *ASEAN and East Asian International Relations, Regional Delusions*, (United Kingdom, Edward Elgar Publishing, 2006), 9-10.
621 In Sean Walsh, ‘The Roar of the Lion City: Ethnicity, Gender, and Culture in the Singapore Armed Forces, Armed Forces and Society, Vol. 33, No. 2 (January 2007), 266-77.
625 Mark Beeson and Alex Bellamy, ‘Taming the tigers? Reforming the security sector in Southeast Asia,’ 449-72.
cited the role of the military in leading economic modernization process. However, their performance in Southeast Asia has not been proven to be any better than the civilian authority. In Indonesia for instance, military officials sat in lucrative government corporations. Pertamina, the state-owned oil company, was called a ‘state within a state’ as the technocrats did not have control over their operations nor did the corporation issue its financial records. On the other hand, their performance in the political arena shows to be significantly and consistently poorer and is usually authoritarian.

This section deserves to mention the Burmese military which seized power in 1962 that turned the country, regarded once as a jewel in Southeast Asia with its rich natural resources and well-developed bureaucracy, into one of the most oppressive, poorest and isolated countries in the world. It continues to defy calls for democratization and brushed aside the results of the first ever democratic election in 1992. It did not wish to open its borders to international aid even for the sake of humanitarian assistance for an irrational fear of exposing its people to any form of international influence. The Burmese junta or the State Peace and Development Council (SPDC), remains to be the biggest blight and challenge to ASEAN’s cohesion and its initiatives at improving credibility to the outside world. There is simply no rule of law, much less rule by law, when the military junta could at will change laws and coopt legal institutions to imprison an opposition leader over frivolous charges in order to prevent them from joining the elections. Law in this case is being used to legitimize an otherwise patently discretionary and absurd action by the military junta.

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627 See for example Zakaria Haji Ahmad and Harold Crouch, eds., Civilian-Military Relations in Southeast Asia, (Singapore, Oxford University Press, 1988).
628 Adnan Buyung Nasution, ‘Democracy’s Struggle in Indonesia,’ 84.
631 Burma, now called Myanmar, has refused to open its borders for technical and other expert disaster assistance from other countries, even the ASEAN, despite massive destruction and human suffering brought by cyclone Nargis on 2-3 May 2008.

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The ASEAN ‘cannot move forward until changes occur in Burma,’ acknowledged Thai Foreign Minister Kasit Piromya. Critics of ASEAN uses Burma as a barometer for the organization’s institutional effectiveness and this criticism has become even sharper in the wake of ASEAN’s inability to make a quick, united and effective response to Burma’s intransigence. ‘The attitude of the military junta in Myanmar is clearly one reason for the inability of the ASEAN to move as a group’, said Rizal Sukma, a noted ASEAN observer.

The importance of the rule of law in reforming and transforming the military establishment in Southeast Asia has come at an important juncture of establishing democracy in the region. On a more positive note, it has been noted that on the wave of democratization movement that swept the region in the 80’s the military’s centrality in the political life in the ASEAN states, particularly in Thailand, Indonesia and the Philippines, has either declined or been transformed. The military’s influence has largely been affected by widespread disaffection of military brutality as well as the increasing clamour of a rising middle class for more tolerance of different political views and respect for individual freedoms. By the 80s, the military in the region is largely perceived as highly corrupt, an anti-democratic force, and has entrenched political and economic power on their own.

3.3.1. The revival of military influence in democratic transition and continuing threat to the rule of law

With the overt revival of military intervention in democratizing countries in the region, particularly in the Philippines and Thailand, it can be said that the democratization process has only given the civilian authority with a breathing space. The weakness of the political institutions to resolve political crises and the inadequacy of legal and judicial institutions to respond to major political controversies has enabled

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633 In ‘FM: Burma key to fate of ASEAN,’ Bangkok Post, 21 July 2009, 1.
military officials to exert significant influence over the outcomes or resolve the stalemate themselves. The lack of accountability for military personnel committing atrocities or in overthrowing governments has only emboldened the establishment. The Davide Commission in the Philippines tasked to investigate the proliferation of *coup d’état* in 1986 to 1989 found that the failure to hold the perpetrators accountable has established a ‘pattern of behaviour’ contrary to deterrence.\(^{638}\) It has thus become possible to ‘recapture’ state institutions with the renewed alliance between the military and national elites which inhibit further reforms at democratization.

In the Philippines, the overthrow of the Marcos regime in the People Power revolution on February 1986, supported by a faction of the military, ushered democratic reforms and a new Constitution in 1987. As a response to popular calls for reform in the military, various legal and institutional reforms were adopted that inculcate democratic principles of governance, provide comprehensive outline of the relationship, power, and responsibilities of various security sectors, and the establishment of civilian oversight institutions within and outside the government including legislative committees, executive and judicial bodies.\(^{639}\) These reforms however are defeated by ‘misuse, abuse, and lack of observance of applicable law, rules, and regulations in the exercise of these powers’ and thus reforms have not resulted in promotion and achievement of sustainable peace.\(^{640}\)

While no *coup d’états* have so far succeeded since attempts at overthrowing the democratic government of Corazon Aquino, the military has succeeded nevertheless in gaining substantial influence on the government and its policies. The military establishment in the Philippines has always derived its influence from its role in counter-insurgency and continues to perceive threat against national security from the Communist Party of the Philippines and its armed component. The Aquino government, though reluctant, had succumbed to military pressure of re-deploying total war policy against the communists against the backdrop of threats to civilian rule. She had appointed an increasing number of retired military and police personnel to strategic

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\(^{640}\) Carolina Hernandez, ‘Security Sector Reform and Governance in the Philippines,’ 2.
offices in the executive and the practice continues to this day even appointing former military officials to constitutional bodies like the Commission on Elections and the Ombudsman.\textsuperscript{641}

The current administration of Gloria Arroyo has been likewise plagued by coup attempts from young officers of the military denouncing corruption in government and beset by legitimacy problem arising from allegations of electoral fraud and corruption scandal. Arroyo has increasingly caved in to senior military officers’ demands for militarization on the pretext of inflated communist threat and its alleged fronts in parliamentary politics. She ‘is a compromised figure whose continuance in office seems dependent on the support of key “loyal” senior officers’.\textsuperscript{642} The result had been a new wave of intensive extra-judicial killings and forced disappearances of suspected communists but also civil society activists that have been traced from armed security. There is general belief that the government is behind the killings though it continues to deny the allegations. The Alston Report points that executions could be most likely blamed on the military or a faction of the military due to the victims’ profiles and the systematic manner of perpetrating the crime.\textsuperscript{643}

The tussle between ‘traditional’ elites and the populist politics ushered by Thaksin through his Thai Rak Thai (TRT) party can be seen as the underlying cause for bringing back the military as a central force in Thai politics. There is growing consensus that the election of Thaksin-led bourgeois capitalist and populist government has changed the political landscape in Thailand away from traditional politicians composed of urban elites and monarchy supported coalition.\textsuperscript{644} TRT’s overwhelming victory in 2005 general elections, the biggest electoral victory by a party in Thailand’s elections, was a consequence of democratic and electoral reforms under the 1997 Constitution. In response to broad coalition for democracy, the framers aimed to enhance civilian government stability by reducing the likelihood of unstable coalition governments that

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\item \textsuperscript{641} Carolina Hernandez, ‘Security Sector Reform and Governance in the Philippines,’ 4.
\item \textsuperscript{643} See Philip Alston, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to the Philippines, 12-21 February 2007.
\end{itemize}
\end{footnotesize}
had become susceptible to frequent coups in the past and by expanding the opportunity for broad political participation.\textsuperscript{645} The TRT became a beneficiary of these reforms.

Thaksin’s ability to consolidate and expand executive power, gain popular support and even trample upon the democratic principles in the constitution alienated significant sectors in society which include mainly the middle class, bureaucrats, traditional politicians and elites.\textsuperscript{646} Its overwhelming victory in the 2005 elections however owes much not only through its undeniable ability to exploit patronage politics deeply embedded in Thai politics but also because Thaksin’s populist policies resonated with the needs and aspirations of poor rural electorates.\textsuperscript{647} One of the rallying points for the opposition was to project Thaksin as competing with or undermining the monarchy. The coalition started to mobilize around the concept of \textit{rachaprachasamasai} or the mutuality of king and people and to calls for ‘return to royal powers’ expressed under Article 7 of the 1997 Constitution.\textsuperscript{648}

The ‘peaceful’ \textit{coup d’etat} on 19 September 2006, the first coup since 1991, came to break the polarity in Thai politics. Or so it seems. The political conflict has even deepened with the current polarization of the population expressed into groups of ‘red shirts’ and ‘yellow shirts’.\textsuperscript{649} While the King Bhumibol Adulyadej did not publicly invoke Article 7 and instead relied on his power of speech\textsuperscript{650}, it is believed that the coup was largely supported by the monarchy despite it being ‘above politics’. The military junta called itself ‘The Reform Committee in the Democratic System with the Monarchy as Head of State’.\textsuperscript{651} This polarity thus represents two schools of thought about the coup. The coup promoters and its supporters presented military intervention as

\begin{itemize}
\item \textsuperscript{645} See Michael Connors, ‘Political Reform and the State in Thailand,’ Journal of Contemporary Asia, Vo. 29, No. 2 (1999), 202-25.
\item \textsuperscript{646} Kitti Prasirtsuk, ‘From Political Reform and Economic Crisis to Coup D’Etat in Thailand,’ Asian Survey, Vol. 47, No. 6 (2007), 872-93.
\item \textsuperscript{647} See for example Somchai Phatharathananunth, Journal of Contemporary Asia, Vol. 38, No. 1, (February 2008), 106-22.
\item \textsuperscript{649} See however Colum Murphy, ‘Populism Erodes Thailand’s Old Order,’ Far Eastern Economic Review, 5 June 2009, at http://www.feer.com/essays/2009/, viewed on 13 August 2009, pointing to trends to transcend categorization and rallying points and emerging cross-class membership.
\item \textsuperscript{651} Giles Ji Ungpakorn, \textit{A Coup for the Rich, Thailand’s Political Crisis}, (Bangkok, Workers Democracy Publishing, 2007), 8.
\end{itemize}
the ‘good coup’ or the ‘only’ way to save democracy and the rule of law from the perversion TRT had employed to consolidate its power. This view goes in accord with the military’s insinuation of its function as ‘political guardian’ which implies the right to intervene whenever it perceives threat to national security.\(^{652}\)

On the other hand, the coup was clearly a setback to democratization and the rule of law. It attempts to reduce Thai politics into a tale of poor and ignorant voters bought by politicians during election time, a belief self-perpetuated by traditional elites. The head of the coup thus remarked that ‘many Thais still lack a proper understanding of democracy’ and the importance ‘to educate people about real democratic rule.’\(^{653}\) The ‘official’ view still refuses to acknowledge the burgeoning political awareness that has developed from below and one of the important catalysts during the democratization in the 70s and 90s. The new constitution drafted under military intervention is perceived to have eroded the democratic gains under the 1997 Constitution and shifted political power from the electorate and the politicians back to the traditional base of Thai political power - the military, monarchy and the urban elites.\(^{654}\) By recognizing the orders of the military regime as valid, a judicial practice that had been recognized since the 50s, the political salience of the military in Thai political life is re-validated. However, the fact that the Thai military had to hand back political power to the civilians in less than one year from the coup shows not only the lack of competence but also the absence of legitimacy to rule the kingdom in contemporary times.\(^{655}\) Thus Pasuk, a leading Thai economics professor, remarked that ‘Thailand’s globalized economy is incompatible with military rule.’\(^{656}\)

Reigning in the military is indeed a crucial task if civilian governments are to fully transition to democratic governance and the rule of law. In Indonesia, the power of the armed forces (TNI) was significantly diminished when viewed from its predominance

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during Suharto era. Despite absence of overt intervention in politics, it has remained an influential political force. A formal abrogation of the doctrine of Dwifungsi ABRI or dual-function military resulted from civil society demand which had guaranteed seats for the military in the parliament and involvement in civil affairs. A set of reforms embodied in a New Paradigm merely emphasized a change in methods, not complete withdrawal – such that it would not be in the forefront, a change from occupying to influencing, use of indirect means to influence, and willingness to engage in political role-sharing. The military, particularly the TNI, still holds ‘huge residual resources’ that enable them to exert political influence arising from their existing territorial structure, strong representation in the intelligence services, and its access to funds through its own businesses and other economic activities. As is common among the three states, the political influence of the military is not only derived from the ‘weakness’ or factionalism of civilian institutions but also derived from the persistence of internal conflicts. This rationale, the military role in ensuring national integrity, remains an inhibiting factor in security sector reform initiatives but also in establishing the rule of law in the military establishment.

4. **The socio-political basis of the constitutional developments in the five states of Southeast Asia**

Having discussed the historical origins of the state and the rule of law in Southeast Asia and contemporary challenges to statehood, this section provides a brief survey of the constitutional developments in each five states. Following the theme to explain these developments within the social and political framework, the section will only attempt to provide a general survey, rather than an exhaustive discussion, on each state. The aim of this section is to provide a general understanding of the rule of law through constitutional developments as a response to or consequence of changing political environment.

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4.1. Indonesia – from integral state to constitutional state

The abject marginalization of law characterized the Sukarno (Guided Democracy) and Suharto (Pancasila Democracy) eras. The two regimes represented the extreme forms of hostility not only towards Western-inspired democracy but particularly towards the rule of law and respect for human rights. The unity of the state and people presupposed by the conception of an integral state meant that the state embodies the law or the source of all laws. The state is therefore not constrained by the law. The 1945 Constitution was merely envisioned to be temporary and consists of just thirty-seven articles. It provided a constitutional basis for a totalitarian form of government where all powers - legislative, executive and military, are concentrated in the hands of the President. The 1945 Constitution, briefly superseded by a more democratic and liberal 1950 Constitution in the 50s, is not however considered the highest source of laws in the land. The state-imposed ideology, the *Pancasila*, is the highest source of national laws while its Preamble was superior to the body of the Constitution.

*Pancasila* is based on five principles – belief in one God, humanity, unity, deliberation for representation, and social justice for all Indonesians. It was by state-sponsored violence accompanied by insidious indoctrination of *Pancasila* Democracy at all levels of society that defined the process of state-building. Under the New Order regime of Suharto, the force of law was given to a triumvirate, the people, armed forces, and the government. From a constitutional perspective, the MPR (*Madjelis Permusjawaratan Rakyat* or People’s Consultative Assembly) composed of members of the parliament and representatives of regions and functional groups (*Utusan Golongan*), represents the highest state institution. Below the MPR are the five institutions of the

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662 Preamble, 1945 Indonesian Constitution.
664 MPR is composed of 695 members meeting every five years, 500 from the DPR, 130 from representatives of provinces elected by local parliament, 65 from functional groups appointed by the
President, the DPR (Dewan Perwakilan Rakyat or the Parliament), the MA (Makahma Agung or Supreme Court), the Supreme Advisory Body (the government’s advisory organ), and the Audit Supervisory Body. The MPR has the power to elect the President and Vice President, to amend the Constitution and to enact a General Guidelines for State Policy (Garis Besar Haluan Negara or GBHN) every five years.

With widespread lawlessness punctuated by government’s violent ‘extra-legal’ campaign on ‘nameless communists’ the Indonesian state assumed not even the thin ‘law state’ Rechtsstaat or ‘rule by law’ but a narrower and more formalistic sense, the ‘law by the rulers’. Law in general was regarded as a constraint on the state. But where law is needed to enhance state power, legislation in the form of security and subversion laws had been enacted. A highly centralized form of administration and a state-managed economy dominated by a few elites close to Suharto and the military had taken a virtual monopoly of political and economic power in Indonesia.

It is against the backdrop of the virtual absence of the ‘rule of law’ that the reformasi or Reformation movement in Indonesia has been anchored. Democratization, human rights and constitutional change are the platform for the new Indonesian republic seeking to re-establish negara hokum and trias politika (separation of powers). Since the holding of the first democratic elections in 1999 after Suharto’s fall, the ‘new’ MPR had approved three successive constitutional amendments and issued reform decrees that would guide the Indonesian polity towards the path to genuine democracy and the rule of law. The extent and intensity of Reformasi Hukum or law reform that took place between 1998 and 2002 is the largest legal reform undertaking in Indonesia which unmistakably manifests the insistent call by Indonesian people for the rule of law. The amended 1945 Constitution now unequivocally declares:

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Election Committee. Out of the 500 seats of the DPR, 38 seats are allocated for the Military and Police Force.


667 Such as Law No. 3 of 1973 on Political Parties and Golkar, creating a state-sponsored party and forced merger of major political parties; etc.

‘The State of Indonesia shall be a state based on the rule of law.’

The supremacy of the law is now enshrined in the constitution and the constitution is upheld as the highest law of the land. The constitutional amendments however still retain the principle of unitary state that had become a symbol of Indonesia’s nationalist struggle for independence but the substantive changes reveal, given Indonesia’s violent and chaotic history, a fundamental break from the past. The fist amendment which took place on 19 October 1999 introduced reforms that seek to prevent the emergence of a strong authoritarian executive by limiting the powers of the president and to give the legislature greater control over law-making. Under the new amendment, the President no longer holds the power to make laws, the pocket veto power on legislation, and now holds concurrent power with the legislature on matters pertaining to the appointment of ambassadors and consuls and with the Supreme Court on granting clemency, amnesty, abolition and rehabilitation, and a limited two five-year term in office. The latter provision is an obvious response to the more than fifty years of combined rule by Sukarno and Suharto.

The second amendment addresses the fundamental issues of the relationship between the regions and the central government, the human rights of individuals, and the role of the military. The new amendments on the provisions of regional governments aims to provide local governments with wider autonomy and powers in their affairs giving particular mention to financial relations, public services and exploitation of natural resources and taking particular consideration of the region’s

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669 Art. 1(3), Chapter I, 1945 Indonesian Constitution, as amended.
670 Par. 28(5).
672 The word ‘improvement’ in lieu of ‘amendment’ was actually used by the 12th MPR Session.
673 Art. 5, Chapter III, 1945 Indonesian Constitution, as amended - grants the President the right to submit draft laws to the Parliament and to issue government regulations to implement the laws.
674 Art. 20, Chapter VII, 1945 Indonesian Constitution, as emended - vests legislative power on the Parliament and makes the legislation becomes law after 30 days should the President fail to ratify it.
675 Arts. 13 and 14, 1945 Indonesian Constitution, as amended.
676 Art. 7, Chapter III, 1945 Indonesian Constitution as amended.
677 Arts. 18 & 18A, Chapter VI, Indonesian Constitution as amended. The amendments were meant to provide greater decentralization of powers and exploitation of natural resources in favour of regional or local governments in response to the Soeharto’s regime’s practice of appropriating to the central government most of the revenues and profits from the region’s industries.
existing traditional rights, a long overdue constitutional recognition of the country’s multi-cultural and pluralistic societies.

A ground-breaking whole chapter on human rights, most of them literally lifted from the United Nations Universal Declaration on Human Rights (UDHR), is added on the 1945 Constitution. The inclusion of this chapter which guarantees each Indonesian the enjoyment and protection of their fundamental freedoms as well as a host of other rights such as right to family, education and improvement of one’s well-being, freedom from discrimination, among others, represents a complete and radical departure from the integralist philosophy of de-emphasizing the individual. It is also an explicit revocation of the Asian values discourse that had been supported and propagated by its former repressive rulers. The Indonesian state, particularly the government, now assumes full responsibility for the ‘protection, advancement, upholding and fulfilment’ of human rights.

Another fundamental change in the constitution was to resolve the socio-political function of the TNI which had been blamed for the excesses of the past regimes and had hampered the democratic development. The constitution provides for the functional and institutional separation of the armed forces and the police, the former having the responsibility over Indonesian external defence while the police would be responsible for maintaining social order and security. Two MPR decrees were also issued known as ‘Repositioning and the Restructuring of the Indonesian National Armed Forces’ outlining the specific structure and responsibilities of the two military forces and prohibiting them from involvement in politics and election contests. An agreement by the military and the MPR had been reached whereby the military would cease representation in 2004. By the fourth constitutional amendment, the appointive seats in

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678 Art. 18B, Chapter VI, Indonesian Constitution as amended.
679 Chapter XA Human Rights, consisting of Pars. 28B to 28J, Indonesian Constitution as amended.
680 Art. 28I(4), 1945 Indonesian Constitution, as amended.
681 Art. 30, Chapter XII on Defense and State Security, 1945 Indonesian Constitution, as amended.
the MPR were completely abolished signalling as well ‘the formal end to *dwifungzi*, at least in terms of its public political role.’

The third and fourth amendments to the 1945 Constitution focus on the fundamental issue of the form of Indonesian government and in fine-tuning the ‘checks and balance’ of key state institutions. A hybrid form of presidential government is provided which provides for a directly elected president and vice-president, a solution to put an end to decades of cooptation of the MPR by the party in power and the attendant horse-trading that had characterized the transition in post-Suharto regime. The president and vice-president can be removed from office through an impeachment process initiated in the DPR and transmitted to the MPR but could be subject to the decision of a Constitutional Court. The creation of a Constitutional Court with jurisdiction over review of legislation, conflict among constitutionally-mandated state institutions, dissolution of political parties and conduct of elections, was another path-breaking constitutional development. It provides for the first time the power of judicial review of acts of legislature and the president. It is thus hoped that the Constitutional Court will live up to its mandate in helping establish a law-based state democratic state (*Democratische rechstaat*) and a Democratic State based on the law (constitutional democracy) in Indonesia.

The third amendment resulted in the formation of a hybrid legislature which strengthens the power of the DPR, the creation of a DPD (Dewan Perwalikan Daerah) as a regional senate with powers to submit laws to the DPR, and redefines the role of the MPR. One of the most radical theoretical re-definition of the Indonesian state has been the removal of the MPR as the expression of the people’s sovereignty and is now

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683 Tim Lindsey, ‘Indonesia Devaluing Asian values, rewriting the rule of law’, 311.
684 The constitution provides for a second round elections should no candidate fails to garner 51% of vote and at least 20% in half of the provinces in the first round.
685 The grounds for impeachment now exclude removal on policy grounds but include violation of the constitution and corruption.
686 Art. 24, 1945 Indonesian Constitution, as amended.
vested in the hands of the people to be exercised in accordance with the constitution.\textsuperscript{689} It has also lost its sole authority to set the GBHN but retained its power to consider constitutional amendments. The new amendment also sets out in strengthening the judiciary such as the establishment of a Judicial Commission which shall have authority to propose candidates for appointment as justices of the Supreme Court and authority to ensure the honour, dignity and behaviour of judges.\textsuperscript{690}

With a newly constituted constitutional democracy, the Indonesian state appears to have weathered the ‘storm’ attendant to post-authoritarian regimes - political instability or return to authoritarianism. One such crisis however which posed a potential political and constitutional backlash was the removal from office of President Abdurrahman Wahid\textsuperscript{691}, the first Indonesian president installed through a democratically elected MPR. He was accused of violating GBHN but also on allegations of massive corruption known as ‘Bulogate’ and ‘Bruneigate’.\textsuperscript{692} Wahid had declared an ‘executive order’ reminiscent of the Soeharto era urging the ‘support’ of the TNI to overcome the crisis that had paralysed the government as a result of the political stand-off and also announced the dissolution of the DPR/MPR. The resolution of the conflict resulting in the ouster of Wahid was a victory for the legislature but also a credit to the military which had stayed out of the political conflict and allowed the constitutional process to take its own course.\textsuperscript{693} The peaceful succession of governments from Wahid to Megawati Soekarnoputri, daughter of Soekarno, and to the incumbent President, Susilo Bambang Yudhoyono has shown great promise for the constitutional democracy in Indonesia.

\textsuperscript{689} Art. 1(1) now states that the sovereignty of the people is to be exercised in accordance with the Constitution.
\textsuperscript{690} Art. 24B(1), Indonesian 1945 Constitution, as amended.
\textsuperscript{693} Although it is also believed that Wahid was ousted precisely because of military influence, in Muhammad Najib Azca, ‘Security Sector Reform, Democratic Transition, and Social Violence: The Case of Ambon, Indonesia,’ 5-6.
4.2. Philippines – elite politics and the ‘unfinished’ revolution

By contrast to Indonesia, the rule of law has been formally enshrined in the constitutional democracy that was the legacy of United States’ occupation of the Philippines for fifty years. However, the constant political turmoil and violence that has characterized Philippine political landscape since the formal independence from the United States in 1946 up to present, is testament to the sheer hallowedness of constitutional and legal precepts handed by the former colonizer to the realities of Philippine society. The Philippine experience is a perfect illustration of a ‘fully-functioning democracy’ gone horribly wrong and shows how constitutional documents could be rendered meaningless in the face of weak political and legal institutions, corrupt politicians and bureaucracy and persistence of patronage politics. In a jeering indictment, Philippine democracy is perceived to be ‘cacique democracy’, one which is characterized by the persistence of elite domination. The growth of political elite is traced from the introduction of electoral politics in the American period.

The ‘weakness’ of the Philippine state where ‘people’s sovereignty’ has been perennially expressed through the competing narrow self-interested elites, courts an auspicious opportunity by which law could be used to consolidate a regime or disregarded when the necessity for it no longer exists. In fact, the elites in the Philippines are considered to be ‘above the law’ through their strong influence on the state through ‘a web of family, social and professional connections’ that has insulated them from government reforms and regulations and from legal accountability. Two past presidents, Ferdinand Marcos and Joseph Estrada, who had campaigned on the populist appeal of ‘law for everyone’ had gathered huge mass support. While genuine belief on the principles of democracy, rule of law and human rights are shared

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694 Philippine independence was only formally granted on 4 July 1946.
698 Estrada was the first Philippine president to have won in a massive landslide victory in the presidential race in 1998 riding both on his charisma as a former film star and a populist platform of dispensing law and justice for everyone regardless of family and social connections.
by both the elites and the people, the protection of the elites’ traditional privilege and power continues to be the ‘norm’ and is simply inconsistent with these principles. There is a robust and hard-to-censure media as well as a highly developed civil society but their effectiveness could only go so far in a well-entrenched socio-political problem.

The unending competition among the Philippine elites has been expressed through electoral contests and within state institutions particularly between the executive and the legislature.\textsuperscript{699} Since Martial Law however, the political battles have been fought in corporate boardrooms such as the recent manoeuvre by government-controlled corporations to wrest management control of the power conglomerate from the Lopez family whose television network has been critical of the Arroyo administration’s lack of transparency and massive corruption attributed to Arroyo’s family and their allies.\textsuperscript{700} It is the same family, old moneyed elite with vast interests in power, electricity, water and media, from which Marcos had previously attempted to destroy its wealth and political power.

The first political crisis in the Philippines had seen the death of democracy with the imposition of Martial Law during the Marcos dictatorship during the period 1971-86. Officially, the imposition of martial law was declared as a measure of last resort to protect the republic from armed rebellion, insurrection and lawless elements comprising primarily of armed communist insurgency led by the CPP/NPA and their front organizations, supporters and friends.\textsuperscript{701} It was widely believed however that Martial Law was intended to stamp out the old oligarchs consisting of powerful local political family dynasties and extremely wealthy national elites.\textsuperscript{702} It was the only way to keep Marcos in power having been barred under the 1935 Constitution to seek for a third presidential term. While initially there was popular support from the people due to its promise to build a New Society, martial law roared its ugly head as Marcos unleashed


\textsuperscript{702} Benedict Anderson, ‘Cacique Democracy in the Philippines, Origins and Dreams,’ 17-23.
its might and power not only against the communists and activists but also against his rivals, critics, and the media and subsequently build his own oligarchy or cronies.\(^{703}\)

During the heyday of martial law from 1972-81, Marcos used the military but increasingly deployed the ‘rule of law’ to consolidate and legitimize his rule. No other Philippine president had so astutely used the state and the law than Marcos.

‘From the very earliest days, Marcos used his plenary Martial Law powers to advise all oligarchs who dreamt of opposing or supplanting him that property was not power, since at a stroke of the pen it ceased to be property.’\(^{704}\)

With the abrogation of the Philippine Congress, Marcos became the supreme lawmaker. At the heyday of Martial Law in 1972 to 1977, Marcos issued more than one thousand presidential decrees, five hundred letters of instructions, five hundred presidential proclamations, sixty general orders and scores of executive orders and implementing regulations.\(^{705}\) With the suspension of the writ of \textit{habeas corpus} and emasculation of the Supreme Court, indiscriminate arrests and detentions were made in accordance with laws and guidelines whose interpretation mainly depend on the personal judgment of the president and his men.\(^{706}\)

The 1973 Constitution was promulgated at the height of Martial Law which legitimated the dictatorial rule.\(^{707}\) Through a high court decision, the new constitution validated a new mode of ratification not actually envisioned in the constitution.\(^{708}\) Subsequent amendments to the constitution were made until 1984 which merely shifted executive powers, still the preponderant power, between Marcos and his allies in the executive or parliament. In any case, with all state institutions under the firm control of


\(^{706}\) See accounts at Rene Sarmiento, \textit{Laws on the National Security of the Philippines – Then and Now}, (Manila, TFDP, Task Force Detainees Update, June 1989), 1-5.


\(^{708}\) In a controversial decision in \textit{Josue Javellana v Executive Secretary}, G.R. No. L-36142, March 31, 1973, the Supreme Court ruled for the validity of the constitution stating that the Citizen’s Assembly, rather than a national referendum, constituted a direct voice and will of the Filipino people.
Marcos, his family, and cohorts, those amendments did not diminish the power of Marcos oligarchy even until the termination of Martial Law in 1981. Indeed, a team dispatched by Amnesty International in 1981 concluded that the pattern of systematic human rights violations did not ebb with the lifting of Martial Law.\(^{709}\)

A virtual capture of state power by a group of oligarchs was the condition under which the People Power revolution had occurred on February 1986 (known as EDSA I). All political and legal institutions had proved feeble against the weight of authoritarianism that the people themselves, braving the tanks and security forces, had to reclaim for themselves their dignity and freedom. The assassination of opposition leader Benigno Aquino and the electoral fraud perpetrated by Marcos against Corazon Aquino in the 1986 snap presidential election precipitated the peaceful revolution. The movement transcended class interests and was bound by the common experience of oppression under the Marcos regime. It gave birth to a truly democratic constitution, the 1987 Constitution, which was a product of broad public deliberation and consultation.\(^{710}\)

The new constitution is clearly a response to two decades of authoritarian rule and therefore the framers saw the wisdom in limiting executive powers, strengthening checks and balances among the three key institutions of state power, and providing adequate legal protection for the enjoyment of individual rights. The constitution reiterates the principle that sovereignty resides in the people wherefrom government authority emanates from them and declares the supremacy of civilian authority over the military.\(^{711}\) It brings back a bicameral form of elected legislature having a lower house, the Parliament and an upper house, the Senate. A lengthy and more detailed provision on human rights protection is crafted with specific proscription against torture, force, violence, threat or intimidation as well secret detention places, solitary, incommunicado or other similar forms of detention.\(^{712}\)


\(^{711}\) Sections I & 3, Article II, Declaration of Principles and State Policies, 1987 Philippine Constitution.

\(^{712}\) Section 12(2), 1987 Philippine Constitution.
The president’s power to declare martial law and to suspend the privilege of the writ of habeas corpus has been severely restricted in theory, with both the Congress and the Supreme Court having a part in reviewing the necessity and sufficiency of the factual basis for the emergency proclamation. A state of martial law does not suspend the operation of the Constitution, nor supplant the functioning of the civil courts or legislative assemblies, nor authorize the conferment of jurisdiction on military courts and agencies over civilians where civil courts are able to function, nor automatically suspend the privilege of the writ of habeas corpus. A novel provision to reform and enhance representation by introducing party-list representation as a measure to give marginalized sectors a voice in Congress.

The Second People Power revolution (known as EDSA II or EDSA Dos) on 21 January 2001 brought the incumbent Gloria Arroyo to power. This event not only demonstrates the fragile character of constitutional democracy in the Philippines but also the structural and institutional weakness of democracy and the rule of law. It was largely triggered by the sterility of the then on-going Senate impeachment trial of the president accused of massive corruption. Although it was led by the urban middle class but welcomed with much relief by the people, EDSA Dos was perceived by the Western world with disappointment by pre-empting constitutional process to take its own course. The Supreme Court however belatedly legitimized the Arroyo government by holding that the office of the president became vacant during the turn of events. EDSA III however took place barely four months after EDSA II. Sarcastically called the ‘May 1 Riot’, it was a failed attempt by mass supporters of ousted president Joseph Estrada to reinstate him as president. This latter attempt showed that a largely mass-based and populist revolution without the support of the middle class, the civil society and the Catholic Church is not bound to succeed but also equally the necessity to

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713 Article 18, 1987 Constitution of the Philippines.
714 Article 18, 1987 Constitution of the Philippines.
715 Section 5(2), 1987 Constitution of the Philippines. This too, has been corrupted with major political parties taking advantage of the loopholes in law to sponsor party-list organizations, while the genuine ones have been constantly harassed and threatened with violence and intimidation, both legal and physical.
establish effective and credible institutions of the rule of law in resolving political conflicts.

The current Arroyo administration is seen as largely corrupt and having a tendency to authoritarian rule. Despite more need for reforms to build its independence and efficiency, the Philippine Supreme Court however has on several occasions upheld the rule of law by striking down government policies aimed at further diminishing checks and balance or infringing constitutionally-protected rights meant to ensure accountability of government officials and guarantee political expression and participation. It struck down as unconstitutional the imposition of a state of emergency after the discovery of an alleged coup plot\textsuperscript{718}, an unconstitutional people’s initiative at amending the constitution,\textsuperscript{719} and illegal arrests and detention of ‘left’ party-list representatives.\textsuperscript{720}

4.3. Thailand – military coups and constitutional instability

The vicious cycle of alternating military regimes and civilian authority usually with the support of the former, has been a feature of the Thai state since the overthrow of the absolute monarchy in the 1932 rebellion.\textsuperscript{721} This cycle is characterized by a succession of constitutions, revival of political parties, parliamentary elections, a honeymoon period, and a crisis leading to another coup.\textsuperscript{722} That ‘might is right’ has been the underlying message of every cycle. The judiciary has been simply powerless to declare the illegality of the coups. At certain times however, the coups represent not only elite fragmentation in responding to mass uprisings that challenged the conservatism of military and elitist leadership. The turning point came on 14 October 1973 when massive student demonstration from Thailand’s three major universities converged on the Democracy Monument in Bangkok protesting against martial law and

\textsuperscript{719} Raul Lambino et al. v Commission on Elections, GR No. 174153, 25 October 2006, although the Supreme Court in 2009 dismissed a Congress’ resolution at convening a constituent assembly.
\textsuperscript{722} Muthiah Alagappa, ‘Asian Civil-Military Relations: Key Developments, Explanations and Trajectories,’ in Coercion and Governance, 461-2.
widespread corruption. The protest was violently crushed but the aftermath ushered the adoption of the ‘most liberal’ constitution to appear since 1932. The event would serve as inspiration for later mass movements and constitutional reforms.\textsuperscript{723}

The euphoria of the 1973 student-led uprising however proved to be short-lived as Thai society regressed into deep polarization along the leftists-rightists lines.\textsuperscript{724} On 6 October 1976 a bloody military coup was launched and suppressed student demonstrations at Thammasat University. This incident was called the ‘Six October Massacre’ due to the brutality that the Thai police and right-wing mob used against the demonstrators such as shooting, clubbing to death, hanging and raping the students. A military regime rose in power lasting for a year and the succeeding period saw a period of ‘moderation’ on the part of military rulers, engagement with the activists who had been driven to the hills during the 1976 massacre, and gradual transition to civilian governance.\textsuperscript{725} This period has a far-reaching significance as military and civilian elites begun to grapple for solutions and explore compromises through constitutional means amidst the growing clamour by rising middle class for democratization.

