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### Quest for relevance: Whither the ASEAN Charter in shaping a shared regional identity and values

Tan K. B. EUGENE

*Singapore Management University*, [eugene@smu.edu.sg](mailto:eugene@smu.edu.sg)

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## QUEST FOR RELEVANCE: WHITHER THE ASEAN CHARTER IN SHAPING A SHARED REGIONAL IDENTITY AND VALUES

*Eugene K B Tan* \*

*Promulgated in 2007, the Charter of the Association of Southeast Asian Nations (ASEAN) reaffirms ASEAN's longstanding policy of non-interference in member-states' internal affairs and the retention of consultation and consensus as fundamental tenets of decision-making in ASEAN. This essay considers the role of soft law in the interpretation and development of the ASEAN Charter. It also considers whether the Charter will help ASEAN achieve integration as well as promote democracy, human rights and development in an immensely diverse region comprising half a billion people. The essay argues that although the Charter is a binding legal instrument, the text enables a significant degree of flexible interpretation and room for negotiation. This inherent flexibility is an encapsulation of the ASEAN way, rendered as a principle of ASEAN regional governance, and continues to be the foundation for the common rules of engagement. As an inherently soft law document, the Charter is better positioned to socialize ASEAN member-states in imbibing the desired values and norms, and helps generate trust. This integrative approach is more sustainable than a plethora of treaty law or an approach that ostensibly and significantly pools sovereignty. Such a crafting of the Charter promotes constitutive processes such as persuasion, learning, cooperation and socialization, while also providing some assurance that ASEAN, as a legal personality, is not attempting to derogate from the 'ASEAN Way' but evolving sensitively to the changing landscape. The Charter is a legal-political nudge requiring ASEAN to calibrate its actions,*

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\* Associate Professor of Law, School of Law, Singapore Management University. Email: eugene@smu.edu.sg. I am grateful for the intellectually-stimulating Yonsei Institute for Legal Studies Winter Workshop held at Yonsei University Law School in January 2018. In particular, I am appreciative of the critique, comments, and insights provided by Professor Woo-Young Rhee (Seoul National University) and the workshop participants. This essay has benefited from some of the themes and arguments outlined in my *The ASEAN Charter as 'Legs to Go Places': Ideational Norms and Pragmatic Legalism in Community Building in Southeast Asia*, (2008) 12 SINGAPORE YEAR BOOK OF INTERNATIONAL LAW 171. Funding for this research was provided by the Singapore Ministry of Education Academic Research Funding Tier 1 grant (13-C234-SMU-005). All shortcomings and infelicities are solely my responsibility.

*policies and its understanding of sovereignty to be in line with the prevailing normative framework globally.*

## I. INTRODUCTION

Promulgated in 2007, the Charter of the Association of Southeast Asian Nations (ASEAN) was hailed as a legal instrument that would integrate the 10 member-states of Southeast Asia into a credible and relevant regional community organization. Closer regional integration, it is often argued, will enable ASEAN to punch above its weight, and ensure that the grouping is more than the sum of its constituent parts. Although the Charter is a binding legal instrument, it was drafted in a nuanced way that facilitates and enables a significant degree of flexible interpretation and room for negotiation. This inherent flexibility is an encapsulation of the 'ASEAN Way,' a core principle of ASEAN governance from its inception in 1967 and a key driver of ASEAN's growth and development. The ASEAN Way continues to be the foundation for the common rules of engagement for the ASEAN member-states and its dialogue partners. Ostensibly crafted as an international treaty, the Charter is a political declaration of the common intent, principles, norms and values of all member-states and provides the basis for ASEAN's evolution and development as a regional inter-governmental organization that is distinct from its member-states.

Accordingly, viewing the Charter as a soft law instrument can help explain the putative socialization of ASEAN member-states in imbibing the desired values and norms. This process helps generate trust that is more sustainable than a plethora of treaty law that ostensibly pools sovereignty. Crafting the Charter as a hard law legal instrument, but with soft law features and effects, is a calibrated measure to combine reflexive self-regulation on the part of member-states, and light-touch regulation on the part of ASEAN. Such an approach would promote constitutive processes such as persuasion, learning, cooperation, and socialization, while also providing some assurance that ASEAN, as a separate legal personality from its member-states, is not attempting to derogate from the ASEAN Way. The Charter can be regarded as a legal-political nudge in which ASEAN increasingly calibrates its actions, policies, and understanding of sovereignty to be in line with the prevailing normative framework globally.

This essay considers the role of soft law, embedded as it were, in the apparent hard law text of the Charter, and whether the Charter, as the constitution of Southeast Asia's foremost regional organization, will help ASEAN achieve integration as well as promote democracy, human rights and development in an immensely diverse region comprising more than a half billion people. These questions are pertinent in light of the Charter's reaffirmation of ASEAN's longstanding policy of non-interference in members' internal affairs and the retention of consultation and consensus as a fundamental tenet of decision-making in ASEAN. The Charter was also regarded as playing a contributory role in the establishment of the ASEAN Community in 2015 in the three key areas of political and security, economic, and socio-cultural development of ASEAN as a whole.<sup>1</sup>

The paper is organized as follows. Part II provides an overview of ASEAN and its diversity, and briefly describes the institutional imperative of organizational adaptation given the geopolitical flux that ASEAN faces. Part III analyzes the soft law attributes of the ASEAN Charter. The crucial role of soft law, as a modality for cooperation and assurance of continuity amid change, in catalyzing ASEAN's institutional evolution and behavioral change is also examined. Part IV examines ASEAN's adaptation of its cherished norms of consensus decision-making and non-interference in domestic affairs of a member-state. Aided by the Charter, this effort to stay relevant is discussed with respect to four areas: (1) the affirmation and tweaking of national sovereignty; (2) the approach towards human rights; (3) the policy of "constructive engagement" of Myanmar; and, (4) the aspiration of strengthening the dispute resolution framework within ASEAN. Part V considers the Charter as a legal 'nudge' towards a limited pooling of sovereignties within ASEAN, and how soft law can aid the process of regional integration. Part VI concludes the essay.

## **II. ASEAN AND THE IMPERATIVE OF ADAPTATION**

ASEAN was born out of strategic idealism and necessity in

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<sup>1</sup> Earlier in 2007, ASEAN adopted the blueprints for the ASEAN Economic Community (AEC), ASEAN Political and Security Community (APSC), and the ASEAN Socio-Cultural Community (ASCC), collectively known as the ASEAN Community.

the tumultuous days of the Cold War as it unfolded in Southeast Asia. The Vietnam War was the catalyst, and ASEAN was conceived as a counter-measure and bulwark against the clear and present danger of communism at its doorstep. The idea and the establishment of a regional organization was way ahead of its time. For the founding fathers of ASEAN, it was a strategic masterstroke and, perhaps, even a leap of faith. ASEAN's founding was framed by the urgent imperative to preserve peace for the purpose of national and regional development in what was hitherto a conflict-ridden region in a turbulent period. Fresh from the throes of European decolonization after the Second World War, Southeast Asia quickly became a venue for the proxy war between the United States and the then Union of Soviet Socialist Republics, primarily played out in the Vietnam War.

Founded in 1967, ASEAN was and is a regional platform for regional dialogue and cooperation. ASEAN today comprises ten Southeast Asian nation-states held together by the commonality of membership in ASEAN but distinguished by their immense diversity.<sup>2</sup> Politically, Singapore, Cambodia and (until recently) Malaysia are dominated by a single party and have been popularly characterized as authoritarian democracies. As a liberal democracy, the Philippines has a history of military coups, extra-legal political changes, and strong man rule. Indonesia has been rapidly democratizing since the end of President Suharto's thirty two-year reign in 1998 amid the Asian financial crisis. Thailand, the only Southeast Asian state never to be colonized, has been a constitutional monarchy since 1932 and has experienced significant and continual democratic challenges, including regular military coups. Vietnam and Laos remain communist states, while Brunei is an absolute monarchy that has recently adopted sharia law. Myanmar, long ASEAN's black sheep, was ruled by a repressive, isolationist military junta for almost five decades and now continues to face internecine strife while also violently repressing ethnic minorities.

Not surprisingly, there are also immense disparities in economic development, giving rise to wide differentials in the area of human development.<sup>3</sup> Nonetheless, in 2017 ASEAN's

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<sup>2</sup> Useful primers on ASEAN include S. SIDDIQUE AND S. KUMAR (compilers), *THE 2ND ASEAN READER* (2003), R.C. SEVERINO, *ASEAN* (2008), and M. BEESON, *INSTITUTIONS OF THE ASIA-PACIFIC: ASEAN, APEC, AND BEYOND* (2009).

<sup>3</sup> For a good but somewhat dated overview of the status and trends of human development in Southeast Asia, see UNESCAP, *Ten as One: Challenges and*

combined population of 642 million people generated a gross regional product (or ASEAN combined GDP) in excess of (US) \$2,766 billion, direct foreign investments of (US) \$137 billion, and a total trade volume of (US) \$3,278 billion. Since the late 1990s, the rise of China and India as putative global powers in the twenty-first century has seen them draw a disproportionate share of global foreign direct investments. This diversion away from Southeast Asia began after China's membership in the World Trade Organization and accelerated for much of the first decade of the twenty-first century.<sup>4</sup> Economically, the challenge is for ASEAN to tap these growth engines while also remaking itself as a desirable regional business and investment destination. The risk of economic marginalization is not theoretical although the threat is perceived with varying degrees of urgency across the region.

Amid growing concerns of organizational atrophy and irrelevance, ASEAN heads of government signed the Charter at the 13<sup>th</sup> ASEAN Summit in Singapore on November 20, 2007. Described as the "crowning achievement"<sup>5</sup> of ASEAN's 40<sup>th</sup> anniversary, the Charter came into force on December 15, 2008.<sup>6</sup> This constitutional moment for the region was to augur bigger achievements beyond regional peace.<sup>7</sup> Broadly speaking, the

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*Opportunities for ASEAN Integration* (2007); UNDP, *South-East Asia Regional Economic Integration and Cooperation: Deepening and Broadening the Benefits for Human Development* (2006). This article does not consider whether the Charter will help narrow the development gap between members.

<sup>4</sup> J. Ravenhill, *Is China an Economic Threat to Southeast Asia*, 46 *ASIAN SURVEY* 653 (2006); M. Bhaskaran, *The Economic Impact of China and India on Southeast Asia*, *SOUTHEAST ASIA AFFAIRS* 2005 62-81 (2006). In terms of purchasing power parity, ASEAN, China, and India combined account for a quarter of the world's economy.

<sup>5</sup> Taken from the Cebu Declaration on the Blueprint of the ASEAN Charter, Jan., 13, 2007, <http://www.aseansec.org/19257.htm>.

<sup>6</sup> The formal legal origins of the Charter can be found in the *Vientiane Action Programme* (VAP), which was endorsed at the 10th ASEAN Summit in Vientiane on November 29, 2004. See *Vientiane Action Programme*, para 1.2 at p. 7, <http://www.aseansec.org/VAP-10th%20ASEAN%20Summit.pdf>. At the 11<sup>th</sup> ASEAN Summit in December 2005, ASEAN member-states adopted the "Kuala Lumpur Declaration on the Establishment of the ASEAN Charter," <http://www.aseansec.org/18030.htm>.

<sup>7</sup> Indonesia, a key member state, was the last member to ratify the Charter, and with conditions attached. Indonesia's addendum to the ratification legislation stated that the Indonesian government was to work for early amendments (including the implementation of a genuine human rights mechanism), a reform of decision-making procedures, and greater people involvement in ASEAN. See, further, a helpful discussion on Indonesia's delayed ratification of the Charter in J.

Charter aspires to strengthen ASEAN as a leading regional organization while catalyzing ASEAN's integration efforts on various fronts.<sup>8</sup> The Charter has three strategic thrusts, all in support of the vision of the 'ASEAN Community.'<sup>9</sup> The Charter is intended to be a legal instrument that would bind the 10 constituent nation-states in Southeast Asia as a rules-based, cohesive regional community.

Despite the Charter's coming into force for almost a decade now, the fundamental question remains whether the Charter is more rhetoric and form, rather than substance and purposeful action. Part of this concern stems from the Charter's reaffirmation of ASEAN's longstanding policy of non-interference in member-states' internal affairs and the retention of consultation and consensus as a fundamental tenet of decision-making in ASEAN, rather than making inroads towards a significant redefining of the norms of non-interference and consensual decision-making. The core norms that have enabled ASEAN to grow in importance are also potential stumbling blocks to its further development.

### III. RECALIBRATING SOVEREIGNTY AND NON-INTERFERENCE: THE UTILITY OF A SOFT LAW APPROACH

Given the massive shift in organizational tack needed after forty years, ASEAN relied on a constitutional document that would make this significant transition feasible and palatable to

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Ruland, *Deepening ASEAN Cooperation through Democratization? The Indonesian Legislature and Foreign Policymaking*, 9 INTERNATIONAL RELATIONS OF THE ASIA PACIFIC 373 at 381-388 (2009).

