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From ASEAN Way to the ASEAN Charter: Towards the Rule of Law?

1.1 A General Background

Writing a book on the rule of law is bound to generate debates, especially where it concerns countries and regions where the rule of law is not generally highly regarded or its very existence is challenged. The Association of Southeast Asian Nations (ASEAN), a highly plural organization with diverse rule of law practices among member states, invites those questions and debates even for those who hope that the rule of law can provide the foundation for intra-regional relations. Finding the rule of law in regional integration, a phenomenon that has emerged almost simultaneously with globalization, can be a difficult task where ‘the rule of law’ itself is an unsettled concept.

By examining the processes of regional integration within ASEAN and extrapolating from the experiences of the European Union (EU) and other projects of regional integration, this book attempts to locate factors and conditions by which the rule of law develops during regional integration. It explores the possibility that regional integration influences the development of rule of law in member states in ASEAN, as it has in European integration.

One of the most significant developments in ASEAN has been the adoption of the ASEAN Charter (Charter) on 20 November 2007 on the occasion of the Thirteenth ASEAN Summit. The Charter was widely regarded as turning a new page in the 40-year history of ASEAN. It came into force on 15 December 2008 after ratification by its 10 member states. The five original member countries were 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.

¹ The ASEAN Declaration (Bangkok Declaration), Bangkok, Thailand, 8 August 1967.

The Charter, aimed at giving ASEAN a legal personality and a more rules-based regime, is a groundbreaking achievement 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). This form of consensus decision-making is observed in Indonesian villages and is said to exist to some extent in Malaysia and the Philippines.² The ASEAN Way not only describes the conduct of relations of member states but also encapsulates the core principles and values of the association based on strict adherence to the principles of national sovereignty and non-intervention. The Charter, which came as a consequence of ASEAN's initiatives in promoting regional integration, ushers in an evolving framework for regional cooperation in Southeast Asia.

The establishment of an ASEAN Community by 2015 is intended to be the culmination of efforts to deepen cooperation in economic, political, security and sociocultural areas among member states. 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'.³ Economic integration is the flagship programme of ASEAN integration, representing a departure from the almost exclusively political basis of regional cooperation in the past. This shift in thrust from political to more substantive economic cooperation has opened a range of possibilities and opportunities for change in the region. 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.⁴ 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.⁵ Thus we see prospects for the development and the promotion of the rule of law at a regional level for the first time.

The impetus for ASEAN cooperation has changed dramatically with the onslaught of combined political and economic events in the 1990s.

² Mely Caballero-Anthony, *Regional Security in Southeast Asia: Beyond the ASEAN Way* (Singapore: Institute of South East Asian Studies, 2005), 72–3; See also Koentjaraningrat, R.M. (ed.), *Villages in Indonesia* (Ithaca: Cornell University Press, 1967).

³ Declaration of ASEAN Concord II (Bali Concord II), Bali, 7 October 2003.

⁴ Cebu Declaration on the Blueprint for an ASEAN Charter, Cebu, 13 January 2007; Bali Concord II.

⁵ Charter of the Association of Southeast Asian Nations 2007 (ASEAN Charter 2007), Singapore, 20 November 2007, art. 2(h).

These included the end of the Cold War, the dismantling of authoritarian regimes in the Philippines, Indonesia and Thailand, the resolution of the Cambodia conflict and its subsequent democratization, the embrace by socialist states of Vietnam and Laos PDR of the market economy and the Asian financial crisis of 1997. The millennium brought about significant events on the world stage, in particular the terrorist attack on September 11, 2001, and its fallout and the current economic and financial crises in North America and Europe. These events have triggered new challenges in Southeast Asia – in particular, the emergence of Islamist radicalism and transnational crimes – that have prompted state leaders to seek stronger regional cooperative solutions.

In ASEAN, regional and international events since 1997 have prompted profound rethinking on the part of leaders and elites about ASEAN's role in the face of internal and external problems. ASEAN's failure to provide a common front against the impact of the Asian financial crisis, particularly as the crisis severely affected many member states, generated strong criticisms about its continued relevance, and its claim to centrality as a regional organization. At the same time, member states have had to grapple with 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 has prompted state leaders and elites to utilize ASEAN in responding to the challenges and benefits of globalization. The Asian financial crisis also exposed the flaws in the 'Asian values' argument espoused by authoritarian regimes in the region that sought to particularize conceptions of democracy and human rights in a cultural and communitarian context.⁶ For civil society in Southeast Asia, the impact of globalization and the idea of a more integrated region have encouraged civil society organizations to reconsider ASEAN as a platform for advocating political, economic and sociocultural reforms.