The third bloody crackdown on demonstrators by the Thai army on 17 May 1992 called the ‘Bloody May’ which happened after the overthrow of a civilian government in 1991, would prove to be a defining moment for Thailand’s transition to democracy. Indeed the supporters of the May uprising mostly came from the middle class who had demanded for greater transparency, more protection for individual rights, and broader participation in the political process. The event vividly shows the impact of globalization on political change and reforms in Thailand.\textsuperscript{726} A movement for profound social and political reform has begun in earnest from 1992 seeking for a constitutional solution to the vicious cycle of coups. Among the major problems identified hindering the democratization process were rampant corruption and inability of political and legal

institutions to prevent it, vote-buying and electoral fraud, and instability of civilian rule due to the nature of coalition governments.®

The 1997 Thai Constitution, known as the ‘people’s constitution’, was a genuine attempt to forge a more durable consensus not only among the elites but the broader mass of people on establishing a stable and coherent framework for the state.® It represents a social compact among the Thai people taking into account the traditional role of the monarchy in the state, and should from the constitutionalist’s idea, a ‘covenant’ entitled to great respect. With the emergence of civil society groups and NGOs, widespread support for a new democratic constitution had been galvanized and a process for country-wide and sectoral consultation had been launched to debate the draft contents of the constitution. After a lengthy and arduous process and the debilitating impact of the 1996 financial crisis, the final push for the adoption of the first democratic constitution in Thailand was completed on 11 October 1997.

There are no perfect constitutions but the 1997 Constitution aimed big. It ‘was designed to promote transparency and accountability of the political system and the stability and effectiveness of government.’ To address the problem of recurring coups or different factions of the military staging or fomenting take-overs, the 1997 Constitution expressly outlawed such activities. To resolve the fractious and often short-lived coalition governments, the constitution strengthened the position of the Prime Minister or PM with the power to dissolve the House of Representatives and together with his ministers, is also collectively responsible to the parliament. A clearer mechanism for separation of powers has been provided by preventing a member of parliament or MP from holding a minister portfolio without resigning their legislative post®, a departure from the old constitution which only encouraged conflict among the

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® Sec. 204, 1997 Thailand Constitution.
coalition parties and weakening the role of the PM. Turn-coatism or resignation from a political party to join another is a cause for removal from legislative office.731

To ensure accountability and transparency of government officials and public institutions, several independent agencies and special courts have been created.732 The National Counter Corruption Commission (NCCC) is given the power of investigation and to charge officials suspected of being unusually wealthy while an Ombudsman is a special court with jurisdiction over charges of maladministration and power to report to the parliament. A National Human Rights Commission (NHRC) was formed to protect and promote human rights and empowered to look into complaints of human rights violations arising from international treaties and conventions where Thailand is a signatory. This constitution has enshrined more individual freedoms than any other Thai constitutions and also provided for institutional reforms such as the end to state monopoly of media and telecommunications.733

Two special courts were created, the Constitutional Court and Administrative Court, the former to decide constitutional issues and conflicts or overlap of authorities of major constitutional institutions, and the second to adjudicate on disputes between ordinary citizens and public officials. In response to clamour for democratic and broader representation, the Senate, which was previously an un-elected seat filled with military and other elite appointees, has become a wholly elected upper chamber. Compulsory voting was introduced to dissuade vote-buying and more direct participation in the political process is to be effected by the provision allowing fifty thousand voters to propose a legislation in the parliament or to petition the Senate to remove high government officials suspected of being ‘unusually wealthiness or unusual increase in assets’ or for violating the constitution.734 A system of party-list representation has also been introduced similar to the Philippines.735

The 2006 coup is regarded as a major setback to the rule of law and to the democratization process begun in 1992. As one observer noted, the military has again

731 Sec. 118(8), 1997 Thailand Constitution.
733 Secs. 45, 47, 48, 1997 Thailand Constitution.
734 Sec. 109, 1997 Thailand Constitution.
735 Sec. 98, 1997 Thailand Constitution.
re-asserted its self-righteous duty to ‘control the law’, a power they do not want relinquished.\textsuperscript{736} It is perceived to have brought back state power to traditional elites – the military, bureaucracy, and royalist supporters. Half of representation in the Senate was brought back to pre-1997 Constitution which is by appointment\textsuperscript{737} while the numbers of legislators had been decreased\textsuperscript{738} and party-list representation in the lower house had been abolished in favour of the more cumbersome proportional representation for eighty out of four hundred MPs.\textsuperscript{739} With the Senate being controlled by elite appointees close to the monarchy and the military, appointment of independent commissions that serve as checks on executive power, will also come under their control and could considerably weaken the office of the prime minister.

The success of the 1997 Constitution in terms of fostering a strong executive also became its failure. The 2007 Constitution which seek to curve the accumulation of power by the executive has altered the balance of power in favour of the upper house of congress which also holds the power of removal of prime minister and his cabinet, MPs and other senior government officials.\textsuperscript{740} Another disturbing feature of the new constitution has been the inclusion of a provision recognizing as valid and constitutional the existence of the interim constitution brought about by the \textit{coup d’etat} and all acts pertaining thereto\textsuperscript{741}, thus effectively giving the military a power of oversight on the activities of the civilian government by placing them ‘outside of the law.’

There has never been a growing polarization of the Thai society since 1976 than the aftermath of the 2006 \textit{coup d’etat}. The Thai government was briefly reclaimed by the People Power Party (PPP), heir to the vast political network of the THT through the December 2007 elections and perceived to be a popular repudiation of the coup. With PPP’s attempts to restore the 1997 Constitution and Thaksin’s policies, the urban middle class represented by the Peoples Alliance for Democracy (PAD) staged massive protests to paralyse the PPP-led coalition government. At the height of the

\textsuperscript{737} Sec. 111, 2007 Thailand Constitution.
\textsuperscript{738} MPs are reduced from 500 to 400 and Senators from 200 to 150.
\textsuperscript{739} Secs. 93 & 95, 2007 Thailand Constitution.
\textsuperscript{740} Secs. 270 & 273, 2007 Thai Constitution.
\textsuperscript{741} Sec. 309, 2007 Thai Constitution.
demonstration, the Constitutional Court for the first time stepped in to resolve the impasse. In a 2 December 2, 2008 ruling, the PPP with two other parties were dissolved and party executives were banned to run for five years on grounds of election malpractice and fraud.\textsuperscript{742} While the decision was hailed as a triumph of the rule of law in correcting a flawed democracy, it was also regarded as biased against the PPP. ‘The court started reading out their verdict for this case within 30 minutes to an hour of the final statements,’ says Prasit, an associate professor at the law faculty at Thammasat University. ‘I have never seen this happening anywhere in the world.’\textsuperscript{743} Previous to the ruling are various other rulings of the Supreme Court disqualifying ranking members of the PPP including Prime Minister Samak Sundaravej.\textsuperscript{744}

With a deeply fractured society, the Constitutional Court now bears the burden of upholding the rule of law as a means to settle political conflicts. It needs to show its independence and impartiality and the test would be if it is capable of handing similar rulings to other persons and political parties. This is especially so since the king, perceived to be the stabilizing force in society, is seen to be less and less so. The increasing use of the \textit{lese majeste} but also the increasing open display of criticism against the monarchy is showing that it is increasingly becoming more difficult ‘to hold the illusion that the monarchy is universally adored.’\textsuperscript{745}

4.4. Malaysia and Singapore – insecurity and racial compact and innovation to rule by law

Having a common colonial historical tradition, Malaysia and Singapore have followed an almost similar path to statehood and in coping with the problems of state reconstruction. In the same vein, they have adopted a rule of law that assures executive dominance of state power and where all other branches, the legislature and judiciary, consistently support and toe the line of the executive branch. The variation lies in the

form but the results are almost the same. Both governments have been patterned after
the Westminster parliamentary system, being former British colonies, with a prime
minister elected or coming from the majority party in power. Malaysia owing to its
cultural roots, has instituted a federal constitutional monarchy, the Yang di-Pertuan
Agong\textsuperscript{746}, which when compared to their Thai contemporary, has a purely ceremonial
function.

Both countries uphold the common-law British tradition of parliamentary
supremacy. Malaysia has a bicameral legislature whose lower house, the Dewan
Rakyat, elects the prime minister. Singapore has a unicameral assembly which is also
responsible in electing the prime minister. The dynamism of parliamentary democracy
like the British model is sought to be ensured by a fully-functioning liberal political
system where vibrant opposition parties compete in a fair game in the electoral process
which in turn acts as a ‘veto’ to inefficient, abusive or simply arrogant dominant
political party. This is not to be the case however for Singapore which considering the
legal and institutional restraints placed upon opposition parties and critics alike, have
evolved a virtual one-party rule. It is the PAP for Singapore and to a lesser extent, the
UMNO in Malaysia. The recent setback suffered by the UMNO in the polls constituted
hardly a dent to the party’s legislative dominance although it has opened the possibility
for wider and more formidable opposition challenges in the future.

The progressive strengthening of the state, as wielded by a powerful executive,
has been a legacy of strong colonial administration and continues until the present.
Laws in the context of Singapore and Malaysia had taken a more formalistic and
instrumentalist turn as a means to achieve the objectives of nation-building. The
Sedition Act has been in place since colonial rule in 1948 which severely restricts
expression of freedom of speech while the powerful Internal Security Act (ISA)
provides for the power of indefinite period of detention without giving the detainee a
day in court. The potency of the ISA has seen its effects in decimating the communists,

\textsuperscript{746} The Yang di Pertuan Agong is, under the Malaysian Constitution, the supreme head of the federation
of Malaysia, which following the Westminster model, exercised executive power only upon the advice of
the Prime Minister. It is a position that is rotated every five years among the nine traditional rulers of the
Malay states forming a Conference of Rulers.
opposition, critics or rivals such as happened in the case of Anwar Ibrahim, Mahathir Mohammad’s protégé turned arch-enemy.

In Singapore, the coverage of the ISA is broad enough to cover both wartime and peacetime enemies of the state allowing the Home Minister the discretion to detain a person indefinitely. The grounds for detention include such determination by the President that a person is acting in a manner prejudicial to the security of Singapore, the maintenance of public order or essential services, the necessity to prevent promotion of anti-government feeling, or encourage racial or class antagonism, or any other acts which undermine the security of the country. In recent constitutional amendments in the Philippines, Thailand, and Indonesia, the power of the executive to exercise emergency and martial rule has been restricted and constrained by judicial and legislative reviews. In Malaysia and Singapore, emergency proclamation remains in its unaltered and broadly discretionary form and still outside parliamentary or constitutional review.

Under Singapore’s ISA, there is ‘no judicial review in any court of any act done or decision made by the President or the Minister under the provisions of this Act save in regard to any question relating to compliance with any procedural requirements of this Act governing such act or decision’. The act was expanded to empower the police to conduct arrests without the benefit of warrants any person whom he has reason to believe is about to act in a manner prejudicial to security. With the ISA, opposition members and social activists have been repeatedly arrested and rearrested and even subjected to torture and other forms of inhumane treatment or punishment. Thus the exercise of fundamental rights such as liberty, speech, assembly or association is highly curtailed which, in the case of Malaysia empowers the parliament to pass laws overriding these rights on such vaguely-defined grounds as exciting disaffection against the Yang di-Pertuan Agong or government, promoting hostility between races or classes in society, or when order and security of the federation or any part thereof is

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747 Sec. 8, Internal Security Act (ISA) Singapore.
748 Emergency or Essential Powers Act 1979 of Malaysia.
749 Sec. 8B(2), Cap 143, ISA Singapore.
750 Sec. 8, ISA Singapore.
threatened. In Singapore, control of the media by the state was brought pursuant to the Newspaper and Printing Presses Act 1974 which required the annual renewal of licenses of media owners, editors and printers and under the control of a government-owned company, the Singapore Press Holdings. Its Societies Act requires registration of any association of more than ten persons and government may refuse registration or order its dissolution without the remedy of judicial review.

A judiciary adopting the technique of formal or strict legalism has been instrumental in sustaining government bodies in cases involving the opposition or critics or those questioning the validity of official acts. In Malaysia, there have been very few cases where the judiciary decided against the state and its bureaucracy and not on the basis of substance but on procedural infirmities which were also cured by enacting subsequent legislation or by amending the constitution. A legislation giving retroactive effect to the Emergency Powers Act 1979 was enacted following the invalidation of the Privy Council of regulations made after 1971. Seemingly innocuous non-political criminal offences have been thrown at opposition leaders and critics not only for purposes of locking them up behind bars and preventing them from joining the electoral process but also to impoverish them.

Defamation suits initiated by government officials have become a potent tool of criminal persecution of PAP’s opponents, critics and the media that also rendered opposition candidates financially bankrupt with astronomical award of damages against them. Since bankruptcy is a ground for removal from parliament and from running in the elections, prominent opposition leaders like JB Jeyaretnam of the Worker’s Party and Chee Soon Juan of the Singapore Democratic Party had been slapped with bankruptcy and imprisonment. Amnesty International has reported that the libel suits had proven to be more insidious than the ISA in recent years and have a chilling effect

752 Sec. 149, Malaysian Constitution.
against expression of dissent and the future of the political opposition as a whole.\textsuperscript{756} The suits were anything but fair and allegations reek of political vindictiveness which were brought against the opposition on election times or based on flimsy tale of injuring the reputation of PAP leaders.\textsuperscript{757}

Where a political party holds absolute control of power, there is no higher law than the party itself. Not even the constitution. The only restraint that could possibly rein in the exercise of discretionary power could be the men or women themselves who hold power. The ease with which the constitutions in Malaysia and Singapore can be amended shows the extent of the party’s power representing the ‘will’ of the people or probably to the party’s mind, the ‘best interest’ of the people. Curtailing competitive political participation in return for comfortable material life appears to have won over the majority in these two states particularly Singapore which has raised the quality of life of its citizens to the level of the developed world. With such enviable prosperity, Singapore’s PAP has never lost its supermajority, or at least 90% of electoral seats since 1968.\textsuperscript{758}

A system of internal self-regulation and periodic political engineering coupled with a system of rewards have not only helped ensure one-party dominance but also prevented the party and its members from falling into the snake-pit of inefficiency, glaring corruption and underdevelopment that plague most of its Southeast Asian neighbours. It is not however a corruption-free society\textsuperscript{759} and the strategy against corruption is to reward officials with salaries and perks comparable to that received by top executives in private companies.\textsuperscript{760} The constitution has been periodically tweaked to introduce innovations in political representation, through state-controlled mechanisms, such as the introduction of the systems of Non-constitutional Members of Parliament (NCMP), Nominated Member of Parliament (NMP), Elected President (EP)

and Group Representation Constituency (GRC) which are designed to give token and controlled representation to other opposition parties or sectors. To draw grassroots participation and consolidate its rule, the PAP has also developed the establishment of Citizen’s Consultative Committees in every electoral constituency and cooptation of organized sectors such as the trade union.

While both countries enjoy a relatively positive perception of the observance of the rule of law in respect to economic governance when compared to other ASEAN countries, they have not been completely insulated from some forms of protests or reaction. Both countries’ dominant parties have continuously enjoyed monolithic status but contemporary developments in their population are showing signs, though still relatively small, of discontent and need for reforms. Malaysia has enjoyed a pliant citizenry for years under the iron hand of Mahathir Mohammad after the brutal suppression of the race riots in 1969. In 1988 the reformasi (reform) movement was galvanized into huge protest against the detention of Anwar Ibrahim under the ISA and to call for Mahathir’s resignation. Anwar’s incarceration and his subsequent humiliation in the legal arena by accusing him of sodomy and corruption has opened the cracks in UMNO’s invincibility and exposed the leadership’s stark abuse of power as well as brought into public discussion the integrity of the court system.

A wave of calls for democratization has spread in the middle class that cut across ethnic lines but also gave rise to civil society activism and NGOs that have linked up with opposition parties. Issues of corruption, cronyism and nepotism that had been muted in the past have been exposed such as those involving massive corruption in government-controlled financial institutions that suggest the participation of high

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762 See Harold Crouch, Domestic Political Structures and Regional Economic Cooperation, (Singapore, Institute of Southeast Asian Studies, 1984), 13-6.
763 The World Bank has developed a benchmark on the rule of law based, in particular, on the quality of contract enforcement, the police, courts, and the likelihood of crime and violence, See Daniel Kaufman, Aart Kraay, & Massimo Mastruzzi, Governance Matters IV: Aggregate and Individual Governance Indicators 1996-2006, WPS4280, at http://www.worldbank.org. Singapore and Malaysia have garnered high percentile scores in rule of law and corruption index, with Singapore achieving one of the highest ranking of all countries polled.
ranking government officials and Mahathir’s family. The stunning results of the opposition in the March 2008 elections are part and parcel of the democratization process that is slowly sweeping Malaysia. States that have been won by the opposition have begun to implement reforms that seek to abrogate some of NEP’s preferential treatment of Malays that has only bred corruption and benefited a few. The Badawi administration itself vowed to introduce economic reforms for poverty alleviation and to re-examine massive subsidies that have only benefited selected companies. But how far the government could tolerate protests or dissent will be tested by growing clamour for fundamental reforms which has increasingly been influenced by globalization, the internet revolution and the current escalating inflation that is drawing mass demonstration.

By contrast, Singapore has not drawn massive protests from its population since the ascendance of the PAP to state power. Its relatively small population and land size have contributed to the manageability of state control of all political processes coupled with economic benefits dispersed through its people. As all signs of dissent or criticisms are immediately nipped in the bud, there has not been enough capability to gather and mount sustained demonstration against the Singaporean leadership. That strong government regulation is needed to achieve robust economic growth and prosperity is reflected in the way the state has adopted an intolerant attitude in the sphere of public law while maintaining a quasi-liberal approach to economic law or rights. There has been certain degree of relaxation in the arts and culture sphere which has allowed, within allowable limits, satirical expressions of criticisms on some aspects of government authority.

But an almost lack of avenue for alternative views is engendering a culture of passivity among the younger generation or stultified creativity which is essential to

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meeting the challenges of a more competitive and interconnected region and world. The absence of meaningful channel for expression of political freedom may have impelled Singaporeans to seek their own private spaces instead of heeding the calls of the state and be active in grassroots participation and in recent years, encouraged emigration of highly skilled citizens.\(^{770}\) A survey by the Strait Times in 2006 among the Singaporean teens had shown that 53% of them, as compared to 28% and 39% of Malaysian and Indian youths respectively, would choose to emigrate to look for ‘greener pastures’.\(^{771}\) Considering that around 42.6% of the population in 2005 are immigrants from other countries and that the Singaporean government has implemented a policy to attract highly-skilled foreigners to work or live in Singapore to meet its increasing demand for industrialization\(^{772}\), migration of Singaporeans is not really about the acquisition of more material opportunities. In 2000, the World Bank reported that 15.2% of college-educated Singaporeans had emigrated.\(^{773}\)

5. **Conclusion: divergence and convergence of the rule of law in Southeast Asian states and implications for ASEAN**

This chapter discussing the five member states, Indonesia, the Philippines, Thailand, Singapore and Malaysia, show four broad processes or themes that have shaped the distinctive state systems and the rule of law in each member state. These are the common experience of colonialism, post-colonial nation-state building, nationalism, and the rise of democratization movement. Globalization, though skimmed through the discussion, underlies the growth of economic, social and political changes - and reforms, that are taking place in the region. The democracy movement itself is a product of this ‘external’ phenomenon but also of internal dynamics that force change even in unintended ways. Globalization has produced a growing mass of the middle class in Southeast Asia who comprised the force for reforms – and of the rule of law, in the region. The middle class, as the political force, is driving change towards constitutional democracy and establishment of institutions that would allow a level

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playing field for all and exact accountability on the state and its officials. It should also
be added that counter-movements, in the contemporary rise of Islamist radicalism and
continuance of insurgent ethnic and class struggles, continue to significantly define the
state, how control of government is fought among contending elites, and how these
subsequently affect the relation between the state and the individual.

The convergence of these processes has determined the rule of law in the region –
the manner it has shifted back and forth as a symbol of state authority or as a limiting
force on the state. The imperative for and existence of real or imagined threats to the
nation-state’s integrity have more likely allowed the instrumentalist function of the rule
of law. On the other hand, the rule of law as a constraint on state power develops under
a climate of greater civil society cohesion and participation. Elite factionalism and
fragmentation of political parties have always engendered an opportunity for the
military or a faction of the political elite to seize power, impose its will, perpetuate
impunity, and disregard the rule of law. In the democratizing states of Indonesia,
Philippines, Malaysia, and even Thailand, it is shown that the rule of law could have the
potential to grow even in the condition of ‘imperfect’ democracy as long as civil society
shares common ideals and goals. In cases of grave political and social divisions
however, the rule of law shows its promise as the most viable mechanism in mediating
contending forces, if only to the extent of providing a breathing space and opening up
avenue for future political discussion and compromise. The absence of the rule of law
shows that it closes a more stable and peaceful form of resolving conflicts and hence
recourse through extra-constitutional means. Moreover, an increasing function of the
rule of law is to ensure transparency and accountability of government officials and
their actions which transcend forms of government.

To say that the region is static, or to lump all the states in one category, however is
to entirely miss the point. For each of the country under study has undergone
tremendous historical and political dynamism affecting not only the state but also the
broader society and its people in a profound way. The peculiar social, economic, and
political conditions of each state have thus defined the manner by which the various
functions of the rule of law are deployed into lesser or greater degree. Thus, the story of
the rule of law in Southeast Asia confirms that there is no ‘one-size, fits all’ conception
of the rule of law. These differences however is not to deny that they share common characteristics which either inhibit or advance the rule of law. At some point in time, they all had authoritarian rulers that wielded virtual monopoly of state powers and gave little weight to human dignity and freedom. Most of them have weak independent institutions, particularly the courts, which could provide a counter-balance to executive dominance and institutional check. Political parties are either weak or fragmented that could serve as a catalyst for political accountability. They also share a political culture of patronage that inhibits legal and institutional reforms. Corruption is a major problem that exacerbates institutional weakness and likewise impairs reforms.

The states in Southeast Asia have all changed however and in it came changes that also brought back the necessity for the state to be governed under the rule of law and for the rule of law to transform state-society relations. These have ushered or highlighted different aspects of the rule of law that can be points for learning and cooperation with one another. Constitutionalisation is one of the major developments shared in common by Southeast Asian states that provide a general, albeit thin, basis of framework of governance. Democratization has also brought forth the development of constitutionalism in many countries that institutionalize the principle of separation of powers and respect for human rights. The creation of more independent institutions - to tackle elections, corruption, and government efficiency, among others, has marked this new era.

It is important to note the establishment of national human rights commissions in the countries of the Philippines, Thailand, Indonesia, and Malaysia to promote and protect human rights. Constitutional courts or courts that are vested with the power of judicial review over legislation and governments acts are also a recent development in these countries that have the potential to advance the rule of law. Judicial independence has also seen a revival, though still limited, in certain countries and shows that it can be a mechanism to provide stable and peaceful solutions to political conflicts. The ‘semi-authoritarian’ state of Singapore has also much to share on its rule of law practices in terms of operating an efficient bureaucracy and judiciary particularly in dealing with economic matters and corruption. Recognizing the sensitivity of ethnic-religious issues, Singapore is also beginning to use a more cautious approach to its draconian laws.
against suspected terrorists. Malaysia had a relatively peaceful elections and its dominant party respected the results of its latest general elections which is an important learning for states that experience widespread electoral violence. A caveat however must be repeated that individually, these changes or reforms do not operate in a vacuum.

As discussed, the five member countries share common challenges to nation-state building and these issues are shared, to lesser or greater extent, by the rest of the members of ASEAN. The rule of law could serve as a framework for solving common problems at the regional level and this has been shown by the way certain territorial disputes between countries in the region had been effectively resolved. Bouts of internal turmoil and nationalism have however occasionally given rise to ‘tensions’. This does not however diminish the value of the rule of law through its capacity to ensure stability, certainty and predictability of official actions but also its ability to depoliticize politics. Socialization has now become an important process of building the rule of law and the experience of the CEE countries in the European Union, with equally poor record of democracy and the rule of law in the past, could serve as guide to Southeast Asian states. ASEAN should provide such venue for socialization of the rule of law among its member states. In the following chapter, we discuss the opportunities and challenges in the ‘new’ ASEAN for the rule of law to function as a framework for regional governance but also as a common project for socialization among member states.
CHAPTER FIVE

The Rule of Law in ASEAN Regional Integration

1. Introduction

The experience of the European Union shows the capacity of ‘national’ rule of law to be transposed into the regional order, though perhaps in more limited and modified form. The EU ‘regional’ rule of law has been in turn instrumental in effecting change to new members from Central and Eastern Europe. Other projects of regional integration like SADC and MERCUSOR have also shown the potential of regional integration in building the rule of law in both the regional and national spheres despite the different rule of law practices of members, though again, in varying forms and successes. ASEAN is more than forty years old and it is hailed as relatively successful in managing regional conflicts and thus in promoting peace and stability in Southeast Asia.\(^774\) Compared with other regional projects however, ASEAN is a relative latecomer to regional integration.\(^775\)

This chapter investigates the rule of law in ASEAN regional integration. In fact, the rule of law is one of the core principles of ASEAN since its founding in 1967. ASEAN however has been defined by its informal practices and institutions rather by independent institutions and legally-binding rules present in other regional integration projects particularly the EU. As such, one fundamental question being asked is whether there is rule of law in ASEAN. The task however of this chapter is to locate the rule of law in ASEAN integration. Does the rule of law exist in ASEAN regional integration? This chapter posits that regional integration has opened possibilities to develop the rule of law in ASEAN and thus make the rule of law one of the working principles in the relation of member states and in regional governance. However, the extent, manner and pace this could be achieved would depend on a number of factors both within and outside ASEAN.

\(^774\) See for example, Mely Caballero Anthony, *Regional Security in Southeast Asia: Beyond the ASEAN Way*, (Singapore, Institute of Southeast Asian Studies, 2005), 18-23.

As in the EU, the rule of law in regional integration has various functions – to foster stability and predictability of economic objectives, to manage the relationship among member states and between member states and regional institutions, to prevent possible excesses or abuses of supranational institutions, to limit the discretion of member states, and to protect the rights of individuals in member states. Since the EU is still a ‘work in progress’, the function of the rule of law is likewise changing. One of the current developments in the EU is in working out a balance among the competing demands of member states, their national, regional, and local institutions, and the citizens. Similarly, the rule of law is shifting from the highly formal and supranational arrangement that had pervaded EU in the past to one that is geared towards more flexible rules and institutions and can accommodate more political discussion at various levels of EU governance. This process has taken shape not only in response to the demands of efficiency or globalization, but also in recognition of the varied levels and needs of members in view of enlargement and popular demand for greater individual participation into the regional processes.

The chapter therefore aims to determine the function of the rule of law in ASEAN integration and the various forms that it is taking. This will be seen from the current legal and institutional arrangements in ASEAN as well as by looking at the historical process and motivations of integration. As suggested by the discussion in Chapter Four, the highly differentiated rule of law practices of member states make it highly difficult to come up with a ‘definitive’ role of the rule of law in integration, particularly as a form of constraint on member states’ powers and prerogatives. As a cooperative project among member states having varied rule of law practices, the rule of law in integration takes account not only of regional aims but also of the rule of law in member states. At the end of the chapter, I will identify the constraints of rule of law-building in its current legal and institutional form but also the existence of opportunities to develop the rule of law at both the regional and national levels.
2. The origins of ASEAN regional integration: moving beyond AFTA?

Regional integration in ASEAN started on economic platform and remains economically driven. ASEAN regional integration is a response to combined economic and political processes in the region and in the member states. The political backlash of the economic crises, first during the mid-80s recession and later the debilitating impact of the 1996 financial crisis, created a favourable environment to explore deeper regional economic cooperation and begin talks of institutional reforms in ASEAN. The establishment of ASEAN Free Trade Area (AFTA), the initial model of integration, is considered as the culmination of liberal economic reforms that member countries started to undertake in the early 80s. The idea in creating a regional free trade area was proposed by Thailand, a move which coincided with the preference of most member states for a step-by-step approach to regional integration. The Thai initiative itself came as a bold move following a new coup that installed a liberal reformer replacing a previously corrupt and repressive regime.

Integration was conceived as the engine to spur national economic growth in member countries in the face of increasing global competition and as a regional mechanism in coping with the economic and financial crises. At post-colonial nation-state building, ASEAN states had to grapple with establishing legitimacy and regime legitimation had focused more on economic development. Most member states still adhere to this view and is echoed in ASEAN. Most ASEAN economies however were battered by the 1997 financial crisis which saw economies and regimes crumble at the same time on the weight of the crisis. Economic integration is seen as a vital strategy to complement economic rehabilitation in member states. It is a means to increase the economic competitiveness and expand external the external market of member states.

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776 The Agreement on the CEPT Scheme for the AFTA was signed by the ASEAN Heads of State on 28 January 1992 at Singapore during the Fourth ASEAN Summit.


779 Andrew Tian Huat Tan, A Handbook of Terrorism and Insurgency in Southeast Asia, 7-11.

A key aspect of regional trade liberalization, of which AFTA is anchored, is to intensify the flow of foreign direct investments (FDI), a central pillar of economic policies in Southeast East Asian states.\textsuperscript{781} Southeast Asia’s attraction for investments however started to be threatened in the 90s by heightened competition from China, India, and other liberalizing economies and thus a potential debacle to economic development in the region. Moreover, other external developments such as the failure of the Uruguay Round of the Multilateral Trade Negotiations in 1991 to reach a settlement and the rise of powerful regional and bilateral trade agreements had posed real threats of trade and investment diversion.\textsuperscript{782} ASEAN leaders themselves issued a strongly-worded statement on the Uruguay Round ‘to be fair and transparent to prevent their use as instruments of harassment and protectionism.’\textsuperscript{783}

At the 1992 ASEAN Summit in Singapore, the two documents that initiated the process of regional integration in ASEAN were signed – the Framework Agreement on Enhancing Economic Cooperation and the AFTA Agreement. These economic instruments underscore the principal objective of regional cooperation in sustaining economic growth in member countries as ‘are essential to the stability and prosperity of the region’.\textsuperscript{784} The Framework Agreement states the broad outlines of economic cooperation which are based on the principle of global trade liberalization and the principle of mutual benefit in bringing about deeper economic linkage among its members.

AFTA’s objective is straightforward. ‘The ultimate objective of AFTA is to increase ASEAN’s competitive edge as a production base geared for the world market’\textsuperscript{785} by eliminating tariff and non-tariff barriers. AFTA, via the mechanism of the Common Effective Preferential Tariff (CEPT), is the principal vehicle for intensified economic cooperation. The CEPT mechanism seeks to eliminate barriers to intra-

\textsuperscript{781} See Gary Rodan, Kevin Hewison, & Richard Robison, eds., The Political Economy of Southeast Asia: Conflicts, Crises and Change, (Oxford University Press, 2001), for extensive discussion of the economic structure and policies of Southeast Asian economies.
\textsuperscript{782} Seiji Naya and Pearl Imada, AFTA: The Way Ahead, (Singapore, Institute of Southeast Asian Studies, 1992), 56.
regional trade by reducing tariffs on manufactured and capital goods and processed agricultural products between 0-5% starting 1993 for a period initially of fifteen years. It also aims to eliminate all non-tariff barriers. The new AFTA target is to remove all duties by 2010 for ASEAN-6 and by 2015 for the new members.\footnote{Decision made during the Third ASEAN Informal Summit, Manila, Philippines, 28 November 1999.}

As a major policy initiative, ASEAN economic integration through the CEPT/AFTA was considered to be a political decision at the highest level.\footnote{Ludo Cuyvers and Wisarn Pupphavesa, ‘From ASEAN to AFTA,’ Centre for ASEAN Studies, CAS Discussion Paper No. 6, September 1996, at http://webh01.ua.ac.be/cas/PDF/CAS06.pdf, viewed on 18 August 2009, 7.} It was state-centred project with very minimal participation of private stakeholders, as shown by the relatively short period of time it was negotiated among member states and the brevity of its provisions, almost ten provisions.\footnote{Richard Stubbs, ‘Signing on to liberalization: AFTA and the politics of regional economic cooperation’, The Pacific Review, Vol. 13, No. 2 (2000), 303-6.} Other complementary liberalization schemes have also been formed with the AFTA and this was particularly so at the height of the 1997 Asian crisis. The ASEAN Framework Agreement on Services (AFAS) was signed at the Fifth ASEAN Summit in 1995 which aims to liberalize the services sector such as financial services, transport, telecommunications and professional services. But because most of services enterprises are in the hands of domestic business elites, there has not been substantial progress on services trade liberalization.\footnote{Hew, Dennis and Sen, Rahul, ‘Towards an ASEAN Economic Community: Challenges and Prospects,’ ISEAS Working Papers: Economics and Finance, Institute of Southeast Asian Studies, 2004, 11-2.}

In 1996, the ASEAN Protocol on Dispute Settlement Mechanism (DSM) was established which has remained largely unused by any member state at present. The ASEAN Investment Area (AIA) was established in 1998 to encourage the flow of both domestic and international investments in the region by liberalizing regional investment regimes. The AIA was designed to complement the ASEAN Industrial Cooperation Scheme (AICO) initiated in 1996 through which member countries could cooperate in the manufacture of selected products. The e-ASEAN Framework Agreement was also signed in 1999 to promote and strengthen the competitiveness of the ICT sector in ASEAN, to reduce the digital divide among member states, and to liberalize trade in ICT products, services, and investments.
AFTA is considered to be a relative success especially when considered with the broader project of regional integration. The data from 1993 to 2006 shows accomplishment of tariff reduction and the significant increase of intra-regional trade. In 2006, 99.77% of the products in the inclusion list (IL) of ASEAN-6 countries have tariffs in the 0-5%, 65.09% of which have been completely eliminated. Thus the average tariff rate for these countries has been brought to an average of 1.74% by 2006 from 12.76% in 1993. The CMLV countries made huge improvements as 90.96% of items traded in the region had been moved to the IL and of which 76.86% had been brought to 0-5% band. It is expected that ASEAN-6 countries would have achieved zero tariffs on all goods in their IL by 2010 and CMLV countries by 2015. In terms of trade, intra-ASEAN trade has jumped from US$44.2 billion in 1993 to US$352,771.4 billion in 2006 and accounts for 25.1% of ASEAN’s total trade.

However, ASEAN integration as a strategy to improve member states’ economic development has remained limited and indirect. AFTA for one was initially hampered by backsliding of member states’ commitments and by its institutional weakness. The scope of CEPT/AFTA is likewise concerned only with manufactured products, including capital goods, processed agricultural products, and those products falling outside the definition of agricultural products. Moreover, the agreement provides a general exception clause that allows countries to take action and measures which are necessary to protect their national security, public morals, human, animal, or plant life or health, and articles of artistic, historic and archaeological value.

AFTA’s target is focused on the manufacturing sector which has become the primary growth industries in ASEAN economies starting from the 80s geared for the export markets and are controlled or operated through joint ventures with foreign multinational corporations. Huge elite conglomerates clustered in banking, telecommunications, construction, airlines, and other utilities and are not covered by

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792 Lu Guangsheng, ‘Assessment on Performance of ASEAN Economic Integration,’ 71.
795 Art. 9, CEPT/AFTA Agreement.
AFTA. Unlike in the EU where the abolition of non-tariff barriers was an important goal through legislation and judicial enforcement, removal of non-tariff barriers in ASEAN is conditional ‘upon enjoyment of concessions applicable to those projects’\textsuperscript{796} and is highly discretionary on member states. With a focus on generating FDI and expanding export market, there is narrow common economic integrating interest in ASEAN that would promote greater integration.\textsuperscript{797}

Formal initiatives at regional integration were conceived at the peak of the 1997 Asian crisis when ASEAN announced the Hanoi Vision 2020 on the Second Informal Summit in Kuala Lumpur. The ASEAN leaders agreed ‘to chart a new direction towards the year 2020 called, ASEAN 2020: Partnership in Dynamic Development which will forge closer economic integration within ASEAN.’\textsuperscript{798} ASEAN Vision 2020 affirms ASEAN’S commitment to open and inclusive regional integration and outlines a broad program for economic cooperation which is based on the creation of ‘a free flow of goods, services and investments, a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities.’ The Hanoi Action Plan (HAP) was subsequently announced in 1998 during the Sixth ASEAN Summit in Hanoi which outlined the programme of action of regional economic integration.