<sup>8</sup> See D. Seah, *The ASEAN Charter*, 58 INTERNATIONAL COMPARATIVE LAW QUARTERLY 197-212 (2009). T. Chalermpananupap, *Institutional Reform: One Charter, Three Communities, Many Challenges*, in HARD CHOICES: SECURITY, DEMOCRACY, AND REGIONALISM IN SOUTHEAST ASIA (D.K. Emmerson ed., 2008).

<sup>9</sup> The first is to formalize ASEAN as an institution while also streamlining its decision-making processes. Secondly, the Charter seeks to strengthen ASEAN institutions, especially the Secretariat. Thirdly, it seeks to establish mechanisms to monitor compliance of ASEAN agreements and settle disputes between member-states. See also E.K.B. Tan, *The ASEAN Charter as 'Legs to Go Places': Ideational Norms and Pragmatic Legalism in Community Building in Southeast Asia*, 12 SINGAPORE YEAR BOOK OF INTERNATIONAL LAW 171-198 (2008).

member-states that were comfortable with and wedded to the status quo.<sup>10</sup> In other words, the Charter needed to respond pragmatically to the needs of the organization and to address the perennial imperative of ASEAN's relevance to member-states and the region and world at large. More importantly, the Charter needed to secure the buy-in of all member-states, which were almost always wary of institutional over-reach as a guise for under-cutting national sovereignty and facilitating external interference in the domestic affairs of member-states.

The drafting of the Charter and its implementation represented an attempt at organizational re-building and re-branding, as well as institutionalizing the values, norms, and desired practices within ASEAN. This crystallization of key principles, values, and norms was necessary to raise ASEAN's game, within its own backyard and globally, through closer political and economic integration. The Charter sought to adapt the key principles, values, and norms to respond to the changing geopolitical realities.

Given this background, the Charter had to offer a viable way forward for the organization and member-states. This meant that, as the constitutional document, it had to be drafted with a focus on principles and organizational behavioral change, rather than relying on rules and compliance. The Charter's drafters were pragmatic: ASEAN can either have a Charter observed more in its breach, or have a Charter that can initiate and gradually inculcate in member-states the need to depart, where necessary and in a principled manner, from the ASEAN Way. Thus, the Charter is not merely a constitutional agreement cast in stone. It has to spearhead institutional change and, more challengingly, induce real and meaningful behavioral change within the organization, and how member-states and other international actors engaged with ASEAN.

Although the Charter is formally 'hard law,' it is more 'soft law' in posture, approach, and effect. This paradox can be explained as follows: The Charter provides ASEAN with the 'hardware' of a constitutional architecture for improved and effective governance. However, the Charter is not a typical 'command and control' legal instrument; this is notwithstanding

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<sup>10</sup> On the drafting of the Charter, see TOMMY KOH, ROSARIO G. MANALO & WALTER WOON (eds.), *THE MAKING OF THE ASEAN CHARTER* (2009) and WALTER WOON, *THE ASEAN CHARTER: A COMMENTARY* (2016).



that it is an international treaty.<sup>11</sup> The Charter may strike some as more of a code of conduct, a set of organizational norms and guidelines, rather than a rulebook or constitution.

A purposeful way of viewing the Charter is to regard it as a composite legal instrument. The Charter is ostensibly hard law for its supposed binding effect and its intent to create a viable organizational and governance structure. Yet it has salient soft law elements in its treatment of key organizational and ideational issues.

Similarly, this composite attribute of the Charter is manifested in its effort to crystallize and embody desired norms and values, and encourage certain patterns of conduct. A case can be made that the Charter also endows ASEAN with the ‘software’ and attitudinal mindset of encouraging member-states to imbibe the desired values and adopt the desired conduct so as to facilitate the attainment of the purposes and principles of ASEAN. The development of the Charter was seen as one of the strategies for the “shaping and sharing of norms” in the Vientiane Action Programme.<sup>12</sup>

In the area of governance in the realm of international affairs and law, the use of hard law has been the main mode of legalization. However, increasingly, soft law is adopted as a complementary mode of legalization. Hard law is generally understood as “legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.”<sup>13</sup> Domestic legislation and international treaties are the tangible expressions of hard law. For example, international agreements and treaties stipulate – in varying degrees of clarity and precision – the legally binding duties and obligations (accountability and compliance), and the punishment for

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<sup>11</sup> Article 54 of the Charter provides for the Charter to 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.”

<sup>12</sup> See para 1.2 at p. 7, <http://www.aseansec.org/VAP-10th%20ASEAN%20Summit.pdf>. On how the Charter process operated as a norm entrepreneur assisting in the localization of human rights standards within ASEAN, see M. Davis, *Explaining the Vientiane Action Programme: ASEAN and the Institutionalisation of Human Rights*, 26 *PACIFIC REVIEW* 385-406 (2013).

<sup>13</sup> K.W. Abbott and D. Snidal, *Hard and Soft Law in International Governance*, in *LEGALIZATION AND WORLD POLITICS* 35 (J. L. Goldstein, M. Kahler, R. O. Keohane & A-M Slaughter eds., 2001).

transgression and non-compliance (sanctions).

However, given that the change sought within ASEAN is ideational at its core and incremental in approach and pace, the structural power of hard law, if given full effect, is not only reactionary but also grossly inadequate as a means of adaptive socialization and social learning for member-states. Hence, the introduction and use of hard law alone cannot make ASEAN a rules-based, effective, and relevant inter-governmental organization. A blind enactment and application of hard law is merely a formalistic and coercive attempt at symptomatic treatment of ASEAN's shortcomings. It would not catalyze the evolutionary but substantive changes necessary to raise ASEAN's profile, effectiveness, and relevance. A Charter that is hard law in form and substance may instead fragment ASEAN at a time when it needs to be cohesive in order to usher in a non-threatening environment for organizational change.

In contrast to hard law, soft law is less definitive and usually does not create enforceable rights and duties. Soft law includes a variety of processes that attempt to set rules, guidelines, or codes of conduct that share the common trait of having non-legally binding normative content but with regulative, practical effects similar to hard law.<sup>14</sup> Soft law's inherent flexibility and potential discursive power can facilitate the setting of normative standards and enable social learning. This is particularly useful in situations where persuasion and reflexive adjustment, rather than rigid adherence and/or enforcement, are needed. In particular, soft law can assist in efforts to internalize the norms embedded in hard law.<sup>15</sup> For instance, the ideational standards or expectations first enunciated in soft law mechanisms can subsequently form the basis on which the practical application of the hard law acquires effectiveness, efficacy, and legitimacy. In the same way, the values promoted by the Charter have a better chance of being institutionalized and acquiring buy-in from member-states than by imposing them by constitutional fiat or political coercion.

As law in the embryonic stage of formation, soft law is a precursor of emerging hard law principles and norms that might eventually cohere and consolidate to become legally binding rules

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<sup>14</sup> As such, it cannot be relied upon as a basis for deterrence, enforcement action and punitive sanctions.

<sup>15</sup> D.M. Trubeck, P. Cottrell and M. Nance, "'Soft Law,' 'Hard Law' and EU Integration," in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* (G. de Búrca & J. Scott eds., 2006).

themselves. As such, soft law can contribute to the legal interpretation of hard law. In this regard, soft law can help knowledge, norms, and values to be framed strategically and dovetail with existing normative frameworks even as institutional change is intended and needed.<sup>16</sup>

Specifically, soft law mechanisms can be adapted for the purposes of persuading ASEAN member-states of the importance of the norms that the Charter seeks to promote, concretize and give effect to. In ASEAN's context, this means member-states can use soft law attributes to attract, socialize and co-opt other member-states on the imperative of observing the Charter as a means to, and an end of, preserving regional peace, stability, and progress. These attributes of soft law may facilitate socialization, the formation of consensual knowledge, and a shared understanding of the way forward for ASEAN in terms of the desired norms, practices, and values.

The utility of a soft law approach is its transformative capacity in socializing stakeholders through a consensual and confidence-building process. Furthermore, soft law can also possess the regulative and constraining effect of hard law. More directly, soft law speaks to reason and understanding, strives to develop consensus, and encourages the internalization of desired values and interests. Lawrence Kohlberg's stages of moral development provide a scaffold to help demonstrate how soft law's iterative, quasi-prescriptive nature can engage cognitive and informed responses in developing a nuanced regulative response to a societal threat (see Figure 1).<sup>17</sup>

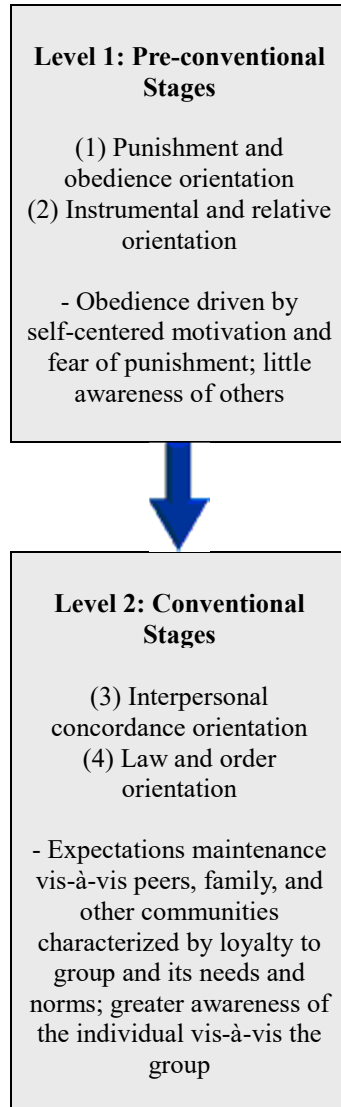
Hard law approaches tend to elicit reasoning and responses that are primarily egocentric, denominated in self-centered terms of avoiding punishment, compliance with an authority, and group norms (levels one or two of Kohlberg's moral development). On the other hand, soft law approaches encourage the movement towards a level three moral development in which a person is able to adopt a perspective that factors the interests of affected parties based on impartial and reasonable principles. When successfully

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<sup>16</sup> For the argument that the ASEAN Charter has engendered only institutional change but not changes in behavioral practices, see A. Jetschke and P. Murray, *Diffusing Regional Integration: The EU and Southeast Asia*, 35 WEST EUROPEAN POLITICS 174-191 (2012).

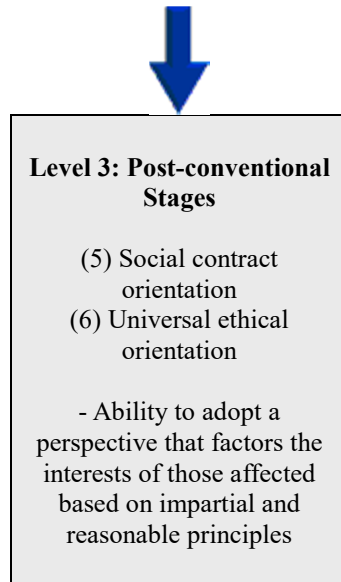
<sup>17</sup> Lawrence Kohlberg, *Moral Stages and Moralization: The Cognitive-Developmental Approach*, in MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH, AND SOCIAL ISSUES (T. Lickona ed., 1976).

imbibed, soft law approaches result in an individual/organization being able to attain the post-conventional stage of moral reasoning in which critical and reflective reasoning is dominant.<sup>18</sup>



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<sup>18</sup> See generally J.L. GOLDSTEIN, M. KAHLER, R.O. KEOHANE & A-M SLAUGHTER (eds.), *LEGALIZATION AND WORLD POLITICS* (2001).



**Figure 1: Kohlberg's Stages of Moral Development**

This ‘softly, softly’ approach is particularly apt for ASEAN. First, such an approach seeks and values consensus, rather than contestation and confrontation. Secondly, this approach recognizes the virtue of an incremental approach as opposed to a top-down rule-implementation. Thirdly, the soft law approach can facilitate the creation of a sense of mutual obligation and collective responsibility between member-states and shape their individual and collective organizational behavior even where the threat of sanctions or legal action is minimal.<sup>19</sup> The Charter is the putative platform on which hard law interacts with the soft law dimension of ASEAN norms and values to generate meaningful legal effects. In keeping with the ASEAN Way of consensual decision-making, this approach is helpful in shifting member-states’ expectations and in harmonizing the governance of ASEAN. In this regard, the ASEAN Charter can also be treated as a soft law agreement that plays a reflexive role in treaty interpretation within ASEAN. This specific role in the proper interpretation of a treaty encompasses

<sup>19</sup> All that the Charter provides for is that “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.” *See* Article 27(2).

the common understanding of all the parties to a treaty.<sup>20</sup>

This ‘hybrid’ nature of the ASEAN Charter means that the embedded soft law dimension will create a legally binding effect if the hard law Charter provisions also encompass the relevant remit, understanding, acceptance, and compliance. Crucially, soft- and hard-law dimensions also give expression to the principles, norms, and values widely accepted and recognized as fundamental values representing the common intent and aspirations of member-states. The Charter’s legal hybridity positions ASEAN to operate in a diverse, pluralist context while promoting the *raison d’être* of ASEAN and furthering the centrality of ASEAN.<sup>21</sup>

The soft law approach pivots on the centrality of developing commitment to common values and ideals that all member-states can identify with and use to guide their policy responses, activities and interactions vis-à-vis ASEAN and other member-states. Given the differing attitudes and interests of member-states towards ASEAN, the Charter is arguably more effective in reinforcing, rather than enforcing, the normative environment of ASEAN.<sup>22</sup> Even if we do not accept that premise, we can appreciate the abiding commitment to the non-interference and consensus within ASEAN. These norms were the bedrock of ASEAN for much of its existence and enabled ASEAN to confidence-build in the tumultuous early years. It also enabled ASEAN to welcome into its fold the Indochinese members, viz Cambodia, Laos, Myanmar, and Vietnam, which subscribe to very different political ideologies and had vastly poorer socio-economic backgrounds.