As with the EU, ASEAN was conceived as a regional grouping to foster peace and stability through greater economic cooperation. Peace-building in most Southeast Asian societies, however, is linked to the wider project of nation-state building. The postcolonial nation-state in the region has struggled to achieve internal cohesion and legitimacy, with the result that most ASEAN members have placed primary emphasis on social unity, cohesion and order. Regionalism, the broader context in which regional

⁶ Amitav Acharya, *The Quest for Identity* (Singapore: Oxford University Press, 2000), 155–6.

integration is situated, remains anchored in ASEAN member states' efforts at nation-state building.

In contrast, achieving peace within the EU builds on a history of ending centuries of Pan-European wars and in restraining the re-emergence of German hegemony.⁷ This has informed to a large extent the decision among EU member states to surrender some parts of their sovereignty in favour of a supranational authority which is responsible for implementing the member states' obligations under legally binding treaties. The act of delegating or pooling of sovereignty to a supranational body has enabled the EU to transcend a state-centred approach to international relations and international law. This has made it possible for the creation of a model of regional governance that exhibits autonomy from its member states.⁸

1.2 The Early ASEAN, Non-intervention and the ASEAN Way

ASEAN began as a regional mechanism to avert major armed conflict in a turbulent region. Its two precursors, the Greater Malayan Confederation, also known as MAPHILINDO representing Malaysia, Philippines and Indonesia, and the Association of South-East Asia (ASA), failed in the face of interstate conflicts among member states.⁹ Ensuing years have seen the stabilization of the region, understood as the absence of any major armed confrontation among member states and was attributed by state leaders and officials to the stabilizing effect of ASEAN's formation. There is wide agreement among academics that ASEAN was established as a security community, though perhaps in a rather implied and limited manner.¹⁰ ASEAN's role in securing peace and security in the region has been partly

⁷ See John Gillingham, 'A German Solution to Europe's Problems? The Early History of the European Communities, 1950–1965' in *European Integration, 1950–2003 Superstate or New Market Economy?* (Cambridge: Cambridge University Press, 2003), 3–80, 3–5.

⁸ Pierre Pescatore, *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.

⁹ 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.

¹⁰ See, for example, Donald Emmerson, 'Security, Community, and Democracy in Southeast Asia: Analyzing ASEAN' (2005) 6(2) *Japanese Journal of Political Science* 165–85; Amitav Acharya, *Constructing a Security Community in Southeast Asia: Asean and the Problem of Regional Order* (London: Routledge, 2001), 1–8.

credited to its ‘political formula’, the preferred method of cooperation in ASEAN particularly during the first 10 years of its existence.¹¹ This approach, as opposed to legally binding treaties and procedures, gives preference to diplomacy and informal mechanisms of dispute settlement or dispute avoidance.

The primacy of the political agenda in ASEAN was not only driven by the members’ desire to achieve freedom from fear of external threats. It was as much dictated by the domestic imperatives of state-building which preoccupied member states in the postcolonial era. Political instability was considered the principal threat to the internal security of member states; ethnic secessionist groups and communist insurgents were deemed to be the ‘enemies of the state’. Security threats were expanded to include any opposition to the government such as political parties, activists and the media. By the late 1960s, most states in ASEAN were ruled by authoritarian regimes.

As a regional grouping, ASEAN has vigorously espoused the principle of national sovereignty and non-intervention. This coincided with member states’ interests in being left alone to tackle their own political and internal security issues, free from any form of interference from their neighbours. The recognition of security threats as the primary source of insecurity was formally recognized in ASEAN when it adopted the Declaration of ASEAN Concord (or Bali Concord), and the Concord principles of regional and national resilience as key to safeguarding the stability of member states and the whole region.¹² 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.¹³ Without having to contend with external interference or pressure, member states could focus on their nation-building objectives, centred on achieving economic growth and development. Regional resilience could therefore be achieved by enabling member states to attain their own national resilience.

The Bali Concord, which came 10 years after the founding of ASEAN, formally elaborated the political framework of ASEAN cooperation. Political cooperation was stated ahead of economic cooperation – a tacit

¹¹ Estrella D. Solidum, *The Politics of ASEAN: An Introduction to Southeast Asian Regionalism* (Singapore: Eastern University Press, 2003), 79.

¹² Declaration of ASEAN Concord (Bali Concord), Bali, 24 February 1976.