2.1. **Building the ASEAN Community and the imperative for reforms**

Ten years into the AFTA and five years after HAP did ASEAN leaders finally agree to establish the ASEAN Community (The Community) at the Ninth ASEAN Summit in Bali on October 2003 through the Bali Concord II. Concord II was approved during the stint of Singapore Minister Ong Keng Yong, then Secretary-General of the ASEAN. The Bali Concord II declared the establishment of ASEAN Community along the old pillar structure of the European Union. The three pillars comprising the Community are the ASEAN Security Community (ASC), the ASEAN Economic Community (AEC), and the ASEAN Socio-Cultural Community (ASCC). A Blueprint for each of the community has been adopted detailing programme of action and

\textsuperscript{796} Art. 5.A, CEPT/AFTA Agreement.
\textsuperscript{797} Lu Guangsheng, ‘Assessment on Performance of ASEAN Economic Integration,’ 74-5.
timetable for implementation.\textsuperscript{799} The adoption of the blueprints is similarly a significant development in ASEAN where the practice of adopting non-binding agreements and commitments had also been couched in general and open-ended language.

Indonesia played a vital role in the adoption of Concord II, the first opportunity at post-Suharto era for Indonesia to assert its leadership position in ASEAN.\textsuperscript{800} Singapore and Thailand were key proponents of economic integration to meet the competition from China and India through the creation of a single market based on the principle of open regionalism. Indonesia vigorously proposed the ASC concept as it would allow her to reclaim her position as a ‘strategic center for regional security’ and in response to the war on terrorism and transnational crime.\textsuperscript{801} As discussed above, economic interests remain to be the source of vital competing interests of member states and in many respects remain to be ‘political’.

On the other hand, the ASCC represents the human or individual component of comprehensive security and tackles non-contentious and non-political issues.\textsuperscript{802} The establishment of the ASEAN Community therefore embraces the security approach at regionalism in ASEAN which is to provide a regional umbrella to the security dilemmas of member states. It forms an important component of an evolving comprehensive approach to member states’ security issues. The Community also carries a strong component of regional identity-building. As in member states, the economic development is a priority objective of Community-building and the AEC is to be the flagship of regional integration.

Under the revitalized integration initiative, the AEC is envisaged to have the following characteristics: (a) a single market and production base, (b) a highly competitive economic region, (c) a region of equitable economic development, and (d) a

\textsuperscript{799} These are: Blueprint for ASEAN Economic Community adopted in 2007, Blueprint for ASEAN Political and Security Community, Blueprint for ASEAN Socio-Cultural Community, both adopted on 1 March 2009, at 14\textsuperscript{th} ASEAN Summit in Cha-Am, Thailand.
\textsuperscript{800} Donald Weatherbee and Ralf Emmers, \textit{International Relations in Southeast Asia: The Struggle for Autonomy}, (United States, Rowman and Littlefield, 2005), 107-8.
\textsuperscript{801} Donald Weatherbee and Ralf Emmers, \textit{International Relations in Southeast Asia: The Struggle for Autonomy}, 108.
\textsuperscript{802} Donald Weatherbee and Ralf Emmers, \textit{International Relations in Southeast Asia: The Struggle for Autonomy}, 108.
region fully integrated into the global economy. As a single market and production base, ASEAN aims to achieve: free flow of goods, free flow of capital, and free flow of skilled labour. During the Twelfth ASEAN Summit in Cebu, member states agreed to accelerate economic integration to 2015. Under the AEC Blueprint adopted to accelerate integration -

‘The ASEC will establish ASEAN as a single market and production base making ASEAN more dynamic and competitive with new mechanisms and measures to strengthen the implementation of its existing economic initiatives; accelerating regional integration in the priority sectors; facilitating movement of business persons, skilled labor and talents; and strengthening the institutional mechanisms of ASEAN.’

An imperative however to establishing regional integration points to the necessity for legal and institutional reforms in ASEAN. The move to establish the ASEAN Community shortly came after the McKinsey Consulting Report on ASEAN Competitiveness (McKinsey Report) commissioned by the ASEAN Economic Meeting (AEM) in 2001. The McKinsey Report highlighted three major concerns affecting economic integration. These are subscale and fragmented markets, unnecessary costs due to different product standards and customs procedures, and unpredictability of policy implementation of ASEAN member countries. The McKinsey Report, which was based on interviews and surveys among businessmen, business groups and industries across the region, noted domestic regulatory barriers that protect companies from competition and keeping small unproductive firms survive by tolerating evasion of taxes, labour standards, and other product regulations. It cited unequal enforcement of regulations in many ASEAN countries have curtailed efficiency and hindered competition among firms causing low productivity and low quality of product standards.

The lack of political will among ASEAN leaders to establish independent regional institutions was mentioned as major reason for the failure of previous efforts at economic cooperation. Thus -

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Our study highlights a number of factors that have diluted ASEAN’s previous efforts to integrate its ten economies. Foremost among these factors has been a lack of political will in most of the region because of widespread uncertainty among policy makers and business executives about the end goal of economic integration and its benefits for individual countries.

This lack of political will is also reflected in ASEAN’s past reluctance to create regional institutions to expedite decision making and raise investor confidence in the integrity of the group’s commitments. ASEAN remains primarily a government-led trade group. Members propose and consider policies collectively, make decisions by consensus, and rely on mutual trust to implement policies. This approach has helped preserve regional stability but is less suited to dealing with the myriad technical policies that economic integration requires.\(^{805}\)

The McKinsey Report recommended regional economic integration through a sector-based approach to integration and elimination of barriers to intra-regional trade such as removing tariff and nontariff barriers and restrictions on cross-border investments transactions. To do this would require institutional and legal reforms such as strengthening regional institutions, establishing institutional framework for regional integration, creating professional and independent bodies, and establishing independent mechanisms to handle disputes. It also proposed the introduction of an ASEAN-wide competition policy to discourage the formation of cartels and other anti-competitive practices that stifle a level playing field for all business interests.

Prior to the McKinsey Report, the ASEAN Eminent Persons Group (EPG) submitted a report on Vision 2020 which expressed ‘the fact that ASEAN has been facing criticism of irrelevance both internally and externally, especially in its failure to respond collectively to the financial crisis of 1997-99.’\(^{806}\) Even as it advocated for a state-centred integration, the EPG stressed the need for a ‘careful and transparent management of financial institutions as a prerequisite of other economic initiatives.’ Acknowledging the minimal participation of non-state actors in the ASEAN processes, the EPG had recommended the involvement of the civil society and the private sector towards the realization of the ASEAN as a ‘caring and sharing Community’ and the

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need to raise the level of awareness of the peoples in Southeast Asia towards ASEAN. Both the EPG and McKinsey Report recognized the political basis of economic cooperation.

Since 2003, ASEAN has adopted various agreements and programs to implement economic integration. ASEAN had adopted the comprehensive recommendation of the High Level Task Force on ASEAN Economic Integration (HLTF) such as the sectoral approach to integration earlier recommended by the McKinsey Report. The HLTF identified eleven priority sectors for integration and assigned member countries to take the lead and responsibility: Indonesia – for wood-based products and automotives; Malaysia – for rubber-based products, textiles and apparels; Myanmar – for agro-based products and fisheries; Philippines – for electronics; Singapore – e-ASEAN and Healthcare; and Thailand – for air travel and tourism. More than sixty instruments in the form of agreements, protocols and declarations relating to intra-regional economic cooperation have been signed by member countries between the period 2003 and 2007.

Some critics of ASEAN still dismiss these initiatives as insubstantial. Nevertheless, the ASEAN Community represents a significant development especially when considered from its highly political past. The adoption of the ASEAN Charter (The Charter) during the Thirteenth ASEAN Summit in Singapore on 20 November 2007, though not a radical break from its past, represents a milestone for ASEAN. Ambitious as it appears, the private sector in ASEAN pointed to several issues by which ASEAN Community could achieve its goals and be effective. To be a real Community, ASEAN needs to bring about substantive changes that address institutional and legal reforms but also tackle vital political and economic issues by member states.

3. The ASEAN Charter as the framework of ASEAN regional integration

808 Table of ASEAN Treaties/Agreements and Ratification, As of 29 October 2007, at http://www.aseansec.org.
The Vientiane Action Program (VAP) is one of the most significant documents in ASEAN which heralded the creation of the ASEAN Charter (The Charter). The VAP represents an express recognition by member states of the political basis of economic cooperation and acknowledgment of the necessity for broad public support for regional integration. The ASEAN Charter came into force on 15 December 2008. The goal of having a charter was first officially acknowledged at the Tenth ASEAN Summit in Laos on November 2004 and embodied in the VAP.\footnote{Chairman’s Statement of the 10th ASEAN Summit, 29 November 2004, Vientiane, Laos at \url{http://www.aseansec.org/ADS-2004.pdf}, viewed on 12 November 2008.} Focusing on ASEAN’s ambitious goal of deepening integration and narrowing the development gap between member states, ASEAN officials in the VAP declared: ‘We recognize the need to strengthen the ASEAN and shall work towards the development of an ASEAN Charter.’\footnote{Par. 5, Sec. 1, Vientiane Action Program, at \url{http://www.aseansec.org/ADS-2004.pdf}} At the 11th ASEAN Summit on December 2005, ASEAN came out with the Kuala Lumpur Declaration on the Establishment of the ASEAN Charter which unequivocally recognized the importance of an institutional framework appropriate to the challenges of the ASEAN Community and the need for a charter that will serve as a firm foundation for ASEAN in the years ahead.\footnote{Kuala Lumpur Declaration on the Establishment of the ASEAN Charter (Kuala Lumpur Declaration), 12 December 2005, Kuala Lumpur, Malaysia, at \url{http://www.aseansec.org/ADS-2005.pdf}, viewed on 12 November 2008, 18-9.}

The Declaration likewise appointed the creation of the EPG, a group of highly-distinguished and well-respected citizens from each member country, which was given mandate to examine and provide practical recommendations to the direction and nature of the charter. It is very clear from the mandate that the drafting of a charter would have two principal objectives: to codify all existing norms, rules and values and to reaffirm the principles, goals and ideals contained in existing ASEAN documents.\footnote{Kuala Lumpur Declaration, 18-9.} The EPG however, given this limited mandate, came forth with ‘bold and visionary recommendations’ that perhaps went beyond the intentions of ASEAN leaders. This only shows the emergence of reform-minded elites in the region who wish to make ASEAN more responsive to the changes and challenges that the region face in contemporary period. The EPG’s work reflects a paradigm shift in some sectors in Southeast Asia wanting change or reforms of the status quo.
The EPG recommendations were not adopted in its entirety but the comprehensive principles that were advocated by its members are written all over The Charter, though in its scaled-down or tempered version. Even as it still represents much of the ‘old order’ in ASEAN, The Charter represents a new current in elite thinking in ASEAN and perhaps a desire to articulate the growing aspirations of many people in the region. To dismiss therefore The Charter as mere paper agreement is to miss the opportunity, though still limited, of making it an instrument of change. It is therefore important to reproduce here some of the key principles, values and objectives that the EPG had aspired of The Charter. They strongly reflect the need to foster the rule of law in various aspects of ASEAN integration.

Promotion of ASEAN’s peace and stability through the active strengthening of democratic values, good governance, rejection of unconstitutional and undemocratic changes of government, the rule of law, including international humanitarian law, and respect for human rights and fundamental freedoms.

Promotion of ASEAN’s timely and effective responses to non-traditional and transboundary challenges and crises through mutual assistance or regional and international cooperation. ASEAN may need to calibrate the traditional policy of non-intervention in areas where the common interest dictates closer cooperation.

Expressing the resolve to realise an ASEAN Community and ultimately an ASEAN Union.

Dispute Settlement Mechanism (DSM) be established in all fields of ASEAN cooperation which should include compliance monitoring, advisory, consultation as well as enforcement mechanisms.

ASEAN should have the power to take measures to redress cases of serious breach of ASEAN’s objectives, major principles, and commitments to important agreements. Failure to comply with decisions of the dispute settlement mechanisms should be referred to the ASEAN Council. Such measures may include suspension of any of the rights and privileges of membership. Unless otherwise decided by the ASEAN Council in exceptional circumstances, there shall be no recourse to expulsion of membership.

Decision-making by consultation and consensus should be retained for all sensitive important decisions. However, if consensus cannot be achieved, decisions may be taken through voting, subject to the rules of procedure determined by the ASEAN Council.

Cultivate ASEAN as a people-centred organisation to strengthen the sense of ownership and belonging among its people, including enhancing the participation of and interaction among Parliamentarians in ASEAN Member States (AIPA),
representatives of the civil society organizations, the private business sector, human rights groups, academic institutions and other stakeholders in ASEAN.’

‘The Principal Organs of ASEAN shall undertake regular consultations with all of the parties mentioned above through appropriate channels.’

The Charter aims to invest ASEAN with institutional framework and legal personality to enable the association to accelerate the pace of regional integration from 2020 to 2015. ASEAN leaders expressed their ‘conviction that an ASEAN Charter will serve as a firm foundation in achieving one ASEAN Community by providing an enhanced institutional framework as well as conferring a legal personality to ASEAN.’ The most controversial aspect of the Charter has been its approval for the establishment of a regional human rights body which had stalled the adoption of the Charter. The next sections investigate whether The Charter could also provide ASEAN with a constitutional framework for developing the rule of law in regional integration.

3.1. The ASEAN Charter as a constitution: establishing the rule of law or mere institutionalization of inter-governmental cooperation

The ASEAN Charter signifies a modest attempt by member states to provide a more coherent and stable framework for intra-regional cooperation. As a state-centred project, the main function of The Charter is to manage the relations of member states and institutionalize such relations. ‘ASEAN, as an inter-governmental organization, is hereby conferred legal personality.’ There are still no supranational bodies in ASEAN and all aspects of regional governance remain to be intergovernmental in nature. There is no doubt that ASEAN leaders intended the Charter to be a legal document among the members requiring ratification from all its member states and the deposit of the instrument to the Secretariat of the United Nations. The ASEAN

814 The decision to speed up integration to 2015 was approved by ASEAN leaders on the occasion of the 12th ASEAN Summit in Cebu, Philippines on January 2007.
leaders intended the Charter to ‘serve as a legal and institutional framework, as well as an inspiration for ASEAN in the years ahead.’\textsuperscript{819} The members expressed -

‘To faithfully respect the rights and fulfil the obligations outlined in the provisions of the ASEAN Charter;

To complete ratification by all Member Countries as soon as possible in order to bring the ASEAN Charter into force; and

‘To undertake all appropriate measures in each Member Country to implement the ASEAN Charter.’\textsuperscript{820}

On the ‘thin’ sense, the ASEAN Charter satisfies the minimum criteria of a constitution mentioned by Raz. It provides for the purposes and principles of ASEAN and enumerates the various organs and their respective functions and responsibilities.\textsuperscript{821} There are now five principal organs in ASEAN – ASEAN Summit, ASEAN Coordinating Council, ASEAN Community Councils, ASEAN Sectoral Ministerial Bodies, ASEAN Secretary General/ASEAN Secretariat, and the Committee of Permanent Representatives, with their respective powers and functions. The Charter also broadly outlines the constitution of its membership and their rights and obligations.\textsuperscript{822}

The Charter reiterates ASEAN’s earlier objectives in the Bangkok Declaration and the Treaty of Amity and Cooperation to maintain, peace, security and stability, to enhance regional resilience and to preserve Southeast Asia as a Nuclear Weapon-Free Zone and from all other weapons of mass destruction. It specifically mentions ASEAN’s economic goal to create a single market and production base and such development goals of alleviating poverty and narrowing of development gap within ASEAN and promoting sustainable development and ensuring protection of the environment in the region. One important addition to the purposes of ASEAN is the promotion of democracy, the rule of law, human rights and fundamental freedoms. This is the first time in the history of ASEAN, a region having prided and advocated ASEAN Way and Asian values in the past, to include the promotion of the values of democracy.


\textsuperscript{820} Singapore Declaration on the ASEAN Charter.

\textsuperscript{821} Arts. 1,2, Chap. I, Arts. 7-15, Chapter IV, The Charter.

\textsuperscript{822} Arts. 4-6, Chap. III, The Charter.
and human rights, though still conditioned by the ‘rights and responsibilities of the Member States’, in its basic instrument. The ASEAN thus endeavours -

‘To strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN.’

There are other newly-adopted principles which suggest commitment towards the rule of law or at least a more rules-based regime in ASEAN. These are -

‘(h) adherence to the rule of law, good governance, the principles of democracy and constitutional government;

‘(i) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;

‘(j) upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States;

‘(n) adherence to multilateral trade rules and ASEAN’s rules-based regimes for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration, in a market-driven economy.’

The ASEAN Charter likewise fulfils some of the requirements of a thick constitution. The Charter is clearly constitutive and provides a stable framework by which member states relate with one another by setting forth the objectives and principles by which member states create expectations but also by providing them an institutional framework for cooperation. The Charter is entrenched providing for a specific procedure by which it can be amended. The manner by which it can only be amended by consensus and ratified by all member states makes charter amendment a difficult and tedious procedure thus assuring longevity and stability.

The Charter however falls short of a thick constitution or constitutionalism embodying the basic principle of separation of powers, or in the case of EU, of checks and balance. There is no specific provision that The Charter is to be a superior law through which inconsistent domestic laws or acts could be declared invalid. The

823 Art. 1(5), The Charter.
824 Art. 48(3), The Charter.
absence of a judicial body or procedure by which incompatibility of certain laws with the Charter can be tested and thereby declared inconsistent or invalid indicates a dim possibility for the establishment of a regional superior law present in the EU. The establishment of the principle of supremacy which is the bulwark of the regional rule of law in the EU is clearly precluded in ASEAN.

Instead a non-judicial mode of settling issues of interpretation concerning the Charter, which could include issues of incompatibility, has been provided. Article 51 provides that the ASEAN Secretariat can undertake the task of interpreting the Charter upon the request of a member state.\textsuperscript{825} Given the strictly administrative and advisory function of the Secretariat, the interpretation could be in the form of a mere opinion or advice. Article 25 provides for the possibility of the establishment of a dispute resolution mechanism on issues of interpretation or application of the Charter. Arbitration however seems to be the preferred mode by which disputes of this nature will be settled and thus precludes the establishment of a coherent and consistent body of regional rules, at least in the foreseeable future. A third option is provided which is referral of the dispute to the ASEAN Summit.\textsuperscript{826} The judicial forum for adjudication of The Charter was clearly rejected by member states. The Charter however points to the development of a depoliticized and independent mechanism in ASEAN to settle disputes.

### 3.2. Cooperation and coordination, not separation of powers

Coordination and cooperation and sometimes overlapping functional responsibility characterize the relationship of the organs of ASEAN under The Charter. In the EU, the constitutional system of checks and balance operates to maintain the integrity, independence and legitimacy of regional institutions even without a strict observance of separation of powers. It also shows the viability of non-government actors working with government representatives and also between independent supranational and intergovernmental institutions in fostering the rule of law based on

\textsuperscript{825} Art. 51, The Charter.
\textsuperscript{826} Art. 26, The Charter.
the practice of co-decision, co-operation and comitology. However, these practices are to be based on adherence to the *acquis communitaire* or the body of laws which have developed in the course of Community building in the EU.

As pointed out, The ASEAN Charter reiterates ASEAN’s inter-governmental character and reaffirms the member states’ aversion to supranational bodies. The Charter institutionalizes the various regional organs and mechanisms that have been in existence in ASEAN on less regular, *ad hoc* or temporary basis. For example, an ASEAN National Secretariat (National Secretariat) which had been constituted on a temporary capacity in the past shall be established in each member country in a permanent basis. It shall serve as the national focal point and repository of all information regarding ASEAN at the national level and be responsible in coordinating the implementation of ASEAN decisions at the national level. The ASEAN Foundation which has already existed to promote ASEAN community-building is now institutionalized.

The Charter not only institutionalized existing informal bodies in ASEAN but also added new organs and mechanisms that will strengthen the capacity of existing organs of ASEAN. The Charter has certainly provided regularity, continuity and permanence of regional institutions that could undertake far-ranging programs for ASEAN and its members. It does not endeavour to provide for a system of ‘checks and balance’ that could establish a semblance of separation of powers among its main organs. At its current institutional arrangements, the EU is increasingly moving to ‘parity’ among its regional institutions particularly in respect to its legislative and executive organs. Like most other regional integration projects such as in SADC and MERCUSOR, ASEAN follows a hierarchical structure with the ASEAN Summit at the apex and all other organs at the bottom.

The ASEAN Summit, comprised of the heads of state or government of member states, is the penultimate institution for decision-making, implementation and

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830 Art. 15, The Charter.
compliance, and settlement of disputes in ASEAN. It has the ultimate control of all major areas of governance in ASEAN. The ASEAN Summit is the supreme policy-making body of ASEAN.\textsuperscript{831} It is the sole authority to decide on serious breach of the Charter or non-compliance by a member state.\textsuperscript{832} Any unresolved disputes shall also be referred to the ASEAN Summit for decision.\textsuperscript{833} The ASEAN Summit is now to be held twice in a year and to be hosted by the member state holding the ASEAN Chairmanship.\textsuperscript{834} The Country-in-Chair is headed by an ASEAN government head which is filled by rotation among the member states’ leaders. Previously, the ASEAN Summit was held infrequently until its institutionalization at the Fourth ASEAN Summit in 1992 where member states agreed to hold a summit every three years and to hold informal ones in between. The present provision makes the Summit a twice-yearly event among member states leaders.

The ASEAN Coordinating Council (Coordinating Council), composed of the ASEAN Foreign Ministers, acts as the policy/legislation initiator in the ASEAN Community and as the link or intermediary between the ASEAN Summit and the ASEAN Community Council (Community Councils) and all relevant bodies in implementing the agreements and decisions of the Summit.\textsuperscript{835} It prepares the meetings of the ASEAN Summit and coordinates with the Community Councils to enhance policy coherence, efficiency and cooperation and the three Councils. It also considers the annual report of the Secretary-General on the work of ASEAN and of the functions and operations of the Secretariat. As its name implies, the work of the Coordinating Council is to coordinate the works of the main organs in ASEAN and feedback them to the ASEAN Summit.

The ASEAN Community Councils are comprised of the ASEAN Political-Security Community Council, ASEAN Economic Community Council, and the ASEAN Socio-cultural Community Council corresponding to the three pillars of the ASEAN Community.\textsuperscript{836} The Community Councils are, together with the ASEAN Sectoral

\textsuperscript{831} Art. 7(2a), The Charter.
\textsuperscript{832} Art. 20(4), Art. 27(1), The Charter.
\textsuperscript{833} Art. 26, The Charter.
\textsuperscript{834} Art. 7(3a), The Charter.
\textsuperscript{835} Art. 8(1,2a-f), The Charter.
\textsuperscript{836} Art. 9(1), The Charter.
Ministerial Bodies (Ministerial Body/Bodies), the main implementing organs in ASEAN. The Community Councils, whose members are designated by member states, are responsible in implementing the relevant decisions of the ASEAN Summit. Each of the ASEAN Community Council shall have under its wing the relevant Ministerial Body which is in turn specifically tasked with implementing the agreements and decisions of the ASEAN Summit under its designated areas of responsibility and to submit reports and recommendations to their respective Community Councils.837

The three main organs discussed above are all staffed by government ministers or senior officials, that is, by the executives of member states. The idea of separation of powers is clearly absent where governments hold a monopoly of all major powers and functions. This is in stark contrast with the EU where an institution can make another institution or its official accountable for violations or non-compliance of treaty obligations.838 Institutional innovations however have been put in place to ensure efficiency and continuity in the area of implementation. Two institutions, given their limited mandate in The Charter, can assume independence and pro-activeness in regional processes.

A Committee of Permanent Representatives (Committee) composed of each country’s Permanent Representative to ASEAN which will have a rank of Ambassador based in Jakarta, has been established.839 Member states have appointed their ambassadors to the ASEAN. This position has the capacity to provide for institutional continuity of each member’s activities in ASEAN being appointed on a permanent basis in contrast to the three previous mentioned organs which are staffed with ministerial or senior government ranks whose appointments could be withdrawn at anytime by their governments. But unlike the COREPER in the EU, the Committee does not perform any decision-making function nor does it have any precise or specific responsibility provided in The Charter in the three core areas of regional governance.840 The Committee’s function is vaguely defined as providing support or coordinating the work

838 The EU Commission can bring enforcement proceedings against a member state while the European Court of Justice can hear preliminary reference proceedings from national courts brought by individuals against institutions or officials of the EU.
839 Art. 12(1), The Charter.
840 The COREPER is a Committee attached to the Council of European Union staffed by senior national officials and whose function is to prepare the work of the latter in approving legislation.
of other organs of ASEAN, with the exception of the ASEAN Summit. The Charter does not say to which organ it is to be responsible or where its findings or recommendations are to go although the Coordinating Council can delegate work to it. The Committee therefore needs a lot of imagination and creativity on how it can be a useful mechanism in ASEAN.

Under the Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights (ToR of AICHR), the Committee is given clearer function in being an intermediary between the Commission and the ASEAN Foreign Ministers Meeting (AFMM) on matters of human rights. It is delegated with the function of recommending to the AFMM the approval of the workplan and budget of the AICHR. It can also consider and present to the AFMM a request for amendment of the ToR by a member state. The Committee can play an influential role in the work and functioning of the newly-constituted AICHR.

The Secretary-General and the ASEAN Secretariat are especially invested with an enhanced and independent status by The Charter. The Secretary General is appointed for a fixed term of five years and will be selected on the basis of integrity, capability and professional experience. Moreover, member states undertake to respect the independence of the Secretary-General and the Secretariat by refraining from influencing them in the discharge of their duties. The institutional capacity of the ASEAN Secretariat is also being enhanced with the appointment of not just two but four Deputy Secretaries-General to the ASEAN Secretary-General. Two of the Deputy Secretary-General will be appointed based on merit while the other two will be appointed from ASEAN nationals based on alphabetical rotation of member states.

The ASEAN Secretariat whose functions has been enhanced by the Protocol Amending the Agreement on the Establishment of the ASEAN Secretariat in 1992, not

841 Art. 12(2d) of The Charter provides however that is responsible in facilitating cooperation with external partners of ASEAN.
842 Art. 2(e), The Charter.
844 Par. 9.3, ToR of AICHR.
845 Art. 11(1), The Charter.
846 Art. 11(9), The Charter.
847 Art. 11(6), The Charter.
only performs administrative or secretariat function for ASEAN but is now entrusted with facilitating and monitoring the progress in the implementation of ASEAN agreements and decisions.\textsuperscript{848} The Secretary-General and the Secretariat is now given a central role in monitoring compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism.\textsuperscript{849} The Secretary-General is also given a prominent role in the AICHR by bringing relevant issues to the Commission in relation to his role in monitoring the implementation of ASEAN agreements and submitting an annual report on the work of ASEAN.\textsuperscript{850} The Secretariat is also to provide necessary secretarial support to the AICHR to ensure its effective performance.\textsuperscript{851}

Indeed the ASEAN Secretariat has come a long way since its beginnings. It was loosely organized having no real powers to initiate proposals but acted only as a mere coordinating body with the member state’s National Secretariats who had supervisory functions over ASEAN activities.\textsuperscript{852} Under the said Protocol, the Secretariat can initiate, advise, co-ordinate and implement ASEAN activities and also be responsible in monitoring the implementation of the AFTA, the backbone of economic integration in ASEAN.

Clearly, The Charter has initiated a process of institution-building in ASEAN. From its loose and informal beginnings, the ASEAN has now moved towards the creation of formal institutions. This bodes well for the development of rule of law which depends on strong institutions to develop and function.

3.3. Building a soft legal regime in the ASEAN Community

As discussed in the previous section, the ASEAN Charter provides a comprehensive provision of the rights and responsibilities of member states, the

\textsuperscript{849} Art. 27(1), The Charter.
\textsuperscript{850} Par. 7.1, ToR of AICHR.
\textsuperscript{851} Par. 7.2, ToR of AICHR.
\textsuperscript{852} Chin Kin Wah, ‘The Institutional Structure,’ in The ASEAN Reader, (Singapore, Institute of Southeast Asian Studies, 1992), 55-6.
functions of the various organs in ASEAN, their composition and relationship with each other. The Charter clearly expresses the intention of the parties to be bound by its terms and specifies mechanisms for rule-making, implementation and adjudication of disputes. The next core question to be asked however is whether the Charter provides a clear, stable and predictable guidance by which member states implement and fulfil their responsibilities under the instrument and other related agreements covered by The Charter.

The ASEAN Charter still reflects a discretionary and consensual approach in the key areas of decision-making, implementation and compliance, and dispute resolution even in the aspect of economic integration where there is strong demand for a formal legal framework. The Charter acknowledges consultation and consensus as the basic principle of decision-making in ASEAN. In fact, it is the only mode of decision-making established in The Charter with the ASEAN Summit as the only body tasked to ‘deliberate, provide policy guidance and take decisions on key issues’ and give instructions to relevant Community Council. The principle of ‘enhanced consultation’ on matters seriously affecting the common interest of ASEAN has been embodied in the statement of principles which marks a move towards a more earnest consideration of issues of regional significance that have otherwise constrained ASEAN from taking further action or decision in the past.

A new article has been added which suggests an exception to the ASEAN Summit’s decision-making power or at least the possibility of delegation to other organs in ASEAN. Article 20(3) of The Charter states that consultation and consensus shall be deemed not to affect the modes of decision-making specified in relevant ASEAN legal instruments. A legal document is one that confers rights and obligations on the parties and is ‘legally’ enforceable. Many ASEAN agreements, particularly economic instruments, are considered legal documents even in the absence of or weak enforcement mechanisms. With the adoption of the Protocol on Dispute Settlement Mechanism in 1996, as amended by 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism (ASEAN Enhanced DSM), covered agreements referring to the forty-seven economic agreements entered since 1971 listed as Appendix 1 and future

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853 Art. 20(1), The Charter.
854 Art. 7(2b,c), The Charter.
economic agreements, were to incorporate provisions of the new dispute settlement mechanisms. These economic documents have certainly acquired legal effect.

Decision-making however is not a function of ASEAN legal documents whose institutional components are mainly designed to implement member states’ obligations. For example, an inter-ministerial body to supervise, coordinate and review the implementation of the CEPT/AFTA had been created, the AFTA Council, which is mandated to report to the ASEAN Economic Ministers (AEM). But neither the AFTA Council nor the AEM are given the power of rule-making. The newly-signed ASEAN Comprehensive Investment Agreement (Investment Agreement) seems to suggest that an inter-governmental body, the ASEAN Investment Area (AIA) Council, could be delegated with authority to make rules on technical areas of cooperation. The Agreement provides the AIA Council with the function of providing ‘policy guidance on global and regional investment matters concerning promotion, facilitation, protection, and liberalisation’ as well as ‘adopt any necessary decisions.’

In the EU, flexibility is now becoming an important, if not complementary, aspect of regional governance. Its function is however geared towards efficiency or to give opportunity for deliberation and does not purport to erode the value of the rule of law. In ASEAN, flexibility is acknowledged particularly in the implementation of economic agreements to recognize the different levels of needs and status of development of member states. However, rather than to ‘free’ member states from the rigidity of attaining a consensus, flexibility as understood in ASEAN still rests on consensus and thus contrarily promotes inflexibility. ‘In the implementation of economic commitments, a formula for flexible participation, including the ASEAN Minus X formula, may be applied where there is a consensus to do so.’

858 Art. 21(2), The Charter.
The use of the word, ‘commitments’, instead of ‘agreements’, in the above provision signifies a pre-agreed concession for flexible implementation and softens the character of ASEAN economic instruments. Moreover, even in economic agreements where there is more precise statement of the parties’ rights and responsibilities, consultation and avoidance of conflict are both the values and function that core institutions are mandated to perform. The AIA Council is required to ‘facilitate the avoidance and settlement of disputes arising from this Agreement.’\(^\text{859}\) The CEPT/AFTA Agreement likewise affords member states adequate opportunity for consultation in the implementation of the agreement through the AEM.\(^\text{860}\) However, to improve compliance of obligations by member states, other institutional devices had been created such as the Legal Unit of the ASEAN Secretariat, the ASEAN Consultation to Solve Trade and Investment Issues, and the ASEAN Compliance body to solve operational and technical problems of implementation.

Indeed, ASEAN economic integration is framed through soft agreements in contrast to ‘hard law’ which provides for more specific and precise statement of obligations and corresponding punitive provisions in case of non-compliance. Only the Investment Agreement provides for specific rules for bringing a claim and award of damages between an investor and a member state.\(^\text{861}\) Rules on sanctions in economic disputes involving member states are generally governed by the ASEAN Enhanced DSM.\(^\text{862}\) Other ASEAN instruments especially those in non-economic forms expressed through declarations and commitments do not provide for enforcement or dispute resolution mechanisms and mainly rely on the continuing commitments of member states. Again in the EU, increasing use of ‘soft law’ is being employed particularly in promoting ‘social Europe’ especially in areas where Union competence does not exist and a voluntary mode of compliance is encouraged for member states. However, as mentioned in Chapter Three, a key lesson from the EU is that even the soft approach is backed up by institutional mechanisms and designed to encourage active participation of social partners and civil society.

\(^{859}\) Art. 42(3e), ASEAN Investment Agreement.
\(^{860}\) Art. 8(1), CEPT/AFTA Agreement.
\(^{861}\) Art. 33-44, ASEAN Investment Agreement.
\(^{862}\) Art. 14 (Panel and Appellate Body Recommendations); Art. 16 (Compensation and Suspension of Concessions), CEPT/AFTA Agreement.
Harmonization of technical standards and mutual recognition agreements (MRAs) in certain professional services is another feature of ASEAN’s soft legalization in the economic area of cooperation. This strategy for bringing about integration depends on the member state’s commitment and voluntary action of making local or domestic standards conform to international or regional standards and voluntary recognition of professional qualifications of persons from another member state. Since 2005, ASEAN has begun adopting MRAs on architectural, surveying, nursing, medical, dental and accounting services paving the way for the free movement of skilled labour in the region.  

Mutual recognition on certain products like cosmetics, pharmaceuticals, and electrical and electronics goods has been adopted and so are harmonized customs standards and procedures through the adoption of the ASEAN Harmonized Tariff Nomenclature in 2004 and the ASEAN Single Window implemented in ASEAN-6 countries in 2008. MRAs and harmonized standards still depend for their implementation on the political will of member states and do not seek to transgress upon member state’s sovereignty particularly on the area of rule-making. Thus, the right to regulate professions still fall within the powers of member states and that MRA ‘shall not reduce, eliminate or modify the rights, power, and authority of each ASEAN member state.’

The economic pillar of ASEAN, the ASEAN Economic Community, therefore strives to operate on the framework of soft legal regime, albeit on its initial and limited phase. It is leaning towards de-politicization of dispute mechanism but still works through the political framework in terms of rule-making and implementation. There is however an evolutionary tendency towards delegation of rule-making in technical matters and development of uniform rules through voluntary reception into the domestic legal system through the method of harmonization. The development of ‘rules-based systems for effective compliance and implementation of economic commitments’ declared in the ASEAN Economic Community Blueprint would depend on gradual and


864 Art. V, ASEAN MRA on Medical Practitioners, Cha-Am, Thailand, 26 February 2009.
step-by-step process based on voluntary adoption of member states.\textsuperscript{865} As in the EU, the use of soft law is not by itself detrimental to the rule of law and could co-exist with hard law. But lest it could degenerate into untrammelled discretion, the use of soft law needs to be accompanied by institutional support, clear guidelines and timetables, and peer review but also the political commitment of national officials.