Crucially, these norms had helped ameliorate suspicion, reduce the tendency to resort to force, and build trust and further cooperation in what was previously an endemically conflict-ridden region. As the constructivist school of international relations argues, it is the collective norms of non-violence in inter-state relations, with consultation and consensus as critical elements, that

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<sup>20</sup> See *First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation*, REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTY-FIFTH SESSION (Geneva, May 6-June 7, and July 8-August 9, 2013), UN Doc. A/CN.4/660, p. 27.

<sup>21</sup> As defined by Article 1(15) of the ASEAN Charter, centrality is where ASEAN is the “primary driving force” in “its relations and cooperation with its external partners in a regional architecture that is open, transparent and inclusive.”

<sup>22</sup> As Narine argues, ASEAN matters for its role in “reinforcing the normative environment of the region.” See S. Narine, *Forty Years of ASEAN: A Historical Review*, 21 *PACIFIC REVIEW* 411-429 (2008).

have shaped ASEAN member-states' attitudes and identities.<sup>23</sup> The Charter has invited the reconsideration of the relevance and saliency of these norms in the current efforts to make ASEAN a rule-based organization and to renew its relevance in a rapidly changing geopolitical and economic environment.

Relevance is integral to ASEAN centrality, which in turn requires ASEAN to be coherent and effective by working together in a shared enterprise even though member-states have different political and economic interests. As Singapore's Prime Minister put it, "The alternative of a looser ASEAN, where each member state is left to fend for itself, and goes its own separate way, will make ASEAN less relevant not only to its members but also its partners and to other powers."<sup>24</sup>

While soft law is at the bottom of the hierarchy of legal rules and norms, it is helpful to recognize and appreciate the differentiation between the ostensible legally binding force of the hard law in the Charter and the regulating effects of soft law that permeates the Charter. In many respects, recognizing the role of soft law in interpreting, applying, understanding, and adding details to the hard law provisions in the Charter will help us appreciate the iterative process and the socializing function of the Charter.

#### IV. ADAPTING THE ASEAN WAY TO STAY RELEVANT

##### *A. Affirming and Tweaking National Sovereignty*

Unlike the European Union (EU), comprising 27 member-states and 490 million citizens, ASEAN does not pool the sovereignty of its member-states to the same extent. Despite its fair share of difficulties and disagreements and lacking natural coherence, ASEAN has been a relatively cohesive grouping of member-states. While there have been the occasional cross-border disputes, no two member-states have gone into armed conflict with each other since ASEAN's founding. It has engendered intra-regional amity and comity within Southeast Asia by

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<sup>23</sup> See, e.g., AMITAV ACHARYA, *CONSTRUCTING A SECURITY COMMUNITY IN SOUTHEAST ASIA: ASEAN AND THE PROBLEM OF REGIONAL ORDER* (2001).

<sup>24</sup> Singapore Prime Minister Lee Hsien Loong's speech at the opening of the 32<sup>nd</sup> ASEAN Summit, April 28, 2018, in Singapore.

nurturing a culture of mutual respect and mutual accommodation in bilateral and multilateral interactions among ASEAN member-states.<sup>25</sup> With regional security secured, economic community building can proceed.<sup>26</sup>

To that extent, ASEAN has been facilitative of regional economic development by providing a stable regional political order. Although ASEAN has been likened to the EU, ASEAN members are realistic that their community building will not be as broad and deep as the EU, notwithstanding the concern that ASEAN was in danger of atrophying with the cessation of the communist threat.<sup>27</sup> ASEAN member-states are pragmatic to a fault in giving regard to the reality and challenges of the diversity of history, culture, politics, language, religion, and economic development within ASEAN for it to be integrated into a union like the EU with components such as having a common currency, a regional judiciary, and legislature.

Prior to the Charter, ASEAN's lack of legal personality and clear rules of engagement were regarded as hampering its functionality and effectiveness as the foremost inter-governmental organization in Southeast Asia, and perhaps even in Asia. Put simply, ASEAN suffered (and still suffers) from the perception

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<sup>25</sup> This has led to the self-congratulatory mantra that “no two ASEAN member-states have ever gone to war with each other.” The UN Secretary-General has affirmed the shared role of regional organizations in resolving crises that occur in their regions and that regionalism as a component of multilateralism is necessary and feasible. *See further Report of the Secretary-General on the Relationship between the United Nations and Regional Organizations, in Particular the African Union, in the Maintenance of International Peace and Security,*” United Nations Security Council S/2008/186, April 7, 2008. For a discussion on the wider ambit of security in ASEAN, see ALAN COLLINS, *BUILDING A PEOPLE-ORIENTED SECURITY COMMUNITY THE ASEAN WAY* (2013) and IMELDA DEINLA, *THE DEVELOPMENT OF THE RULE OF LAW IN ASEAN: THE STATE AND REGIONAL INTEGRATION* (2017).

<sup>26</sup> *See also* AMITAV ACHARYA, *CONSTRUCTING A SECURITY COMMUNITY IN SOUTHEAST ASIA: ASEAN AND THE PROBLEM OF REGIONAL ORDER* (3<sup>rd</sup> edition, 2014).

<sup>27</sup> For the similarities and differences between regionalism and integration in the EU and ASEAN, see LAURA ALLISON, *THE EU, ASEAN AND INTERREGIONALISM: REGIONALISM SUPPORT AND NORM DIFFUSION BETWEEN THE EU AND ASEAN* (2015), L. Henry, *The ASEAN Way and Community Integration: Two Different Models of Regionalism*, 13 *EUROPEAN LAW JOURNAL* 857-879 (2007). *See also* E. Moxon-Browne, *Political Integration in the European Union: Any Lessons for ASEAN?*, in *EUROPE AND ASIA: REGIONS IN FLUX* (P. Murray ed., 2008) and Reuben Wong, *Model Power or Reference Point? The EU and the ASEAN Charter*, 25 *CAMBRIDGE REVIEW OF INTERNATIONAL AFFAIRS* 669-682 (2012).



problem of being less than the sum of its parts.<sup>28</sup> There remains the concern that a weakened ASEAN could be a source of regional instability. Further, ASEAN's internal weaknesses will negate its effectiveness and relevance as a regional organization. Externally, much has been made of the rise of China and India, and how it is important for ASEAN to leverage on these growth engines.<sup>29</sup>

In security matters, ASEAN was instrumental in establishing the ASEAN Regional Forum (ARF), the only regular multilateral platform for ASEAN and its stakeholders in the Asia-Pacific region to discuss security matters. For a region that has tacitly subscribed to the realist doctrine of a balance of powers, the concern is that ASEAN could become subordinate to external elements within its own backyard.<sup>30</sup> ASEAN member-states realized, with varying degrees of urgency and commitment, that ASEAN could be eclipsed, or worse be made marginal and irrelevant in East Asian international affairs.<sup>31</sup> Put simply,

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<sup>28</sup> As Singapore diplomat Tommy Koh puts it, "ASEAN suffers from a serious perception problem ... policy-makers in Washington and Brussels do not take it seriously and continue to disrespect the institution." See T. Koh, *ASEAN at Forty: Perception and Reality*, in REGIONAL OUTLOOK SOUTHEAST ASIA, 2008-2009 8 (D. Nair & Lee P.O. eds., 2008). See also, SHAUN NARINE, *EXPLAINING ASEAN: REGIONALISM IN SOUTHEAST ASIA* (2002).

<sup>29</sup> ASEAN regionalism also has to be considered in light of other Asian regionalisms. The literature on Asian regionalism is a burgeoning one. Useful primers include NICHOLAS TARLING, *REGIONALISM IN SOUTHEAST ASIA: TO FOSTER THE POLITICAL WILL* (2006), and MARK BEESON, *INSTITUTIONS OF THE ASIA-PACIFIC: ASEAN, APEC, AND BEYOND* (2009). See also ALICE D. BA, *(RE)NEGOTIATING EAST AND SOUTHEAST ASIA: REGION, REGIONALISM, AND THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS* (2009), H. DIETER (ED.), *THE EVOLUTION OF REGIONALISM IN ASIA: ECONOMIC AND SECURITY ISSUES* (2007); A. Hurrell, *One World? Many Worlds? The Place of Regions in the Study of International Society*, 83 *INTERNATIONAL AFFAIRS* 127 (2007); D. Camroux, *Asia ... Whose Asia? A 'Return to the Future' of a Sino-Indic Asian Community*, 20 *PACIFIC REVIEW* 551-575 (2007). But see the analysis that ASEAN regionalism is an illusion and delusion in DAVID MARTIN JONES and M.L.R. SMITH, *ASEAN AND EAST ASIAN INTERNATIONAL RELATIONS: REGIONAL DELUSION* (2006).

<sup>30</sup> See F. Frost, *ASEAN's Regional Cooperation and Multilateral Relations: Recent Developments and Australia's Interests*, PARLIAMENT OF AUSTRALIA RESEARCH PAPER No. 12 (October 9, 2008). For a succinct discussion of the security challenges facing ASEAN, see S.W. SIMON, *ASEAN AND ITS SECURITY OFFSPRING: FACING NEW CHALLENGES* (2007).

<sup>31</sup> Bill Emmott describes ASEAN's fear as a "collective sentiment of being overshadowed by others: Japan, to the north-east, the United States, across the Pacific, but above all China, which sits all around their northern boundaries. Their problem, in other words, is of being small fish in a sea dominated by big ones." See Emmott's *RIVALRY: HOW THE POWER STRUGGLE BETWEEN CHINA, INDIA*

ASEAN would lose its centrality and the region and member-states would be dictated to by external powers.

Hence, the constant refrain that ASEAN must be “in the driver’s seat” and the ASEAN mantra of “regional solutions to regional problems.” Collectively, they seek to minimize external intervention in Southeast Asia and for ASEAN to be in-charge of its own destiny rather than have its destiny and the rules of engagement determined by non-ASEAN players.<sup>32</sup> This has been the *raison d’être* of ASEAN. To lose that ownership and leadership in their own backyard in a rapidly changing geopolitical landscape could mean a significant loss of control over the destiny of the region, and possibly external intervention in ASEAN affairs by external powers. To avoid such a scenario, ASEAN has to be sufficiently cohesive to be a key player in its own right in regional politics, and not become an arena for external elements to advance their strategic causes in self-interest. This imperative for a graduated broadening and deepening of regional integration occurs within the larger quest for stability, peace, and economic development.

To that end, ASEAN had to move beyond dialoguing, informal workings, weak commitments to ASEAN agreements, and an inadequate organizational set-up. The Charter was part housekeeping, part aspiration, and part goal setting. As the legal and institutional framework of ASEAN, not only does it belatedly confer upon ASEAN a legal personality, it serves to codify regional norms, rules, and values. It remains a work-in-progress although institutions and processes, such as the human rights body, ASEAN Inter-governmental Commission on Human Rights (AICHR), either have been or are being established pursuant to the Charter since 2007.<sup>33</sup> Such institutions and processes will need to

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AND JAPAN WILL SHAPE OUR NEXT DECADE 45 (2008).

<sup>32</sup> See also E. Goh, *Southeast Asian Perspectives on the China Challenge*, 30 JOURNAL OF STRATEGIC STUDIES 809-832 (2007); A. Collins, *Forming a Security Community: Lessons from ASEAN*, 7 INTERNATIONAL RELATIONS OF THE ASIA-PACIFIC 203-225 (2007).

<sup>33</sup> TAN HSIEN-LI, THE ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS: INSTITUTIONALISING HUMAN RIGHTS IN SOUTHEAST ASIA (2011); VITIT MUNTARBHORN, UNITY IN CONNECTIVITY?: EVOLVING HUMAN RIGHTS MECHANISMS IN THE ASEAN REGION (2013). See also ROBERT BECKMAN ET AL., PROMOTING COMPLIANCE: THE ROLE OF DISPUTE SETTLEMENT AND MONITORING MECHANISMS IN ASEAN INSTRUMENTS (2016), and SIMON CHESTERMAN, FROM COMMUNITY TO COMPLIANCE: THE EVOLUTION OF MONITORING OBLIGATIONS IN ASEAN (2015).

be workable and relevant to member-states and to ASEAN.