¹³ Alan Collins, *Security and Southeast Asia: Domestic, Regional and Global Issues* (Singapore: Institute of Southeast Asian Studies, 2003), 129–30.

acknowledgement of ASEAN's *raison d'état*. The instrument lays down the components of political cooperation as:

1. Meeting of the Heads of Government of the member states as and when necessary.
2. Signing of the Treaty of Amity and Cooperation (TAC) in Southeast Asia.
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. Improving ASEAN machinery to strengthen political cooperation.
6. Studying 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.¹⁴

Implicit in ASEAN's rationale for regional cooperation is the goal of strengthening the sovereign capacities of member states. Unlike the EU where states agreed to voluntarily surrender certain parts of their sovereignties to a supranational body, ASEAN states had no intention of limiting their sovereign authority, 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 called for a political solution or approach. Some territorial conflicts, however, had been referred to the International Court of Justice for legal adjudication. Examples of the latter are the territorial issues between Indonesia and Malaysia involving the *Pulau Ligitan* and *Pulau Sipadan* Islands in the Celebes Sea; between Malaysia and Singapore over *Pedra Branca* and the dispute between Thailand and Cambodia over the Preah Vihear Temple.¹⁵ Most other pressing disputes

¹⁴ Bali Concord, s. A.

¹⁵ The Malaysia–Indonesia dispute was decided in 2002 by the ICJ in favour of Malaysia though it left open issues of maritime demarcation that have remained contentious, and Indonesia is still claiming maritime jurisdiction over Ambalat and East Ambalat. On 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 Preah Vihear was adjudged by the ICJ in favour of Cambodia's sovereignty in 1962 but violent clashes occurred recently. 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

in the region, however, had been dealt with or managed through the traditional method of state diplomacy.

The building of trust and confidence among member states in view of existing intra-state conflicts was a key consideration in developing regional cooperation. ASEAN became a venue for regional diplomacy where issues that were considered too sensitive to tackle are dealt with either through quiet diplomacy or bilateral summitry.¹⁶ Issues that are considered for bilateral negotiations range from secessionism, insurgencies and 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 wording of the 1967 Bangkok Declaration itself where ASEAN is described as an 'Association for Regional Cooperation' consisting of 'the collective will of the nations of Southeast Asia to bind themselves together in friendship and cooperation'.¹⁷

ASEAN's legal and institutional mechanisms in its early years reflected the political aims of the organization. The ASEAN Declaration only provided for four informal and loose institutions – an 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.¹⁸ It was only in 1976 that the ASEAN Secretariat was established in Jakarta and the first ASEAN Summit, or meeting of the Heads of States, was convened.

ASEAN has developed a mechanism of regional cooperation that state leaders and officials consider to be distinctive of the association, the so-called ASEAN Way.¹⁹ The ASEAN Way has generally defined what the organization is about. It has evolved as the core organizational principles and norms and consists of both behavioural and procedural dimensions. The behavioural aspect comprises what can be collectively called a 'code of conduct' to be observed by member states in relation to one another. The ASEAN TAC

effective security management in the region. For further discussion, see Yukiko Nishikawa, 'The "ASEAN Way" and Asian Regional Security' (2007) 35(1) *Politics and Policy* 42–56.

¹⁶ Solidum, *The Politics of ASEAN*, 102–9.

¹⁷ Bangkok Declaration.

¹⁸ *Ibid.*, para. 3.

¹⁹ Acharya, *The Quest for Identity*, 127–8.

states basic principles of international law that have assumed greater (and even peculiar) meaning in ASEAN owing to its 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;
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.²⁰

ASEAN has invested peculiar meanings in these concepts which are otherwise generally recognized by the international community as norms of international law. For example, the principles of respect for national sovereignty and non-intervention reflect expectations of conduct of member states towards each other that include refraining from criticizing the actions and policies of another member state towards 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, and to provide support or material assistance to member states in their campaign against subversive and destabilizing activities.²¹

The procedural dimension of the ASEAN Way is grounded in the use of informal mechanisms to manage conflicts or to arrive at decisions. Informal means of dispute settlement in ASEAN are underpinned by conflict avoidance or containment. They are usually characterized by observance of particular conduct which is not formally expressed in formal and institutional mechanisms of the association. They place emphasis on self-restraint, respect and tolerance, acceptance of the processes of *mushawarah* and *mufakat*,²² 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.²³

²⁰ TAC in Southeast Asia, Bali, 24 February 1976, in force 21 June 1976, 1025 UNTS 316.

²¹ Acharya, *Constructing a Security Community*, 58.

²² Caballero-Anthony, *Regional Security in Southeast Asia*, 72; Davie Capie and Paul Evans, 'The ASEAN Way' in Sharon Siddique and Sree Kumar (eds.), *The 2nd ASEAN Reader* (Singapore: Institute of Southeast Asian Studies, 2003), 45–51, 48.

²³ Mely Caballero-Anthony, 'Mechanisms of Dispute Settlement: The ASEAN Experience' (1998) 20(1) *Contemporary Southeast Asia* 51–64. See also Michael Antolik, *ASEAN and the Diplomacy of Accommodation* (New York: M.E. Sharpe, 1990).