3.4. Reform or the status quo in ASEAN dispute settlement mechanisms

A mechanism for dispute settlement has become an institutional development to ensure the rule of law in international relations. The WTO Dispute Settlement Body (DSB) has made substantial contribution to improving compliance of member states’ commitments.\textsuperscript{866} The EU on the other hand, through the European Court of Justice (ECJ), has secured the development of a huge body of regional law that is enforceable in member states. Where compliance had been a matter of loose commitments by member states, conflict adjudication is one of the most significant areas recommended for reform in ASEAN. According to the statement of the Eminent Person’s Group (EPG) on ASEAN Charter,

\begin{quote}
‘ASEAN’s problem is not one of lack of vision, ideas, or action plans. The problem is one of ensuring compliance and effective implementation. ASEAN must have a culture of commitment to honour and implement decisions, agreements and timelines.’\textsuperscript{867}
\end{quote}

The EPG thus advised that a dispute settlement mechanism be established in all areas of ASEAN cooperation which should also include compliance monitoring, advisory, consultation and enforcement. Following on EPG’s recommendation, the ASEAN Charter has provided to maintain and establish dispute settlement mechanisms in all fields of ASEAN cooperation.\textsuperscript{868} There are now at least three modes of dispute resolution in ASEAN – through good offices, conciliation and mediation through the Chair of ASEAN or Secretary-General\textsuperscript{869}, through the ASEAN Summit, and an instrument-specific mode of dispute settlement. As already mentioned in the previous

\begin{footnotes}
\textsuperscript{865} AEC Blueprint, at http://www.aseansec.org/21083.pdf, viewed on 27 March 2009.
\textsuperscript{868} Art. 22(2), The Charter.
\textsuperscript{869} Art. 23, The Charter.
\end{footnotes}
section, the ASEAN Summit shall have the authority to decide on ‘unresolved disputes’ as well as to decide on issues of non-compliance by member states resulting from an ASEAN dispute settlement mechanism. Article 24 of The Charter provides for an instrument-specific mode of dispute resolution in ASEAN. This provision brings a degree of clarity and specificity of avenues for conflict settlement, when compared to the uncertainty of informal channels in the past.

Issues or conflicts relating to specific ASEAN instrument shall be settled through the mechanisms or procedures provided for in that instrument. For instance, the ASEAN Investment Agreement 2009, which superseded the 1987 Agreement for the Promotion and Protection of Investments, provides for two distinct mechanisms of dispute resolution. One involves disputes between member states for which the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (ASEAN Enhanced DSM) is applicable and the other involves the investor and a member state. In the latter instance, an investor has the choice either to submit a claim before the domestic court or administrative tribunal of a disputing member state or bring the claim before international or regional arbitral bodies. In 1987, the Investment Agreement was nearly tested when an investment dispute involving a Singapore company and the government of Myanmar had led to the establishment of the ASEAN Arbitral Tribunal before the ICSID. The case did not undergo the full arbitral process as the case was refused jurisdiction on the basis that Myanmar was not a member of the ASEAN when the investment was made and not a contracting party to the 1987 agreement.

Economic disputes are now, as a rule, to be settled pursuant to the ASEAN Protocol on Enhanced ASEAN Enhanced DSM, unless a specific mechanism is provided for in a separate agreement. For issues that do not involve the interpretation or application of any ASEAN instrument, the mechanisms provided under the Treaty of Amity and Cooperation (TAC) shall be used. This would refer to highly sensitive political and security issues among member states or those that are likely to disturb the

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871 Art. 33, Submission of a Claim, ASEAN Investment Agreement, such as International Convention on the Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL), and the Regional Centre for Arbitration in Kuala Lumpur.
872 Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar, ASEAN Arbitral Tribunal (Award, 31 March 2003), 42 ILM 540 (2003).
peace and harmony in the region. Despite the establishment of the TAC in 1976, the High Council as a regional mechanism to be constituted as good offices or into a committee of mediation, inquiry or conciliation and to recommend appropriate measures to prevent the deterioration of a dispute or situation has never been established. The APSC Blueprint aims to strengthen cooperation under the TAC by convening a conference of High Contracting Parties to the TAC to review its implementing mechanisms.

The ASEAN Enhanced DSM is perceived as the most radical attempt to date, to produce ‘hard law’ in ASEAN through dispute resolution and rule interpretation. It is patterned in most respects to the WTO Dispute Settlement Understanding and is hoped to address criticisms of its earlier precursor, the 1996 Dispute Settlement Mechanism, for lack of specific complaint procedure and concrete mechanism for compensation. Similar to the WTO Dispute Settlement Body which is composed of an inter-governamental body, the Senior Economic Officers Meeting (SEOM), administers the ASEAN Enhanced DSM and provides for three stages or processes to settle disputes. A request for consultation is the first stage where a party may submit an issue or dispute for settlement.

A failure to reach a settlement during the consultation stage may allow a party to request for the establishment of a panel and thereafter an appeal may be made to the Appellate Body which shall be established by the ASEAN Economic Ministers (AEM). ASEAN has likewise adopted the negative or reverse consensus practiced in the WTO DSB in the establishment of a panel and in adopting a panel or Appellate Body report. Thus, the SEOM shall adopt the panel report or report of the Appellate Body unless the SEOM decided by consensus not to adopt the report. The SEOM shall also keep under surveillance the implementation of the findings and recommendations of the panel or Appellate Body and can also authorize, upon request of a party, to suspend concession enjoyed by the other party under the covered agreement.

874 Par. A.2.2., APSC Blueprint.
875 Arts. 3, 5, 12, Protocol on ASEAN Enhanced DSM.
876 Arts. 9(1), 12(13), Protocol on ASEAN Enhanced DSM.
877 Arts. 15 & 16, Protocol on ASEAN Enhanced DSM.
Since 2004, the ASEAN Enhanced DSM has not been used for economic dispute settlement by member countries, preferring instead to use other international forums for dispute resolution. However, ASEAN has reported that efforts are underway to make concrete and make the mechanism accessible to users such as the completion of the Special Service Agreement for the establishment of the panels and Appellate Body, the ancillary ASEAN Administrative Guidelines for requesting the Establishment of the SSA, the ASEAN General Conditions Applicable to Panel and Appellate Body members under the SSA, and the Working Procedures for the ASEAN Compliance Body. Moreover, a program to encourage the use of the ASEAN Enhanced DSM has been launched through the ASEAN-EU Programme for Regional Integration and Support-phase II (APRIS II) project, Promotion of the Visibility and Use of the ASEAN Enhanced DSM Protocol.

For issues that may involve the interpretation or application of The Charter appropriate dispute settlement mechanisms, including arbitration, shall be provided. The coverage of this mechanism has not been specifically defined. There are a range of possibilities for such issues as affecting the relationships among the various ASEAN organs, between an ASEAN organ and member state and its agencies, between an ASEAN organ and an ASEAN citizen, and issues of compatibility between The Charter and other ASEAN agreements or instruments to come under the purview of this mechanism. Although it has been specifically mentioned that ASEAN is an intergovernmental body, bestowing it with legal personality opens it to prospects of being subjected to suits from individuals or groups that may be affected by the operation of The Charter. This will be tested in the future and when in fact this mechanism, as an additional mechanism for dispute settlement, would be receptive to citizen complaints. Also, there is possibility that The Charter and other ASEAN instruments may also be subject for adjudication or interpretation before domestic courts and administrative bodies.

Since ASEAN’s inception, its leaders have relied on consultation and consensus for decision-making and settling issues among member states. The traditional

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Indonesian village method for decision-making known as *musyawarah* (consultation process) and *mufakat* (consensus arrived at) have guided the relationship of member states for decades. In *musyawarah*, the participants avoid hard and inflexible positions and disagreements are set aside for some future time while points of agreement are being taken up. These two mechanisms have not been used since their establishment and in the few occasions where member states opted to submit to formal adjudication such as the disputes involving Singapore and Malaysia and between Thailand and Cambodia, they utilized international dispute resolution mechanism. In these two instances, the International Court of Justice rather than the regional dispute resolution mechanism such as those provided in the TAC, was resorted to in resolving the disputes.

In matters involving economic disputes, member countries have continuously used the WTO Dispute Settlement Body (DSB) not only to bring complaints against non-members but also against each other. In 1995, the first case brought before the newly-constituted DSB was a request for consultation by Singapore against Malaysia which was later on settled. On 7 February 2008, the Philippines made a request for consultation before the WTO DSB concerning Thailand’s customs and tax measures on Philippine cigarettes. These measures are considered to be non-tariff barriers which could have been threshed out under ASEAN economic agreements or submitted before the ASEAN Enhanced DSM. These incidents serve to reinforce observations that ASEAN members are in general sensitive and reluctant to submit issues among themselves for adjudication and their preference to resolve problems through bilateral negotiations or through international mechanisms.

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881 Malaysia – Prohibition of Imports of Polyethylene and Polypropylene, DS1 WTO DSB, Request for Consultation, 10 January 1995.

882 Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines, DS371 WTO DSB, Request for Consultation, 7 February 2008.

On the other hand, the ‘hesitation’ to use existing formal mechanisms by member states could be explained not merely as expression of deep-seated cultural norms or values but as conscious and deliberate choice of member states. Thus, the willingness to use international formal adjudication is not an exception to the norm, the ASEAN Way, but as a strategic decision of member states that will serve their purposes. Referral by member states of some territorial disputes to international adjudication was not impelled by the mere altruistic desire to end intra-state conflicts but driven by the pursuit of economic objectives. Malaysia’s initiative to settle some of its territorial issues with other member states was driven by the need to economically develop the disputed territories in question and taking the issues to an international formal legal process was calculated to obtain an objective decision. The adoption of the Protocol of the ASEAN Dispute Settlement Mechanism was clearly in response to Asian financial crisis and also subsequently by the imperatives of increasing economic integration.

Two major events had already undermined the future effectiveness and integrity of the framework of dispute resolution outlined in the Charter. They also represent a continuing challenge to the avowed cohesiveness of the member states in the face of crises. One had been Burma’s steadfast refusal to open its doors to international humanitarian assistance after cyclone Nargis wrought untold destruction upon the impoverished country that killed more than 130,000 people and left over two million more at risk in June 2008. Instead of ASEAN exerting the most diplomatic pressure on the Myanmar junta, it was the United Nations’ persistent efforts and the harsh condemnation from the world community that prompted the junta to finally open its borders albeit in a limited scale.

The second incident involves the Thai-Cambodia military stand-off over the Preah Vihear temple that erupted in July 2008. The issue over the temple has long historical roots but was also triggered by domestic political instability in Thailand where the

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opposition sought to undermine the government led by Prime Minister Samak by criticizing its position in supporting Cambodia’s bid to have the temple listed under the UNESCO world heritage list.\textsuperscript{886} In the escalation of tension that followed, Cambodia had sought ASEAN to intervene and diffuse the crisis but the Thai government insisted that it be resolved bilaterally.\textsuperscript{887} ASEAN had to reject the request therefore and Cambodia sought the United Nations Security Council to ease the tension. While the crisis was diffused when the two countries mutually agreed to a voluntary troop withdrawal from the disputed border, the incident proved yet again the inadequacy of ASEAN’s regional dispute mechanism framework to effectively and promptly respond to regional issues without the participation or intervention of third parties.

The establishment of various dispute settlement mechanisms at all levels of economic and political conflicts shows some promise of institutionalization of conflict resolution in ASEAN. The use of these mechanisms is however limited and their continued non-use, even those in the economic sphere, points to the constraints imposed by other substantive factors within ASEAN. Economic activities drive the imperative to seek for impartial and non-political mechanism and this has been the trend in international dispute adjudication. As the EU experience demonstrates, the increase in the use of its dispute settlement mechanism has been triggered by increased demand and the private sector was the vociferous user of judicial mechanism. As mentioned in section two above there are limited areas of economic activities in ASEAN that could be the source of more contentious disputes requiring formal adjudication. Recent agreements and initiatives at deeper economic cooperation could potentially encourage more economic activities and the enhanced Investment Agreement giving individuals capacity to access both domestic and regional dispute mechanisms could potentially affect the dynamic of ASEAN dispute adjudication.

In the case of intra-member disputes however, the potential for use of formal ASEAN dispute mechanisms remains doubtful. As discussed in Chapter III, even member states in the EU have shown their hesitation to invoke formal proceedings


against another member state and the procedure has been rarely used. In ASEAN, a culture of consensus and harmony prevails among state leaders. In the few instances where cases were brought for international adjudication however, member states clearly did not feel averse to formal adjudication and merely shows that such decisions do not depend as much on the consideration of the prevailing norm in ASEAN as their economic and strategic interests. At any rate, the ‘weakness’ of formal adjudicative mechanisms for enforcement is sought to be supplemented by softer methods like monitoring and creation of inter-agency cooperation.

4. Establishing a rules-based Community or a political Community

In the above sections the discussion points to the development of the rule of law in the AEC from the instrumentalist conception. This section briefly examines how the rule of law is being fostered on the other pillars of the ASEAN Community. These are the ASEAN Political and Security Community (APSC) and the ASEAN Socio-Cultural Community (ASCC). The APSC contains the most sensitive matters of ASEAN cooperation. The ASCC on the other hand deals in promoting solidarity and unity among the member states and their peoples by forging a common identity and building a caring and sharing society. Compared with the APSC, the ASCC deals with the less contentious areas of member states’ interests or where there is convergence of interests. Both pillars employ political or soft means to accomplish their objectives which show that these pillars, particularly the APSC, go into the heart of member states’ vital political and security interests as discussed in Chapter Four.

Compared with the AEC, these two pillars represent the ‘least developed’ areas in ASEAN in terms of rules-formation and ‘formal’ institutionalization. The divergence of strategy, the AEC leaning more towards greater rules-creation and institutionalization to ensure certainty and predictability of economic relations, reflects the prevailing view on the separation of economics and politics. For one, the Blueprint for each pillar was finalized two years later than the AEC or only on March 2009. Many of the covered areas however have been the subject of cooperation, interaction, or discussion among member states for many years. Solidarity in the region has been fostered through inter-

state activities such as the holding of biennial Southeast Asia Games since 1958. Cooperation, consultation or discussion between ASEAN and private sector and civil society has also taken place in recent years in certain areas particularly those in the ASCC.

The areas of responsibility of the ASCC focus on the ‘individual’ or people component of the ASEAN Community although they overlap or are necessarily connected with those in the APSC. ASCC’s agenda are on human development, social welfare and protection, social justice and rights, environmental sustainability, and building of ASEAN identity. The ASCC Council and relevant ASEAN ministerial bodies are the principal organs directed to ensure implementation mainly through the process of mainstreaming the blueprint into each member states development plans, ratification of ASEAN Agreements, and engagement with dialogue partners, private sector, and civil society.889

There are however significant areas in ASCC that are in the process of institutionalization. This development has coincided with member states’ interests in dealing with inter-migration issues that have become critical agenda for negotiations among member states through bilateral or multilateral agreements.890 Migration within Southeast Asia is largely driven by disparities in economic development among member states in ASEAN and by displacement of ethnic minorities as exemplified by Burma. The current trend at institutionalization is also influenced by member states’ signing of international agreements or treaties and the push by civil society for member states to implement their commitments. Most notable are the initiatives at establishing the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) and the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of Rights of Migrant Workers which are based on member states’ signing of international agreement and voluntary commitments.891 These initiatives have also opened opportunities for limited

889 Chapter IIIA, ASCC Blueprint.
participation of non-government organizations, the academe and other members of civil society through the establishment of multi-sectoral working groups and holding of consultation meetings.

The political objectives of the APSC is ‘to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN, so as to ultimately create a Rules-based Community of shared values and norms.’ Having placed matters of democracy, the rule of law and good governance, and human rights under the APSC signifies that these are highly contentious issues for member states and also shows the differences in practices and perception of national interests of member states. However, the segregation of women and children, and migrant workers rights into the ASCC, means that there are certain areas of human rights which are less controversial and non-threatening that could be dealt with collectively.

The security objective is based on the principle of comprehensive security which includes not only traditional security but also non-traditional aspects involving economic, socio-cultural, and environmental dimensions of development. Merging the political and security in one umbrella indicates the prevailing attitudes of member states on the impact of political conditions on national security. As discussed in Chapter Four, most member states still regard political instability or domestic politics as a major threat to national integrity although there is increasing recognition of non-traditional aspects to security which were heightened with the rise of Islamist radicalism in the region.

The APSC Blueprint announced that efforts are being made to lay the groundwork for an institutional framework on such areas as free flow of information based on each country’s national laws and regulations, preventing and combating corruption, cooperation to strengthen the rule of law, judiciary systems and legal infrastructure, and

893 Par. 17, Chapter IIB.A., APSC Blueprint.
good governance. The strategy envisioned in achieving a rules-based Community is concerned with building intergovernmental institutions, developing norms, and socialization or through the soft method. For instance, the strategy in promoting democracy is through education, holding of capacity-building activities for government officials, think-tanks, and relevant civil society organizations for exchanging views and sharing of experiences and promoting democracy and democratic institutions, and conducting researches. The strategy of APSC clearly reflects a controlled top-down approach at norm-creation and socialization and thus the engagement with non-state actors is deemed more selective.

Compared thus with the EU, many of the values contained in the two other pillars have already been judicialized or within the authority of independent institutions. In transposing these values to CEE countries had also required a mixed strategy of direct transplantation of laws and institutions and through socialization. Or where soft methods are solely used in areas outside of the Union competence such as in social welfare, these were accompanied by clear guidelines, fully-functioning institutions but also the participation of parliaments and civil society. ASEAN’s approach therefore in these other pillars, particularly the APSC, still manifests an aversion to broader non-state participation in regional affairs which is but a manifestation of state-executive identity or the preponderant power of executive over other state institutions.

4.1. The AICHR: the prospects and limits of promoting human rights in the region

Human rights have become a bulwark against abusive governments. By its very nature, human rights, by empowering individuals to exercise their freedoms and enhance their individual capacities, are able to restrain the exercise of absolute sovereign powers, or at the very least, regulate state actions. In Southeast Asia, the issue of human rights protection had been in the sensitive list of issues that are deemed off-limits to member states’ scrutiny. It is one issue that has long enjoyed the protective mantle of the principle of non-interference in the conduct of regional affairs.

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894 Par. 15, Chapter IIA.1, APSC Blueprint.
895 Chapter IIA.1.8, APSC Blueprint.
As discussed in Chapter Four, ASEAN states had used the salience of nation-state building towards limiting individual freedoms. Given this background, the decision by state leaders to include human rights as a formal agenda in ASEAN is therefore unprecedented. The promotion and protection of human rights is one of key principles mandated by The Charter and the establishment of an ASEAN human rights body is expressly provided for.

‘In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.’

On 23 October 2009, the Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights was unanimously adopted by member states heralding the creation of the first regional human rights body in Asia. The member states of ASEAN –

‘APPLAUD the inauguration of the AICHR as giving concrete expression to the implementation of Article 14 of the ASEAN Charter and ASEAN’s commitment to pursue forward-looking strategies to strengthen regional cooperation on human rights.’

‘EMPHASIZE the importance of the AICHR as a historic milestone in ASEAN Community-building process, and as a vehicle for progressive social development and justice, the full realization of human dignity and the attainment of a higher quality of life for ASEAN peoples.’

In taking stock of promotion and protection of human rights as a new basis for collective action in ASEAN requires a brief review of previous attitudes of member states. At the height of the Cold War and into the early 90s, the Asian values discourse was articulated by ASEAN leaders particularly Malaysia’s Mahathir and Singapore’s Lee Kuan Yew. The discourse was a way to distance Southeast Asian political governments from the liberal democratic models in Western countries. Briefly, it

899 Most ASEAN states, except the Philippines and Cambodia, have not ratified all major six human rights instruments while only three, Philippines, Cambodia and Indonesia, ratified the UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT). The most ratified human rights instrument by ASEAN countries are the Convention on the Elimination of
articulates the existence of values common among societies in East Asia which place emphasis on such values as collectivism over individualism, education, strong family relations, benevolent paternalism, and social norms and discipline.\textsuperscript{900} It was perceived as a reflection of the region’s growing assertiveness of its independence and their newly-acquired economic prosperity into the new post-Cold War order.\textsuperscript{901} The absence of an effective political opposition especially in ASEAN states which champion the Asian values argument also contributed in articulating a distinctive approach to human rights.\textsuperscript{902}

The result of the region’s assertiveness of Asian values had culminated in ASEAN’s adoption of the Bangkok Governmental Human Rights Declaration in 1993, a declaration which was meant to send an emphatic reservation to the 1993 World Conference on Human Rights in Vienna. But it is also in this backdrop that the stimulus to establish a regional human rights mechanism by ASEAN members had come.

‘…The Foreign Ministers exchanged views on the issue of human rights and noted with concern its tendentious application in inter-state relations. They agreed that while human rights is universal in character, implementation in the national context should remain within the competence and responsibility of each country, having regard for the complex variety of economic, social and cultural realities. They emphasized that the international application of human rights be narrow and selective nor should it violate the sovereignty of nations.’

‘…They further stressed the importance of strengthening international cooperation on all aspects of human rights and that all governments should uphold humane standards and respect human dignity. In this regard and in support of the Vienna Declaration and Programme of Action of 25 June 1993, they agreed that ASEAN should also consider the establishment of an appropriate regional mechanism on human rights.’\textsuperscript{903}


\textsuperscript{902} Maznah Mohamad, ‘Towards a Human Rights Regime in Southeast Asia: Charting the Course of State Commitment,’ Contemporary Southeast Asia, Vol. 24, No. 2 (August 2002), 232-36.

\textsuperscript{903} Joint Communiqué of the 26th ASEAN Ministerial Meeting, Kuala Lumpur, 1993.
Concrete consideration for the establishment of an ASEAN human rights body as provided in the Charter had come fourteen long years later. The period between 1993 and until 2004 when the program for human rights emerged in ASEAN was also a period of rapid change in the political and economic conditions in the five founding member states but also in their neighbours, the CMLV countries. This created a favourable climate for relaxing the non-intervention concept in ASEAN.904 As discussed in Chapter Four, all founding member states have varying forms of legitimacy problems and the principle of non-interference enabled them to cope with their own domestic issues. Thailand and the Philippines were the two states most willing to modify ASEAN’s strict adherence to the principle in view of political realities in the region and the international community but also reflecting their own domestic conditions.

The significant events taking place in this period include the formal resolution of the Cambodian conflict in 1993 signalling the formal end of the Cold War in Southeast Asia, the democratization process in Thailand and Indonesia culminating in Suharto’s fall in 1998, the resolution of the East Timor issue in 1999 and consequent massive atrocities in that country, the admission of CMLV countries into ASEAN, and the September 11, 2001 event and its fall-out in the region.905 As mentioned in Chapter II, Thailand particularly advocated for the principle of ‘flexible engagement’ which would allow ASEAN to make public comments and discussions on domestic issue in one member if it would have regional repercussion or adverse impact on another member. In its stead, ASEAN adopted the policy of ‘enhanced interaction’ that would allow individual member states to comment on another member’s domestic issue if it should have a potential impact on regional concerns without undermining the principle of non-intervention.

As discussed in Chapter II, the development of international human rights standards including humanitarian law is increasingly affecting the conduct of inter-state relations but also that of member states and their citizens. Member states have become signatories to many of those international instruments and the democratization process

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905 Shaun Narine, ‘Humanitarian Intervention and the Question of Sovereignty: The Case of ASEAN,’ 12-22.
has pushed states to take them into consideration in their domestic policies. The start of Asian financial crisis in 1996 and subsequent democratization in Indonesia and Thailand had helped in thawing ASEAN’s resistance to civil society’s advocacy for human rights mechanism in the region and moderated the Asian values discourse that had permeated the mindset of most ASEAN leaders in the past.

As mentioned in Chapter Four, the formation of national human rights institutions in Thailand, the Philippines, Indonesia, and Malaysia was an offshoot of the convergence of these domestic and international processes. The formation of human rights commissions (NHRI) has been informed in varying degrees by heightened public demand for better human rights protection. Despite their perceived institutional weakness, that is, on their independence and effectiveness, the national human rights commission in these four countries have made certain inroads in promoting human rights in their national jurisdictions. The Philippine National Human Rights Commission has been in recent years asserting its independence from state actors. The NHRIIs have also actively pushed for initiatives at creating a regional human rights mechanism and the proposal for cooperation with the institution.

The most concrete manifestation that ASEAN was seriously considering the adoption of human rights mechanism in the region was in the adoption of the VAP in 2004. The VAP initiated preparatory activities for the drafting of the ASEAN Charter as well as enumerates specific human rights agenda in ASEAN which includes cooperation program among national human rights commission and creation of committee or commission in ASEAN protecting the rights of migrant workers and that of women and children. However, credit must be given to civil society groups that

906 Maznah Mohamad, ‘Towards a Human Rights Regime in Southeast Asia: Charting the Course of State Commitment,’ 237-45. Cambodia is in the process of drafting legislation for the creation of National Human Rights Institution of Cambodia.
put great pressure towards the formation of a regional human rights body in ASEAN, the only region in the world that has lacked a regional mechanism. For one, civil society in the region banded together to register their strongest opposition to ASEAN governments’ position on human rights reiterating the universality and indivisibility of human rights –

We affirm our commitment to the indivisibility and interdependence of human rights, be they economic, social and cultural, or civil and political rights. There must be a holistic and integrated approach to human rights. One set of rights cannot be used to bargain for another.910

In 1995 the Human Rights Committee of the Law Association of Asia (LAWASIA) initiated consultative meetings among national human rights institutions in the region, parliamentarians, NGOs and the academe to explore the possibility of pushing initiatives for a regional human rights mechanism in ASEAN. An informal coalition of individuals, NGOs and academics was formed in 1996, the Working Group for an ASEAN Human Rights Mechanism whose primary objective was to urge ASEAN leaders to establish an intergovernmental human rights mechanism.911 The Working Group had engaged the ASEAN ministers towards this goal and also made its position clear to adhere to the principle of the universality of human rights and the need to conform to international human rights standards by the national laws of member countries.912

Human rights is perceived to be the most intrusive instrument against state sovereignty and this perception resonates more in the case of ASEAN states. The decision to establish a human rights body in ASEAN was a breakthrough but it was also met with scepticism. Despite initial opposition from Cambodia, Laos, Vietnam and most notably Burma,913 countries which are ruled by one-party governments, the decision to provide the regional mechanism was hailed as a dramatic outcome for a

912 For the complete report of the Working Group, please see *Towards an ASEAN Human Rights Mechanism: Proposals, Declarations and Related Documents*, Working Group for an ASEAN Human Rights Mechanism, Ateneo de Manila University, Philippines, 1999.
region which had resisted human rights in its regional agenda and which is known for its well-documented human rights violations. Critics believe that the establishment of the much-touted ASEAN human rights body is intended to bolster ASEAN’s image in the international community rather than as a functional mechanism that could be used to better promote and protect human rights in the region. A vague and general description of the regional rights body in the Charter led ASEAN-sceptics to be suspicious and pessimistic about its outcomes. The mandate in drafting the Terms of Reference (TOR) of the regional human rights body was given to an intergovernmental ad hoc organ, the inter-governmental High Level Panel on the Drafting of the ASEAN Human Rights Body (HLP).

Burma’s opposition was muted with assurances that the rights body would improve ASEAN’s credibility. State officials had expressed concern that non-inclusion of human rights in the Charter ‘will create a bad image’ for ASEAN and could be interpreted to mean that it is not supportive of human rights. ‘The ASEAN charter presents us with a golden opportunity to make a bold and visionary political statement to the world. For others to take ASEAN seriously, we in the region must take ASEAN seriously,’ says Singapore’s Foreign Minister George Yeo. However, it appears that the more persuasive approach to Burma’s recalcitrance had been in reaching a consensus that the rights body is not envisaged as a mechanism that will impose punitive measures and embarrass governments but one that will be based on consultative and consensual approach which has been entrenched in the Charter. The Chair of the HLTF that drafted the ASEAN Charter had hinted at the nature of the rights body.

‘In ASEAN, they work on consultation and consensus. If they can’t work together what else they can do. That’s it. There is no confrontation. ASEAN does not like confrontation. That’s why they will never put phraseology that

appears to divide the group, that appears to create confrontation in the group. They will not like that.\textsuperscript{918}

On 21 July 2008, the High Level Panel on the Drafting of the ASEAN Human Rights Body was formally convened. Consultations with civil society in the region on the structure and authority of the envisioned rights commission had in fact been sanctioned by ASEAN officials. These initiatives include not only continuous engagement with the Working Group but also hosting of roundtable discussions among government officials, national human rights commission, NGOs and the academe in the region.\textsuperscript{919} Engagement with the civil society is a commendable move from the ASEAN but it is the state officials themselves who ultimately drafted and approved the TOR of the rights mechanism. Civil society groups operating at the regional level are not overly-optimistic about ASEAN’s adopting a radical mechanism and there is danger of exaggerating the extent of their influence on the regional processes. Human rights at the national level are still treated with caution and even suspicion by the governments and with both democratic and non-democracy regimes in the region registering evident human rights violations. The guidance given by the 41\textsuperscript{st} ASEAN Ministerial Meeting in Singapore to the HLP made it clear that the ASEAN human rights body is to be a ‘result that is realistic, balanced and credible, and which would be in the best collective interest of ASEAN’ and would have to build on ASEAN’s previous agreements and declarations on human rights.\textsuperscript{920}

Given the historical and political context of human rights, the decision to establish the ASEAN human rights body is a calibrated response by member states to changing political and economic dynamics at the domestic and international levels. It indicates a shift in ‘elite-thinking’ in the region towards recognizing the force of an ever-growing number of people clamouring not only for a bigger and more equitable share of national wealth but also for more participatory and accountable approach to political governance. Globalization has brought about this potential and highlighted the disparities and grave

\textsuperscript{918} Remarks of Ambassador Rosario Manalo, HLTF Chair during preparatory meetings before the 12\textsuperscript{th} ASEAN Summit in the Philippines, in ‘Rights violators to be treated ‘ASEAN Way’,’ Inquirer.net, 1 August 2007, at http://newsinfo.inquirer.net/breakingnews/nation/, viewed on 1 August 2007.

\textsuperscript{919} Through the program ‘Holding of Roundtable Discussion on Human Rights in ASEAN: Building Human Rights in an ASEAN Community across the ASEAN countries.’

inequalities in existing social orders in the region. Thus both the internal and external factors have pressed for the paradigm shift in ASEAN. If regional cooperation in ASEAN is to be relevant, it has to be relevant in confronting both its domestic and international challenges and responsibilities. A departure from the traditional construction of regional cooperation based on traditional security perspective, that is, the threat to the integrity of the nation-state, to one that recognizes ‘human security’ is a political agenda that ASEAN member states have started to respond to. Moreover, to steer the region towards deeper regional economic cooperation successful would need a broader social support than its current state officials and national elites. A more inclusive society, and the formation of a regional community, has to start recognizing the realization of basic rights for its peoples.

The human rights body is indeed a historic achievement especially if viewed from ASEAN’s past where the subject of human rights had been taboo among government leaders. The creation of a regional institution has made it possible to provide a ‘formal’ regional venue through which human rights issues in member countries could be discussed and promoted among member states and among its officials and institutions. As states remain to be the principal guarantor of human rights, the regional mechanism provides the possibility for the development of strengthened human rights norms and institutions among member states that adhere to international standards. At the same time, the human rights body is a potential mechanism to address human rights issues arising from the implementation of trade and economic agreements in ASEAN particularly where these instruments do not provide for human rights safeguards. In the absence of institutional mechanism to address individual complaints on possible dire consequences of economic agreements, the human rights body could be the only appropriate mechanism to take the issue on its own initiative.

However, the diversity in human rights practices among member states and the preservation of non-intervention as the primary principle for regional integration could only mean that the human rights agenda could be implemented through the ‘soft’ approach. ASEAN leaders had rejected the Indonesian proposal to give more teeth to
the body by giving it protection, not only promotion, function.\textsuperscript{921} Indonesia wanted to expand the authority of the rights body to include country visits to assess and monitor human rights situation in member states and to review the terms of reference in the next five years to strengthen the body’s mandate and develop mechanisms. It was observed however that Indonesia’s position is driven by its internal politics, that is, the holding of presidential elections on July 2009.\textsuperscript{922} It is therefore difficult to conceive the regional body as a mechanism to tackle state violations or responsibility on human rights, much more as a constraint on regional institutions of governance.

The APSC Blueprint indicated the nature of the terms of reference of the ASEAN Intergovernmental Commission on Human Rights. As its name implies, the newly-constituted body is intergovernmental in nature although various sectors pressed ASEAN to at least ensure the appointment of independent experts.\textsuperscript{923} The strategy envisaged in the Blueprint focuses on cooperation and interaction of existing human rights mechanisms in the region and in the exchange of information among member countries.\textsuperscript{924} Observers have expected ASEAN to adopt a minimum standard to human rights and an ‘evolutionary, step by step’ approach to human rights promotion and protection.\textsuperscript{925} A draft of the terms of reference was published a few months before the formal adoption by member states on 23 October 2009.

4.1.1. The mandate and institutional capacities of AICHR

The ToR of the AICHR clearly sets out the purposes of the regional human rights body – to promote and protect human rights and fundamental freedoms, to uphold the right of the peoples to live in peace, dignity, and prosperity, to contribute to the realization of the purposes of the ASEAN, to promote human rights in the regional context, to enhance regional cooperation on the promotion and protection of human

\textsuperscript{921} In ‘ASEAN Human Rights Body ‘A Necessary Start’, Kasit defends commission against alleged lack of teeth,’ The Nation, 21 July 2009, 1.
\textsuperscript{922} ‘Indonesia nearly derails rights body talks,’ Bangkok Post, 21 July 2009, 3.
\textsuperscript{924} Par. A.1.5, APSC Blueprint.
rights, and to uphold international human rights standards. 926 The enumeration of the purposes shows the inherent contradictions in the establishment of the AICHR. As a political project of member states, the AICHR reflects the commitment by the governments to promote and protect human rights. At the same time, it shows the role that governments want to play - by determining what, when and how they intend the AICHR to fulfil its functions.

‘The AICHR is an inter-governmental body and an integral part of the ASEAN organizational structure. It is a consultative body.’ 927

The AICHR is situated within the broader framework of ASEAN cooperation, as shown by its purposes and institutional mandate, and as such indicative of its current limits and constraints. By reiterating that AICHR is a creation of the member states, the AICHR is reminded that it can only function within the specific parameters set out by the governments. First, the mandate of the AICHR is to be guided by ASEAN’s overarching principles of independence, sovereignty, and non-interference and the recognition that the primary responsibility to promote and protect human rights rests with each member state. 928 Second, a ‘constructive and non-confrontational approach’ to human rights protection and promotion and an ‘evolutionary approach’ to development of human rights norms and standards should be adopted by the Commission. 929

The enumerated mandate and functions of the AICHR follow the framework of a government-controlled regional organ. The mandate of the AICHR falls within three broad themes – education and research, capacity building, and advice and consultation. Unlike other regional human rights bodies in Europe, Africa, and Latin America, the AICHR has no specific mandate to receive individual complaints or to conduct investigations on human rights violations. It has no judicial or quasi-judicial function. Its main function is to develop ‘strategies’ for the promotion and protection of human rights to ‘complement the building of the ASEAN Community’ and to develop an

926 Par. 1, Purposes, ToR of AICHR.
927 Par. 3, ToR of AICHR.
928 Pars. 2.1 & 2.3, ToR of AICHR.
929 Pars. 2.4 & 2.5, ToR of AICHR.
ASEAN Human Rights Declaration that will serve as a framework for establishing human rights cooperation among member states.\textsuperscript{930}

On the regional architecture, the AICHR is to be the overarching human rights institution in ASEAN with overall responsibility for the promotion and protection of human rights.\textsuperscript{931} It is tasked to promote the full implementation of ASEAN instruments related to human rights and to provide advice or technical assistance to other ASEAN sectoral bodies when requested.\textsuperscript{932} It will also have to work with all ASEAN sectoral bodies dealing with human rights and their ultimate alignment with AICHR.\textsuperscript{933} This mandate of the AICHR will have the potential to mainstream human rights in all other aspects of regional cooperation such as the economic, political and security dimensions of ASEAN Community building.