ASEAN patently needs to be more action-driven, organizationally responsive and effective, and cohesive. This is particularly so given the rapidly evolving geopolitical situation with China, India, Japan, and Russia showing renewed interests in Southeast Asia. This entails that member-states dutifully observe the rights and responsibilities of membership. A more stable, cooperative, and robust framework for ASEAN enables member-states to engage purposively with each other and with external partners. The process of drawing up the constitution of ASEAN was long overdue. Had the Charter been in place before enlarging its membership to include Myanmar, Laos, Vietnam and Cambodia, ASEAN could have avoided some of the competing and even conflicting interests, needs, and motivations in ASEAN matters between the founding and newer members.

Article 1 of the Charter elaborates on ASEAN's purposes. It expands the seven "aims and purposes" in the ASEAN Declaration (also known as the Bangkok Declaration) adopted on August 8, 1967. The ASEAN Declaration describes ASEAN as an "Association for Regional Cooperation." The Charter reaffirms that all member-states have "equal rights and obligations."<sup>34</sup> Of significance, Article 3 declares ASEAN's conferral of "legal personality" and the resultant ability to make agreements in its own right.<sup>35</sup> 'Legalizing' ASEAN clarifies that ASEAN is not an informal family grouping of Southeast Asian nation-states but one that has status and standing under international law as well as under domestic laws of member-states. However, as Simon Chesterman rightly observes, "personality at the international level is not so much a status as a capacity. It matters less what you *claim* than what you *do*."<sup>36</sup> With the Charter, ASEAN's challenge is no longer that it lacks a legal personality but whether it can engender

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<sup>34</sup> Article 5(1), ASEAN Charter.

<sup>35</sup> For a discussion of what ASEAN's legal personality does or does not do, see S. Chesterman, *Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person*, 12 SINGAPORE YEAR BOOK OF INTERNATIONAL LAW 199-211 (2008).

<sup>36</sup> *Id.* (emphasis in original). To be sure, ASEAN had always existed even if it lacked a legal enabling clause on its existence. For instance, ASEAN's role and standing as a convener, facilitator, and regional architect of key East Asian and Asia-Pacific intergovernmental organizations and forums such as the ASEAN Regional Forum (ARF), Asia-Pacific Economic Cooperation (APEC), and the East Asia Summit (EAS) were never in doubt even though it had no *de jure* legal personality.

a shared vision of the purpose of its existence, of its place in the world.<sup>37</sup>

The common values of ASEAN are found in Article 2 titled “Principles.” The reconfiguration of ASEAN and community building cannot be achieved solely by a mechanical construction of institutions. Institution building is not about organizational architecture *per se* but needs to be complemented by a subscription to a core of common values. Common values give added meaning to the organization architecture, and help bind the organization. The Charter recognizes ASEAN’s diversity, respect for the different cultures, languages, and religions while emphasizing “common values in the spirit of unity in diversity.”<sup>38</sup> The majority of the common values codified in the Charter, such as sovereignty, collective responsibility, renunciation of the use of force, peaceful settlement of disputes, adherence to rule of law, good governance, democratic principles and constitutional government, are not problematic as they are in accord with universal values. It is how they are applied and practiced that is the nub of the issue.

Shared values can help to discipline shared purpose. Yet, shared purpose is real only if political will exists on that score among the member-states. Clothing ASEAN with rules and legal personality, as the Charter does, is the easy part. Mere recognition of such values and norms is one thing but observing and living up to those values meaningfully, and recognizing the distinction between ASEAN the organization and ASEAN member-states, are separate matters altogether.

With ASEAN acquiring a legal personality, it also acquires a formal decision-making capacity and contracting capacity in the international arena. The harder part is whether the legal personality is meaningful and relevant to its stakeholders within and outside the region. Previously, it was not entirely clear that in negotiating with ASEAN, whether ASEAN was speaking authoritatively with one voice, or there was a cacophony of 10 voices – with some voices louder than others, and others at cross-purposes. Nevertheless, even with its own legal personality, one should not expect ASEAN members to act in unison on all

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<sup>37</sup> *Id.* See also L. Hsu, *Towards an ASEAN Charter: Some Thought from the Legal Perspective*, in FRAMING THE ASEAN CHARTER: AN ISEAS PERSPECTIVE (R.C. Severino, compiler, 2005).

<sup>38</sup> Article 2(2)(1), ASEAN Charter.

matters at all times, especially on controversial issues.<sup>39</sup>

It remains to be seen whether ASEAN will be a mere collective of Southeast Asian nation-states or whether it will rise to be a moral and political agent in its own right. Since the Charter entered into force, ASEAN – as a regional inter-governmental organization – has become more prominent. For instance, there is the Committee of Permanent Representatives to ASEAN (CPR), which is constituted by the Permanent Representatives of ASEAN member-states at the rank of ambassadors based in Jakarta. The CPR supports ASEAN's Community-building efforts by coordinating with the three Community pillars and ASEAN Sectoral Ministerial Bodies, liaising with the Secretary-General of ASEAN and the ASEAN Secretariat, as well as promoting ASEAN's cooperation with Dialogue Partners and external parties. With ASEAN as a separate legal identity distinct from that of its member states, China, India, Japan, the Republic of Korea, the United States, Russia, and the EU are some of the countries with ambassadors accredited to ASEAN.

However, ASEAN will have to continue to forge and acquire a distinct identity of its own. This separate identity is central to its *raison d'être*. This distinction is vital if ASEAN is to be relevant intra-regionally and be a player in regional and international affairs. Dunne puts it well: “[A] moral agent possesses an identity that is more than an aggregate of the identities of its parts; and the collective agent has a decision-making capacity.”<sup>40</sup> It is perhaps not too far-fetched to suggest that the Charter is a measure of self-help in regional integration as part of ASEAN's gradual development, in response to internal and external factors, and to help entrench ASEAN governance with minimal pooled sovereignty. To be sure, much work remains to be done to clothe it with substance and ensure that ASEAN's collective sovereignty is distinct and separate from that of its constituent member-states.

The original founding members of ASEAN, viz Indonesia,

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<sup>39</sup> As Dunne observes of the European Union (EU), the expectation of complete agreement is unrealistic even in the EU's context: “[H]aving agency does not mean the union will be able to mobilize a common position at all times. Indeed, the likelihood of this occurring has been reduced by the process of enlargement to a more numerous group in which consensus is harder to achieve and where the gap between the more powerful and the weaker members (especially when it comes to military capability) is enormous.” See T. Dunne, *Good Citizen Europe* 84 INTERNATIONAL AFFAIRS 13, 19 (2008).

<sup>40</sup> T. Dunne, *Good Citizen Europe* 84 INTERNATIONAL AFFAIRS 13, 19 (2008). It should be noted that ASEAN, even post-Charter, is not modeled on the EU.

Malaysia, the Philippines, Singapore, and Thailand, adopted and religiously adhered to a policy of non-interference.<sup>41</sup> It was then a pragmatic and strategic policy given the bilateral spats and conflicts between the founding members. The larger concern was the potential domino effect of communism with the Vietnam War at its doorstep. The strategic imperative was to develop national and regional resilience among the five non-communist original members of ASEAN. Thus, the abiding demand for the sovereignty norm, encompassing non-interference and consensual decision-making, was not surprising at this nascent stage of community building. There was a trade-off, of course.

The downside of unbridled pragmatism is the inherent tendency to veer towards acting without principle. Hence, it is unsurprising that keen observers have noted that “ASEAN’s core norms are affiliated with political realism, which might provide significant potential for intermittent backsliding and unilateral reversals in Southeast Asian regionalism.”<sup>42</sup>

The Charter enshrines the so-called ‘ASEAN Way’ of non-interference in the internal affairs of member-states. Article 2 states that:

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; ...
- (e) non-interference in the internal affairs of ASEAN Member-states; ....

As such, the Charter advocates enhanced consultations on matters that seriously affect ASEAN’s common interests, and consensual decision-making to maintain regional unity. The affirmation of sovereignty and non-interference in the Charter arguably valorizes these values and norms within ASEAN. These values have been often criticized for the excesses found in some ASEAN member-states, particularly those with autocratic regimes. ASEAN’s supposed complicity in turning a blind eye to the Myanmar excesses, prior to the 2010 leadership change, was a

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<sup>41</sup> Brunei joined ASEAN in January 1984, Vietnam in July 1995, Myanmar and Laos in July 1997, and Cambodia in April 1999.

<sup>42</sup> J. Ruland and A. Jetschke, *40 Years of ASEAN: Perspectives, Performance and Lessons for Change*, 21 *PACIFIC REVIEW* 397, 406 (2008).

major source of grievance for ASEAN's critics. More recently, the Rohingya human rights and humanitarian crisis in Myanmar is seriously challenging ASEAN's credentials in reining in the human rights abuses in a member-state.

Much as the Charter seems to defend the constituent ingredients of the ASEAN Way, however, one should not be too hasty to regard their inclusion as a blatant codification of problematic values and norms. Although the Charter was a milestone for ASEAN, the Charter does not make revolutionary changes to ASEAN. The Charter does not represent a 'big bang' approach to changing the internal dynamics, workings, and the *raison d'être* of ASEAN.

A more nuanced interpretation is needed: The Charter embodies a calibrated approach to promote change amid continuity. For ASEAN to maintain its geopolitical stature and relevance, the Charter must catalyze change and inspire reforms in terms of how member-states conduct themselves vis-à-vis each other and with ASEAN. To 'outlaw' or scrub out of existence norms that have kept ASEAN relatively cohesive despite the vast differences between member-states is not only foolhardy but would also undermine the foundations of ASEAN.

Further, the geopolitical reality of interdependence in today's world does not make regional cooperation a foregone conclusion. This applies to ASEAN where cooperation has to be consciously worked upon, encouraged, and scaled-up in the years ahead. This paradox is profoundly manifested in ASEAN where bilateral spats are to be expected among close neighbors; indeed, enlargement has made some of these bilateral disagreements and tensions more marked.<sup>43</sup>

Critics forget that ASEAN has maintained its relevance by tinkering, not overhauling, then-existing rules. ASEAN's institutional path dependency, pivoting on the ASEAN Way, necessarily requires incrementalism being the preferred approach to institutional change. Although the non-interference principle is ostensibly maintained in the Charter, non-interference is probably no longer the same creature that it was when the Charter came into force.

Article 20(1) stipulates that, as "a basic principle,"

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<sup>43</sup> N. GANESAN, *BILATERAL TENSIONS IN POST-COLD WAR ASEAN* (1999). *See also* KISHORE MAHBUBANI AND JEFFERY SNG, *THE ASEAN MIRACLE: A CATALYST FOR PEACE* (2017).

consultation and consensus shall be the basis of decision-making in ASEAN. Where consensus is not achieved, the Charter provides that the ASEAN Summit “may decide how a specific decision can be made.”<sup>44</sup> This is significant for two reasons. First, while the default approach is consultation and consensus, the Charter provides that the ASEAN Summit may decide on a basis other than consensus.<sup>45</sup> In egregious cases such as a serious breach of the Charter or non-compliance, this means that the ASEAN Summit can possibly decide with a wider latitude of options available. Second, the deliberate use of “decide” in the Charter is significant because it connotes influencing or affecting resolutely the outcome of an issue.

“Consensus” and “consultation” may lack the determinative edge that “decide” does. Thus far, the ASEAN Summit has not found cause to deviate drastically from precedents and is mindful of not unnecessarily derogating from ASEAN’s principles enshrined in Article 2 of the Charter. But the Charter does furnish ASEAN with this option as a measure of last resort. This option is also provided for unresolved disputes (Article 26), and for non-compliance by a member state of findings, recommendations, or decisions from an ASEAN dispute settlement mechanism (Article 27). Thus, a significant but under-stated inroad is being made to the consensual decision-making framework.

Consensus decision-making in ASEAN has been over-hyped. To be sure, this norm is important and buttresses how decisions are made within ASEAN. However, a closer examination of the practice of consensus decision-making will demonstrate that unanimity is not necessary in every decision taken. Instead, and more accurately, consensus decision-making refers to a situation in which no member state objects so strongly to a decision that it is compelled to register its dissent. This is a face-saving gesture that is saliently necessary in associational life in ASEAN. Consensus decision-making results in no member state “losing face” as a consequence of being the outlier.

While useful in the fledgling days of ASEAN, consensus decision-making can be unduly restrictive and contains severe weaknesses. This was evident as ASEAN grew from the original five to the current 10 member-states. There was recognition that

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<sup>44</sup> Article 20(2), ASEAN Charter.

<sup>45</sup> The Charter vests the ASEAN Summit, comprising the Heads of State or Government of member-states, with the authority of the supreme policy-making body of ASEAN (Article 7(2)(a)).



the pace of integration in various spheres of endeavor should not be set by the slowest member. Hence, since the late 1990s, especially in economic matters, a flexible approach towards the implementation of decisions taken (or “flexible participation”) has been adopted.<sup>46</sup>

Two approaches commonly used are “2+X” and “ASEAN minus X.” Both modes emphasize the general principle that member-states able and ready to implement an economic decision would proceed first. There is no need for every member state to agree with the decision and to proceed in tandem. The “2+X” flexible participation approach has an even lower implementation threshold: It only requires two member-states that are ready; those who are not ready can join in when they are ready.