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Formal mechanisms for dispute settlement have been instituted in ASEAN such as the provision for a High Council in the TAC and the Protocol for Enhanced Dispute Settlement Mechanism and the dispute resolution mechanisms of ASEAN's economic agreements. These mechanisms have not been used or even invoked by member states in resolving their conflicts. A prominent example of this vacuum is the continuing dispute between Thailand and Cambodia over the Preah Vihear temple which continues to be a flashpoint to regional security but also an issue that impacts on domestic politics. Since 2008 fresh border clashes started after the recognition by UNESCO of the temple as a world heritage site and ASEAN, through Indonesia, offered to mediate. This was largely unsuccessful. Neither ASEAN's formal dispute resolution mechanisms were invoked by either disputant. Cambodia formally referred it to the ICJ where the latter issued a provisional measure for the cessation of armed hostilities, and authorized the creation of a provisional demilitarized zone pending the resolution of the case.²⁴ The ruling also urged the parties to continue to cooperate with ASEAN, particularly in deploying observers to the demilitarized zone. Although a ceasefire did materialize, the deployment of the Indonesian or ASEAN observer team was rejected by Thailand, particularly by its military.²⁵

The ASEAN Way on decision-making, which emphasizes consensus building through a process of discussion and consultation, has been argued to be Southeast Asian cultural paradigm. It is said to reflect the customary way of arriving at decisions in villages and among the elites in Southeast Asia.²⁶ 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

²⁴ Temple of Preah Vihear (Cambodia vs. Thailand) (Provisional Measures, Judgment) [2013] ICJ Rep 281.

²⁵ See Prentice, Jonathan, *Waiting for RI observers at Preah Vihear* (17 March 2012) The Jakarta Post, www.thejakartapost.com/news/2012/03/17/waiting-ri-observers-preah-vihear.html; Bangkok Post, *Preah Vihear Dispute Weighs on Army Brass* (24 May 2012), www.bangkokpost.com/opinion/opinion/294787/preah-vihear-dispute-weighs-on-army-brass

²⁶ Solidum, *The Politics of ASEAN*, 93–4; See also Pushpa Thambipillai and J. Savaranamuttu, *ASEAN Negotiations: Two Insights* (Singapore: Institute of Southeast Asian Studies, 1985), 3–25.

(ZOPFAN).²⁷ While there is doubt as to whether the ASEAN Way is distinctively Southeast Asian, there is little question that it has crystallized into ASEAN's diplomatic and security culture, and perhaps mediated to a certain extent 'estrangement and insecurity' in the region.²⁸

The ASEAN Way has served the purposes of ASEAN particularly well in its formative years. It has performed a state-building or regime-maintenance function in member countries. Member states were enabled to direct their energies towards domestic problems without fear of intervention or criticisms from neighbouring states. Autonomy, discretion and flexibility have been enhanced in member states through ASEAN's reliance on its core values of sovereignty, non-intervention and informality. It has fostered solidarity among leaders of member states and even the maintenance of dictatorships.

The ASEAN Way has not been inviolable, however. The intermittent armed clashes between Thailand and Cambodia over Preah Vihear show non-observance of the code of conduct on restraint and non-use of force. Various other incidents in the past also show deviation from non-interference, such as the Indonesian protests over Malaysia's expulsion of its Rohingya Muslim inhabitants, the giving of sanctuary to Philippine Muslim rebels in Sabah and Indonesian pressure on the Philippines to ban East Timorese and foreign delegates from attending a conference on East Timor in 1994.²⁹

The adoption of the ASEAN Charter in 2007 amounts to an implicit recognition of the limits of the ASEAN Way as the association embarks on an ambitious plan of building a Community. New challenges have emerged that go beyond the traditional conception of security. The 'new' ASEAN now recognizes the principle of comprehensive security that includes both state and human security and extends to all forms of threats such as transnational crimes and trans-boundary challenges that need greater political, security, economic and sociocultural cooperation.³⁰ To bring about economic integration would require a degree of clarity, stability and

²⁷ Jürgen Haacke, *ASEAN's Diplomatic and Security Culture: Origins, Development and Prospects* (London: Routledge Curzon, 2005), 16–51.

²⁸ Ibid.

²⁹ Jürgen Rüländ, 'ASEAN and the Asian Crisis: Theoretical Implications and Practical Consequences for Southeast Asian Regionalism' (2000) 13(2) *The Pacific Review* 421–51, 439–40; See also *East Timor Conference in Manila Tests Southeast Asia's 'Good Neighbor' Policy*, International Herald Tribune (1 June 1994), www.iht.com/articles/1994/06/01/timor.php

³⁰ ASEAN Charter 2007, ch. 1, art. 1.