On the other hand, the AICHR is given the capacity to go beyond governments and the official organs in ASEAN – and the opportunity to broaden and strengthen its capacity. It can engage in dialogue and consultation with civil society organizations and other stakeholders.\textsuperscript{934} Through its function ‘to obtain information from Member States’ on human rights and to prepare thematic studies of human rights in ASEAN, the AICHR may be able to engage with other domestic and international entities or sources of information. It can submit an annual report on its activities or ‘other reports if deemed necessary’ to the ASEAN Foreign Ministers Meeting,\textsuperscript{935} which could serve as a mechanism for bringing into regional focus certain grave human rights situation in member states.

To be able to perform its mandate effectively, the AICHR has to develop its institutional capacity and integrity. This will be a challenge for the members of the AICHR who are appointed for a term of three years from each government of the member state.\textsuperscript{936} While members of the AICHR are to act impartially in the discharge of their duties, they are however accountable to the appointing government which could

\textsuperscript{930} Pars. 4.1 & 4.2, ToR of AICHR.
\textsuperscript{931} Par. 6.8, ToR of AICHR.
\textsuperscript{932} Pars. 4.6 & 4.7, ToR of AICHR.
\textsuperscript{933} Par. 6.9, ToR of AICHR.
\textsuperscript{934} Par. 4.8, ToR of AICHR.
\textsuperscript{935} Pars. 4.10, 4.12, & 4.13, ToR of AICHR.
\textsuperscript{936} Par. 5, Composition, ToR of AICHR.
also replace, at its discretion, its representative. 937 The power to replace the appointment sends a strong message to the representative that he or she can only do their duties within the acceptable or tolerable limits of their government. The current composition of the AICHR reflects that most representatives come from or worked previously with the appointing governments. Indonesia and Thailand are the only two member states which appointed representatives from the non-government organization and the academe. 938 Unless and until domestic processes require stakeholders’ participation or exert strong influence on the selection process of the commissioner, the AICHR would largely be any other sectoral body in ASEAN unable to perform independently of the member states.

As part of the wider ASEAN structure, the AICHR as a regional organ is under the oversight of not just one, but two intergovernmental bodies. This process will severely constrain the exercise of independence of members and will put a tighter lid on the plans and activities of AICHR. The ASEAN Foreign Ministers Meeting (AFMM) serves as the highest authority overseeing the AICHR through its powers to delegate tasks and accept reports, to approve the work plan and budget of the Commission, and to approve proposed amendments to the ToR of the AICHR. 939 The Committee of Permanent Representatives to ASEAN exerts supervisory function over AICHR by giving its recommendations to the AFMM on the Commission’s work plan and budget. As a semi-\textit{ad hoc} organ in ASEAN, the AICHR has no permanent office and meets only twice a year to be held alternately at the ASEAN Secretariat and on the member state holding the Chair of ASEAN. 940

Human rights is still a vigorously contested concept in most Southeast Asian states and member states have varying appreciation for its protection. While the ‘Asian values’ discourse has lost steam in the aftermath of the financial crisis, it has remained a political agenda in member states and is discernible in the language of The Charter. Thus ASEAN is mandated to promote and protect human rights and fundamental freedoms, ‘with due regard to the rights and responsibilities of the Member States of

\footnotesize{937} Par. 5.6, ToR of AICHR.

\footnotesize{938} Indonesia appointed Rafendi Djamin, a human rights activist while Thailand appointed Dr. Sripapha Petcharamesree, also a human rights practitioner and professor at Mahidol University.

\footnotesize{939} Pars. 4.13, 4.14, 8.1, 8.2, & 9.4, ToR of AICHR.

\footnotesize{940} Pars. 6.2 & 6.3, ToR of AICHR.
The ToR of the AICHR reflects a tendency to revive and make Asian values a defining feature of human rights protection in ASEAN. The AICHR is mandated –

‘To promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities.’

The ‘Asian values’ – with its tendency to build an alternative model for liberal democracy, challenges basic Western idea of the rule of law which rests on limits to sovereign power through respect for individual rights and popular democratic governance. The institution of the AICHR framed within the above purpose, and taken with other provisions of the ToR on the purposes, principles, and functions, seems to put human rights even beyond the cultural, religious and communitarian values that the discourse had been grounded in the past. This is an emphatic reassertion of the state’s sovereign power to define the boundaries and processes of human rights protection within its own territory and the tendency to revitalize not only the Asian values discourse but also to give effect a ‘plurality of values’ in Southeast Asia which could thus discourage the development of human rights norms.

The AICHR therefore possesses both potential to either expand human rights protection into the direction of international norms and standards or restrict it to the narrow confines of state interests. A leadership role being taken by Indonesia in pushing the human rights agenda into the forefront of ASEAN cooperation could provide a much needed boost for AICHR and in encouraging other member states, particularly the democratizing states, to support a more proactive and independent role for the AICHR in promoting and protecting human rights in the region. The Indonesian proposal to provide for an initial review of the ToR after five years of its entry into force ‘with a view to further enhancing the promotion and protection of human rights

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941 Art. 1(7), The Charter.

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within ASEAN’ has been incorporated, and thus provides an opportunity to further improve the mandate and institutional capacity of the AICHR.

5. **Prospects of non-state actors as a push for the rule of in ASEAN**

Like other international organizations, ASEAN started as an association of leaders and diplomats. Owing to the predominance of state leaders and officials in association, ASEAN had been widely perceived as ‘elite-centred’ or even a ‘dictators’ club’ at the heyday of authoritarian regimes in the region. On the other hand, regional integration processes in Europe had early on recognized the participation and access of individuals and other non-state actors to its various mechanisms and processes. Indeed, the progressive development of the rule of law in the EU has been pushed deeply into the substantive areas by the continued use, challenge and advocacy of groups and individuals of EU norms and rules. In terms of policy-making, interest groups particularly from the business sector have played an active role in advancing the formation and influencing the direction of the European single market. These business interest groups were independently established by European CEOs or industrialists which provide independent advice or opinion to the EU on matters affecting its economic programs.

In ASEAN, non-state actor’s involvement initially came mainly from the business group resulting in the establishment of the ASEAN Chamber of Commerce and Industry (ASEAN CCI) in April 1972 composed of the national chambers of commerce and industry groups in the five founding member countries. The ASEAN CCI is said to have influenced the formation of the AFTA and also ASEAN’s 2020 Vision. Weak institutional linkage to ASEAN as well as weak organizational and decision-making capacity had resulted in its inactivity in the years 1997 to 2004. In April 2003, the ASEAN Business Advisory Council (ASEAN BAC) was constituted from among

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944 Par. 9.6, ToR of AICHR.
business leaders from member countries to give ASEAN their views about the future direction of ASEAN’s economic integration and regional competitiveness. But unlike its counterpart in the EU, the ASEAN CCI and the ASEAN BAC are perceived to be less independent having been organized and its members selected by member states and do not act as effective pressure groups.\footnote{Hidetaka Yoshimatsu, ‘The Political Economy of Regionalism in East Asia, Integrative Explanation for Dynamics and Challenges,’ 52-60.} Being representatives of governments rather than as independent lobby group, these business interests are perceived to be inadequate to pursue bold measures for closer integration but are there to protect and guard against possible detriment to narrow national economic interests. Other than the business groups mentioned, there was no mechanism for civil society representatives to access or engage with at a regional level.

Selective involvement of member states’ individuals and groups begun at a much later stage or in the mid-80s when ASEAN began to make itself accessible to academic elites and think tanks. This is known as the ‘track two’ diplomacy where ASEAN officials in their non-official capacity discuss problems with non-government experts.\footnote{See Allan Christopher Aguilar, Track 2 Diplomacy and the ASEAN Peace, Master Thesis, University of Oslo, 2008, at http://www.duo.uio.no/publ/statsvitenskap/2008/73452/MA_Aguilar.pdf, viewed on 20 August 2009, 1-2.} In 1984, the ASEAN Institute for Strategic and International Studies (ISIS) was organized in Bali, Indonesia composed of national think thanks from the original member countries. \footnote{Carolina Hernandez, ‘The ASEAN-ISIS and CSCAP Experience,’ in Sharon Sidique & Sree Kumar, eds., \textit{The 2nd ASEAN Reader}, (Singapore, Institute of Southeast Asian Studies, 2005), 58. There are now nine members of ASEAN-ISIS: Institute of Security and International Studies (Thailand), Singapore Institute of International Affairs, Institute for Strategic and Development Studies (ISDS), Institute for International Relations (IIR), Cambodia Institute for Cooperation and Peace (CICP), and Brunei Darussalam Institute of Policy and Strategic Studies (BDIPSS).} ASEAN ISIS has since 1988, established institutional linkage with ASEAN through regular meetings with the ASEAN Senior Officers Meeting (SOM) and submitted memoranda on various policy issues. The ASEAN ISIS was responsible in pushing for the emergence of ‘track two’ diplomacy in ASEAN which is an informal process that aims to bridge the gap between civil society and ASEAN by providing venue for discussion among intellectuals, academics, government, the business community and other sectors on issues of national, regional and international importance.
Through its initiative, ASEAN ISIS was responsible in bringing forth the establishment of the ASEAN People’s Assembly (APA) which brought together for the first time the civil society organizations (CSO), non-government organizations (NGOs) and representatives of ASEAN member states.\textsuperscript{951} Since 2000, the APA has served as a link and meeting assembly between ASEAN and civil society groups in the region. Singapore’s Institute for Southeast Asian Studies (ISEAS) is a national think thank that has also provided ASEAN with policy inputs for its direction and regional integration initiatives.

The constitution of the Eminent Persons Group (EPG) since 1998 during the 6\textsuperscript{th} ASEAN Summit in Hanoi has been an important source not only of fresh ideas and policy recommendations but also providing critiques of ASEAN’s existing policies and measures.\textsuperscript{952} The EPG has become a driving force for reforms in ASEAN as state leaders have been more inclined to listen to their views because of their stature. The EPG’s membership has come from the ranks of distinguished and well-respected elites, former high-ranking officials, diplomats and academics in member states. The Report on ASEAN Vision 2020 has advocated for engagement with civil society in the process of building a regional community. It had urgently called for the ‘empowerment, participation and involvement of the people in ASEAN towards building a resilient and highly cohesive and competitive ASEAN in the global environment.’\textsuperscript{953} It has engaged with civil society in drafting the ASEAN Charter and provided a consultation process for the establishment of the ASEAN human rights commission.

The financial crisis in 1997 had influenced advances on democratization in member states but also the gradual and selective engagement of regional processes with civil society. Civil society in Southeast Asia did not only play the fiscal role that exposed the excesses of authoritarian rule but also continues to play a significant role in the process of democratic transition by articulating local and national issues. The democratization movement that swept many of the region’s states starting from the 80s particularly in the Philippines, Thailand and Indonesia had certainly opened a small

\textsuperscript{951} APA held its first meeting in Batam, Indonesia on 24-26 November 2000.
\textsuperscript{952} EPGs were constituted since 1998, one for the ASEAN Vision 2020 and the other for the ASEAN Charter.
avenue for civil society participation, at least initially from the elite level and towards
gradual engagement with a broader sector. The crisis acted as the trigger that
encouraged the growing influence of national ‘regionalist’ elites, who are cognizant of
both difficulties and opportunities presented by globalization, in regional decision-
making processes. It was in the aftermath of the crisis that more civil society groups
emerged, particularly the NGOs that recognized the strategic value of regional
engagement through the ASEAN. This trend also coincided with the increasing
reception by other regional and international organizations of civil society participation
recognizing the grassroots and issue-oriented nature of their advocacy work.

Prior to the crisis, civil society groups were indifferent to ASEAN’s elitist nature
and its perceived irrelevance to the peoples in the region. They preferred interaction
with international organizations such as the United Nations systems, WTO and
including international financial institutions that offer more effective pressure upon their
national governments. The signing of the Bali Concord II in 2000 announcing the
establishment of the ASEAN Community stirred regional and national civil society
organizations to take a serious look at ASEAN. The prospects of building one regional
community, the possible impact of regional agreements to the people in the region, and
the potential to influence regional policies are among the realizations that propelled a
growing number of CSOs to mobilize and undertake sustained engagement with
ASEAN.

ASEAN opened itself up to an enhanced engagement with civil society
particularly in the late 90s. Engagement was mostly made through the ASEAN
Secretariat or through the ASEAN Foundation. It culminated in the process of
registration or accreditation of NGOs in approving the Guidelines for ASEAN Relations
with Civil Society Organizations (ASEAN CSO Guidelines) which were later revised
on 6 April 2006. The number of ASEAN-affiliated CSOs has now reached fifty-seven

954 In June 1986 in Manila, the ASEAN Standing Committee released its Guidelines on ASEAN’s
Relations with Civil Society Organization which provides for procedures for CSOs accreditation with
ASEAN and their engagement with the ASEAN Secretariat. The Guidelines were revised in March 2006
reflecting the change from the use of the term ‘non-governmental organizations’ to ‘civil society
955 See Marlene Ramirez, ‘AsiaDHRRA and ASEAN: A Case Study on the Process of Civil Society
Engagement with a Regional Intergovernmental Organization,’ Paper presented at the Montreal
that range from banking groups to youth organizations, still a miniscule percentage in view of proliferation of NGOs and civil society groups in the region. Admission or registration is clearly hampered by tight admissions criteria. Applications for CSO affiliation will be considered by the ASEAN Standing Committee after an ‘assessment of positive contribution’ that the CSO could make to ASEAN and after the review by both the ASEAN Secretariat and by an ‘appropriate link body’ or ASEAN National Secretariat. The ASEAN Secretariat has the power to revoke CSO affiliation on complaint by a link body or an ASEAN member country on such grounds as engaging in acts ‘inimical’ to ASEAN or any member country or contrary to the aims, objectives, and fundamental principles of ASEAN, or when the CSO is found to have committed ‘gross misconduct which brings disrepute to ASEAN.’

ASEAN’s engagement with civil society has indeed considerably improved, albeit still within narrow confines. ‘ASEAN leaders were now more comfortable dealing directly with activists, but that much more effort was needed to make the interaction meaningful.’ One of the newer points for engagement is on establishing cooperation by ASEAN Defence Ministers’ Meeting (ADMM) with civil society organizations on non-traditional security. Recently formed in 2006, the ADMM is expected to pave the way for the evolution of ASEAN security and defence cooperation among ASEAN defence establishments. Among the principles and strategies being promoted by the ADMM is enhancing dialogue and cooperation with civil society and cooperation through practical and concrete activities such as establishment of contact and cooperation and arrangement of workshops. This resulted in the adoption of a Concept Paper on ASEAN Defence Establishments and Civil Society Organizations.

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956 As of 31 March 2008, Register of ASEAN-Affiliated CSOs, at http://www.aseansec.org. These regional CSOs range from a host of sectors and composed of national organizations.
957 Art. 6-8, Guidelines for ASEAN Relations with Civil Society Organizations, 6 April 2006, at http://www.aseansec.org/18362.htm, viewed on 20 August 2009.
958 Art. 13, ASEAN CSO Guidelines.
(CSOs) Cooperation on Non-Traditional Security. This is not however a full and open engagement with defence officials but that member states ‘retain the full and final discretion with regard to the nature, manner and extent of their respective engagement’ and that the ADMM has the discretion to ‘identify and select the capable CSOs.’

Ongoing engagement of CSOs with ASEAN has led to regional coalition building among national and regional NGOs and subsequently the formation of alternative forum for engagement with ASEAN. One was the establishment of the ASEAN Civil Society Conference (ACSC) organized by the Universiti Teknologi MARA (UiTM, Malaysia) with the support of the Malaysian government on 7-9 December 2005. The ACSC was co-organized and participated in by more than one hundred twenty civil society organizations from all ASEAN member states and presented their deliberations before the 11th ASEAN Summit on 12 December 2005 in Kuala Lumpur and led to ACSC’s recognition by ASEAN. ACSC’s statement had called for openness, transparency, democracy, and promotion of basic human rights in ASEAN’s processes. However, during the 12th ASEAN Summit in 2006 in Cebu, the Philippine government did not recognize ACSC but the APA as the CSO component of the Summit. At the 13th ASEAN Summit in 2007, the Singapore government being the host country recognized the ACSC but in partnership with its academic think thank, the Singapore Institute of International Affairs.

The need for a bigger and broad-based forum to offer an alternative vision of ASEAN regionalism led to the formation of the Solidarity for Asian People’s Advocacy (SAPA). Informal meetings among CSOs in the APA and ACSC fora brought five regional CSOs to facilitate the organization of the SAPA which started active

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962 Joint Declaration ADMM Non-Traditional Security.
963 Sec. 11, Concept Paper CSO.
engagement with ASEAN particularly the ASEAN Secretariat and the EPG through critical yet constructive assessment of ASEAN’s goals and processes. The CSOs through the ACSC and SAPA have divergent views with the academic think tanks not only on the method of engagement with ASEAN but also on their reluctant if not resistant position, to open market liberalization with its adverse impact on the marginal sectors across the region. Another network for regional civil society forum has emerged with the formation of ASEAN People’s Assembly (APF) which was constituted in preparation for the Fourteenth ASEAN Summit in Thailand in 2008.

Civil society in Southeast Asia has started to advance an alternative vision of regionalism for ASEAN. They advance an alternative form of regionalism that is not only of an economically-integrated region but also one that promotes sustainable and equitable development alleviation of poverty, rural development, and promotion of human rights, among other issues. An important component of this new regionalism is inclusive participation and an ASEAN leadership that adheres to the principles of democratic governance. Because people participation is being constrained by curtailment of basic rights, ASEAN civil society has extensively lobbied for the establishment of a regional human rights mechanism. Persistent efforts of civil society had borne a small and incomplete victory in the form of a clear provision for the establishment of an ASEAN Human Rights Body in the ASEAN Charter.

Under the Charter, ASEAN has not deemed civil society participation a part of its institutionalized mechanisms despite establishing the principle of a ‘people-oriented’ ASEAN. ASEAN aims to ‘promote a people-oriented- ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building.’ ASEAN-civil society engagement remains through the informal framework that could be revoked or enhanced at the discretion of

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970 Art. 1(13), The Charter.
member states. As such, civil society participation is subject to the vagaries of political changes in member states and their leaders. Since ASEAN is primarily an intergovernmental organization, democratic regional governance is still a far vision. A form of ‘democratic’ process is however being implemented which is still state-centred, state-controlled and elite-driven. Political institutions, comprising the representatives of citizens, are excluded from ASEAN’s formal processes. The establishment of an integrated role for ASEAN peoples’ representatives through the formation of an ASEAN Assembly composed of representatives from member states’ legislature has been relegated as a ‘long term goal’ for the ASEAN Community. At present, a separate organization for national assemblies exists on vaguely-defined ‘inter-parliamentary cooperation’ through the ASEAN Inter-Parliamentary Assembly (AIPA).971

In its current form, the Charter only states broad declarations for civil society participation in ASEAN governance. Current institutional forms point to an informal, indirect and limited process of engagement with individuals, NGOs and other civil society groups. As a push for the rule of law in regional integration, non-state actors could only wield limited influence given the narrow space for participation. To widen the space, they need to work with national elites and through regional organs in constructive engagement. The inclusion of the ASEAN Foundation as one of the main organs in The Charter points to its evolving role as ASEAN’s indirect link to civil society and an implied rejection of definitive or institutional role for broader political participation of non-state actors, the citizens or their representatives. The AICHR also shows the potential to develop its own framework for regular mechanism of engagement with civil society groups.

6. Conclusion: the function of the rule of law in ASEAN regional integration

Economic and political processes within and outside Southeast Asia since the 90s have brought about changes that challenged the traditional basis of regional cooperation that rested on the principle of non-intervention. The institution of the rule of law has become one of key principles but also the means towards achieving the vision of

971 AIPA website, at http://www.aipo.org/default.htm, viewed on 25 September 2008. AIPA was previously called the ASEAN Inter-Parliamentary Organization and was established on 2 September 1977 at the initiative of Indonesia.
building a sharing and caring ASEAN Community. In this sense, regional integration is an incentive or provides an opportunity for the establishment of the rule of law in regional processes. That ASEAN has provided the space for greater regional cooperation has meant that the rule of law has become a vital component – both as an end and a means, of regional integration. The function of the rule of law in ASEAN integration however remains to be limited, evolutionary, and constrained by non-intervention which remains the overarching foundation of regional integration. The concept of limited sovereign powers in international relations, the core concept of the rule of law in the EU, has not found acceptance in ASEAN.

The Charter, representing ASEAN’s constitution, serves as the framework and reflects the nature, form, and direction of the rule of law in ASEAN integration. The Charter’s thin constitutionalism is aimed at providing greater coherence, clarity and stability as a framework of inter-state cooperation among member states. Thus The Charter provides for comprehensive provisions on the responsibilities of member states, the functions of various organs, and relationship of regional institutions among each other and with member states, and the various modes of dispute settlement. Efficiency is a function of the rule of law and The Charter brought about the strengthening of existing institutions and creation of new ones that could ensure regularity and stability of regional cooperation but also spur the undertaking of cooperative activities.

Enforcement and compliance of obligations, particularly in the field of economic cooperation, is being fostered by the establishment of independent non-judicial dispute mechanisms. Only states can access these mechanisms but an exception has been given to individual complaints based on the Investment Agreement. Legalization or rule-making is increasingly being established in economic integration and this is seen from the greater precision of language of economic agreements. Adoption of these legal documents however still rests on voluntary adoption by member states through harmonization of national laws and standardization of rules, thus preserving the sovereignty of member states. However, limited delegation of rule-making is being attempted in certain aspects of technical decision-making. Compliance of obligations is also being enhanced by creating mechanisms and procedures of monitoring, detailed programme of action and timelines, and strengthening inter-agency cooperation among
various offices and officials in member states. There are noticeable, but still limited, successes in economic cooperation such as the implementation of the CEPT/AFTA, the ASEAN Single Window, and even the Chiang Mai Initiative,\(^{972}\) through the soft, gradual, and evolutionary process. ASEAN could do more in enhancing regional cooperation.

Clearly, ASEAN remains a classic type of intergovernmental organization having shunned supranational institutions and judicial form of dispute settlement, exclusion of political national organs - the parliaments, from formal regional governance, and informal engagement with non-state actors particularly the civil society. The absence of these elements represents the limited function of the rule of law in regional integration and consequently the limits of ASEAN integration in achieving deeper cooperation. It represents ASEAN’s contrasting development with the European Union but also the existence of far and wide differences in the rule of law practices and values of member states.

The rule of law in ASEAN integration does not operate as a form of constraint on the sovereignty of member states. The concept of pooling of sovereignty remains an unattractive concept for deepening of regional integration, for it would surely ‘erode’ sovereignty and give ASEAN the power to intrude into member states’ sensitive economic and political issues. As such, The Charter is not constituted as a form of a supreme law but essentially as a compact among member states in their relations with one another. The Charter avoided any reference to the role of the rule of law in the interpretation of agreements which is now a feature of other projects of regional integration. ASEAN has no role for a judicial body in interpreting the Charter and other agreements thus precluding the development of general regional principles that are the basis of legal integration among member states. Even the institution of dispute resolution mechanisms in ASEAN is not intended to create a coherent body of regional rules but is designed to disperse or fragment adjudication to a range of administrative bodies. The unused ASEAN Enhanced DSM is in the nature of an *ad hoc* and open-

\(^{972}\) The Chiang Mai Initiative (CMI) has initiated the Bilateral Swap Arrangements among ASEAN + 3 countries (Japan, China, and South Korea) to manage short term regional liquidity problems, as a response to the 1997 Asian financial crisis.
ended system and does not follow the principle of precedent setting but decides cases on individual basis.

The Charter does not institute a form of checks and balance but formalized and entrenched member states’ control over regional institutions and processes. ASEAN bodies are designed to function into cooperative and coordinated fashion. Informal and ad hoc regional mechanisms in ASEAN were strengthened and made more effective by making them more permanent, regular and continuous. Member states retain absolute control of the processes of regional integration, be it on rule-making and decision-making, compliance and dispute adjudication. Functional cooperation, rather than integration, remains the salient strategy of attaining regional integration.

Institutional accountability of regional organs is virtually absent in ASEAN. In the absence of institutional check on intergovernmental powers on its rule-making and decision-making powers under The Charter, member states acting through their executives may have actually enhanced their domestic authorities further by being able to make decisions without the constraints of their national legislatures or judiciary. This is particularly so as member states’ executives enjoy the preponderance of state authority in relation to other state institutions. The human rights agenda in ASEAN is not intended as a limiting function on state powers or on regional institutions. The adoption of the ToR of AICHR is clear that the human rights mechanism is not designed to take member states to task for failing in their obligations to protect human rights or for violating human rights. As a regional project, human rights are highly political matter and member states have agreed to a states-managed and consultative approach in dealing with human rights issues of member states.

The above discussion points to the tensions generated by reforms in ASEAN and the contradictory processes of the rule of law in regional integration. It suggests that the new regionalism still primarily rests on the nation-state building processes that punctuated its earlier development. An instrumentalist role for the rule of law is clearly employed in establishing the AEC and the use of soft law is designed to balance the demands of clear and predictable economic rules and the need to accommodate different economic interests and for flexibility. But an instrumentalist function has the tendency
to reinforce informal practices that have pervaded ASEAN cooperation and thus
discourage the use of institutional organs and development of hard and predictable
rules. It could likewise legitimize conservative values and ideas by invoking domestic
particularities, such as human rights, that had fostered dictatorships and fomented gross
human rights violations in the region.

On the other hand, the political approach is still the dominant strategy in dealing
with matters in the other two pillars. There are positive developments however at
institution-building, increasing soft agreements, and limited engagement with non-state
actors and civil society organizations. The defence ministers’ engagement, albeit
limited and discretionary, in the non-traditional aspects of security with civil society
organizations, represents a growing recognition by ASEAN of the dynamic changes in
the region and the need to move beyond state-centrism. At its top-down and
patrimonial approach to fostering the rule of law, the development of the rule of law in
ASEAN would be through the process of non-confrontation, non-adjudication, and
evolution. Socialization has been considered an important strategy for developing
norms through repetition of practices that could harden into rules or laws. However,
this is always a long-term goal and results could be unpredictable.

What are the factors that hamper the development of a more expansive function of
the rule of law in ASEAN integration? These are the same factors that could be
exploited in pushing for further rule of law reforms in ASEAN. The norm of non-
interference, despite its relative relaxation, is still strong among member states and is
rooted in different domestic processes, particularly the persistence of traditional security
fears of member states. This perception however is no longer monolithic or static and
member states have shown differences in a number of occasions and could open the
potential for new mechanisms. For example on the matter of human rights, ‘less
intrusive’ mechanisms could be adopted such as the system of reporting that is already a
current practice in international treaty bodies could be explored. On the economic side,
the use of the OMC in the EU could be explored such as the use of peer review system,
the formation of social partners and civil society for discussion. The use of independent
experts in the committees could aid officials in their function particularly at drafting
technical rules. The limited bases of cooperation, such as in the economic field,
generate less cooperation and also of activities that could be source for rule or norm creation. This lies at the structural foundation of member states and what could be done is to develop regional mechanisms that could engage stakeholders with important economic sectors in member states such as holding of meetings and dialogues with state and regional officials and experts.

The absence of decisive leadership in ASEAN makes it difficult to introduce changes or reforms. Indonesia has largely assumed this leadership position in ASEAN but has been unable to exert much influence as shown by the recent AICHR debacle. It was however successful in forcing a concession for an automatic review of the TOR of AICHR. This is explained not only by the wide diversity of views of member states but also rooted from the relative weakness of its domestic conditions and weak support from member states. Indonesia, the Philippines, and Thailand are democratizing states that have shown warmer reception at more participatory and inclusive regional governance and could forge informal alliance on common areas of interests. However, they are also constrained by their domestic problems particularly their ongoing political conflicts, and necessity for building strong, independent, and credible institutions and bureaucracies. Discussion groups or DGs could be promoted within ASEAN for member states who express common desire at solving specific issues or in building mini alliances on particular issues. The ‘alliance building’ has begun on certain aspects of economic cooperation and along the sensitive issue of migrant workers rights for those countries where migration is a vital component of economic development strategy.

The limited participation of non-state actors, including the parliaments, has likewise limited the possibility of gaining broad political legitimacy for the regional project but also lesser respectability and credibility from the international community. Current engagement with civil society needs to be enhanced and innovative forms of engagement can be made within the current institutional framework, if more substantive amendment is not foreseeable in the near future. The work of the EPGs is commendable but it has to have wider basis. The creation of multi-sectoral working groups could be supplemented by the practice in the EU of drafting White Papers by independent experts or committees and its circulation to stakeholders and civil society for comment and discussion could be explored in ASEAN. An informal working
relationship could also be established with national parliaments to discuss or explore issues and possible drafting of regional agreements and not merely as a passive organ to ratify regional agreements. Judicial cooperation could also be established by inviting respected jurists to discuss on important legal questions affecting the processes of regional integration.

ASEAN indeed has followed a different course to integration than the European Union. The particularities of ASEAN integration and the huge variation of national interests and rule of law practices account for this divergence. The rule of law in regional integration however shows that there are opportunities to foster and enhance the function of the rule of law even in its current legal framework and institutional arrangements. Laws, institutions, and agents – these are the main drivers of the rule of law and their combinations could be worked out to fit distinct economic, social and political environment.
CHAPTER SIX

Conclusion
In Search of a Vision of the Rule of Law in ASEAN

1. The research project

The overall theme in this thesis is how the processes of regional integration could promote the rule of law. Is the rule of law a salient component for the realization of the objectives of regional integration or is it, by itself, one of the goals through which regional integration should strive to achieve? The rule of law in regional integration has been mostly understood in the context of the European Union and little has been written about other projects of regional integration that have proliferated since the 80s. Investigating the rule of law in ASEAN came at a time of its rapid institutional developments – reflecting its responses to changing economic and political circumstances in the states in Southeast Asia, in the region as a whole, and in the wider international community. The academe, scholars, and observers have been divided whether these developments could bring about real progress to regional cooperation but also the promotion of democracy, the rule of law and human rights – values and principles that are still seen as ‘weak’ in member states.

There exists wide disagreement over what rule of law means in the context of states and this is further complicated by the phenomenon of regional integration. In situating the rule of law in the context of regional integration, this thesis has taken a view in looking at the rule of law not from its conceptual meaning but through its functions. In certain ways, the approach is instrumentalist but the thesis adopted a holistic and interdisciplinary approach in showing the motivations and interests among states in adopting a peculiar type of regional arrangement. The research project has shown that both internal (state) and external (globalization) processes have triggered the current drive for regional integration among states and the development of the rule of law has to be considered from the legal, institutional and political processes in the state, the region, and in international relations.
A corollary question that came out of this paper is whether a common framework of the rule of law could be conceived in regional integration given the diversity of rule of law practices in member states. ASEAN is one region where wide diversity exists among its member states. If so, is it possible then to transmit the idea of a rule of law in a member state and under what conditions and forms is this type of regional rule of law able to function? Regional integration, situated within the broader context of regionalism, has been the outcome of coping with the challenges and opportunities of globalization and equally so at providing a regional avenue for promoting national interests and in fostering solidarity among countries. The rule of law is likewise situated in this environment.

This research project has undertaken a search for the basis and function of the rule of law in ASEAN integration and an exploration of the contours of its future development. One basic question that is often asked is whether there is rule of law in ASEAN. This research tends to focus on the present - whether there is rule of law in ASEAN integration, perhaps a convenient technique to avoid a controversial question. However this paper deems it more important to focus on the significance of current developments especially as there is little disagreement about the highly informal and consensual framework of relations and limited cooperative activities of member states in the past. But this is not to lose sight of the past practices, values and institutions through which current reforms have evolved. As such, this paper has started with examining the concept of ASEAN Way, a catch-all phrase defining the mode of conduct and the norms and principles adhered to by member states since its founding in 1967. A question then is asked whether ASEAN’s new legal and institutional framework has significantly departed from the ASEAN Way.

1.1. Key research issues of the rule of law in ASEAN integration

There are four important issues that were looked into in examining the development of the rule of law in ASEAN integration. Does regional integration bring about conditions for the promotion of the rule of law? What are the conditions through which the rule of law can develop in regional integration and whether is it possible to transfer features of the rule of law in the state to a regional setting? Is there such a
particular form of the rule of law in regional integration or a model of a regional rule of law? What is the nature, as well as prospects and limits, of the rule of law in ASEAN integration in its current legal and institutional arrangement?

Regional integration is a viable program to promote the rule of law in regional cooperation and in member states. The demands of deeper economic cooperation for clear, stable, and predictable legal regime require the institution of the rule of law, at least in its narrow and instrumentalist conception. Regional integration has both involved economic and political cooperation, as part of the broader phenomenon of regionalism but also that economic integration requires a wider basis of support and legitimacy. The rule of law in regional integration however assumes various functions - from providing stability, predictability and enforceability of rules, as a framework for interstate relations and the functioning of regional organs, to imposing limits to member states’ sovereign discretion, providing mechanisms of accountability of regional authorities, and providing protection to human rights. The function of the rule of law in regional integration as a decisive constraint to state sovereignty is distinctive of the EU.

Conception of the rule of law is as highly contested in states as in projects of regional integration. The existence of greater plurality in national interests and traditions of the rule of law in member countries makes it extremely difficult to forge a consensus on a type of rule of law in regional integration, particularly as a mechanism of constraint on state powers. The European Union represents an example by which it is possible for the state rule of law, in terms of limitation, to be transported to regional integration and back to member states. This has been made possible through the development of a constitutional legal order based on the principle of supremacy, adoption of a constitutional arrangement imbibing the principle of checks and balance, an independent judicial institution and access by individuals of regional mechanisms.

What have been the vital factors that promote the rule of law in the EU? Through an exploration of the legal and institutional development in the Union, the thesis has identified at least three key elements. One is common legal tradition of member states, particularly a common understanding and recognition by most member states of the function of the rule of law as a bulwark against arbitrary power. This has allowed
member states to provide an initial commitment to the rule of law through the institution of a regional judicial body independent from the states. In ASEAN, there are wide differences on the rule of law traditions of member states and also the development of rule of law practices that promote law as a symbol of state authority rather than as a limit to it. The rule of law in most ASEAN states has developed from a top-down approach starting with colonialism which fostered a different conception of the rule of law.

Second, a ‘leadership’ role provided by key member states in pushing for the establishment of the rule of law was evident in the EU. The political commitment to advance deeper cooperation encourage those other member states still hesitant in forging the European project such as the United Kingdom. Despite the initial recalcitrance of some states in recognizing Community principles, the ‘obedience’ to the decisions of the ECJ by a majority of the states made it possible for the uninterrupted development of the legal and constitutional foundation of the Union. At the current stage in ASEAN, a persuasive leadership role is yet to emerge precisely because its leading states, like Indonesia, still face many of its internal political and security issues. However, the relative stability that Indonesia has enjoyed since the fall of Suharto has allowed it to renew its commitment to more strengthened regional cooperation and initiatives for regional mechanism on human rights.

Third, institutional strengthening was a defining feature in the development of the rule of law in the EU. The development of independent and credible supranational institutions enabled the continuous and progressive implementation of the treaties despite attempts of some member states in frustrating the terms of the agreements. The ECJ, the intergovernmental organs, and Parliament in the EU all performed to ensure the realization of the objectives of the treaties. In ASEAN, the member states need to support the capacity of the regional organs by giving it respect, independence and institutional support if ASEAN Community building is to become a reality.