Furthermore, in the “ASEAN minus X” approach, the focus is not on unanimity. Rather, the central idea is that no member should hold back the group. Cognizant of the differential capacity of member-states to participate in different ASEAN projects in the economic realm, the flexible participation approach can facilitate the implementation of economic plans and decisions without undue delay. ASEAN member-states are aware of their different capacities, priorities and perspectives towards economic and political integration.

In addition, another dimension of consensus decision-making is the growing popularity of ASEAN agreements coming into force without requiring the ratification of all signatories.<sup>47</sup> Again, this reflects the subtlety of consensus as not requiring unanimity. For example, the ASEAN Agreement on Transboundary Haze Pollution requires only six ratifications.<sup>48</sup> Likewise, the Treaty on Southeast Asia Nuclear Weapon Free Zone requires only seven ratifications.<sup>49</sup> Another example is the ASEAN Free Trade Area where there is a two-track system for the abolishment of all import duties: The original six ASEAN member-states were to comply by 2010, with the other four member-states by 2015.

The Charter, without being explicit, has opened the door to a robust if nuanced interpretation and application of the norm of non-interference. The Charter seeks to preserve the benefits of the

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<sup>46</sup> See also Article 21(2), ASEAN Charter.

<sup>47</sup> The Charter, however, requires ratification by all member-states (Article 47(2)).

<sup>48</sup> Article 29(1), ASEAN Agreement on Transboundary Haze Pollution (2002), [http://www.aseansec.org/images/agr\\_haze.pdf](http://www.aseansec.org/images/agr_haze.pdf).

<sup>49</sup> Article 16(1), Treaty on Southeast Asia Nuclear Weapon Free Zone (1995), <http://www.aseansec.org/2082.htm>.

consensus decision-making norm but is sensitive to and sufficiently nuanced to manage the downsides to ensure that no member-state feels compelled to act unilaterally to the collective detriment of ASEAN.<sup>50</sup> To do away completely with the norm would make the Charter's signing and ratification more than a decade ago untenable. More than that, associational life in ASEAN can become fraught with tension, suspicion, and disunity if unanimity is insisted upon, or if majority rule is the *modus operandi* to decision-making within ASEAN. The Charter seeks to avoid these situations in devolving high policy decision-making to the Summit.

While ASEAN is keen to maintain the norm of non-interference as a means to sustaining regional comity and unity, it is conscious that the norm cannot be applied inflexibly, especially when internal developments in one member state affect other ASEAN members or ASEAN collectively. Consultative and consensual decision-making had served ASEAN reasonably well in the early days when ASEAN was smaller. Although such a mode of decision-making contributes to confidence building, it can equally lead to indecision and incapacity to act resolutely and implement effectively.

This has been evident with the addition of new member-states in the 1990s, and with the geopolitical and geo-economic context being vastly different from 1967. Not only has decision-making become relatively more stymied and contentious, but it also strained ASEAN's reputed informal and cohesive way of getting things done. In turn, the practical effect has enabled a determined or recalcitrant member to hold ASEAN to ransom. For example, prior to 2010, Myanmar had been able to use this, in concert with the policy of non-interference, to prevent ASEAN from acting more decisively and substantively on the former's atrocious human rights record. Going by recent experience, this norm is being reinterpreted and is not as sacrosanct as it is often made out to be.

Although Article 21 of the Charter provides for a flexible, two-tiered approach in economic matters, that approach has also

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<sup>50</sup> For the argument that the Charter is evidence of ASEAN's 'cautious liberal turn,' see J. Dosch, *ASEAN's Reluctant Liberal Turn and the Thorny Road to Democracy Promotion*, 21 *PACIFIC REVIEW* 527-545 (2008). See also E.M. Kuhonta, *Walking a Tightrope: Democracy versus Sovereignty in ASEAN's Illiberal Peace*, 19 *PACIFIC REVIEW* 337-358 (2006).

been applied in non-economic matters.<sup>51</sup> For instance, ASEAN proceeded with implementing the Charter without waiting for all member-states to ratify it. The 41<sup>st</sup> ASEAN Ministerial Meeting, held in Singapore in July 2008, had started work on the Charter viz the dispute settlement mechanism under Article 25. This was similarly the case for the drafting of the terms of reference for the ASEAN Human Rights Body under Article 14. There is an emerging discourse that the “all-or-nothing” approach will not benefit member-states and ASEAN. The shift towards flexible participation and implementation that is inclusive is discernible and is indicative of a nuanced re-calibration of the consensus approach.

What the Charter does is to facilitate the basic institutionalization and strengthening of the institutions and processes of ASEAN. This can also help manage the danger of a bifurcated ASEAN developing, in which member-states are operating at two different speeds, where the gap between the original and new members is in constant danger of becoming a chasm that can leave ASEAN bereft of principle and purpose. This is the approach taken in two controversial topics: Human rights in ASEAN, and the relationship between Myanmar and ASEAN.

### ***B. ASEAN and Human Rights: Mutually Exclusive?***

Unsurprisingly, the issue of human rights is controversial in ASEAN. As such, the provision in the Charter for a human rights mechanism in ASEAN was a significant step in the right direction. The state of democratic development and commitment to democracy and rule of law varies from member state to member state. In the international fora, ASEAN is seen as an outlier, primarily because of its (in)action towards and tolerance of human rights abuses in Myanmar. Nonetheless, ASEAN is increasingly sensitive to and cognizant of international concerns and developments on human rights. It is fully aware that it cannot sidestep this issue even within ASEAN.

In essence, ASEAN’s position on human rights emphasizes that human rights have a role to play in the development of ASEAN and individual member-states. However, ASEAN

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<sup>51</sup> Article 21(2) states: “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.”

eschews a universal approach to human rights. A steadfast position that ASEAN adheres to is that human rights have to operate within and be sensitive to the socio-political and cultural milieu. ASEAN's perspective on human rights can be summarized as follows:<sup>52</sup>

- (1) The equality, inter-relatedness and indivisibility of civil, political, economic, social and cultural rights.
- (2) The promotion of human rights must take into account the specific cultural, social, economic and political circumstances, and in the context of development and international cooperation.
- (3) The rejection of the politicization of human rights, including its use as a precedent condition for economic cooperation and development assistance.
- (4) The promotion and protection of human rights must respect the national sovereignty, territorial integrity and non-interference in the internal affairs of states.
- (5) The balance of individual rights and community rights.

ASEAN's position on human rights was clearly enunciated following the World Conference on Human Rights in Vienna in 1993. The careful wording of the joint communiqué by the 26<sup>th</sup> ASEAN Ministerial Meeting that year was evident and deliberate:

16. The Foreign Ministers welcomed the international consensus achieved during the World Conference on Human Rights in Vienna, 14-25 June 1993, and reaffirmed ASEAN's commitment to and respect for human rights and fundamental freedoms as set out in the Vienna Declaration of 25 June 1993. They stressed that human rights are interrelated and indivisible comprising civil, political, economic, social and cultural rights. These rights are of equal importance. They should be addressed in a balanced and integrated manner and protected and promoted with due regard for specific

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<sup>52</sup> See also Thio L.A., *Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to go before I Sleep*, 2 YALE HUMAN RIGHTS & DEVELOPMENT LAW JOURNAL 1-86 (1999). See generally ANTHONY J. LANGLOIS, *THE POLITICS OF JUSTICE AND HUMAN RIGHTS: SOUTHEAST ASIA AND UNIVERSALIST THEORY* (2001).

cultural, social, economic and political circumstances. They emphasized that the promotion and protection of human rights should not be politicized.

17. The Foreign Ministers agreed that ASEAN should coordinate a common approach on human rights and actively participate and contribute to the application, promotion and protection of human rights. They noted that the UN Charter had placed the question of universal observance and promotion of human rights within the context of international cooperation. They stressed that development is an inalienable right and that the use of human rights as a conditionality for economic cooperation and development assistance is detrimental to international cooperation and could undermine an international consensus on human rights. They emphasized that the protection and promotion of human rights in the international community should take cognizance of the principles of respect for national sovereignty, territorial integrity and non-interference in the internal affairs of states. They were convinced that freedom, progress and national stability are promoted by a balance between the rights of the individual and those of the community, through which many individual rights are realized, as provided for in the Universal Declaration of Human Rights.

18. The Foreign Ministers reviewed with satisfaction the considerable and continuing progress of ASEAN in freeing its peoples from fear and want, enabling them to live in dignity. They stressed that the violations of basic human rights must be redressed and should not be tolerated under any pretext. 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.<sup>53</sup>

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<sup>53</sup> Joint Communiqué of the Twenty-Sixth ASEAN Ministerial Meeting in

Article 1(7) of the Charter states that one of ASEAN's purpose 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." Article 14 of the Charter states that "ASEAN shall establish an ASEAN human rights body." This body is the ASEAN Intergovernmental Commission on Human Rights (AICHR), which was established in 2009. AICHR "shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting."<sup>54</sup> At the foreign ministers level (the ASEAN Foreign Ministers Meeting (AMM)), which AICHR directly reports to, they agreed to such a provision being included in the Charter although Myanmar (earlier, Cambodia, Laos and Vietnam) had objected to such a body.<sup>55</sup> In 2012, the ASEAN Human Rights Declaration (AHRD) was adopted.<sup>56</sup> The AHRD has been criticized for lacking teeth, especially in terms of rights protection, given that it defers to domestic laws of member-states and the commitment to principles of non-interference and consensus decision-making. To be sure, political compromise was the subtext of the AHRD, and it was not meant to be a legally-binding document.

Given the varying commitment to human rights among ASEAN member-states, ASEAN suffers from a credibility gap in that it is unable to defend human rights assertively and resolutely by example and through advocacy. There is also the issue of what

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Singapore, July 23-24, 1993, <http://www.aseansec.org/2009.htm>.

<sup>54</sup> As expected, human rights were a key area of disagreement among ASEAN members in the draft Charter. See *Asean Divided over Regional Charter*, FINANCIAL TIMES – ASIA, July 31, 2007, at 2. See also the efforts by the regional civil society Working Group for an ASEAN Human Rights Mechanism. The Group's primary goal is to establish a regional human rights commission for ASEAN. For more details, see <http://www.aseanhrmech.org/>.

<sup>55</sup> Singapore's Foreign Minister noted the disagreement on the nature the ASEAN human rights organization should take. However, he assured Singapore parliamentarians that the body "will not be a toothless paper tiger.... It is precisely because of a lack of agreement among ASEAN countries that the human rights body was called a 'body' and not a 'commission'.... [W]e will have in the end a body which, while lacking in teeth, will at least have a tongue and a tongue will have its uses." Remarks in Singapore Parliament during Committee of Supply Debate, Feb. 28, 2008.

<sup>56</sup> See ASEAN Human Rights Declaration of Nov. 18, 2012, <http://www.asean.org/news/asean-statement-communications/item/asean-human-rights-declaration>.

the core human rights in ASEAN should be. Although Article 14 may not go as far as it ought to, the dynamics at work suggest that AICHR can only evolve in the direction of human rights gaining more prominence within ASEAN. All 10 member-states were willing parties to the AHRD; and, while the progress might be dismal to some stakeholders, the fact that human rights are now a feature of ASEAN is important. Some member-states are concerned that the human rights body would be a segue for intervention by external parties in the internal affairs of a member state. This strong adherence to the ASEAN Way in this specific instance is, therefore, to be expected.

Nonetheless, the die has been cast in that human rights have acquired recognition by the ASEAN leadership as an important issue that cannot be wished away.<sup>57</sup> AICHR has moved cautiously. In recent years, it has organized activities that highlight the crosscutting nature of human rights and commissioned thematic studies, while also engaging with civil society organizations. Thematic studies on corporate social responsibility, legal aid and access to justice, and the rights of persons facing capital punishment, have been organized. While these studies are generally not too sensitive, they seek to highlight best practices and promote the role of human rights in various contexts. Thus far, AICHR consciously steers away from a rights-protection role.

Clearly, ASEAN member-states now have to deal with the issue of human rights within their individual jurisdiction and with ASEAN collectively. The unique ASEAN approach is to ground human rights on real and substantive interests and issues instead of an idealistic, aspirational approach. In this regard, the regional discourse on human rights conceives human rights as a means to an end, and not just an end in itself. As such, the emphasis on the human rights discourse and engagement in ASEAN is on tangible outcomes than a muscular 'rights-based' approach.

