Making ASEAN a Rule-Based Community: Revisiting the Legal Fundamentals

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ABSTRACT

The legal system of the ASEAN Community has not been widely discussed among scholars in this area. The community is often considered to be an entity subjected to international law alone, but this article finds a configuration of the ASEAN Community that sets it apart from other entities under the international law system. The author proposes that the ASEAN Community, which will have the future status of an advanced economic and non-economic integration, requires an appropriate legal system that guarantees adherence to the objectives and policies of the regional bloc. To this end, the legal fundamentals of the ASEAN Community, including, but not limited to, theoretical influences and legal institutions, will be ascertained and analysed in this paper. The author believes this to be an inevitable task before proceeding to the next step, namely, designating the model of the ASEAN integration.

I. INTRODUCTION

The aim of economic integration is to transform the ASEAN Community[1] into a model comparable to the European Union (EU) in the future. On the one hand, it is undeniable that some of the main objectives are common to other regional blocs,[2] for instance, the free movement of economic factors, the elimination of trade barriers, and the spillover effects from economic on non-economic components of the system. This set of objectives maintains the ASEAN Community in a similar configuration as others. On the other hand, an observation of the history of the ASEAN Community suggests that it constructs a particular model, which may not pursue an identical or similar path to the so-called 'Community Legal System', introduced by the (former) European Economic Community, as affirmed in *Van Gend en Loos*,[3] but is able to transform itself into a competing regional bloc in the future.

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1 The term 'community' does not, as yet, connote a particular legal system as appears in the European Union. The European Coal and Steel Community (ECSC) also contains the term 'community', but had not qualified as having a particular legal system at the time. However, this is related to the substance inside the system. At the time of writing this article, the ASEAN Community is just a regional society of states, and has no particular status.

2 European Union, Eastern African Community, MERCOSUR, Andean Community, NAFTA and African Union

3 Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (1963) ECR 1.

This hypothesis is significant to determine the factors that can contribute to the development of the ASEAN Community, identify the obstacles or weakest links in the process, and examine some probable compatible models to be created and transposed. These complexities can be unravelled to a large extent after observing the historical evolution of the community in Part I, which explains why the European way is not in alignment with the ASEAN way. The particularities of the ASEAN Community, which are connected to the historical aspects and are significant for further analyses of the regional integration in this context, are examined in Part II. Furthermore, intellectual development in this field is restricted, since the literature often refers to theories related to the ASEAN integration, but few studies contribute to bridging the non-legal and legal aspects; the theories are interwoven to a large extent, as illustrated in Part III. The source of the law in the ASEAN Community, which is different from that of the pure international law, is addressed in Part IV. All these analyses will contribute to a proposal for a particular model[4] of the ASEAN Community, which will be solidified in the next issue of this Journal.

II. BRIEF ACCOUNT OF THE HISTORICAL EVOLUTION OF THE ASEAN COMMUNITY: FROM POLITICAL COOPERATION TO THE MAKING OF A LEGAL INSTITUTION

The European Coal and Steel Community (ECSC) and the Association of Southeast Asian Nations (ASEAN) were both established in the same historical timeframe. Both of these regional blocs were a consequence of World War II, when the great powers were divided into two opposing military alliances, namely, the allies and the axis. The war ended with the defeat of the axis. The results of this war were disastrous, as evidenced by the countless deaths on both sides. It also caused an unprecedented economic depression. The European continent had, and has since maintained its power to define the destiny of much, if not the whole, of mankind. Whether heads or tails wins the game is contingent on her extrovert determination. To be precise, Europe accommodates the great powers of both allies and axis, four in Europe, namely England, France, Germany and Italy, the USA in North America, and China and in Asia. If the four great European powers had refrained from declaring war, World War II may not have happened, or it may have happened, albeit in a different form. It would also be logical to apply this reasoning to the declaration of World War I.