Moreover, the development of a form of substantive rule of law in the EU took place under a peculiar historical and political setting – as a means to end the war and bind German power, and the acceptance and adherence by member states of the rule of
law as the framework of regional cooperation. Why it is possible for countries to adopt a form of rule of law, but not by others - reflects the sociopolitical basis of the rule of law, and thus the diversity of rule of law traditions. However, the experience of the EU in establishing its type of rule of law to Central and Eastern European countries also presents the potential of regional integration as a mechanism for rule of law transmission. Issues of compliance, sovereignty claims, democracy and legitimacy as well as of coping with expansion of membership and globalization are common challenges faced in lesser or greater measure by other projects of regional integration.

The way EU has coped with these problems makes it an inspiration for other regional projects. The EU cannot be a ‘model’, in the strict sense, to ASEAN because of their wide differences in legal, institutional, political, and historical development. ASEAN needs to develop its own strategies which include the incorporation of the rule of law- as a symbol of limit to state authority, in the member states’ legal culture and political processes and in the process of establishing the ASEAN Community. This is not an easy straightforward task.

Regional integration has provided an incentive and opportunity for ASEAN to develop the rule of law both as means to and one of the objectives of regional cooperation. The rule of law in ASEAN integration is essentially designed to provide a stable and coherent framework for interstate relations among member states and to achieve better implementation and compliance of member states of their economic commitments. As a limiting function on the sovereign capacities in regional relations, the rule of law in ASEAN does not show this potential, at least in the near future. Instead, ASEAN has adopted an instrumentalist conception of the rule of law and one based on ‘thin’ constitutionalism, as reflected in the ASEAN Charter. The features of the rule of law in ASEAN integration are – state-controlled, limited, evolutionary and resting on soft legal regime.

ASEAN has chosen a different path of regional integration and globalization has offered new techniques of the rule of law. The conception of the rule of law in ASEAN however has to be understood within the wider context of new regionalism which opens up ASEAN to new challenges and opportunities at dealing with domestic and
international challenges to nation-state building. As such, while ASEAN and its member states have been receptive to deeper basis of regional cooperation they also seek to preserve their adherence to the classical tenets of sovereignty and non-intervention. There has been no radical departure from the ‘ASEAN Way’ but there are appreciable advances towards the prospects of developing the rule of law in ASEAN.

2. Locating the rule of law in ASEAN regional integration

In locating the rule of law in ASEAN regional integration, this research project sets out with four salient tasks. One, it looks at the particular condition of ASEAN regional integration by situating it within the broader context of regionalism. The discussion in Chapter Two and Chapter Five has identified key economic and political factors that have driven new regionalism in Southeast Asia in the 90s. Of particular significance are the confluence of domestic, regional and international developments – the end of the Cold War, the resolution of the Cambodian conflict in 1993, the Asian financial crisis in 1996, the democratization movement in some member states, September 11 and rise of Islamist radicalism in the region - promoting new regionalism. This regionalism ushered critical developments in ASEAN which seeks a broader basis of cooperation based on greater economic and political cooperation, a re-examination by regional elites of the fundamental principles, values and institutions of ASEAN cooperation, and changing security perspectives in member states encouraging increased recognition for a comprehensive approach to national and regional security problems.

It is noted in the concluding part in Chapter Two that regional integration remains an integral process of nation-state building in member states and thus suggests that respect for sovereignty and non-interference remains the over-riding framework of regional integration. But ASEAN’s fidelity to the principle of non-intervention has not been static and as mentioned in Chapter Five, member states have on several occasions violated or adverted to moderation of the principle in the form of ‘flexible engagement’ or ‘enhanced interaction.’ Chapter Five points to the emergence of regional integration and conception of the ASEAN Community by 2015, and with it a much improved basis of economic and political cooperation requiring a more stable and coherent framework for interstate cooperation. In this sense, there is loosening of the principle of non-
Second, the research enquires the way the rule of law has developed in the context of globalization and its impact on rule of law practices in the nation state and in international relations. Chapter Two and Chapter Five have discussed how globalization acted as the crucial trigger to regional integration which is anchored on closer economic cooperation. The discussion on Chapter Two points to contradictory processes of globalization on the rule of law – the way it is possible to either promote or inhibit the development of the rule of law. Moreover, Chapter IV has outlined the rise of democracy movements in member states in ASEAN in great part pushed by the emergence of the middle class seeking greater economic and political participation and accountability of state actors. In certain measure, regional integration seeks to ameliorate the problem by creating or stimulating economic development and incremental political reforms without unsettling the power of entrenched elites.

Globalization has triggered new forms of rule of law mechanisms such as the use of soft laws, private source of rule-making, and non-judicial forms of adjudication in promoting stability and predictability of transnational economic activities. The prominent role of non-sate actors in global rule of law has been a point of vigorous debates among scholars as to whether it amounts to weakening of the state. On the other hand, globalization is seen as fostering the rule of law through the promotion of the rule of law in international organizations and its aspects of promoting efficiency, transparency and accountability as indispensable to good governance. Many aspects of this rule of law are brought to bear in regional integration – both in the European Union and ASEAN. As shown in Chapter Five, the increasing use of soft law is the key mechanism for achieving the rule of law in economic integration in conjunction with greater institutionalization of intergovernmental cooperation.

Third, the thesis looks at the manner the rule of law is conceived in regional integration – either as a means to achieve the goals of regional integration as one of its key principles or an important objective to promote the rule of law in member states. Chapter Three discusses the development of the rule of law in EU integration, as a
model for and as a point for comparison with ASEAN and other projects of regional integration in the developing world. The function of the rule of law in the EU suggests the possibility of form of state rule of law adopted in regional integration, in its modified form. The persistence of democracy deficit is confirms the impossibility of developing perfect equality of the rule of law in the state and in regional integration. Recent events in the EU such as the rejection of important reform treaties also underscore the limits of constitutionalism in the EU and the pressing challenges from member states themselves of their sovereign prerogatives and calls by their citizens for broader democratic participation. Thus, the discussion in Chapter Three also points to the way the nature of EU rule of law is shifting from a hard and well-ordered regime towards more flexibility, renationalization, and decentralization that seek to incorporate domestic politics into the EU constitutional framework.

While EU and ASEAN have distinct political and economic environment as well as different rule of law traditions, there are areas of common interests that are points for learning. Some aspects of EU regional integration are finding their way in other projects of regional integration such as the SADC and MERCUSOR particularly in the establishment of supranational or independent institutions and development of regional integration law. In particular, SADC has adopted the EU process of regional judicial adjudication and preliminary reference procedure and is slowly building its own body of jurisprudence. As noted in Chapter Three, The SADC Tribunal’s experience however with Zimbabwe points to the limits of judicial power in the absence of strong political will and capacity by other member states to enforce judicial decisions. This is in the face of diversity of opinions among member states and given the recalcitrant attitude of the offending member state to which the decision is sought to be enforced. The Burma question poses the same problem in ASEAN but also that other member states face similar issues of violations of principles of democracy and human rights, to some lesser extent. In the absence of concurrence among member states to sanction member states for serious breaches of fundamental principles such as in the EU, it is inconceivable how the rule of law could be upheld in such situation.

ASEAN has shied away from the use of supranational institutions and judicial means of dispute resolution but there are other rule of law mechanisms that can be
explored to suit the conditions of ASEAN and without undermining its sovereignty claims. In fact, our discussion on Chapter Three shows the steadfast position of member states in both the old and newer member states in the EU, in claiming and exercising their sovereign authority vis-à-vis Union authority. There are various rule of law techniques that have been employed in the EU to balance the interests of member states which could be useful in highly plural community like ASEAN.

The concept of variable or differentiated integration could be used in a variety of sectors of cooperation allowing some member states to advance in their chosen areas for deeper cooperation. As discussed in Chapter Five, flexible integration is still severely limited by consensus. The use of hard and legally-binding rules could also be explored in ASEAN using the technique of the principle of subsidiarity as a way to temper the rigid application of laws especially when flexibility for implementation is desired. EU’s mixed use of the *acquis communitaire*, soft law and socialization in transposing the rule of law to new members with ‘weaker’ rule of law traditions is an example for other projects of regional integration with substantial differences. However, it must be pointed out that this was also achieved by imposing compliance with the Accession criteria and strong economic incentives.

Another point for learning is the way soft law is being employed to achieve the demands of member states for flexibility, to encourage voluntary action and compliance by member states in the absence of Union authority or where wide differences exists among member states, and to accommodate demands for greater deliberation and participation by stakeholders and civil society. The use of independent experts and committees in drafting proposals and implementation guidelines has been effective in the EU. Even demands for accountability can be achieved through the process of co-decision and co-operation. National parliaments in member states can be accommodated in this process. This is by no means an exhaustive and definitive investigation but as a general exploration of how EU is still a relevant and viable model of regional integration. This could be an interesting area for further research as ASEAN continues to implement programs outlined in the Blueprints for the three pillars. As stated in Chapter Five, the rule of law can be developed and enhanced in the current legal and institutional setting in ASEAN.
Fourth, this research enquires into the attitudes to and function of the rule of law in the founding member states. Regional integration in ASEAN has been conceived of as a state-centered program. The promotion of the rule of law is treated as a political program of cooperation by member states as discussed in Chapter Five to be promoted mainly through creation and socialization of norms among state agencies and officials. As such, the rule of law practices of member states reflect the proclivity of individual member states to support a type of rule of law in regional integration. ASEAN integration in its nascent stage has supported a rule of law based on thin constitutionalism to provide a more coherent and stable framework for intergovernmental relations and an instrumentalist conception that promotes efficiency in economic integration. As a form of constraint or mechanism of accountability, the rule of law in ASEAN integration does little – and much is to be desired. On the contrary, there is greater tendency to strengthen executive powers of member states through the control of member states of the processes and institutions of regional integration. This is primarily rooted in its nature as an intergovernmental organization, the absence of form of checks and balance among regional organs and absence of participation by national parliaments in the formal processes, and the largely informal, limited and selective participation of non-state actors and civil society.

As mentioned in Chapter Four, there is divergence but also convergence of rule of law practices in member states that makes it difficult to establish a rule of law regime in ASEAN based on constraint to sovereign or institutional powers. Despite democratization and the development of constitutionalism in member states, a pattern common among member states is the predominance of executive powers over other state institutions, the legislative and judiciary. However, there is growing consensus among member states, regardless of forms of government, of the necessity to adhere to the rule of law at both the national and regional levels. Not only economic, but also domestic political changes have driven legal and institutional reforms in Southeast Asia that aims to curb excessive government powers through the institution of the principles of separation of powers or checks and balance, the creation of independent institutions, strengthening of legal and judicial institutions, and increasing the space for civil society advocacy. The extent of reforms and actual practices have remained varied in member
states. Again, the expansion of the middle class translated into well-informed and committed civil society encourages further political and institutional reforms.

Domestic reforms are bearing influence on regional integration as shown by the democratizing states’ greater support in ASEAN at relaxing the principles of non-intervention. This has been translated into enhanced interaction or cooperation even in the sphere of sensitive political and security issues with non-state actors and civil society and the decision to establish an ASEAN human rights body. In many respects, domestic changes have also coincided with the imperative of ASEAN regional integration project to obtain wider basis of political support and to enhance ASEAN’s credibility and respectability in the international community. In this sense, efforts at establishing participatory democracy and greater promotion of human rights in ASEAN could also have the potential to enhance democracy movements in member states and the rights of citizens in the region.

3. The limits and challenges of the rule of law in ASEAN

The constraints in building the rule of law in ASEAN, both in its thin or thick senses, are rooted in its structural and legal and institutional foundation. The thesis has identified four main issues constraining the development of the rule of law. As discussed in Chapters Two and Five, the economic basis of regional integration rests on a reaction to globalization that is narrowly focused on attracting foreign investments and not so much on deepening intra-regional trade. Regional economic cooperation strategy remains locked on tariff removals and is yet to launch a dynamic program aimed at deepening intra-regional trade. In the EU, the removal of quantitave barriers to trade was the main source of Community instition-building and of case laws establishing the foundation for legal integration. With a narrow basis of integration, ASEAN economic integration yields limited activities and thus lesser necessity or incentive to establish clear rules and institutions. As a response mechanism to economic challenges, regional integration generates institutions through which economic measures could function. Having limited basis of cooperation means that there is less incentive and opportunity for rule-creation and to strengthen regional institutions.
One of the main findings in Chapter Four is the establishment of a type of a rule of law in member state that does not impose restraint on state power which is expressed mainly through the executive. Despite constitutional reforms in Southeast Asian states, the idea of separation of powers either exists only on paper or is rendered meaningless by weak institutional and socio-cultural practices. This means that the state, represented by the executive, is still the prime mover in international relations in Southeast Asia or the pivotal source of regional norm or law creation. Strong sovereignty claims have always come from ‘strong’ states while those states having instituted constitutional reforms and formal democracy tend to be supportive in moderating the principle of non-intervention in ASEAN. These latter states have been more receptive to broader participation by non-state actors and civil society groups in the regional processes and to the idea of independent regional mechanisms. There is now diversity of views among member states on non-intervention but such differences are not strong enough to overcome the dominance of traditional view still espoused by most member states. This is confounded by the absence of strong leadership position of a member state in ASEAN which could espouse bold and decisive reforms. As such, consensus and flexibility would remain to be the mode of conduct among member states.

A critical flaw of the rule of law in ASEAN is its weak institutions. To raise the prestige of its institutions should be an indispensable component of ASEAN Community-building. This would entail investing regional organs with respect and indepence, allowing these mechanisms the capacity to generate credible actions and decisions, and supporting their institutional continuity. This task is however constrained by at least two main factors. One is the lukewarm attitude by member states to establish independent institutions and provision for at least some form of institutional accountability. At present, there is basically a form of intergovernmental system guided by the principle of cooperation and coordination. Despite enhancement of its functions, the ASEAN Secretariat still lacks independent authority over other ASEAN organs, particularly in relation to implementing regional agreements or commitments. Second, the soft legal foundation of ASEAN has the tendency to reinforce the weakness of institutions - in the absence of efforts to strengthen institutions. For instance, with the built-in flexibility afforded to member states in their agreements, and absence of specific punitive sanctions for non-performance of
obligations, the establishment of the enhanced dispute settlement mechanism could be rendered meaningless or ineffective, if at all it would be used by member states.

The predominance of ‘extralegal’ norm in ASEAN, the ‘ASEAN Way’, and the persistence of attitude among state leaders and officials that it is ‘the way’ and identity of the association, inhibits the development of clear, stable, and predictable rules – although there are now increasing efforts at providing agreements with more precise language in the economic field. As discussed, discretion still predominates the implementation even of economic agreements. Also, the existence of these ‘cultural’ norms discourage member states from actively using formal regional institutions. This is shown by the continued non-use of regional mechanisms for dispute settlement. To raise the integrity of ASEAN demands that regional institutions are respected and used and that they work in managing regional relations and activities. The fact that individuals and non-state actors are given very restricted access to regional formal mechanisms also inhibits the creation of more responsive, effective and relevant regional institutions.

4. Prospects of the rule of law in ASEAN integration – some possible directions

Persistent demands in sustaining the integrity and legitimacy of the nation-states in Southeast Asia still constitute the foundation of new regionalism in ASEAN. Regional integration continues to be defined by this interest and of ASEAN’s continued adherence to the principle of non-intervention. Similarly, the limited role of the rule of law in ASEAN integration and the highly political nature of the rule of law, democracy and human rights as regional programs are likewise defined and constrained by these conditions. There is no doubt however that ASEAN integration brought opportunities for building the rule of law through the introduction of principles and rules, institutions and opportunity for enhanced interaction with non-state actors. Economic, social and political conditions have determined the nature and form of the rule of law. But laws, institutions and agents have comprised the change-agents of the rule of law and in these factors come the potential for social reforms or transformation.
The ASEAN Charter is an intergovernmental agreement but it also outlines commitment to the principles of democracy, the rule of law, human rights and good governance which are applicable to the states as well as to the peoples in the region. The various economic agreements and declarations signed by governments are intergovernmental in character but these are matters that affect and impact on the lives of the people. These instruments, including The Charter, can be pushed for implementation and advocacy in national agencies and institutions but they can likewise be tested in domestic jurisdictions. The fact that The Charter went through the process of ratification by the peoples’ representatives in member countries has made it ‘justiciable’ in countries permitting judicial review of government acts and agreements. Parliaments in member countries are now in a better position, and can be urged, to demand parliamentary oversight of executive actions in ASEAN. Increasing assertiveness of independence of a growing number of legislators in member countries in democratizing states could start the process of constructive engagement with ASEAN.

The use of soft law has its own advantages and this project has given an outline as to how soft law techniques can be explored within ASEAN’s limited institutional framework. The point is, there is plenty of room to explore the use of soft law by regional personnel and also by non-state actors wishing to engage with ASEAN. Repetitive practices of soft law could also result in crystallizing it to hard law and socialization among state officials and agencies has been a useful process for adopting habits of the the rule of law. Voluntary adoption of rules through harmonization of rules and standard setting could provide encouragement to member states through its non-intrusive process and could include the independent experts in the region in drawing up technical rules and guidelines for implementation. There have been relative successes in ASEAN in using the softer process such as the AFTA, the ASEAN Framework on Visa Exemption which has now allowed visa-free entry to all ASEAN nationals in the region, and the ASEAN Single Window which simplifies and accelerates customs clearance of cargo coming from member states.

A key challenge however in ASEAN is how to expand the function of the rule of law in regional integration, as a mechanism for accountability and as a form of
constraint on sovereign actions. Institutions and laws have the tendency to embed conservative habits and practices - without the push by agents for reforms or progress. Our discussion in ASEAN has shown how the work or advice of reform-minded national elites has influenced state leaders to consider new ideas and concepts and to implement institutional reforms. The growth of civil society in Southeast Asia has also seen the growing advocacy and activism at the regional level and in pushing for important political issues – such as the creation of the ASEAN human rights body and rights of marginalized groups, into the forefront of regional agenda. The civil society has become an important voice in articulating alternative or progressive visions of regionalism.

The last four years have seen the willingness of member states to address, in non-binding manner, certain sensitive transnational issues. ASEAN signed three instruments that seek to provide greater protection to vulnerable sectors, in large part due to sustained efforts by civil society – the ASEAN Declaration on the Elimination of Violence Against Women in the ASEAN Region (2004), ASEAN Declaration Against Trafficking in Persons Particularly Women and Children (2004), and ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007). Given the non-binding character of these declarations, the burden falls upon committed civil society groups to advocate and press upon ASEAN leaders to make good their promises in addressing the problems faced by marginalized sectors. The biggest challenge for civil society is on how they can engage the envisioned ASEAN Community to genuinely respond to pressing economic, political, and socio-cultural issues in the region and for it to open itself up to broader civil society participation. They also need to find ways in creatively engaging with reform-minded elites as with ASEAN institutions. There is also a potential to get independent constitutional bodies in member states to take up issues in ASEAN and link up with regional mechanisms.

Building the rule of law in ASEAN regional integration is a process that depends on the willingness of the states to place limitations through legal and institutional limits on their sovereign powers. Because of the need to gather a broader basis of legitimacy, regional integration has opened opportunities for non-state actors and civil society to participate in or influence regional processes. In the context of ASEAN, the absence of
formal institutions of accountability makes it extremely difficult to work for expanding the function of the rule of law in regional integration. Taking a lesson from the experience of the European Union, the rule of law needs to be driven by end-users or subjects of rules of regional integration. In the absence of avenues for individual access to ASEAN mechanisms, the work of civil society organizations has become more significant to demand for a more substantive type of the rule of law in regional integration.

The Charter, the institution of various organs in ASEAN, and adoption of the Blueprints for the ASEAN Community have all opened new spaces for civil society engagement with ASEAN to advance more specific and concrete issues that are themselves committed to by ASEAN leaders. Moreover, as human rights is treated as a regional concern by member states through the establishment of an ASEAN human rights body, the role of the rule of law in regional integration could assume greater significance. The institution of the AICHR, even in its ‘toothless’ form, provides a space for greater advocacy of human rights promotion and protection in the region. It can also be a venue, a ‘site for struggle’, through which the human rights promoted by ASEAN states can be examined in the light of established international law, norms, and standards. The inter-relatedness of the rule of law with democracy and human rights is as evident in the context of regional integration as in the nation-state in expanding the function of the rule of law to its more substantive role – as a limit to sovereign authority.
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(Bangkok Declaration)

Bangkok, 8 August 1967

The Presidium Minister for Political Affairs/Minister for Foreign Affairs of Indonesia, the Deputy Prime Minister of Malaysia, the Secretary of Foreign Affairs of the Philippines, the Minister for Foreign Affairs of Singapore and the Minister of Foreign Affairs of Thailand:

MINDFUL of the existence of mutual interests and common problems among countries of South-East Asia and convinced of the need to strengthen further the existing bonds of regional solidarity and cooperation;

DESIRING to establish a firm foundation for common action to promote regional cooperation in South-East Asia in the spirit of equality and partnership and thereby contribute towards peace, progress and prosperity in the region;

CONSCIOUS that in an increasingly interdependent world, the cherished ideals of peace, freedom, social justice and economic well-being are best attained by fostering good understanding, good neighbourliness and meaningful cooperation among the countries of the region already bound together by ties of history and culture;

CONSIDERING that the countries of South-East Asia share a primary responsibility for strengthening the economic and social stability of the region and ensuring their peaceful and progressive national development, and that they are determined to ensure their stability and security from external interference in any form or manifestation in order to preserve their national identities in accordance with the ideals and aspirations of their peoples;

AFFIRMING that all foreign bases are temporary and remain only with the expressed concurrence of the countries concerned and are not intended to be used directly or indirectly to subvert the national independence and freedom of States in the area or prejudice the orderly processes of their national development;

DO HEREBY DECLARE:

FIRST, the establishment of an Association for Regional Cooperation among the countries of South-East Asia to be known as the Association of South-East Asian Nations (ASEAN).

SECOND, that the aims and purposes of the Association shall be:

1. To accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South-East Asian Nations;
2. To promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter;

3. To promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields;

4. To provide assistance to each other in the form of training and research facilities in the educational, professional, technical and administrative spheres;

5. To collaborate more effectively for the greater utilization of their agriculture and industries, the expansion of their trade, including the study of the problems of international commodity trade, the improvement of their transportation and communications facilities and the raising of the living standards of their peoples;

6. To promote South-East Asian studies;

7. To maintain close and beneficial cooperation with existing international and regional organizations with similar aims and purposes, and explore all avenues for even closer cooperation among themselves.

THIRD, that to carry out these aims and purposes, the following machinery shall be established:

(a) Annual Meeting of Foreign Ministers, which shall be by rotation and referred to as ASEAN Ministerial Meeting. Special Meetings of Foreign Ministers may be convened as required.

(b) A Standing committee, under the chairmanship of the Foreign Minister of the host country or his representative and having as its members the accredited Ambassadors of the other member countries, to carry on the work of the Association in between Meetings of Foreign Ministers.

(c) Ad-Hoc Committees and Permanent Committees of specialists and officials on specific subjects.

(d) A National Secretariat in each member country to carry out the work of the Association on behalf of that country and to service the Annual or Special Meetings of Foreign Ministers, the Standing Committee and such other committees as may hereafter be established.

FOURTH, that the Association is open for participation to all States in the South-East Asian Region subscribing to the aforementioned aims, principles and purposes.

FIFTH, that the Association represents the collective will of the nations of South-East Asia to bind themselves together in friendship and cooperation and, through joint efforts and sacrifices, secure for their peoples and for posterity the blessings of peace, freedom and prosperity.

DONE in Bangkok on the Eighth Day of August in the Year One Thousand Nine Hundred and Sixty-Seven.
For the Republic of Indonesia:

ADAM MALIK

President Minister for Political
Minister for Foreign Affairs

For Malaysia:

THE ABDEL RAMAT

Deputy Prime Minister,
Minister of Defense and
Minister of National Development

For the Republic of Singapore:

J. RABANAKH

Minister of Foreign Affairs

For the Kingdom of Thailand:

TEERAT KARNOH

Minister of Foreign Affairs

For the Republic of the Philippines:

YANGIO RAMIN

Secretary of Foreign Affairs
The High Contracting Parties:

CONSCIOUS of the existing ties of history, geography and culture, which have bound their peoples together;

ANXIOUS to promote regional peace and stability through abiding respect for justice and the rule or law and enhancing regional resilience in their relations;

DESIRING to enhance peace, friendship and mutual cooperation on matters affecting Southeast Asia consistent with the spirit and principles of the Charter of the United Nations, the Ten Principles adopted by the Asian-African Conference in Bandung on 25 April 1955, the Declaration of the Association of Southeast Asian Nations signed in Bangkok on 8 August 1967, and the Declaration signed in Kuala Lumpur on 27 November 1971;

CONVINCED that the settlement of differences or disputes between their countries should be regulated by rational, effective and sufficiently flexible procedures, avoiding negative attitudes which might endanger or hinder cooperation;

BELIEVING in the need for cooperation with all peace-loving nations, both within and outside Southeast Asia, in the furtherance of world peace, stability and harmony;

SOLEMNLY AGREE to enter into a Treaty of Amity and Cooperation as follows:

CHAPTER I : PURPOSE AND PRINCIPLES

Article 1

The purpose of this Treaty is to promote perpetual peace, everlasting amity and cooperation among their peoples which would contribute to their strength, solidarity and closer relationship,

Article 2

In their relations with one another, the High Contracting Parties shall be guided by
the following fundamental principles:

a. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;

b. The right of every State to lead its national existence free from external interference, subversion or coercion;

c. Non-interference in the internal affairs of one another;

d. Settlement of differences or disputes by peaceful means;

e. Renunciation of the threat or use of force;

f. Effective cooperation among themselves.

CHAPTER II : AMITY

In pursuance of the purpose of this Treaty the High Contracting Parties shall endeavour to develop and strengthen the traditional, cultural and historical ties of friendship, good neighbourliness and cooperation which bind them together and shall fulfill in good faith the obligations assumed under this Treaty. In order to promote closer understanding among them, the High Contracting Parties shall encourage and facilitate contact and intercourse among their peoples.

CHAPTER III : COOPERATION

The High Contracting Parties shall promote active cooperation in the economic, social, technical, scientific and administrative fields as well as in matters of common ideals and aspirations of international peace and stability in the region and all other matters of common interest.

Pursuant to Article 4 the High Contracting Parties shall exert their maximum efforts multilaterally as well as bilaterally on the basis of equality, non-discrimination and mutual benefit.
Article 6

The High Contracting Parties shall collaborate for the acceleration of the economic growth in the region in order to strengthen the foundation for a prosperous and peaceful community of nations in Southeast Asia. To this end, they shall promote the greater utilization of their agriculture and industries, the expansion of their trade and the improvement of their economic infrastructure for the mutual benefit of their peoples. In this regard, they shall continue to explore all avenues for close and beneficial cooperation with other States as well as international and regional organisations outside the region.

Article 7

The High Contracting Parties, in order to achieve social justice and to raise the standards of living of the peoples of the region, shall intensify economic cooperation. For this purpose, they shall adopt appropriate regional strategies for economic development and mutual assistance.

Article 8

The High Contracting Parties shall strive to achieve the closest cooperation on the widest scale and shall seek to provide assistance to one another in the form of training and research facilities in the social, cultural, technical, scientific and administrative fields.

Article 9

The High Contracting Parties shall endeavour to foster cooperation in the furtherance of the cause of peace, harmony, and stability in the region. To this end, the High Contracting Parties shall maintain regular contacts and consultations with one another on international and regional matters with a view to coordinating their views, actions and policies.

Article 10

Each High Contracting Party shall not in any manner or form participate in any activity which shall constitute a threat to the political and economic stability,
sovereignty, or territorial integrity of another High Contracting Party.

Article 11

The High Contracting Parties shall endeavour to strengthen their respective national resilience in their political, economic, socio-cultural as well as security fields in conformity with their respective ideals and aspirations, free from external interference as well as internal subversive activities in order to preserve their respective national identities.

Article 12

The High Contracting Parties in their efforts to achieve regional prosperity and security, shall endeavour to cooperate in all fields for the promotion of regional resilience, based on the principles of self-confidence, self-reliance, mutual respect, cooperation and solidarity which will constitute the foundation for a strong and viable community of nations in Southeast Asia.

CHAPTER IV : PACIFIC SETTLEMENT OF DISPUTES

Article 13

The High Contracting Parties shall have the determination and good faith to prevent disputes from arising. In case disputes on matters directly affecting them should arise, especially disputes likely to disturb regional peace and harmony, they shall refrain from the threat or use of force and shall at all times settle such disputes among themselves through friendly negotiations.

Article 14

To settle disputes through regional processes, the High Contracting Parties shall constitute, as a continuing body, a High Council comprising a Representative at ministerial level from each of the High Contracting Parties to take cognizance of the existence of disputes or situations likely to disturb regional peace and harmony.
In the event no solution is reached through direct negotiations, the High Council shall take cognizance of the dispute or the situation and shall recommend to the parties in dispute appropriate means of settlement such as good offices, mediation, inquiry or conciliation. The High Council may however offer its good offices, or upon agreement of the parties in dispute, constitute itself into a committee of mediation, inquiry or conciliation. When deemed necessary, the High Council shall recommend appropriate measures for the prevention of a deterioration of the dispute or the situation.

Article 16

The foregoing provision of this Chapter shall not apply to a dispute unless all the parties to the dispute agree to their application to that dispute. However, this shall not preclude the other High Contracting Parties not party to the dispute from offering all possible assistance to settle the said dispute. Parties to the dispute should be well disposed towards such offers of assistance.

Article 17

Nothing in this Treaty shall preclude recourse to the modes of peaceful settlement contained in Article 33(1) of the Charter of the United Nations. The High Contracting Parties which are parties to a dispute should be encouraged to take initiatives to solve it by friendly negotiations before resorting to the other procedures provided for in the Charter of the United Nations.

CHAPTER V : General Provision

Article 18

This Treaty shall be signed by the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand. It shall be ratified in accordance with the constitutional procedures of each signatory State. It shall be open for accession by other States in Southeast Asia.

Article 19
This Treaty shall enter into force on the date of the deposit of the fifth instrument of ratification with the Governments of the signatory States which are designated Depositories of this Treaty and the instruments of ratification or accession.

Article 20

This Treaty is drawn up in the official languages of the High Contracting Parties, all of which are equally authoritative. There shall be an agreed common translation of the texts in the English language. Any divergent interpretation of the common text shall be settled by negotiation.

IN FAITH THEREOF the High Contracting Parties have signed the Treaty and have hereto affixed their Seals.

DONE at Denpasar, Bali, this twenty-fourth day of February in the year one thousand nine hundred and seventy-six.
For the Republic of Indonesia:

SOEHARTO
President

For the Republic of Singapore:

LEE KUAN YEW
Prime Minister

For Malaysia:

DATUK HUSEIN ONN
Prime Minister

For the Kingdom of Thailand:

KUKRIT PRAMOJ
Prime Minister

For the Republic of the Philippines:

FERDINAND E. MARCOS
DECLARATION OF ASEAN CONCORD II
(BALI CONCORD II)

The Sultan of Brunei Darussalam, the Prime Minister of the Kingdom of Cambodia, the
President of the Republic of Indonesia, the Prime Minister of the Lao People’s
Democratic Republic, the Prime Minister of Malaysia, the Prime Minister of the Union of
Myanmar, the President of the Republic of the Philippines, the Prime Minister of the
Republic of Singapore, the Prime Minister of the Kingdom of Thailand and the Prime
Minister of the Socialist Republic of Viet Nam;

RECALLING the Declaration of ASEAN Concord adopted in this historic place of Bali,
Indonesia in 1976, the Leaders of the Association of Southeast Asian Nations (ASEAN)
expressed satisfaction with the overall progress made in the region;

NOTING in particular the expansion of ASEAN to ten countries in Southeast Asia, the
deepening of regional economic integration and the impending accession to the Treaty of
Amity and Cooperation (TAC) by States outside Southeast Asia;

CONSCIOUS of the need to further consolidate and enhance the achievements of
ASEAN as a dynamic, resilient, and cohesive regional association for the well being of
its member states and people as well as the need to further strengthen the Association’s
guidelines in achieving a more coherent and clearer path for cooperation between and
among them;

REAFFIRMING their commitment to the principles enshrined in the ASEAN
Declaration (Bangkok, 1967), the Declaration on Zone of Peace, Freedom, and Neutrality
(Kuala Lumpur, 1971), the Treaty of Amity and Cooperation in Southeast Asia (Bali,
1976), the Declaration of ASEAN Concord (Bali, 1976), and the Treaty on the Southeast
Asia Nuclear Weapons Free Zone (Bangkok, 1995);

COGNIZANT that the future of ASEAN cooperation is guided by the ASEAN Vision
2020, the Hanoi Plan of Action (1999-2004), and its succeeding Plans of Action, the
Initiative for ASEAN Integration (IAI), and the Roadmap for the Integration of ASEAN
(RIA);

CONFIRMING further that ASEAN Member Countries share primary responsibility for
strengthening the economic and social stability in the region and ensuring their peaceful
and progressive national development, and that they are determined to ensure their
stability and security from external interference in any form or manner in order to
preserve their national interest in accordance with the ideals and aspirations of their
peoples;

REAFFIRMING the fundamental importance of adhering to the principle of non-
interference and consensus in ASEAN cooperation;
REITERATING that the Treaty of Amity and Cooperation in Southeast Asia (TAC) is an effective code of conduct for relations among governments and peoples;

RECOGNIZING that sustainable economic development requires a secure political environment based on a strong foundation of mutual interests generated by economic cooperation and political solidarity;

COGNIZANT of the interdependence of the ASEAN economies and the need for ASEAN member countries to adopt “Prosper Thy Neighbour” policies in order to ensure the long-term vibrancy and prosperity of the ASEAN region;

REITERATING the importance of rules-based multilateral trading system that is equitable and that contributes towards the pursuit of development;

REAFFIRMING that ASEAN is a concert of Southeast Asian nations, bonded together in partnership in dynamic development and in a community of caring societies, committed to upholding cultural diversity and social harmony;

DO HEREBY DECLARE THAT:

1. An ASEAN Community shall be established comprising three pillars, namely political and security cooperation, economic cooperation, and socio-cultural cooperation that are closely intertwined and mutually reinforcing for the purpose of ensuring durable peace, stability and shared prosperity in the region;

2. ASEAN shall continue its efforts to ensure closer and mutually beneficial integration among its member states and among their peoples, and to promote regional peace and stability, security, development and prosperity with a view to realizing an ASEAN Community that is open, dynamic and resilient;

3. ASEAN shall respond to the new dynamics within the respective ASEAN Member Countries and shall urgently and effectively address the challenge of translating ASEAN cultural diversities and different economic levels into equitable development opportunity and prosperity, in an environment of solidarity, regional resilience and harmony;

4. ASEAN shall nurture common values, such as habit of consultation to discuss political issues and the willingness to share information on matters of common concern, such as environmental degradation, maritime security cooperation, the enhancement of defense cooperation among ASEAN countries, develop a set of socio-political values and principles, and resolve to settle long-standing disputes through peaceful means;

5. The Treaty of Amity and Cooperation in Southeast Asia (TAC) is the key code of conduct governing relations between states and a diplomatic instrument for the promotion of peace and stability in the region;
6. The ASEAN Regional Forum (ARF) shall remain the primary forum in enhancing political and security cooperation in the Asia Pacific region, as well as the pivot in building peace and stability in the region. ASEAN shall enhance its role in further advancing the stages of cooperation within the ARF to ensure the security of the Asia Pacific region;

7. ASEAN is committed to deepening and broadening its internal economic integration and linkages with the world economy to realize an ASEAN Economic Community through a bold, pragmatic and unified strategy;

8. ASEAN shall further build on the momentum already gained in the ASEAN+3 process so as to further draw synergies through broader and deeper cooperation in various areas;

9. ASEAN shall build upon opportunities for mutually beneficial regional integration arising from its existing initiatives and those with partners, through enhanced trade and investment links as well as through IAI process and the RIA;

10. ASEAN shall continue to foster a community of caring societies and promote a common regional identity;

DO HEREBY ADOPT:

The framework to achieve a dynamic, cohesive, resilient and integrated ASEAN Community:

A. ASEAN SECURITY COMMUNITY (ASC)

1. The ASEAN Security Community is envisaged to bring ASEAN’s political and security cooperation to a higher plane to ensure that countries in the region live at peace with one another and with the world at large in a just, democratic and harmonious environment. The ASEAN Security Community members shall rely exclusively on peaceful processes in the settlement of intra-regional differences and regard their security as fundamentally linked to one another and bound by geographic location, common vision and objectives.