More than just creating greater awareness of human rights,

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<sup>57</sup> See also C.S. Renshaw, *The ASEAN Human Rights Declaration 2012*, 13(3) HUMAN RIGHTS LAW REVIEW 557-579 (2013); H.E.S. Nesadurai, *ASEAN and Regional Governance after the Cold War? From Regional Order to Regional Community?* 22 PACIFIC REVIEW 91-118 (2009); R. Burchill, *Regional Integration and the Promotion and Protection of Democracy in Asia: Lessons from ASEAN*, 13 ASIAN YEARBOOK OF INTERNATIONAL LAW 51-80 (2009). On the relationship between multilateralism and democracy, see R.O. Keohane, S. Macedo, and A. Moravcsik, *Democracy-Enhancing Multilateralism*, 63 INTERNATIONAL ORGANIZATION 1-31 (2009).

AICHR should make incremental progress towards developing a viable reporting and monitoring mechanism, and, in the fullness of time, be independent like other regional human rights commissions in Africa and Latin America. Ultimately, the Charter and ASEAN are judged on their commitment to the issue of human rights. Given the importance of human rights to the United States and European Union, ASEAN will have to be cognizant of if it seeks to enhance its dealings with those entities.

The principle of non-interference is, of course, a real stumbling block. If this principle is given *de facto* overriding veto effect, then the Charter and ASEAN will be rendered toothless. Too often, however, critics fail to appreciate that, even if ASEAN is not up to mark in this regard, it smacks of unrealism to expect the ASEAN and its member-states to improve overnight and have a flawless human rights record. The life and experience of international politics are familiar with the distinction between form and substance. On either count, ASEAN will need to be able to stand up to scrutiny – internally and externally. Requiring member-states, through the Charter, to pull themselves up by their bootstraps sends a strong signal and sets the stage for concrete action even if this is juxtaposed with incremental change and inertia.

The challenge of having robust protection of human rights in ASEAN is real. Promotional efforts are important, but Doyle posits that the ASEAN human rights mechanism would actually reduce pressure on member-states, not committed to international human rights treaty regimes, to not accord due recognition to international norms in the human rights realm.<sup>58</sup> However, a full-suite human rights regime will likely be perceived by member-states as an attempt to supersede state sovereignty and the non-interference principle so cherished by ASEAN member-states. This would potentially undermine the nascent human rights agenda in ASEAN as well. Thus, it is to be expected that ASEAN is treading very cautiously on the human rights agenda. The concern is that the human rights agenda and AICHR becomes a Trojan horse by which human rights are admitted to the domestic and regional agenda, with member-states losing the prerogative and control of the human rights debate, domestically and

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<sup>58</sup> See N. Doyle, *The ASEAN Human Rights Declaration and the Implication of Recent Southeast Asian Initiatives in Human Rights Institution-Building and Standard Setting*, 63 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 67-101 (2014).



regionally.<sup>59</sup>

Allied to this is the emergence of the putative “responsibility to protect” (R2P) norm in humanitarian law. At the basic level, R2P requires a sovereign government to protect its people from mass atrocity crimes (e.g., ethnic cleansing, genocide). However, if the government is unable or unwilling to do so, then a wider responsibility lies with the international community to take the requisite action necessary to assist preventively, and, if required, react effectively. This is the responsibility of all states. R2P focuses on assistance and prevention as well as non-military action before, during, and after a crisis. Use of force, specifically military intervention, is a last-resort option but only with the United Nations Security Council’s endorsement.<sup>60</sup> This emergent international norm will add pressure on ASEAN to intervene, when necessary, when an ASEAN member state is unable or unwilling to protect the welfare of its people in the event of mass atrocity crime.<sup>61</sup> Thus far, ASEAN has been hesitant to intervene, keeping faith with the norm of non-intervention. However, this does not mean that ASEAN turns a blind eye to human rights abuses in the region. Instead, it approaches the issue more holistically and pragmatically, using the tack of “constructive engagement.”

### *C. ASEAN and the Constructive Engagement of Myanmar*

ASEAN’s weakest link where human rights are concerned is Myanmar. Its continued “constructive engagement” policy with Myanmar had seemingly resulted in no shortage of opprobrium, embarrassment, and angst generated towards ASEAN as the policy seemed to have negligible effect.<sup>62</sup> Myanmar is seen as a clear manifestation of ASEAN’s insufficient regard for civil and political rights as well as human development. Notwithstanding

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<sup>59</sup> For the argument that ASEAN member-states are regressing in their commitment to human rights, see A. Collins, *From Commitment to Compliance: ASEAN’s Human Rights Regression?* PACIFIC REVIEW (forthcoming).

<sup>60</sup> See also GARETH EVANS, *THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL* (2008). R2P was adopted at the UN World Summit in 2005.

<sup>61</sup> On the dismal prospects for R2P in ASEAN, see N.M. Morada, *The ASEAN Charter and the Promotion of R2P in Southeast Asia: Challenges and Constraints*, 1 *GLOBAL RESPONSIBILITY TO PROTECT* 185-207 (2009).

<sup>62</sup> In recent years, “constructive engagement” has not been used by ASEAN and its member-states.

the accusations of kids-glove treatment, complicity, and cowardice, ASEAN has steadfastly stood by Myanmar as an ASEAN member, and defended its constructive engagement policy. However, unhappiness within the ASEAN ranks has been evident even prior to 2010. Suspending or expelling Myanmar from ASEAN, while talked about privately, have never been openly and seriously considered as solutions.<sup>63</sup> For people inside and outside ASEAN, this was ASEAN's failure: That its benign constructive engagement with Myanmar's military junta was a cover for inaction and ineffectiveness rather than a real pathway of reform.<sup>64</sup>

To be sure, ASEAN was increasingly mindful of international opinion and pressure in the 2000s, and how Myanmar's internal developments were undermining ASEAN's effectiveness and derailing its Charter aspirations, and throwing a spanner in the works in ASEAN's engagements with the United States and European Union.<sup>65</sup> Myanmar had become a thorn in the flesh for all concerned. In the process, ASEAN's standing and reputation have suffered.<sup>66</sup> Yet, realpolitik was at play. Ultimately, geopolitical imperatives motivate ASEAN to reach out to and keep Myanmar within the ASEAN family. For ASEAN, moral vanity, manifested primarily in economic sanctions on Myanmar by the United States and European Union, was not construed as a sensible policy. Expelling Myanmar is not a viable policy: it would neither solve Myanmar's intransigence nor result in

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<sup>63</sup> *Unity Lacking on Diplomatic Approach to Burma's Junta*, WASHINGTON POST, Oct. 25, 2007; *Losing Patience with Burma*, WALL STREET JOURNAL ASIA, Jan. 12, 2006, at 15; *It Is not Possible to Defend Myanmar*, WALL STREET JOURNAL ASIA, July 24, 2006, at 13 (op-ed by Malaysia's Foreign Minister Syed Hamid Albar); *Suspend Myanmar from Asean*, STRAITS TIMES (Singapore), Oct. 4, 2007, at 24; *Disparate Views in Asean on Crisis in the Family*, STRAITS TIMES, Oct. 10, 2007, at 13; *The Gathering Mild Rebuke*, THE ECONOMIST, Sept. 2, 2006, at 25.

<sup>64</sup> See a damning indictment in M. Suryodiningrat, *Southeast Asian Nations Risk Dissension by Ignoring Human Rights*, YALEGLOBAL, Aug. 4, 2009.

<sup>65</sup> R. Katanyuu, *Beyond Non-Interference in ASEAN*, 46 ASIAN SURVEY 825-845 (2006); L.Z. Rahim, *Fragmented Community and Unconstructive Engagements: ASEAN and Burma's SPDC Regime*, 40 CRITICAL ASIAN STUDIES 67-88 (2008). A group of jurists has called on the UN Security Council to investigate into alleged crimes against humanity and war crimes in Myanmar; see *Crimes in Burma* (May 2009), a report commissioned by the International Human Rights Clinic at Harvard Law School. The report is available at <http://www.law.harvard.edu/programs/hrp/documents/Crimes-in-Burma.pdf>.

<sup>66</sup> *Asia's Former Tigers are Flirting with Irrelevance*, FINANCIAL TIMES – ASIA, Aug. 3, 2006, at 11.

beneficial changes for ASEAN.<sup>67</sup> Expelling Myanmar from ASEAN would not only exacerbate the problem for ASEAN but undermine the inclusive community aspiration of ASEAN.

In maintaining Myanmar's ASEAN membership, ASEAN believed that it was provided with channels of communication with the military junta. A good example was in the aftermath of Cyclone Nargis, which hit Myanmar in May 2008. ASEAN, with the United Nations, mediated in the standoff between Myanmar and the international community over emergency relief to those affected.<sup>68</sup> The metaphor ASEAN often uses to explain its relationship with Myanmar is a familial one and also in tandem with ASEAN's communitarian perspective: Whatever the behavior of a family member, Myanmar is still a family member. Singapore's then Foreign Minister had acknowledged the challenge and dilemma that Myanmar posed:

ASEAN considers Myanmar to be part of the family, maybe an awkward member of the family but still a member of the family, and we will, from that perspective, always view Myanmar differently from the way outsiders view Myanmar.... So from that perspective, our continued engagement of Myanmar may not be viewed with favour by some of our European friends, but it is a matter of absolute necessity and one which serves our long-term interest in the region, and which I believe will also serve European long-term interests in the region.<sup>69</sup>

This is notwithstanding ASEAN's pragmatic assessment that

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<sup>67</sup> The junta was prepared for deep and long isolation; it was relatively confident that isolation would not lead to regime change. For a persuasive view of why sanctions would not work on Myanmar, see Thant M-U, *What to do about Burma*, LONDON REVIEW OF BOOKS, Feb. 8, 2007. On the junta's intransigence post-September 2007, see A.M. Thawngghmung and Maung A.M., *Myanmar in 2007: A Turning Point in the 'Roadmap'?* 48 ASIAN SURVEY 13-19 (2008). See also G. Sheridan's op-ed, *Isolating Burma Doesn't Help*, THE AUSTRALIAN, May 15, 2008.

<sup>68</sup> See M. Green and D. Mitchell, *Asia's Forgotten Crisis: A New Approach to Burma*, 86 FOREIGN AFFAIRS 147-158 (Nov.-Dec. 2007), for their "coordinated engagement" proposal involving ASEAN, China, India, Japan, and the USA.

<sup>69</sup> Transcript of press conference with Minister for Foreign Affairs, George Yeo and Minister of Foreign Affairs of the Czech Republic Karel Schwazenberg, April 11, 2008, at the Ministry of Foreign Affairs in Prague, Czech Republic.

it had limited influence and leverage compared with China or India, over Myanmar. However, ASEAN believed that it could exercise some moral suasion since Myanmar would rather be part of the ASEAN family than be caught between India and China.<sup>70</sup> During Singapore's chairmanship of ASEAN in 2007-2008, Singapore's Foreign Minister enunciated on ASEAN's realpolitik vis-à-vis Myanmar:

But let us push that hypothetical possibility, say we expel Myanmar from ASEAN, rid ourselves of a problem. What happens? Myanmar is the buffer state between China and India. China has vast interests in Myanmar; India has vast interests in Myanmar. If it is not a member of ASEAN, both sides will have to create options for themselves in that country. And if there is internal discord, in self-defence, each will have to interfere to protect its own self-interests. So if China and India are dragged in, I think the Americans, the Japanese and the others will also be alarmed. In the end, Myanmar can become an arena for big power conflicts. At that point in time, our own interests will be dragged in too. So it would be better that we pinch our noses, and bear with the problem, and keep Myanmar within ASEAN's table, than to come to the conclusion that jumping out from the frying pan will land us in a cooler situation.<sup>71</sup>

Yet, in spite of ASEAN's determination to maintain ties with Myanmar, ASEAN has increasingly not let Myanmar hold it back nor dictate the pace of ASEAN's approach to human rights. Indeed, ASEAN had chastised Myanmar in the past. Member-states, of their own accord, are also increasingly expressing their concern over the state of human rights in Myanmar. Constructive engagement of Myanmar is itself an inroad into the principle of non-interference.

On September 27, 2007, George Yeo, at the sidelines of the UN General Assembly and on behalf ASEAN foreign ministers, stated that the ASEAN foreign ministers were "appalled" to learn of the use of automatic weapons and violence on the

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<sup>70</sup> On Myanmar-ASEAN relations, see J. HAACKE, MYANMAR'S FOREIGN POLICY: DOMESTIC INFLUENCES AND INTERNATIONAL IMPLICATIONS 41-60 (2006).

<sup>71</sup> Response in Parliament to Supplementary Questions during Committee of Supply Debate, Feb. 28, 2008.

demonstrators. They also “expressed their revulsion” to their Myanmar counterpart. On the same day, Singapore’s Prime Minister Lee Hsien Loong, in Singapore’s capacity as Chairman of the ASEAN Standing Committee, in consulting with the leaders of Brunei, Indonesia, Malaysia, the Philippines, Thailand and Vietnam, noted that the confrontation in Myanmar “would have implications for ASEAN and the whole region. ASEAN therefore could not credibly remain silent or uninvolved in this matter.”<sup>72</sup> Prime Minister Lee in a September 29, 2007 letter to Myanmar’s Senior General Than Shwe expressed ASEAN’s “deep concerns ... over the very grave situation in Myanmar.” He noted that media coverage of events in Myanmar “have evoked the revulsion of people throughout Southeast Asia and all over the world.” In giving recognition to the non-interference principle, PM Lee ended his letter by emphasizing that “ASEAN’s concerns are for the welfare of the people of Myanmar, for a return to stability and normalcy, and for Myanmar to take its place among the comity of nations. I hope you will consider these views in that spirit.”<sup>73</sup> While such a chastisement has not happened since 2007, a precedent has been set, representing a subtle re-interpretation of non-interference. Furthermore, the implicit recognition given to human rights represents an important incremental step.

These expressions of criticism, chastisement and rebuke has been more frequent since the 2000s. In May 2009, during the closed-door trial of Daw Aung San Suu Kyi, who was charged with breaking the terms of her house arrest, ASEAN expressed its “grave concern about recent developments... given her fragile health.” In calling for the immediate release of Daw Aung San Suu Kyi, ASEAN stated that Myanmar “has the responsibility to protect and promote human rights.”<sup>74</sup> Although ASEAN had criticized Myanmar on its human rights record, concerns persisted over whether ASEAN had done enough to bring a recalcitrant member to task.

Contrary to how it had been popularly presented in the media,

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<sup>72</sup> Singapore Ministry of Foreign Affairs (MFA), MFA Spokesman’s Comments on PM Lee Hsien Loong calls to ASEAN leaders on the Myanmar issue, Sept. 27, 2007.

<sup>73</sup> PM Lee’s letter was in Singapore’s capacity as the ASEAN Chair. Than Shwe was then the Chairman of Myanmar’s State Peace and Development Council (SPDC).

<sup>74</sup> See ASEAN Chairman’s Statement Issued by Thailand, May 19, 2009, <http://www.aseansec.org/PR-ASEANChairmanStatementonMyanmar.pdf>.

non-interference is not always rigidly adhered to by ASEAN. ASEAN's relationship with Myanmar is an example. The Charter will give further impetus to this, but it would be unrealistic to expect that the norm of non-interference to be eroded away immediately.<sup>75</sup>

Critics and media reports tend to portray the norm of non-interference as a non-negotiable principle. The reality is that this norm is not the sacred cow that it has been made out to be. ASEAN has undoubtedly "interfered" before, even if rarely and far between, in the internal affairs of its members: the Philippine political crisis of 1986 involving President Marcos, the forest fires and the haze in Indonesia in the late 1990s, and Myanmar's internal situation.<sup>76</sup> A little articulated perspective on ASEAN's stance on non-interference is that ASEAN is coming to grips with the limitations of traditional sovereignty.

Increasingly, the principle of "responsible sovereignty" is gaining currency. Responsible sovereignty is "the idea that states must take responsibility for the external effects of their domestic actions – that sovereignty entails obligations and duties towards

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<sup>75</sup> During the 2007-08 trouble in Myanmar, ASEAN sought the United Nation's assistance, aware that it had little leverage and given how Myanmar has repudiated ASEAN in preference for the United Nations. The UN Secretary-General then appointed Special Envoy Ibrahim Gambari to be a neutral interlocutor to all parties in Myanmar. In October 2008, Tomás Ojea Quintana, the UN Special Rapporteur on the situation of human rights in Myanmar, reported to the UN General Assembly that democracy would take decades to take root in Myanmar, and, in the meantime tangible, step-by-step benchmarks should be set up to spur progress towards national reconciliation and promotion of democracy there. *See* UN General Assembly (Third Committee - Social, Humanitarian, Cultural), Press Release (GA/SHC/3926), Oct. 23, 2008. The special procedure's mandate on human rights in Myanmar began in 1992. At a press conference, Tomás Ojea Quintana, said in response to reporters' questions, "To get a civil Government will take time. They [Myanmar] are not prepared for that. They are prepared for war." He added that the process to democracy can be helped by tackling the country's human rights challenges. He also urged the international community to speak in one voice as they nudged Myanmar towards a democratic Government and the elections then scheduled for 2010. *See* Press Conference Report,

[http://www.un.org/News/briefings/docs/2008/081023\\_Quintana.doc.htm](http://www.un.org/News/briefings/docs/2008/081023_Quintana.doc.htm). Of course, the changes in Myanmar could not have been predicted in 2008. For an assessment, see DAVID I. STEINBERG, *BURMA/MYANMAR: WHAT EVERYONE NEEDS TO KNOW* 188-218 (2<sup>nd</sup> ed., 2013).

<sup>76</sup> *See also* L. Jones, *ASEAN Intervention in Cambodia: From Cold War to Conditionality*, 20 *PACIFIC REVIEW* 523-550 (2007). Jones argues that ASEAN elites had regularly intervened in Cambodia's internal political conflicts between 1979 and 1999.

other sovereign states as well as to one's own citizens."<sup>77</sup> This emerging norm emphasizes the dual importance of sovereignty and responsibility. Sovereignty recognizes that states remain the primary actors of the international system. Responsibility highlights the need for international cooperation among states, rather than unilateral action, "to meet the most fundamental demands of sovereignty: to protect their people and advance their interests."<sup>78</sup>

Like the responsibility to protect, ASEAN must come to grips with this emerging international norm sooner or later.<sup>79</sup> With closer and more intense scrutiny by the European Union, United States, investors, and civil society organizations, ASEAN can ill-afford to ignore such a norm as well as international, regional, and local sentiments. Disregarding such a norm will undoubtedly present constraints in ASEAN's engagement with key political and economic partners. More fundamentally, ASEAN will also have difficulty justifying its non-observance of prevailing and emerging international norms to the region's domestic constituencies, who are increasingly more vocal with civil society organizations being active on the human rights. But it may take a while as Myanmar continues to hold its ground in the latest manifestation of rights abuses in the Rohingya crisis of the last few years. How ASEAN responds will be closely watched.

#### ***D. Strengthening Dispute Resolution within ASEAN***

Chapter VIII of the Charter does not provide for a judicial method of dispute resolution. Article 22(1), for instance, provides that "Member-states shall endeavor to resolve peacefully all disputes in a timely manner through dialogue, consultation and

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<sup>77</sup> MANAGING GLOBAL INSECURITY (MGI), A PLAN FOR ACTION: A NEW ERA OF INTERNATIONAL COOPERATION FOR A CHANGED WORLD: 2009, 2010, AND BEYOND 10-14 (2008). MGI is a joint project of the Brookings Institution, Stanford University's Center for International Security and Cooperation, and New York University's Center on International Cooperation. Kishore Mahbubani expresses the idea thus: "No village can accept a home whose actions endanger the village. Neither can the global village accept the behavior of nations which endanger the globe." *Id.* at 11.

<sup>78</sup> *Id.*

<sup>79</sup> See also the discussion of the linkage between responsible sovereignty and intervention in E.M. Kuhonta, *Toward Responsible Sovereignty: The Case for Intervention*, in *HARD CHOICES: SECURITY, DEMOCRACY, AND REGIONALISM IN SOUTHEAST ASIA* (D.K. Emmerson ed., 2008).

negotiation.” Article 22(2) provides that “ASEAN shall maintain and establish dispute settlement mechanisms in all fields of ASEAN cooperation.” Where no such mechanism is provided for, Article 25 stipulates that “appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments.”

Where a dispute remains unresolved, after the application of the provisions of the Charter, the dispute shall be referred to the ASEAN Summit for its decision.<sup>80</sup> This effectively makes the Summit, ASEAN’s executive body, the final arbiter. Given that the Charter encapsulates the fundamental principles and norms of ASEAN as an intrinsic feature, this positions the Charter as a vital socializing agent, and the Summit a mediating protagonist in ASEAN’s socializing process.

Thus, if the Charter exhorts and promotes consensus decision-making and dispute resolution, then the requirements of legal certainty and legitimate expectations can bolster such exhortatory principles having binding effect. While this soft law approach may have the same practical effect as a definitive hard law instrument, the process to achieve the outcome and the implications are different.

ASEAN adopted the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms in April 2010.<sup>81</sup> The Protocol aims to put in place a mechanism to help ASEAN member-states resolve disputes concerning the interpretation or application of the ASEAN Charter. It provides member-states with a framework for largely optional means of dispute settlement in the form of diplomatic, or non-adjudicative, modes, consultation, good offices, mediation, and conciliation, to the quasi-judicial, arbitration. It steers a middle path between compulsory adjudication and freedom of choice, combining elements of both. It also prescribes how these mechanisms should be organized and conducted.<sup>82</sup> The Protocol also applies to other ASEAN instruments, which do not

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<sup>80</sup> Article 26 of the Charter.

<sup>81</sup> See <https://cil.nus.edu.sg/wp-content/uploads/formidable/18/2010-Protocol-to-the-ASEAN-Charter-on-Dispute-Settlement-Mechanisms.pdf>.

<sup>82</sup> For an examination of the Protocol, including notable omissions in the procedures, see G. J. Naldi, *The ASEAN Protocol on Dispute Settlement Mechanisms: An Appraisal*, 5 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 105-138 (2014).



specifically provide for dispute settlement mechanisms.

Given the centrality of a dispute resolution mechanism in any regional organization, the Protocol indicates another step towards ASEAN's transformation into a rules-based organization. It signifies the further development of the commitment to the peaceful settlement of disputes within ASEAN. A formalized dispute resolution mechanism facilitates the implementation of the ASEAN Charter, especially the interpretation or application of the ASEAN Charter. As the mechanisms develop over time, it is likely that consensus and non-interference, while remaining a part of the ASEAN process, will register a lower profile. This can only be beneficial to the growth and development of ASEAN.

## V. NUDGING THE LIMITED POOLING OF SOVEREIGNTY IN ASEAN

While one should not view the Charter as the death knell for the challenged norms, the Charter does not adequately guide ASEAN on how to deal with a situation in which local practice and policy are at odds with the purposes and principles of ASEAN. The Charter may be relegated to secondary importance if the ASEAN Summit, ASEAN's supreme decision-making body, adopts the approach of ad-hoc decisions. In turn, the quest for a principles-based organization will be hampered. This, however, is not a suggestion that a stridently bureaucratic and inflexible Charter for ASEAN is preferred. Rather, the lack of a clear, principled, and legitimate approach only denies the Charter and ASEAN of much needed credibility and legitimacy. The basic requirement is for the Charter to assist, to facilitate the institutionalization of a principled-based decision-making without fear or favor of encrusted norms being honored as organizational relics that have long outlived their purpose.

ASEAN's relevance as a regional organization will ultimately hinge on its ability to entrench norms within ASEAN but also re-orientate itself such that its practices can be reconciled with the normative orders outside ASEAN. It is a truism that "no man is an island": ASEAN is no different. ASEAN's geopolitical relevance is a function of internal and, increasingly, external developments. External developments are more challenging since internal developments are largely within ASEAN and its member states'

control while the former are not.

In a very limited manner, the Charter pools, in a very limited way, national sovereignty as a segue to developing a regional commitment to common values and ideals that all member-states can identify with and use to guide their policy responses, activities, and interactions vis-à-vis ASEAN, as a separate legal entity, and its member-states. Given the differing attitudes and interests of member-states towards ASEAN, the Charter's attempt at re-conceptualizing national sovereignty is arguably more effective in reinforcing, rather than enforcing, the normative environment of ASEAN. Considering the abiding commitment to the non-interference and consensus by ASEAN member-states, a calibrated attempt towards a limited pooling of sovereignties can help ameliorate suspicion, and reduce the tendency to resort to force in what was previously an endemically conflict-ridden region.

The Charter can function as a legal-political nudge in which ASEAN increasingly will have to calibrate its actions and policies to be in line with the prevailing normative framework, globally. The Charter is a means to the end of regional integration in a region that is so diverse along geographical, socio-economic, political, historical, and ethnic (race, language, and religion) lines. Community building cannot be achieved by fiat.<sup>83</sup> As it is, Southeast Asians do not think of ASEAN as a community.<sup>84</sup>

*The Economist* had derisively described the Charter as “toothless,” “contains little more than waffle,” and commits ASEAN leaders “to nothing that matters.”<sup>85</sup> Indeed, such strident criticisms of ASEAN are not new, and neither are they totally devoid of merit. The aspirations in Chapter 1 of the Charter seem pious when juxtaposed against the processes, mechanisms, and powers provided in the Charter.

Slightly more than a decade has since passed since the Charter came into force. A generous way of looking at the travails

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<sup>83</sup> Lin C.H., *ASEAN Charter: Deeper Regional Integration under International Law?* 9 CHINESE JOURNAL OF INTERNATIONAL LAW 821-837 (2010).

<sup>84</sup> E. THOMSON AND C. THIANTHAI, AWARENESS OF AND ATTITUDES TOWARD ASEAN: SUMMARY FINDINGS FROM A TEN NATION SURVEY OF UNIVERSITY STUDENTS (2008).