2. The ASEAN Security Community, recognizing the sovereign right of the member countries to pursue their individual foreign policies and defense arrangements and taking into account the strong interconnections among political, economic and social realities, subscribes to the principle of comprehensive security as having broad political, economic, social and cultural aspects in consonance with the ASEAN Vision 2020 rather than to a defense pact, military alliance or a joint foreign policy.

3. ASEAN shall continue to promote regional solidarity and cooperation. Member Countries shall exercise their rights to lead their national existence free from outside interference in their internal affairs.
4. The ASEAN Security Community shall abide by the UN Charter and other principles of international law and uphold ASEAN’s principles of non-interference, consensus-based decision-making, national and regional resilience, respect for national sovereignty, the renunciation of the threat or the use of force, and peaceful settlement of differences and disputes.

5. Maritime issues and concerns are transboundary in nature, and therefore shall be addressed regionally in holistic, integrated and comprehensive manner. Maritime cooperation between and among ASEAN member countries shall contribute to the evolution of the ASEAN Security Community.

6. Existing ASEAN political instruments such as the Declaration on ZOPFAN, the TAC, and the SEANWFZ Treaty shall continue to play a pivotal role in the area of confidence building measures, preventive diplomacy and the approaches to conflict resolution.

7. The High Council of the TAC shall be the important component in the ASEAN Security Community since it reflects ASEAN’s commitment to resolve all differences, disputes and conflicts peacefully.

8. The ASEAN Security Community shall contribute to further promoting peace and security in the wider Asia Pacific region and reflect ASEAN’s determination to move forward at a pace comfortable to all. In this regard, the ARF shall remain the main forum for regional security dialogue, with ASEAN as the primary driving force.

9. The ASEAN Security Community is open and outward looking in respect of actively engaging ASEAN’s friends and Dialogue Partners to promote peace and stability in the region, and shall build on the ARF to facilitate consultation and cooperation between ASEAN and its friends and Partners on regional security matters.

10. The ASEAN Security Community shall fully utilize the existing institutions and mechanisms within ASEAN with a view to strengthening national and regional capacities to counter terrorism, drug trafficking, trafficking in persons and other transnational crimes; and shall work to ensure that the Southeast Asian Region remains free of all weapons of mass destruction. It shall enable ASEAN to demonstrate a greater capacity and responsibility of being the primary driving force of the ARF.

11. The ASEAN Security Community shall explore enhanced cooperation with the United Nations as well as other international and regional bodies for the maintenance of international peace and security.

12. ASEAN shall explore innovative ways to increase its security and establish modalities for the ASEAN Security Community, which include, inter alia, the following elements: norms-setting, conflict prevention, approaches to conflict resolution, and post-conflict peace building.

B. ASEAN ECONOMIC COMMUNITY (AEC)
1. The ASEAN Economic Community is the realisation of the end-goal of economic integration as outlined in the ASEAN Vision 2020, to create a stable, prosperous and highly competitive ASEAN economic region in which there is a free flow of goods, services, investment and a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities in year 2020.

2. The ASEAN Economic Community is based on a convergence of interests among ASEAN members to deepen and broaden economic integration efforts through existing and new initiatives with clear timelines.

3. The ASEAN Economic Community shall establish ASEAN as a single market and production base, turning the diversity that characterises the region into opportunities for business complementation making the ASEAN a more dynamic and stronger segment of the global supply chain. ASEAN’s strategy shall consist of the integration of ASEAN and enhancing ASEAN’s economic competitiveness. In moving towards the ASEAN Economic Community, ASEAN shall, inter alia, institute new mechanisms and measures to strengthen the implementation of its existing economic initiatives including the ASEAN Free Trade Area (AFTA), ASEAN Framework Agreement on Services (AFAS) and ASEAN Investment Area (AIA); accelerate regional integration in the priority sectors; facilitate movement of business persons, skilled labour and talents; and strengthen the institutional mechanisms of ASEAN, including the improvement of the existing ASEAN Dispute Settlement Mechanism to ensure expeditious and legally binding resolution of any economic disputes. As a first step towards the realization of the ASEAN Economic Community, ASEAN shall implement the recommendations of the High Level Task Force on ASEAN Economic Integration as annexed.

4. The ASEAN Economic Community shall ensure that deepening and broadening integration of ASEAN shall be accompanied by technical and development cooperation in order to address the development divide and accelerate the economic integration of Cambodia, Lao PDR, Myanmar and Viet Nam through IAI and RIA so that the benefits of ASEAN integration are shared and enable all ASEAN Member Countries to move forward in a unified manner.

5. The realization of a fully integrated economic community requires implementation of both liberalization and cooperation measures. There is a need to enhance cooperation and integration activities in other areas. These will involve, among others, human resources development and capacity building; recognition of educational 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; and enhancing private sector involvement.

C. ASEAN SOCIO-CULTURAL COMMUNITY (ASCC)
1. The ASEAN Socio-cultural Community, in consonance with the goal set by ASEAN Vision 2020, envisages a Southeast Asia bonded together in partnership as a community of caring societies.

2. In line with the programme of action set by the 1976 Declaration of ASEAN Concord, the Community shall foster cooperation in social development aimed at raising the standard of living of disadvantaged groups and the rural population, and shall seek the active involvement of all sectors of society, in particular women, youth, and local communities.

3. ASEAN shall ensure that its work force shall be prepared for, and benefit from, economic integration by investing more resources for basic and higher education, training, science and technology development, job creation, and social protection. The development and enhancement of human resources is a key strategy for employment generation, alleviating poverty and socio-economic disparities, and ensuring economic growth with equity. ASEAN shall continue existing efforts to promote regional mobility and mutual recognition of professional credentials, talents, and skills development.

4. ASEAN shall further intensify cooperation in the area of public health, including in the prevention and control of infectious diseases, such as HIV/AIDS and SARS, and support joint regional actions to increase access to affordable medicines. The security of the Community is enhanced when poverty and diseases are held in check, and the peoples of ASEAN are assured of adequate health care.

5. The Community shall nurture talent and promote interaction among ASEAN scholars, writers, artists and media practitioners to help preserve and promote ASEAN’s diverse cultural heritage while fostering regional identity as well as cultivating people’s awareness of ASEAN.

6. The Community shall intensify cooperation in addressing problems associated with population growth, unemployment, environmental degradation and transboundary pollution as well as disaster management in the region to enable individual members to fully realize their development potentials and to enhance the mutual ASEAN spirit.

We hereby pledge to our peoples our resolve and commitment to bring the ASEAN Community into reality and, for this purpose, task the concerned Ministers to implement this Declaration.
Done in Bali, Indonesia, on the Seventh Day of October in the Year Two Thousand and Three.

For Brunei Darussalam

HAI HASSANAL BOLKIAH
Sultan of Brunei Darussalam

For the Kingdom of Cambodia

For the Republic of Indonesia

MEGAWATI SOEKARNOHUTU
President

BOUHNANG VORACHITH
Prime Minister

For the Lao People's Democratic Republic

For Malaysia

DR. MAHATHIR BIN MOHAMAD
Prime Minister

For the Union of Myanmar

For the Republic of the Philippines

GLORIA MACAPAGAL-ARROYO
President

For the Republic of Singapore

For the Socialist Republic of Vietnam

DR. THAKSIN SHINAWATRA
Prime Minister

PHAN VAN KHAI
Prime Minister
ASEAN Protocol on Enhanced Dispute Settlement Mechanism

The Governments of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People’s Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam, Member States of the Association of South East Asian Nations (hereinafter collectively referred to as “ASEAN” or “Member States” or singularly as “Member State”);

RECALLING the Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Singapore on 28 January 1992, as amended by the Protocol to Amend the Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Bangkok on 15 December 1995 (the "Agreement") and the Protocol on Dispute Settlement Mechanism signed in Manila on 20 November 1996 (the “1996 Protocol on DSM”);

FURTHER RECALLING that the 9th ASEAN Summit held in Bali on 7-8 October 2003, had decided on institutional strengthening of ASEAN, including the improvement of the ASEAN Dispute Settlement Mechanism, as reflected in the Bali Concord II;

DESIRING to replace the 1996 Protocol on DSM with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (hereinafter referred to as “Protocol”);

HAVE AGREED AS FOLLOWS:

ARTICLE 1
Coverage and Application

1. The rules and procedures of this Protocol shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the Agreement as well as the agreements listed in Appendix I and future ASEAN economic agreements (the "covered agreements").

2. The rules and procedures of this Protocol shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements. To the extent that there is a difference between the rules and procedures of this Protocol and the special or additional rules and procedures in the covered agreements, the special or additional rules and procedures shall prevail.

3. The provisions of this Protocol are without prejudice to the rights of Member States to seek recourse to other fora for the settlement of disputes involving other Member States. A Member State involved in a dispute can resort to other fora at any stage before a party has made a request to the Senior Economic Officials Meeting (“SEOM”) to establish a panel pursuant to paragraph 1 Article 5 of this Protocol.

ARTICLE 2
Administration

1. The SEOM shall administer this Protocol and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the SEOM shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of findings and recommendations of panel and Appellate Body reports adopted by the SEOM and authorise suspension of concessions and other obligations under the covered agreements.
2. The SEOM and other relevant ASEAN bodies shall be notified of mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements.

ARTICLE 3
Consultations

1. Member States shall accord adequate opportunity for consultations regarding any representations made by other Member States with respect to any matter affecting the implementation, interpretation or application of the Agreement or any covered agreement. Any differences shall, as far as possible, be settled amicably between the Member States.

2. Member States which consider that any benefit accruing to them directly or indirectly, under the Agreement or any covered agreement is being nullified or impaired, or that the attainment of any objective of the Agreement or any covered agreement is being impeded as a result of failure of another Member State to carry out its obligations under the Agreement or any covered agreement, or the existence of any other situation may, with a view to achieving satisfactory settlement of the matter, make representations or proposals to the other Member State concerned, which shall give due consideration to the representations or proposals made to it.

3. All such requests for consultations shall be notified to the SEOM. Any request for consultations shall be submitted in writing and shall give the reason for the request including identification of the measures at issue and an indication of the legal basis for the complaint.

4. If a request for consultations is made, the Member State to which the request is made shall reply to the request within ten (10) days after the date of its receipt and shall enter into consultations within a period of thirty (30) days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.

5. In cases of urgency, including those which concern perishable goods, the parties to the dispute, panels and the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible.

ARTICLE 4
Good Offices, Conciliation or Mediation

1. Member States which are parties to a dispute may at any time agree to good offices, conciliation or mediation. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request to the SEOM for the establishment of a panel.

2. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.

3. The Secretary-General of ASEAN may, acting in an ex officio capacity, offer good offices, conciliation or mediation with the view to assisting Member States to settle a dispute.

ARTICLE 5
Establishment of Panels

1. If the Member State to which the request for consultations is made does not reply within ten (10) days after the date of receipt of the request, or does not enter into consultations within a period of thirty (30) days after the date of receipt of the request, or the consultations fail to settle a dispute within sixty (60) days after the date of receipt of the request, the matter shall be raised to the SEOM if the complaining party
wishes to request for a panel. The panel shall be established by the SEOM, unless the SEOM decides by consensus not to establish a panel.

2. A panel shall be established at the meeting of the SEOM held immediately after the receipt of the request for a panel and accordingly the request shall be placed on the agenda of the SEOM at that meeting. In the event that no the SEOM meeting is scheduled or planned within forty five (45) days of receipt of the request, the establishment of the panel or the decision not to establish it shall be done or taken, as the case may be, by circulation. A non-reply shall be considered as agreement to the request for the establishment of a panel. The issue of the establishment of the panel shall be settled within the forty five (45) day-period, irrespective of whether it is settled at the SEOM or by circulation.

3. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the complainant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of the special terms of reference.

**ARTICLE 6**
Terms of Reference of Panels

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise prior to the establishment of a panel:

   “To examine in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the SEOM by (name of party) in (document) … and to make such findings as will assist the SEOM in the adoption of the panel report or in making its decision not to adopt the report.”

2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.

3. In establishing a panel, the SEOM may authorise its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, notwithstanding the provisions in paragraph 1 hereof. The terms of reference thus drawn up shall be circulated to all Member States. If other than standard terms of reference are agreed upon, any Member State may raise any point relating thereto with the SEOM at the time of establishment of a panel.

**ARTICLE 7**
Function of Panel

The function of the panel is to make an objective assessment of the dispute before it, (including an examination of the facts of the case and the applicability of and conformity with the sections of the Agreement or any covered agreements) and its findings and recommendations in relation to the case.

**ARTICLE 8**
Panel Procedures, Deliberations and Findings

1. A panel shall, apart from the matters covered in Appendix II regulate its own procedures in relation to the rights of parties to be heard and its deliberations.

2. A panel shall submit its findings and recommendations to the SEOM in the form of a written report within sixty (60) days of its establishment. In exceptional cases, the panel may take an additional ten (10) days to submit its findings and recommendations to the SEOM.
3. Before submitting its findings and recommendations to the SEOM, the panel shall accord adequate opportunity to the parties to the dispute to review the report.

4. A panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. A Member State shall respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.

5. Panel deliberations shall be confidential. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

**ARTICLE 9**

**Treatment of Panel Report**

1. The SEOM shall adopt the panel report within thirty (30) days of its submission by the panel unless a party to the dispute formally notifies the SEOM of its decision to appeal or the SEOM decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the SEOM until after the completion of the appeal. SEOM representatives from Member States which are parties to a dispute can be present during the deliberations of the SEOM.

2. In the event that no meeting of the SEOM is scheduled or planned to enable adoption or non-adoption of the panel report, as the case may be, within the thirty (30) day period in paragraph 1 hereof, the adoption shall be done by circulation. A non-reply shall be considered as acceptance of the decision and/or recommendation in the panel report. The adoption or non-adoption shall be completed within the thirty (30) day period in paragraph 1 hereof, notwithstanding the resort to a circulation process.

**ARTICLE 10**

**Procedures for Multiple Complainants**

1. Where more than one Member State requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Member States concerned. A single panel should be established to examine such complaints whenever feasible.

2. The single panel shall organize its examination and present its findings and recommendations to the SEOM in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel.

3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible, the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

**ARTICLE 11**

**Third Parties**

1. The interests of the parties to a dispute and those of other Member States under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.
2. Any Member State having a substantial interest in a matter before a panel and having notified its interest to the SEOM (referred to in this Protocol as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

3. Third parties shall receive the submissions of the parties to the dispute to the first substantive meeting of the panel.

4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member State may have recourse to normal dispute settlement procedures under this Protocol. Such a dispute shall be referred to the original panel wherever possible.

ARTICLE 12
Appellate Review

1. An Appellate Body shall be established by the ASEAN Economic Ministers (“AEM”). The Appellate Body shall hear appeals from panel cases. It shall be composed of seven (7) persons, three (3) of whom shall serve on any one case. Persons serving on the Appellate Body shall serve on cases in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

2. The AEM shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

3. The Appellate Body shall comprise of persons of recognised authority, irrespective of nationality, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of ASEAN. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties, which have notified the SEOM of a substantial interest in the matter pursuant to paragraph 2 of Article 11 may make written submissions to, and be given an opportunity to be heard by the Appellate Body.

5. As a general rule, the proceedings of the Appellate Body shall not exceed sixty (60) days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 5 of Article 3. When the Appellate Body considers that it cannot provide its report within sixty (60) days, it shall inform the SEOM in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed ninety (90) days.

6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

7. The Appellate Body shall be provided with the appropriate administrative and legal support as it requires.

8. Working procedures of the Appellate Body shall be drawn up by the SEOM. Any amendments thereto, shall be drawn up from time to time as necessary by the Appellate Body in consultation with the SEOM and the Secretary-General of ASEAN, and communicated to the Member States for their information.
9. The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.

10. Opinions expressed in the Appellate Body report by the individuals serving on the Appellate Body shall be anonymous.

11. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 hereof during the appellate proceeding.

12. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

13. An Appellate Body report shall be adopted by the SEOM and unconditionally accepted by the parties to the dispute unless the SEOM decides by consensus not to adopt the Appellate Body report within thirty (30) days following its circulation to the Member States. In the event that no meeting of the SEOM is scheduled or planned to enable adoption or non-adoption of the report, as the case may be, within the thirty (30) day period, adoption shall be done by circulation. A non-reply within the said thirty (30) day period shall be considered as an acceptance of the Appellate Body report. This adoption procedure is without prejudice to the rights of Member States to express their views on an Appellate Body report. The adoption process shall be completed within the thirty (30) day period irrespective of whether it is settled at the SEOM or by circulation.

ARTICLE 13
Communications with the Panel or Appellate Body

1. There shall be no ex parte communications with the panel or Appellate Body concerning matters under consideration by the panel or the Appellate Body.

2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but it shall be made available to the parties to the dispute. Nothing in this Protocol shall preclude a party to a dispute from disclosing statement of its own positions to the public. Member States shall treat as confidential information submitted by another Member State to the panel or the Appellate Body which that Member State has designated as confidential. A party to a dispute shall also, upon request of a Member State, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

ARTICLE 14
Panel and Appellate Body Recommendations

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member State concerned bring the measure into conformity with that agreement. In addition to its recommendations, a panel or the Appellate Body may suggest ways in which the Member State concerned could implement the recommendations.

2. In their findings and recommendations, a panel and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

3. The panels and the Appellate Body shall also deal with the issue of expenses to be borne by the parties to the dispute, including third parties, to replenish the ASEAN Dispute Settlement Mechanism (“DSM”) Fund as part of their findings and recommendations. The panels and the Appellate Body may apportion the expenses in the manner appropriate to the particular case.

ARTICLE 15
Surveillance of Implementation of Findings and Recommendations

1. Since prompt compliance with the findings and recommendations of panel and Appellate Body reports adopted by the SEOM is essential in order to ensure effective resolution of disputes, parties to the dispute who are required to do so shall comply with the findings and recommendations of panel reports adopted by the SEOM within sixty (60) days from the SEOM's adoption of the same, or in the event of an appeal sixty (60) days from the SEOM's adoption of the findings and recommendations of the Appellate Body reports, unless the parties to the dispute agree on a longer time period.

2. When a party to the dispute requests for a longer time period for compliance, the other party shall take into account the circumstances of the particular case and accord favourable consideration to the complexity of the actions required to comply with the findings and recommendations of panel and Appellate Body reports adopted by the SEOM. The request for a longer period of time shall not be unreasonably denied. Where it is necessary to pass national legislation to comply with the findings and recommendations of panel and Appellate Body reports, a longer period appropriate for that purpose shall be allowed.

3. The decision of the parties on the extension of time shall be made within fourteen (14) days from the SEOM’s adoption of the findings and recommendations of the panel report, or in the event of an appeal fourteen (14) days from the SEOM’s adoption of the findings and recommendations of the Appellate Body’s reports.

4. Any party required to comply with the findings and recommendations shall provide the SEOM with a status report in writing of their progress in the implementation of the findings and recommendations of panel and Appellate Body reports adopted by the SEOM.

5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the findings and recommendations of panel and Appellate Body reports adopted by the SEOM such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within sixty (60) days, after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the SEOM in writing of the reasons for the delay together with an indication of the period within which it will submit its report. In no case shall the proceedings for this purpose and the submission of the report exceed ninety (90) days after the date of reference of the matter to the panel.

6. The SEOM shall keep under surveillance the implementation of the findings and recommendations of panel and Appellate Body reports adopted by it. The issue of implementation of the findings and recommendations of panel and Appellate Body reports adopted by the SEOM may be raised at the SEOM by any Member State at any time following their adoption. Unless the SEOM decides otherwise, the issue of implementation of the findings and recommendations of panel and Appellate Body reports adopted by the SEOM shall be placed on the agenda of the SEOM meeting and shall remain on the SEOM’s agenda until the issue is resolved. At least ten (10) days prior to each such the SEOM meeting, the party concerned shall provide the SEOM with a status report in writing of its progress in the implementation of the findings and recommendations of panel and Appellate Body reports adopted by the SEOM.
ARTICLE 16
Compensation and the Suspension of Concessions

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the findings and recommendations of panel and Appellate Body reports adopted by the SEOM are not implemented within the period of sixty (60) days or the longer time period as agreed upon by the parties to the dispute as referred to in Article 15. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member State concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the findings and recommendations of panel and Appellate Body reports adopted by the SEOM within the period of sixty (60) days or the longer time period as agreed upon by the parties to the dispute as referred to in Article 15, such Member State shall, if so requested, and no later than the expiry of the period of sixty (60) days or the longer time period referred to in Article 15, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within twenty (20) days after the date of expiry of the period of sixty (60) days or the longer time period as agreed upon by the parties to the dispute as referred to in Article 15, any party having invoked the dispute settlement procedures may request authorization from the SEOM to suspend the application to the Member State concerned of concessions or other obligations under the covered agreements.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sector(s) under the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sector(s) under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

(d) in applying the above principles, that party shall take into account:

(i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;

(ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;

(e) for purposes of this paragraph, "sector" means:

(i) with respect to goods, all goods;

(ii) with respect to services, a principal sector as identified in the current schedules of commitments under the ASEAN Framework Agreement on Services (AFAS).
(f) for purposes of this paragraph, "agreement" means:

(i) with respect to goods, the agreements in relation to goods listed in Appendix I to this Protocol;

(ii) with respect to services, the ASEAN Framework Agreement of Services and subsequent protocols;

(iii) any other covered agreement as defined in Article 1 of this Protocol.

4. The level of the suspension of concessions or other obligations authorized by the SEOM shall be equivalent to the level of the nullification or impairment.

5. The SEOM shall not authorise suspension of concessions or other obligations if a covered agreement prohibits such suspension.

6. When the situation described in paragraph 2 hereof occurs, the SEOM, upon request, shall grant authorization to suspend concessions or other obligations within thirty (30) days of the expiry of the sixty (60) day-period or the expiry of the longer period agreed upon by the parties to the dispute, as the case may be, referred to in Article 15, unless the SEOM decides by consensus to reject the request. In the event that no meeting of the SEOM is scheduled or planned to enable authorisation to suspend concessions or other obligations within the thirty (30) day period, the authorisation shall be done by circulation. A non-reply within the said thirty (30) day period shall be considered as an acceptance of the authorisation. The authorisation process shall be completed within the thirty (30) day period irrespective of whether it is settled at the SEOM or by circulation.

7. However, if the Member State concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorisation to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitration appointed by the Secretary-General of ASEAN and shall be completed within sixty (60) days after the date of expiry of the sixty (60) day period or the expiry of the longer period agreed upon by the parties to the dispute, as the case may be, referred to in Article 15. Concessions or other obligations shall not be suspended during the course of the arbitration.

8. The arbitrator acting pursuant to paragraph 7 hereof shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 hereof have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3 hereof. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The SEOM shall be informed promptly of the decision of the arbitrator and shall, upon request, grant authorisation to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the SEOM decides by consensus to reject the request.

9. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member State that must implement recommendations and findings of the panel and Appellate Body reports adopted by the SEOM provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 15, the SEOM shall continue to keep under surveillance the implementation of adopted recommendations and findings of the panel and Appellate Body reports adopted by the SEOM, including those cases where compensation has been
provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

10. The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member State. When the SEOM has ruled that a provision of a covered agreement has not been observed, the responsible Member State shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Protocol relating to compensation and suspension of concessions or other obligations shall apply in cases where it has not been possible to secure such observance.

**ARTICLE 17**

**ASEAN DSM Fund**

1. There shall be established an ASEAN DSM Fund (hereinafter referred to as ‘the Fund’) for the purposes of this Protocol. The Fund shall be a revolving fund, separate from ASEAN Secretariat’s regular budget. The initial sum for the Fund shall be contributed equally by all the Member States. Any drawdown from the Fund shall be replenished by the parties to the dispute in line with the provision of paragraph 3 of Article 14. The ASEAN Secretariat shall be responsible for administering the Fund.

2. The Fund shall be used to meet the expenses of the panels, the Appellate Body and any related administration costs of the ASEAN Secretariat. All other expenses, including legal representation, incurred by any party to a dispute shall be borne by that party.

3. The subsistence allowances and other expenses of the panels and the Appellate Body shall be in accordance with the criteria approved by the AEM on the recommendations of the ASEAN Budget Committee.

**ARTICLE 18**

**Maximum Time-Frame**

The total period for the disposal of disputes under this Protocol until the stage contemplated under paragraph 7 of Article 16, shall not exceed 445 days, unless the longer time period under Article 15 applies.

**ARTICLE 19**

**Responsibilities of the Secretariat**

1. The ASEAN Secretariat shall have the responsibility of assisting the panels and the Appellate Body, especially on the legal, historical and the procedural aspects of the matters dealt with, and of providing secretarial and technical support.

2. The ASEAN Secretariat shall assist the SEOM to monitor and maintain surveillance of the implementation of the findings and recommendations of the panel and Appellate Body reports adopted by it.

3. The ASEAN Secretariat shall be the focal point to receive all documentations in relation to disputes and shall deal with them as appropriate.

4. The ASEAN Secretariat in consultation with the SEOM shall administratively update the list of covered agreements in Appendix I, as may be required from time to time. The Secretariat shall inform Member States as and when the changes have been made.
ARTICLE 20
Venue for Proceedings

1. The venue for proceedings of the panels and the Appellate Body shall be the ASEAN Secretariat.

2. Notwithstanding the provisions of paragraph 1 above, panel and Appellate Body proceedings, apart from substantive meetings, may be held at any venue which the panels and the Appellate Body consider appropriate in consultation with the parties to the dispute, having regard to the convenience and cost effectiveness of such venue.

ARTICLE 21
Final Provisions

1. This Protocol shall enter into force upon signing.

2. This Protocol shall replace the 1996 Protocol on DSM and shall not apply to any dispute which has arisen before its entry into force. Such dispute shall continue to be governed by the 1996 Protocol on DSM.

3. The provisions of this Protocol may be modified through amendments mutually agreed upon in writing by all Member States.

4. This Protocol shall be deposited with the Secretary-General of ASEAN, who shall promptly furnish a certified copy thereof, to each ASEAN Member State.

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed the ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

DONE at Vientiane, Lao PDR on 29 November 2004, in a single copy in the English language.
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<thead>
<tr>
<th>For the Government of Brunei Darussalam</th>
<th>For the Government of the Kingdom of Cambodia</th>
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<tr>
<td><strong>ABDUL RAHMAN TAIB</strong></td>
<td><strong>CHAM PRASIDH</strong></td>
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<tr>
<td>Minister of Industry and Primary Resources</td>
<td>Senior Minister Minister of Commerce</td>
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<tr>
<td>For the Government of the Republic of Indonesia</td>
<td>For the Government of the Lao People’s Democratic Republic</td>
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<tr>
<td><strong>MARI ELKA PANGESTU</strong></td>
<td><strong>SOULIVONG DARAVONG</strong></td>
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<td>Minister of Trade</td>
<td>Minister of Commerce</td>
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<td>For the Government of Malaysia</td>
<td>For the Government of the Union of Myanmar</td>
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<tr>
<td><strong>RAFIDAH AZIZ</strong></td>
<td><strong>SOE THA</strong></td>
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<tr>
<td>Minister of International Trade and Industry</td>
<td>Minister of National Planning and Economic Development</td>
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<tr>
<td>For the Government of the Republic of the Philippines</td>
<td>For the Government of the Republic of Singapore</td>
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<tr>
<td><strong>CESAR V. PURISIMA</strong></td>
<td><strong>LIM HNG KIANG</strong></td>
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<tr>
<td>Secretary of Trade and Industry</td>
<td>Minister for Trade and Industry</td>
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<tr>
<td>For the Government of the Kingdom of Thailand</td>
<td>For the Government of the Socialist Republic of Vietnam</td>
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<tr>
<td><strong>WATANA MUANGSOOK</strong></td>
<td><strong>TRUONG DINH TUYEN</strong></td>
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<tr>
<td>Minister of Commerce</td>
<td>Minister of Trade</td>
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APPENDIX I
COVERED AGREEMENTS

4. Supplementary Agreement of the Basic Agreement on ASEAN Industrial Projects ASEAN Urea Project (Indonesia), Kuala Lumpur, 6 March 1980.
5. Basic Agreement on ASEAN Industrial Joint Ventures, Jakarta, 7 November 1983.
12. Agreement Among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, Manila, 15 December 1987.
13. Protocol to Amend the Revised Basic Agreement on ASEAN Industrial Joint Ventures, 1 January 1991.
17. Third Protocol to Amend the Revised Basic Agreement on ASEAN Industrial Joint Ventures, 2 March 1995.
18. Protocol to Amend the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA), Bangkok, 15 December 1995.
20. ASEAN Framework Agreement on Services, Bangkok, 15 December 1995.


23. Basic Agreement on ASEAN Industrial Cooperation, Singapore, 26 April 1996.

24. Protocol to Amend the Agreement Among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, Jakarta, 12 September 1996.

25. ASEAN Agreement on Customs, Phuket, Thailand, 1 March 1997.


27. 2nd Protocol to Amend the Agreement on the ASEAN Food Security Reserve, Subang Jaya, Malaysia, 23 July 1997.


32. ASEAN Framework Agreement on Mutual Recognition Arrangement (MRAs), Ha Noi, Viet Nam, 16 December 1998.


40. Protocol to Implement the Third Package of Commitments Under the ASEAN Framework Agreement Services, Ha Noi, Viet Nam, 31 December 2001

41. ASEAN Sectoral Mutual Recognition Arrangement for Electrical and Electronic Equipment, Bangkok, Thailand, 5 April 2002

42. Protocol to Implement the Second Package of Commitments on Financial Services Under the ASEAN Framework Agreements on Services, Yangon, Myanmar, 6 April 2002

43. Protocol to Amend the Agreement the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA) for the Elimination of Import Duties, 31 January 2003

44. Protocol Governing the Implementation of the ASEAN Harmonized Tariff Nomenclature, Makati, Philippines, 7 August 2003

45. Agreement on the ASEAN Harmonized Cosmetic Regulatory Scheme, Phnom Penh, Cambodia, 2 September 2003

46. Protocol to Amend the Protocol Governing the Implementation of the ASEAN Harmonised Tariff Nomenclature, Jeju Island, Korea, 15 May 2004
APPENDIX II
WORKING PROCEDURES OF THE PANEL

I. Composition of Panels

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member State. In the nomination to the panels, preference shall be given to individuals who are nationals of ASEAN Member States.

2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

3. Nationals of Member States whose governments are parties to the dispute shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the SEOM. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.

5. Panels shall be composed of three panelists unless the parties to the dispute agree, within ten (10) days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel.

6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.

7. If there is no agreement on the panelists, within twenty (20) days of the decision of the SEOM to establish a panel, at the request of either party, the Secretary-General of ASEAN, in consultation with the SEOM shall, within ten (10) days determine the composition of the panel by appointing the panelists whom the Secretary-General of ASEAN considers most appropriate, and if so relevant, in accordance with any relevant special or additional rules or procedures of the covered agreed or covered agreements which are at issue in the dispute, after consulting the parties in the dispute. The ASEAN Secretariat shall inform the Member States of the composition of the panel thus formed.

8. Member States shall undertake, as a general rule, to permit their officials to serve as panelists.

9. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Member States shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.

II. Panel Proceedings

1. In its proceedings the panel shall follow the relevant provisions of this Protocol. In addition, the following working procedures shall apply.
2. The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.

3. The deliberations of the panel and the documents submitted to it shall be kept confidential. Nothing in this Protocol shall preclude a party to a dispute from disclosing statements of its own positions to the public. Member States shall treat as confidential information submitted by another Member State to the panel which that Member State has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member State, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.

5. At its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought shall be asked to present its point of view.

6. All third parties which have notified their interest in the dispute to the SEOM shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.

7. Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel.

8. The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.

9. The parties to the dispute and any third party invited to present its views in accordance with Article 11 shall make available to the panel a written version of their oral statements.

10. The parties to the dispute shall make available to the panel a written version of their oral statements.

11. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 8 shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties.

12. Any additional procedures specific to the panel.
CHARTER OF THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS

PREAMBLE

WE, THE PEOPLES of the Member States of the Association of Southeast Asian Nations (ASEAN), as represented by the Heads of State or Government of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People’s Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam:

NOTING with satisfaction the significant achievements and expansion of ASEAN since its establishment in Bangkok through the promulgation of The ASEAN Declaration;

RECALLING the decisions to establish an ASEAN Charter in the Vientiane Action Programme, the Kuala Lumpur Declaration on the Establishment of the ASEAN Charter and the Cebu Declaration on the Blueprint of the ASEAN Charter;

MINDFUL of the existence of mutual interests and interdependence among the peoples and Member States of ASEAN which are bound by geography, common objectives and shared destiny;

INSPIRED by and united under One Vision, One Identity and One Caring and Sharing Community;

UNITED by a common desire and collective will to live in a region of lasting peace, security and stability, sustained
economic growth, shared prosperity and social progress, and to promote our vital interests, ideals and aspirations;

RESPECTING the fundamental importance of amity and cooperation, and the principles of sovereignty, equality, territorial integrity, non-interference, consensus and unity in diversity;

ADHERING to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms;

RESOLVED to ensure sustainable development for the benefit of present and future generations and to place the well-being, livelihood and welfare of the peoples at the centre of the ASEAN community building process;

CONVINCED of the need to strengthen existing bonds of regional solidarity to realise an ASEAN Community that is politically cohesive, economically integrated and socially responsible in order to effectively respond to current and future challenges and opportunities;

COMMITTED to intensifying community building through enhanced regional cooperation and integration, in particular by establishing an ASEAN Community comprising the ASEAN Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community, as provided for in the Bali Declaration of ASEAN Concord II;

HEREBY DECIDE to establish, through this Charter, the legal and institutional framework for ASEAN,

AND TO THIS END, the Heads of State or Government of the Member States of ASEAN, assembled in Singapore on the historic occasion of the 40th anniversary of the founding of ASEAN, have agreed to this Charter.
CHAPTER I
PURPOSES AND PRINCIPLES

ARTICLE 1
PURPOSES

The Purposes of ASEAN are:

1. To maintain and enhance peace, security and stability and further strengthen peace-oriented values in the region;

2. To enhance regional resilience by promoting greater political, security, economic and socio-cultural cooperation;

3. To preserve Southeast Asia as a Nuclear Weapon-Free Zone and free of all other weapons of mass destruction;

4. To ensure that the peoples and Member States of ASEAN live in peace with the world at large in a just, democratic and harmonious environment;

5. To create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labour; and freer flow of capital;

6. To alleviate poverty and narrow the development gap within ASEAN through mutual assistance and cooperation;

7. To strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN;
8. To respond effectively, in accordance with the principle of comprehensive security, to all forms of threats, transnational crimes and transboundary challenges;

9. To promote sustainable development so as to ensure the protection of the region’s environment, the sustainability of its natural resources, the preservation of its cultural heritage and the high quality of life of its peoples;

10. To develop human resources through closer cooperation in education and life-long learning, and in science and technology, for the empowerment of the peoples of ASEAN and for the strengthening of the ASEAN Community;

11. To enhance the well-being and livelihood of the peoples of ASEAN by providing them with equitable access to opportunities for human development, social welfare and justice;

12. To strengthen cooperation in building a safe, secure and drug-free environment for the peoples of ASEAN;

13. To promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building;

14. To promote an ASEAN identity through the fostering of greater awareness of the diverse culture and heritage of the region; and

15. To maintain the centrality and proactive role of ASEAN as the primary driving force in its relations and cooperation with its external partners in a regional architecture that is open, transparent and inclusive.
ARTICLE 2
PRINCIPLES

1. In pursuit of the Purposes stated in Article 1, ASEAN and its Member States reaffirm and adhere to the fundamental principles contained in the declarations, agreements, conventions, concords, treaties and other instruments of ASEAN.