<sup>85</sup> *Fifth From the Right is the Party-Pooper*, THE ECONOMIST, Nov. 22, 2007. Cf. R. Stubbs, *The ASEAN Alternative? Ideas, Institutions and the Challenge to 'Global' Governance*, 21 PACIFIC REVIEW 451-468 (2008); S. Narine, *Forty Years of ASEAN: A Historical Review*, 21 PACIFIC REVIEW 411-429 (2008).

of ASEAN's seeming helplessness in dealing with Myanmar and the South China Sea disputes is that the Charter was the first, albeit important, step in a long journey. ASEAN's consensus and non-interference norms have resulted in a "one-for-all and all-for-one" mindset. For too long, ASEAN has moved at a pace that accommodated as many, if not all, member-states as possible. This is a real structural constraint and ideational rigidity not so much of ASEAN but of its member-states. At that stage of its early- to mid-development, ASEAN had rightly prioritized unity, manifested in consensus and non-interference, over separateness. But this realist approach is no longer sustainable as the Charter implicitly acknowledges.

While the Charter seeks to give substantive effect to the purposes and principles of ASEAN, its potential transformative capacity that should not be easily dismissed. This arises from the Charter's potential of promoting the internalization of the values critical to ASEAN's growth and development. As ASEAN seeks to re-energize itself, the key challenge is to ensure that the Charter spearheads the generation of norms and behavior that become self-enforcing and provide the substratum and impetus for engendering the desired norms. Self-enforcing norms and behavior, when prudently applied, acquire legitimacy and increasingly become inviolable.

To reiterate, although the Charter is a binding legal instrument, the way it was drafted enables a significant degree of flexible interpretation and room for negotiation. This inherent flexibility is an encapsulation of the ASEAN Way, rendered as a principle of ASEAN governance, and continues to be the foundation for the common rules of engagement. Accordingly, the discursive power of soft law facilitates the socialization of ASEAN member-states in imbibing the desired values and norms, and helps generate trust that can be more sustainable than a plethora of treaty law. Crafting the Charter as hard law, but with soft law features and effects, is a calibrated measure to combine reflexive self-regulation on the part of member-states and light-touch regulation on the part of ASEAN. Such an approach can promote constitutive processes such as persuasion, learning, cooperation and socialization, while also providing some assurance that ASEAN, as a legal personality, is not attempting to derogate from the ASEAN Way.<sup>86</sup>

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<sup>86</sup> Simon Tay argues that the espousal of the responsive Asian Way has enabled

The Charter's subtext is of a normative, desired state of inter-government governmentality but short of the pooling of sovereignty, which the European Union epitomizes. On the other hand, the Charter, if properly internalized, can encourage and facilitate compliance. This in turn would enhance ASEAN's organizational efficiency and effectiveness. The norms that the Charter embodies are more likely to have greater traction and be politically sustainable through its calibrated response to a diverse range of interests, concerns, and priorities among member-states. In this way, the incremental ASEAN governmentality will facilitate the development of the organization's ability to deal with the myriad of complex issues and stresses that domestic politics inflected by nationalistic sentiments can arouse from time to time.

The Charter has not done away with ASEAN's cherished norms of non-interference and consensual decision-making.<sup>87</sup> It would be naïve to think otherwise and a complete misperception of the Charter. At one extreme, the Charter codifies many of ASEAN's existing practices, values, and norms. It would be unrealistic to expect that these norms will be done away with in the short- to medium-term. These norms were apt in the earlier years but now run the risk of becoming anachronistic and quixotic, if the meaning and substance are not reviewed, refreshed, and rejuvenated. The Charter has made tentative inroads by questioning the relevance of the two much-vaunted norms of non-interference and consensual decision-making.

The more likely scenario is that ASEAN and its individual members will be less insistent on using those norms as a crutch or as a matter of political convenience. The norms will be titrated down by custom and practice within and outside ASEAN.<sup>88</sup> This interplay between hard and soft law should not be ignored in

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ASEAN to continue to evolve. S.S.C. Tay, *Institutions and Processes: Dilemmas and Possibilities*, in *REINVENTING ASEAN* (S.S.C. Tay, J.P. Estanislao & H. Soesastro eds., 2001). See also A. Jetschke and J. Ruland, *Decoupling Rhetoric and Practice: The Cultural Limits of ASEAN Cooperation*, 22 *PACIFIC REVIEW* 179-203 (2009).

<sup>87</sup> On the origins and purposes of non-interference in ASEAN, see H.E.S. Nesadurai, *The Association of Southeast Asian Nations (ASEAN)*, 13 *NEW POLITICAL ECONOMY* 225-239 (2008). For a more extensive discourse on ASEAN founding ethos and norms, see ALICE D. BA, (RE)NEGOTIATING EAST AND SOUTHEAST ASIA: REGION, REGIONALISM, AND THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS (2009).

<sup>88</sup> T. Yukawa, *The ASEAN Way as a Symbol: An Analysis of Discourses on the ASEAN Norms*, 31 *PACIFIC REVIEW* 298-314 (2018).

organizational change and the constitutionalization of ASEAN. They can help in regulating member-states' conduct more quickly than can perhaps be achieved if a hard law approach is only adopted.

The Charter also represents a compromise among ASEAN member-states. The compromise also represents the ASEAN practice of not allowing a single issue to dominate the agenda. Singapore's Prime Minister Lee Hsien Loong gave a sense of how the Charter was readied so that it would be acceptable to all members: "[The Charter] cannot compel the countries to do things which they do not want to agree to in the first place."<sup>89</sup> While this approach might strike some as another example of ASEAN's "lowest common denominator" approach, it is an institutional constraint that ASEAN has to manage and live with. The enigmatic priority is to keep all 10 member-states in ASEAN rather than to marginalize or exclude even one member.

But the Charter provides a normative framework for change amidst continuity that can be built upon. With the hardware in place, hard-nosed decisions will have to be made if the Charter is to be a springboard to renewed relevance and influence in a rapidly evolving geopolitical environment. The promulgation of the Charter is necessary but insufficient in making ASEAN a strong and cohesive inter-governmental organization. The real test is whether ASEAN and its members are committed to the principles, values, and duties in both form and substance. Will ASEAN progress towards being defined by the rule of law? If shared vision and shared purpose, grounded in shared values, are absent, the Charter will become a way station to ASEAN's irrelevance. The next phase regional integration, as envisioned by the Charter, requires ASEAN's institutionalization of its institutions, processes, and values. The convergence of norms, manifested in the Charter, among ASEAN member-states is therefore a *sine qua non*.

## VI. CONCLUSION: NUDGING TO RELEVANCE

In 1967, the forward-looking leaders of Indonesia, Malaysia, Philippines, Singapore, and Thailand recognized that there was

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<sup>89</sup> *Charter must be Agreeable to All Members: PM Lee*, STRAITS TIMES (SINGAPORE), Aug. 8, 2007, at H8.

much to be gained from the limited pooling of their countries' sovereignties through ASEAN. In his memoirs, Mr. Lee Kuan Yew, who was a strong proponent of ASEAN, had presciently put forth that "[t]he unspoken objective of ASEAN was to gain strength through solidarity ahead of the power vacuum that would come with an impending British and later a possible US withdrawal."<sup>90</sup> The geopolitical realities and challenges have evolved and are evolving one generation on. Even if there is no US withdrawal, a new China-dominant security and economic order is already in the making and challenging the status quo that ASEAN has become complacently accustomed to.<sup>91</sup>

China's status, power, and rise is accompanied by a more assertive and ambitious foreign policy under President Xi Jinping, made abundantly clear at its 19<sup>th</sup> Communist Party National Congress in 2017. US President Donald Trump's "America First" foreign policy posture inevitably casts grave doubts on American resolve and commitment to the region's security and interests, which for long have been taken for granted in Southeast Asia. This apparent waxing and waning of Chinese and American power, respectively, put ASEAN in uncharted territory. How it negotiates the US-China power politics will determine whether ASEAN is central or peripheral in its own backyard. The Charter can play an influential role in helping ASEAN maintain its centrality although that has so far not been apparent.

This essay's premise is that the collective norms of non-violence in ASEAN inter-state relations, consultation and consensus, and non-interference have functioned as ASEAN's operating system. They operate as critical norms that have shaped ASEAN member-states' attitudes and identities vis-à-vis each other and towards ASEAN. The Charter has kick-started, albeit tentatively, the process of a nuanced, if contested, reconsideration of the relevance and saliency of these norms in the on-going efforts to make ASEAN as a rule-based organization and to renew its relevance in a rapidly changing geopolitical and economic environment.

In short, the Charter as a constitutional endeavor marks a bold attempt to recalibrate the understanding of national

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<sup>90</sup> LEE KUAN YEW, *FROM THIRD WORLD TO FIRST: THE SINGAPORE STORY 1965-2000*, MEMOIRS OF LEE KUAN YEW (2000), 369.

<sup>91</sup> L.T. Huong, *China's Dual Strategy of Coercion and Inducement towards ASEAN*, PACIFIC REVIEW (forthcoming).

sovereignty and of the necessity of some degree of pooled sovereignty in regional affairs. The giving up of some national sovereignty for collective action and unity can help make for a stronger region. But the Charter must engender trust and confidence among member-states that the giving up of limited sovereignty will benefit not just ASEAN but the individual member-states as well.

While the Charter seeks to give substantive effect to the purposes and principles of ASEAN, I argue that the ‘soft law’ transformative capacity of the Charter is a better way to examine the constitutional effects of this belated legalization process. In particular, the Charter’s potential and capacity of introducing tiered sovereignty in connection with human rights in ASEAN is a potential that should not be easily dismissed. This dual-track attempt at simultaneously pooling and maintaining national sovereignty represents an attempt to promote the role of self-enforcing norms and behavior within ASEAN.

This engendering of a ‘bifurcated sovereignty,’ at this fledgling stage of deeper regional integration, is primarily concerned with education and promotion, rather than protection and enforcement. As ASEAN seeks to re-energize itself as a relevant regional inter-governmental organization, the key challenge is to ensure that the Charter spearheads the generation of norms and behavior that become self-enforcing and provide the substratum and impetus for engendering the desired norms. The past decade has shown that the Charter still has much work to do. Perhaps it is not fair to place the burden on the Charter, when it is the 10 member-states that have to breathe life and give effect to the Charter.

The Charter was not conceived nor intended to be a revolutionary legal instrument. Instead, it is to spearhead evolutionary changes with ASEAN. The Charter is generally concerned with formalizing the principles, values, and the workings of ASEAN. Prior to the Charter, ASEAN operated on conventions, informal diplomacy, and decision-making by consensus. The Charter seeks to formalize and codify these practices. All things considered, the Charter provides a framework for gradual and structured change.<sup>92</sup> However, the pace of evolution since 2007 runs the risk of rendering the Charter more as

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<sup>92</sup> K. Freistein, *A Living Document’: Promises of the ASEAN Charter*, 26 THE PACIFIC REVIEW 407-429 (2013).

a constitutional comforter, papering over its lack of traction and internalization by member-states while giving the impression of progress.

The fundamental question is *how* the Charter and its subsequent evolution will keep ASEAN firmly in the driver's seat in Southeast Asia. ASEAN's future inevitably depends on how successful it is in recalibrating its norms, values, and purpose to remain nimble, relevant, and effective in an increasingly uncertain world. ASEAN's relevance as a regional organization will ultimately hinge on its ability to entrench norms within ASEAN but also calibrate itself such that its practices can be reconciled with the normative orders outside ASEAN. Against the backdrop of global and regional political, security, and economic architecture oscillating unpredictably in search of a new equilibrium, ASEAN's future and destiny in the coming decade and beyond depends on how adroitly it positions its norms, values, and purpose in an increasingly uncertain and rapidly changing world, where an Asia dominated by China cannot be foreclosed.

The carefully scripted display of *esprit de corps* at the various ASEAN meetings belies the persisting question of ASEAN's relevance – to the people and governments of ASEAN member-states and the international community. In this regard, ASEAN's persistent and self-interested conceptions of community and its self-interests will find difficulty in having buy-in from internal and external stakeholders if that norm is out-of-sync with generally accepted international norms or lacks legitimacy. The Charter has to function effectively as a legal-political nudge in which ASEAN increasingly will have to calibrate its actions, policies and its understanding of sovereignty to be in line with the prevailing normative framework globally. The Charter must provide that pivotal role in helping ASEAN achieve regional integration as well as promote rule of law, democracy, human rights, and development in Southeast Asia.

Despite past successes, an irrelevant ASEAN in the future is not a foregone conclusion. Singapore's first Foreign Minister S. Rajaratnam had said at ASEAN's founding that "If ASEAN does not hang together, they shall be hung separately." To be nimble, relevant, and effective, ASEAN member-states must resist individual and collective navel-gazing, and instead recommit to regional solidarity through being a principled, visionary and cohesive bloc. The Charter is the roadmap for ASEAN but time is of the essence if ASEAN is to continue to be in the driver's seat in



regional affairs through re-defining its norms, values, and purpose.

**Keywords**

ASEAN, Southeast Asia, Soft Law, Sovereignty, Regionalism

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