2. ASEAN and its Member States shall act in accordance with the following Principles:

   (a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States;

   (b) shared commitment and collective responsibility in enhancing regional peace, security and prosperity;

   (c) renunciation of aggression and of the threat or use of force or other actions in any manner inconsistent with international law;

   (d) reliance on peaceful settlement of disputes;

   (e) non-interference in the internal affairs of ASEAN Member States;

   (f) respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion;

   (g) enhanced consultations on matters seriously affecting the common interest of ASEAN;
(h) adherence to the rule of law, good governance, the principles of democracy and constitutional government;

(i) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;

(j) upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States;

(k) abstention from participation in any policy or activity, including the use of its territory, pursued by any ASEAN Member State or non-ASEAN State or any non-State actor, which threatens the sovereignty, territorial integrity or political and economic stability of ASEAN Member States;

(l) respect for the different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity;

(m) the centrality of ASEAN in external political, economic, social and cultural relations while remaining actively engaged, outward-looking, inclusive and non-discriminatory; and

(n) adherence to multilateral trade rules and ASEAN’s rules-based regimes for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration, in a market-driven economy.
CHAPTER II
LEGAL PERSONALITY

ARTICLE 3
LEGAL PERSONALITY OF ASEAN

ASEAN, as an inter-governmental organisation, is hereby conferred legal personality.
CHAPTER III
MEMBERSHIP

ARTICLE 4
MEMBER STATES

The Member States of ASEAN are Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People’s Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam.

ARTICLE 5
RIGHTS AND OBLIGATIONS

1. Member States shall have equal rights and obligations under this Charter.

2. Member States shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of membership.

3. In the case of a serious breach of the Charter or non-compliance, the matter shall be referred to Article 20.

ARTICLE 6
ADMISSION OF NEW MEMBERS

1. The procedure for application and admission to ASEAN shall be prescribed by the ASEAN Coordinating Council.

2. Admission shall be based on the following criteria:
(a) location in the recognised geographical region of Southeast Asia;

(b) recognition by all ASEAN Member States;

(c) agreement to be bound and to abide by the Charter; and

(d) ability and willingness to carry out the obligations of Membership.

3. Admission shall be decided by consensus by the ASEAN Summit, upon the recommendation of the ASEAN Coordinating Council.

4. An applicant State shall be admitted to ASEAN upon signing an Instrument of Accession to the Charter.
CHAPTER IV
ORGANS

ARTICLE 7
ASEAN SUMMIT

1. The ASEAN Summit shall comprise the Heads of State or Government of the Member States.

2. The ASEAN Summit shall:

   (a) be the supreme policy-making body of ASEAN;

   (b) deliberate, provide policy guidance and take decisions on key issues pertaining to the realisation of the objectives of ASEAN, important matters of interest to Member States and all issues referred to it by the ASEAN Coordinating Council, the ASEAN Community Councils and ASEAN Sectoral Ministerial Bodies;

   (c) instruct the relevant Ministers in each of the Councils concerned to hold ad hoc inter-Ministerial meetings, and address important issues concerning ASEAN that cut across the Community Councils. Rules of procedure for such meetings shall be adopted by the ASEAN Coordinating Council;

   (d) address emergency situations affecting ASEAN by taking appropriate actions;

   (e) decide on matters referred to it under Chapters VII and VIII;
(f) authorise the establishment and the dissolution of Sectoral Ministerial Bodies and other ASEAN institutions; and

(g) appoint the Secretary-General of ASEAN, with the rank and status of Minister, who will serve with the confidence and at the pleasure of the Heads of State or Government upon the recommendation of the ASEAN Foreign Ministers Meeting.

3. ASEAN Summit Meetings shall be:

   (a) held twice annually, and be hosted by the Member State holding the ASEAN Chairmanship; and

   (b) convened, whenever necessary, as special or ad hoc meetings to be chaired by the Member State holding the ASEAN Chairmanship, at venues to be agreed upon by ASEAN Member States.

ARTICLE 8
ASEAN COORDINATING COUNCIL

1. The ASEAN Coordinating Council shall comprise the ASEAN Foreign Ministers and meet at least twice a year.

2. The ASEAN Coordinating Council shall:

   (a) prepare the meetings of the ASEAN Summit;

   (b) coordinate the implementation of agreements and decisions of the ASEAN Summit;

   (c) coordinate with the ASEAN Community Councils to enhance policy coherence, efficiency and cooperation among them;
(d) coordinate the reports of the ASEAN Community Councils to the ASEAN Summit;

(e) consider the annual report of the Secretary-General on the work of ASEAN;

(f) consider the report of the Secretary-General on the functions and operations of the ASEAN Secretariat and other relevant bodies;

(g) approve the appointment and termination of the Deputy Secretaries-General upon the recommendation of the Secretary-General; and

(h) undertake other tasks provided for in this Charter or such other functions as may be assigned by the ASEAN Summit.

3. The ASEAN Coordinating Council shall be supported by the relevant senior officials.

ARTICLE 9
ASEAN COMMUNITY COUNCILS

1. The ASEAN Community Councils shall comprise the ASEAN Political-Security Community Council, ASEAN Economic Community Council, and ASEAN Socio-Cultural Community Council.

2. Each ASEAN Community Council shall have under its purview the relevant ASEAN Sectoral Ministerial Bodies.

3. Each Member State shall designate its national representation for each ASEAN Community Council meeting.
4. In order to realise the objectives of each of the three pillars of the ASEAN Community, each ASEAN Community Council shall:

(a) ensure the implementation of the relevant decisions of the ASEAN Summit;

(b) coordinate the work of the different sectors under its purview, and on issues which cut across the other Community Councils; and

(c) submit reports and recommendations to the ASEAN Summit on matters under its purview.

5. Each ASEAN Community Council shall meet at least twice a year and shall be chaired by the appropriate Minister from the Member State holding the ASEAN Chairmanship.

6. Each ASEAN Community Council shall be supported by the relevant senior officials.

ARTICLE 10
ASEAN SECTORAL MINISTERIAL BODIES

1. ASEAN Sectoral Ministerial Bodies shall:

(a) function in accordance with their respective established mandates;

(b) implement the agreements and decisions of the ASEAN Summit under their respective purview;

(c) strengthen cooperation in their respective fields in support of ASEAN integration and community building; and
(d) submit reports and recommendations to their respective Community Councils.

2. Each ASEAN Sectoral Ministerial Body may have under its purview the relevant senior officials and subsidiary bodies to undertake its functions as contained in Annex 1. The Annex may be updated by the Secretary-General of ASEAN upon the recommendation of the Committee of Permanent Representatives without recourse to the provision on Amendments under this Charter.

ARTICLE 11
SECRETARY-GENERAL OF ASEAN AND ASEAN SECRETARIAT

1. The Secretary-General of ASEAN shall be appointed by the ASEAN Summit for a non-renewable term of office of five years, selected from among nationals of the ASEAN Member States based on alphabetical rotation, with due consideration to integrity, capability and professional experience, and gender equality.

2. The Secretary-General shall:

(a) carry out the duties and responsibilities of this high office in accordance with the provisions of this Charter and relevant ASEAN instruments, protocols and established practices;

(b) facilitate and monitor progress in the implementation of ASEAN agreements and decisions, and submit an annual report on the work of ASEAN to the ASEAN Summit;

(c) participate in meetings of the ASEAN Summit, the ASEAN Community Councils, the ASEAN
Coordinating Council, and ASEAN Sectoral Ministerial Bodies and other relevant ASEAN meetings;

(d) present the views of ASEAN and participate in meetings with external parties in accordance with approved policy guidelines and mandate given to the Secretary-General; and

(e) recommend the appointment and termination of the Deputy Secretaries-General to the ASEAN Coordinating Council for approval.

3. The Secretary-General shall also be the Chief Administrative Officer of ASEAN.

4. The Secretary-General shall be assisted by four Deputy Secretaries-General with the rank and status of Deputy Ministers. The Deputy Secretaries-General shall be accountable to the Secretary-General in carrying out their functions.

5. The four Deputy Secretaries-General shall be of different nationalities from the Secretary-General and shall come from four different ASEAN Member States.

6. The four Deputy Secretaries-General shall comprise:

(a) two Deputy Secretaries-General who will serve a non-renewable term of three years, selected from among nationals of the ASEAN Member States based on alphabetical rotation, with due consideration to integrity, qualifications, competence, experience and gender equality; and
(b) two Deputy Secretaries-General who will serve a term of three years, which may be renewed for another three years. These two Deputy Secretaries-General shall be openly recruited based on merit.

7. The ASEAN Secretariat shall comprise the Secretary-General and such staff as may be required.

8. The Secretary-General and the staff shall:

   (a) uphold the highest standards of integrity, efficiency, and competence in the performance of their duties;

   (b) not seek or receive instructions from any government or external party outside of ASEAN; and

   (c) refrain from any action which might reflect on their position as ASEAN Secretariat officials responsible only to ASEAN.

9. Each ASEAN Member State undertakes to respect the exclusively ASEAN character of the responsibilities of the Secretary-General and the staff, and not to seek to influence them in the discharge of their responsibilities.

ARTICLE 12
COMMITTEE OF PERMANENT REPRESENTATIVES TO ASEAN

1. Each ASEAN Member State shall appoint a Permanent Representative to ASEAN with the rank of Ambassador based in Jakarta.

2. The Permanent Representatives collectively constitute a Committee of Permanent Representatives, which shall:
(a) support the work of the ASEAN Community Councils and ASEAN Sectoral Ministerial Bodies;

(b) coordinate with ASEAN National Secretariats and other ASEAN Sectoral Ministerial Bodies;

(c) liaise with the Secretary-General of ASEAN and the ASEAN Secretariat on all subjects relevant to its work;

(d) facilitate ASEAN cooperation with external partners; and

(e) perform such other functions as may be determined by the ASEAN Coordinating Council.

ARTICLE 13
ASEAN NATIONAL SECRETARIATS

Each ASEAN Member State shall establish an ASEAN National Secretariat which shall:

(a) serve as the national focal point;

(b) be the repository of information on all ASEAN matters at the national level;

(c) coordinate the implementation of ASEAN decisions at the national level;

(d) coordinate and support the national preparations of ASEAN meetings;

(e) promote ASEAN identity and awareness at the national level; and
(f) contribute to ASEAN community building.

ARTICLE 14
ASEAN HUMAN RIGHTS BODY

1. In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.

2. This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.

ARTICLE 15
ASEAN FOUNDATION

1. The ASEAN Foundation shall support the Secretary-General of ASEAN and collaborate with the relevant ASEAN bodies to support ASEAN community building by promoting greater awareness of the ASEAN identity, people-to-people interaction, and close collaboration among the business sector, civil society, academia and other stakeholders in ASEAN.

2. The ASEAN Foundation shall be accountable to the Secretary-General of ASEAN, who shall submit its report to the ASEAN Summit through the ASEAN Coordinating Council.
CHAPTER V
ENTITIES ASSOCIATED WITH ASEAN

ARTICLE 16
ENTITIES ASSOCIATED WITH ASEAN

1. ASEAN may engage with entities which support the ASEAN Charter, in particular its purposes and principles. These associated entities are listed in Annex 2.

2. Rules of procedure and criteria for engagement shall be prescribed by the Committee of Permanent Representatives upon the recommendation of the Secretary-General of ASEAN.

3. Annex 2 may be updated by the Secretary-General of ASEAN upon the recommendation of the Committee of Permanent Representatives without recourse to the provision on Amendments under this Charter.
CHAPTER VI
IMMUNITIES AND PRIVILEGES

ARTICLE 17
IMMUNITIES AND PRIVILEGES OF ASEAN

1. ASEAN shall enjoy in the territories of the Member States such immunities and privileges as are necessary for the fulfilment of its purposes.

2. The immunities and privileges shall be laid down in separate agreements between ASEAN and the host Member State.

ARTICLE 18
IMMUNITIES AND PRIVILEGES OF THE SECRETARY-GENERAL OF ASEAN AND STAFF OF THE ASEAN SECRETARIAT

1. The Secretary-General of ASEAN and staff of the ASEAN Secretariat participating in official ASEAN activities or representing ASEAN in the Member States shall enjoy such immunities and privileges as are necessary for the independent exercise of their functions.

2. The immunities and privileges under this Article shall be laid down in a separate ASEAN agreement.

ARTICLE 19
IMMUNITIES AND PRIVILEGES OF THE PERMANENT REPRESENTATIVES AND OFFICIALS ON ASEAN DUTIES

1. The Permanent Representatives of the Member States to ASEAN and officials of the Member States participating in official ASEAN activities or representing ASEAN in the Member
States shall enjoy such immunities and privileges as are necessary for the exercise of their functions.

2. The immunities and privileges of the Permanent Representatives and officials on ASEAN duties shall be governed by the 1961 Vienna Convention on Diplomatic Relations or in accordance with the national law of the ASEAN Member State concerned.
CHAPTER VII
DECISION-MAKING

ARTICLE 20
CONSULTATION AND CONSENSUS

1. As a basic principle, decision-making in ASEAN shall be based on consultation and consensus.

2. Where consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made.

3. Nothing in paragraphs 1 and 2 of this Article shall affect the modes of decision-making as contained in the relevant ASEAN legal instruments.

4. In the case of a serious breach of the Charter or non-compliance, the matter shall be referred to the ASEAN Summit for decision.

ARTICLE 21
IMPLEMENTATION AND PROCEDURE

1. Each ASEAN Community Council shall prescribe its own rules of procedure.

2. In the implementation of economic commitments, a formula for flexible participation, including the ASEAN Minus X formula, may be applied where there is a consensus to do so.
CHAPTER VIII
SETTLEMENT OF DISPUTES

ARTICLE 22
GENERAL PRINCIPLES

1. Member States shall endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation.

2. ASEAN shall maintain and establish dispute settlement mechanisms in all fields of ASEAN cooperation.

ARTICLE 23
GOOD OFFICES, CONCILIATION AND MEDIATION

1. Member States which are parties to a dispute may at any time agree to resort to good offices, conciliation or mediation in order to resolve the dispute within an agreed time limit.

2. Parties to the dispute may request the Chairman of ASEAN or the Secretary-General of ASEAN, acting in an ex-officio capacity, to provide good offices, conciliation or mediation.

ARTICLE 24
DISPUTE SETTLEMENT MECHANISMS IN SPECIFIC INSTRUMENTS

1. Disputes relating to specific ASEAN instruments shall be settled through the mechanisms and procedures provided for in such instruments.

2. Disputes which do not concern the interpretation or application of any ASEAN instrument shall be resolved
peacefully in accordance with the Treaty of Amity and Cooperation in Southeast Asia and its rules of procedure.

3. Where not otherwise specifically provided, disputes which concern the interpretation or application of ASEAN economic agreements shall be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

ARTICLE 25
ESTABLISHMENT OF DISPUTE SETTLEMENT MECHANISMS

Where not otherwise specifically provided, appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments.

ARTICLE 26
UNRESOLVED DISPUTES

When a dispute remains unresolved, after the application of the preceding provisions of this Chapter, this dispute shall be referred to the ASEAN Summit, for its decision.

ARTICLE 27
COMPLIANCE

1. The Secretary-General of ASEAN, assisted by the ASEAN Secretariat or any other designated ASEAN body, shall monitor the compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, and submit a report to the ASEAN Summit.

2. Any Member State affected by non-compliance with the findings, recommendations or decisions resulting from an
ASEAN dispute settlement mechanism, may refer the matter to the ASEAN Summit for a decision.

ARTICLE 28
UNITED NATIONS CHARTER PROVISIONS AND OTHER RELEVANT INTERNATIONAL PROCEDURES

Unless otherwise provided for in this Charter, Member States have the right of recourse to the modes of peaceful settlement contained in Article 33(1) of the Charter of the United Nations or any other international legal instruments to which the disputing Member States are parties.
CHAPTER IX
BUDGET AND FINANCE

ARTICLE 29
GENERAL PRINCIPLES

1. ASEAN shall establish financial rules and procedures in accordance with international standards.

2. ASEAN shall observe sound financial management policies and practices and budgetary discipline.

3. Financial accounts shall be subject to internal and external audits.

ARTICLE 30
OPERATIONAL BUDGET AND FINANCES
OF THE ASEAN SECRETARIAT

1. The ASEAN Secretariat shall be provided with the necessary financial resources to perform its functions effectively.

2. The operational budget of the ASEAN Secretariat shall be met by ASEAN Member States through equal annual contributions which shall be remitted in a timely manner.

3. The Secretary-General shall prepare the annual operational budget of the ASEAN Secretariat for approval by the ASEAN Coordinating Council upon the recommendation of the Committee of Permanent Representatives.

4. The ASEAN Secretariat shall operate in accordance with the financial rules and procedures determined by the ASEAN Coordinating Council upon the recommendation of the Committee of Permanent Representatives.
CHAPTER X
ADMINISTRATION AND PROCEDURE

ARTICLE 31
CHAIRMAN OF ASEAN

1. The Chairmanship of ASEAN shall rotate annually, based on the alphabetical order of the English names of Member States.

2. ASEAN shall have, in a calendar year, a single Chairmanship by which the Member State assuming the Chairmanship shall chair:

   (a) the ASEAN Summit and related summits;
   (b) the ASEAN Coordinating Council;
   (c) the three ASEAN Community Councils;
   (d) where appropriate, the relevant ASEAN Sectoral Ministerial Bodies and senior officials; and
   (e) the Committee of Permanent Representatives.

ARTICLE 32
ROLE OF THE CHAIRMAN OF ASEAN

The Member State holding the Chairmanship of ASEAN shall:

   (a) actively promote and enhance the interests and well-being of ASEAN, including efforts to build an ASEAN Community through policy initiatives, coordination, consensus and cooperation;
   (b) ensure the centrality of ASEAN;
(c) ensure an effective and timely response to urgent issues or crisis situations affecting ASEAN, including providing its good offices and such other arrangements to immediately address these concerns;

(d) represent ASEAN in strengthening and promoting closer relations with external partners; and

(e) carry out such other tasks and functions as may be mandated.

ARTICLE 33
DIPLOMATIC PROTOCOL AND PRACTICES

ASEAN and its Member States shall adhere to existing diplomatic protocol and practices in the conduct of all activities relating to ASEAN. Any changes shall be approved by the ASEAN Coordinating Council upon the recommendation of the Committee of Permanent Representatives.

ARTICLE 34
WORKING LANGUAGE OF ASEAN

The working language of ASEAN shall be English.
CHAPTER XI
IDENTITY AND SYMBOLS

ARTICLE 35
ASEAN IDENTITY

ASEAN shall promote its common ASEAN identity and a sense of belonging among its peoples in order to achieve its shared destiny, goals and values.

ARTICLE 36
ASEAN MOTTO

The ASEAN motto shall be: "One Vision, One Identity, One Community"

ARTICLE 37
ASEAN FLAG

The ASEAN flag shall be as shown in Annex 3.

ARTICLE 38
ASEAN EMBLEM

The ASEAN emblem shall be as shown in Annex 4.

ARTICLE 39
ASEAN DAY

The eighth of August shall be observed as ASEAN Day.

ARTICLE 40
ASEAN ANTHEM

ASEAN shall have an anthem.
CHAPTER XII

EXTERNAL RELATIONS

ARTICLE 41

CONDUCT OF EXTERNAL RELATIONS

1. ASEAN shall develop friendly relations and mutually beneficial dialogue, cooperation and partnerships with countries and sub-regional, regional and international organisations and institutions.

2. The external relations of ASEAN shall adhere to the purposes and principles set forth in this Charter.

3. ASEAN shall be the primary driving force in regional arrangements that it initiates and maintain its centrality in regional cooperation and community building.

4. In the conduct of external relations of ASEAN, Member States shall, on the basis of unity and solidarity, coordinate and endeavour to develop common positions and pursue joint actions.

5. The strategic policy directions of ASEAN’s external relations shall be set by the ASEAN Summit upon the recommendation of the ASEAN Foreign Ministers Meeting.

6. The ASEAN Foreign Ministers Meeting shall ensure consistency and coherence in the conduct of ASEAN’s external relations.

7. ASEAN may conclude agreements with countries or sub-regional, regional and international organisations and institutions. The procedures for concluding such agreements
shall be prescribed by the ASEAN Coordinating Council in consultation with the ASEAN Community Councils.

**ARTICLE 42**
**DIALOGUE COORDINATOR**

1. Member States, acting as Country Coordinators, shall take turns to take overall responsibility in coordinating and promoting the interests of ASEAN in its relations with the relevant Dialogue Partners, regional and international organisations and institutions.

2. In relations with the external partners, the Country Coordinators shall, inter alia:

   (a) represent ASEAN and enhance relations on the basis of mutual respect and equality, in conformity with ASEAN’s principles;

   (b) co-chair relevant meetings between ASEAN and external partners; and

   (c) be supported by the relevant ASEAN Committees in Third Countries and International Organisations.

**ARTICLE 43**
**ASEAN COMMITTEES IN THIRD COUNTRIES AND INTERNATIONAL ORGANISATIONS**

1. ASEAN Committees in Third Countries may be established in non-ASEAN countries comprising heads of diplomatic missions of ASEAN Member States. Similar Committees may be established relating to international organisations. Such Committees shall promote ASEAN’s interests and identity in the host countries and international organisations.
2. The ASEAN Foreign Ministers Meeting shall determine the rules of procedure of such Committees.

ARTICLE 44
STATUS OF EXTERNAL PARTIES

1. In conducting ASEAN’s external relations, the ASEAN Foreign Ministers Meeting may confer on an external party the formal status of Dialogue Partner, Sectoral Dialogue Partner, Development Partner, Special Observer, Guest, or other status that may be established henceforth.

2. External parties may be invited to ASEAN meetings or cooperative activities without being conferred any formal status, in accordance with the rules of procedure.

ARTICLE 45
RELATIONS WITH THE UNITED NATIONS SYSTEM AND OTHER INTERNATIONAL ORGANISATIONS AND INSTITUTIONS

1. ASEAN may seek an appropriate status with the United Nations system as well as with other sub-regional, regional, international organisations and institutions.

2. The ASEAN Coordinating Council shall decide on the participation of ASEAN in other sub-regional, regional, international organisations and institutions.

ARTICLE 46
ACCREDITATION OF NON-ASEAN MEMBER STATES TO ASEAN

Non-ASEAN Member States and relevant inter-governmental organisations may appoint and accredit Ambassadors to ASEAN. The ASEAN Foreign Ministers Meeting shall decide on such accreditation.
CHAPTER XIII
GENERAL AND FINAL PROVISIONS

ARTICLE 47
SIGNATURE, RATIFICATION, DEPOSITORY AND ENTRY INTO FORCE

1. This Charter shall be signed by all ASEAN Member States.
2. This Charter shall be subject to ratification by all ASEAN Member States in accordance with their respective internal procedures.

3. Instruments of ratification shall be deposited with the Secretary-General of ASEAN who shall promptly notify all Member States of each deposit.

4. This Charter shall enter into force on the thirtieth day following the date of deposit of the tenth instrument of ratification with the Secretary-General of ASEAN.

ARTICLE 48
AMENDMENTS

1. Any Member State may propose amendments to the Charter.

2. Proposed amendments to the Charter shall be submitted by the ASEAN Coordinating Council by consensus to the ASEAN Summit for its decision.

3. Amendments to the Charter agreed to by consensus by the ASEAN Summit shall be ratified by all Member States in accordance with Article 47.
4. An amendment shall enter into force on the thirtieth day following the date of deposit of the last instrument of ratification with the Secretary-General of ASEAN.

ARTICLE 49
TERMS OF REFERENCE AND RULES OF PROCEDURE

Unless otherwise provided for in this Charter, the ASEAN Coordinating Council shall determine the terms of reference and rules of procedure and shall ensure their consistency.

ARTICLE 50
REVIEW

This Charter may be reviewed five years after its entry into force or as otherwise determined by the ASEAN Summit.

ARTICLE 51
INTERPRETATION OF THE CHARTER

1. Upon the request of any Member State, the interpretation of the Charter shall be undertaken by the ASEAN Secretariat in accordance with the rules of procedure determined by the ASEAN Coordinating Council.

2. Any dispute arising from the interpretation of the Charter shall be settled in accordance with the relevant provisions in Chapter VIII.

3. Headings and titles used throughout the Charter shall only be for the purpose of reference.
ARTICLE 52
LEGAL CONTINUITY

1. All treaties, conventions, agreements, concords, declarations, protocols and other ASEAN instruments which have been in effect before the entry into force of this Charter shall continue to be valid.

2. In case of inconsistency between the rights and obligations of ASEAN Member States under such instruments and this Charter, the Charter shall prevail.

ARTICLE 53
ORIGINAL TEXT

The signed original text of this Charter in English shall be deposited with the Secretary-General of ASEAN, who shall provide a certified copy to each Member State.

ARTICLE 54
REGISTRATION OF THE ASEAN CHARTER

This Charter shall be registered by the Secretary-General of ASEAN with the Secretariat of the United Nations, pursuant to Article 102, paragraph 1 of the Charter of the United Nations.

ARTICLE 55
ASEAN ASSETS

The assets and funds of the Organisation shall be vested in the name of ASEAN.
Done in Singapore on the Twentieth Day of November in the Year Two Thousand and Seven, in a single original in the English language.

For Brunei Darussalam:

HAJI HASSANAL BOLKIAH
Sultan of Brunei Darussalam

For the Kingdom of Cambodia:

SAMDECH HUN SEN
Prime Minister
For the Republic of Indonesia:

DR. SUSILO BAMBANG YUDHOYONO
President

For the Lao People’s Democratic Republic:

BOUASONE BOUPHAVANH
Prime Minister

For Malaysia:

DATO’ SERI ABDULLAH AHMAD BADAWI
Prime Minister
For the Union of Myanmar:

GENERAL THEIN SEIN  
Prime Minister

For the Republic of the Philippines:

GLORIA MACAPAGAL-ARROYO  
President

For the Republic of Singapore:

LEE HSIEN LOONG  
Prime Minister
For the Kingdom of Thailand:

GENERAL SURAYUD CHULANONT (RET.)
Prime Minister

For the Socialist Republic of Viet Nam:

NGUYEN TAN DUNG
Prime Minister
Pursuant to Article 14 of the ASEAN Charter, the ASEAN Intergovernmental Commission on Human Rights (AICHR) shall operate in accordance with the following Terms of Reference (TOR):

1. PURPOSES

The purposes of the AICHR are:

1.1 To promote and protect human rights and fundamental freedoms of the peoples of ASEAN;

1.2 To uphold the right of the peoples of ASEAN to live in peace, dignity and prosperity;

1.3 To contribute to the realisation of the purposes of ASEAN as set out in the ASEAN Charter in order to promote stability and harmony in the region, friendship and cooperation among ASEAN Member States, as well as the well-being, livelihood, welfare and participation of ASEAN peoples in the ASEAN Community building process;
1.4 To promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities;

1.5 To enhance regional cooperation with a view to complementing national and international efforts on the promotion and protection of human rights; and

1.6 To uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties.

2. PRINCIPLES

The AICHR shall be guided by the following principles:

2.1 Respect for principles of ASEAN as embodied in Article 2 of the ASEAN Charter, in particular:

   a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States;

   b) non-interference in the internal affairs of ASEAN Member States;

   c) respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion;

   d) adherence to the rule of law, good governance, the principles of democracy and constitutional government;

   e) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;
f) upholding the Charter of the United Nations and international law, including international humanitarian law, subscribed to by ASEAN Member States; and

g) respect for different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity.

2.2 Respect for international human rights principles, including universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms, as well as impartiality, objectivity, non-selectivity, non-discrimination, and avoidance of double standards and politicisation;

2.3 Recognition that the primary responsibility to promote and protect human rights and fundamental freedoms rests with each Member State;

2.4 Pursuance of a constructive and non-confrontational approach and cooperation to enhance promotion and protection of human rights; and

2.5 Adoption of an evolutionary approach that would contribute to the development of human rights norms and standards in ASEAN.

3. CONSULTATIVE INTER-GOVERNMENTAL BODY

The AICHR is an inter-governmental body and an integral part of the ASEAN organisational structure. It is a consultative body.

4. MANDATE AND FUNCTIONS

4.1. To develop strategies for the promotion and protection of human rights and fundamental freedoms to complement the building of the ASEAN Community;
4.2. To develop an ASEAN Human Rights Declaration with a view to establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights;

4.3. To enhance public awareness of human rights among the peoples of ASEAN through education, research and dissemination of information;

4.4. To promote capacity building for the effective implementation of international human rights treaty obligations undertaken by ASEAN Member States;

4.5. To encourage ASEAN Member States to consider acceding to and ratifying international human rights instruments;

4.6. To promote the full implementation of ASEAN instruments related to human rights;

4.7. To provide advisory services and technical assistance on human rights matters to ASEAN sectoral bodies upon request;

4.8. To engage in dialogue and consultation with other ASEAN bodies and entities associated with ASEAN, including civil society organisations and other stakeholders, as provided for in Chapter V of the ASEAN Charter;

4.9. To consult, as may be appropriate, with other national, regional and international institutions and entities concerned with the promotion and protection of human rights;

4.10. To obtain information from ASEAN Member States on the promotion and protection of human rights;
4.11. To develop common approaches and positions on human rights matters of interest to ASEAN;

4.12. To prepare studies on thematic issues of human rights in ASEAN;

4.13. To submit an annual report on its activities, or other reports if deemed necessary, to the ASEAN Foreign Ministers Meeting; and

4.14. To perform any other tasks as may be assigned to it by the ASEAN Foreign Ministers Meeting.

5. COMPOSITION

Membership

5.1 The AICHR shall consist of the Member States of ASEAN.

5.2 Each ASEAN Member State shall appoint a Representative to the AICHR who shall be accountable to the appointing Government.

Qualifications

5.3 When appointing their Representatives to the AICHR, Member States shall give due consideration to gender equality, integrity and competence in the field of human rights.

5.4 Member States should consult, if required by their respective internal processes, with appropriate stakeholders in the appointment of their Representatives to the AICHR.

Term of Office

5.5 Each Representative serves a term of three years and may be consecutively re-appointed for only one more term.

5.6 Notwithstanding paragraph 5.5, the appointing Government may decide, at its discretion, to replace its Representative.
**Responsibility**

5.7 Each Representative, in the discharge of his or her duties, shall act impartially in accordance with the ASEAN Charter and this TOR.

5.8 Representatives shall have the obligation to attend AICHR meetings. If a Representative is unable to attend a meeting due to exceptional circumstances, the Government concerned shall formally notify the Chair of the AICHR of the appointment of a temporary representative with a full mandate to represent the Member State concerned.

**Chair of the AICHR**

5.9 The Chair of the AICHR shall be the Representative of the Member State holding the Chairmanship of ASEAN.

5.10 The Chair of the AICHR shall exercise his or her role in accordance with this TOR, which shall include:

a) leading in the preparation of reports of the AICHR and presenting such reports to the ASEAN Foreign Ministers Meeting;

b) coordinating with the AICHR’s Representatives in between meetings of the AICHR and with the relevant ASEAN bodies;

c) representing the AICHR at regional and international events pertaining to the promotion and protection of human rights as entrusted by the AICHR; and

d) undertaking other specific functions entrusted by the AICHR in accordance with this TOR.

**Immunities and Privileges**

5.11 In accordance with Article 19 of the ASEAN Charter, Representatives participating in official activities of the AICHR shall enjoy such immunities and privileges as are necessary for the exercise of their functions.
6. MODALITIES

Decision-making

6.1 Decision-making in the AICHR shall be based on consultation and consensus in accordance with Article 20 of the ASEAN Charter.

Number of Meetings

6.2 The AICHR shall convene two regular meetings per year. Each meeting shall normally be not more than five days.

6.3 Regular meetings of the AICHR shall be held alternately at the ASEAN Secretariat and the Member State holding the Chair of ASEAN.

6.4 As and when appropriate, the AICHR may hold additional meetings at the ASEAN Secretariat or at a venue to be agreed upon by the Representatives.

6.5 When necessary, the ASEAN Foreign Ministers may instruct the AICHR to meet.

Line of Reporting
6.6 The AICHR shall submit an annual report and other appropriate reports to the ASEAN Foreign Ministers Meeting for its consideration.

Public Information

6.7 The AICHR shall keep the public periodically informed of its work and activities through appropriate public information materials produced by the AICHR.

Relationship with Other Human Rights Bodies within ASEAN

6.8 The AICHR is the overarching human rights institution in ASEAN with overall responsibility for the promotion and protection of human rights in ASEAN.

6.9 The AICHR shall work with all ASEAN sectoral bodies dealing with human rights to expeditiously determine the modalities for their ultimate alignment with the AICHR. To this end, the AICHR shall closely consult, coordinate and collaborate with such bodies in order to promote synergy and coherence in ASEAN’s promotion and protection of human rights.

7. ROLE OF THE SECRETARY-GENERAL AND ASEAN SECRETARIAT

7.1 The Secretary-General of ASEAN may bring relevant issues to the attention of the AICHR in accordance with Article 11.2 (a) and (b) of the ASEAN Charter. In so doing, the Secretary-General of ASEAN shall concurrently inform the ASEAN Foreign Ministers of these issues.

7.2 The ASEAN Secretariat shall provide the necessary secretarial support to the AICHR to ensure its effective performance.
facilitate the Secretariat’s support to the AICHR, ASEAN Member States may, with the concurrence of the Secretary-General of ASEAN, second their officials to the ASEAN Secretariat.

8. WORK PLAN AND FUNDING

8.1 The AICHR shall prepare and submit a Work Plan of programmes and activities with indicative budget for a cycle of five years to be approved by the ASEAN Foreign Ministers Meeting, upon the recommendation of the Committee of Permanent Representatives to ASEAN.

8.2 The AICHR shall also prepare and submit an annual budget to support high priority programmes and activities, which shall be approved by the ASEAN Foreign Ministers Meeting, upon the recommendation of the Committee of Permanent Representatives to ASEAN.

8.3 The annual budget shall be funded on equal sharing basis by ASEAN Member States.

8.4 The AICHR may also receive resources from any ASEAN Member States for specific extra-budgetary programmes from the Work Plan.

8.5 The AICHR shall also establish an endowment fund which consists of voluntary contributions from ASEAN Member States and other sources.
8.6 Funding and other resources from non-ASEAN Member States shall be solely for human rights promotion, capacity building and education.

8.7 All funds used by the AICHR shall be managed and disbursed in conformity with the general financial rules of ASEAN.

8.8 Secretarial support for the AICHR shall be funded by the ASEAN Secretariat’s annual operational budget.

9. GENERAL AND FINAL PROVISIONS

9.1. This TOR shall come into force upon the approval of the ASEAN Foreign Ministers Meeting.

Amendments

9.2. Any Member State may submit a formal request for an amendment of this TOR.

9.3. The request for amendment shall be considered by the Committee of Permanent Representatives to ASEAN in consultation with the AICHR, and presented to the ASEAN Foreign Ministers Meeting for approval.

9.4. Such amendments shall enter into force upon the approval of the ASEAN Foreign Ministers Meeting.

9.5. Such amendments shall not prejudice the rights and obligations arising from or based on this TOR before or up to the date of such amendments.

Review
9.6. This TOR shall be initially reviewed five years after its entry into force. This review and subsequent reviews shall be undertaken by the ASEAN Foreign Ministers Meeting, with a view to further enhancing the promotion and protection of human rights within ASEAN.

9.7. In this connection, the AICHR shall assess its work and submit recommendations for the consideration of the ASEAN Foreign Ministers Meeting on future efforts that could be undertaken in the promotion and protection of human rights within ASEAN consistent with the principles and purposes of the ASEAN Charter and this TOR.

*Interpretation*

9.8. Any difference concerning the interpretation of this TOR which cannot be resolved shall be referred to the ASEAN Foreign Ministers Meeting for a decision

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