The consequences of World War II are not raised with the intention of frustrating European scholars who may read this article, but to demonstrate a prior consideration related to a significant difference between the emergence of the ECSC and the ASEAN. The ECSC emerged from a deep sense of responsibility for the tragedy of mankind, or more precisely, the creation of the European bloc and the prevention of another world disaster were strongly interconnected. Therefore, the economic integration in Europe appeared to be a means to guarantee world peace and pursue regional prosperity. In contrast, the ASEAN was established during the course of progressive resistance and regional adaptation as a consequence of events after the end of World War II, including, *inter alia*, the existence of the Cold War, the establishment of the SEATO, the containment policy by the USA in Southeast Asia against Chinese communism, and the widespread attempt of non-alignment and neutrality. Although

4 In brief, the author makes clear from the beginning that the objective of the ASEAN integration, unlike the means to achieve such an objective, is not different from that of the EU and others.

the ASEAN was established not long after the ECSC, there are consequences in the time gap that make the ASEAN much different.

Briefly, the aim of establishing the ASEAN was principally introverted. The member states had suffered from suppression by outsiders in the form of colonisation[5] and more recently, as mentioned, the aftermath of World War II; thus, they wanted no more of outsiders. The primary objective of establishing the ASEAN was to exercise and enhance their self-determination through political cooperation, and this introversion subsists despite the ending of the Cold War and the fall of the Soviet Union, and/or is transformed into some common values of the region.[6]

The end of the Cold War did much to settle the historical complexity.[7] In effect, the political cooperation increasingly appeared to be less preponderant, as did the economic collaboration. Various policies may affect the neighbouring areas of a regional institution, including, *inter alia*, social or economic factors, in a manner comparable to the spillover effects in the theory of neo-functionalism, which employs economic integration as a fulcrum.[8] Nevertheless, when one policy loses its position, it is replaced by another, and in this respect, it could be said that the economic integration of the ASEAN came later and appeared as a secondary objective, or what could also be logically regarded, in language of the author, as 'soft spillover effects' as a result of political cooperation.[9] Economics is more closely related than politics to the ongoing process of countries and the lives of their people. Its dynamism is contemporaneous, at least within our lifetime, and results in a profound and multidimensional effect, which can also be connected back to political cooperation and be subject to endless enhancement.

Although the economic cooperation had taken place before the end of the Cold War, it had not replaced the political collaboration and become a primary *de facto* and *de jure* object; in other words, the force of one did not outweigh the other, and it was not regarded as a pivotal strategy to drive the regional bloc forward, as the (former) European Economic Community deliberately did. However, considering the interdependence of the both facets, the ASEAN would have been different[10] if political cooperation had not been positioned on time, and the

5 All the countries in the Southeast Asia have been colonised by European countries, apart from Thailand.

6 A practice that is supported by this common value is the regard for the principle of non-interference, which is highly respected by all Member States. This is a good reflection for coherence between the past common experience and the making of the internal norms of the ASEAN. All the States apart from Thailand have suffered suppression from outsiders; therefore, they do not want to follow their example, but rather to understand those who are different from them. The situation in Thailand, where the Thai government was ousted by a military coup, is evidence of the implementation of this rule, since no countries in the ASEAN have imposed sanctions on Thailand. However, if this happened in MERCOSUR, the membership of the country that had acted undemocratically would be suspended according to Article 3 of the Protocol of Ushuaia on Democratic Clause.

7 Donald E. Weatherbee, *International Relations in Southeast Asia: The Struggle for Autonomy* (2nd edn, Rowman & Littlefield 2009) 63-74.

8 Ernst Haas, *The Uniting of Europe, Political, Social and Economic Forces 1950-1957* (University of Notre Dame Press 2004) 291-299.

9 This is to distinguish the idea from the spillover effect as a result of economic policy as illustrated in the theory of neo-functionalism.

10 It was too difficult to make the whole region politically-neutral. The striking of a balance in political ideology was an achievement that at least rendered the competition of two political ideologies possible. If the containment policy by the USA had not been so successful, more countries would be

ASEAN had not been established as early as 1967. In effect, the author finds a long-lasting relationship between both of these dimensions. The progressive outcome and the relationship between political and economic aspects subsequently constituted the common values and the *status quo* of the ASEAN Community.

The development of the ASEAN Community was inspired by the outcome of the experience of regional integration in other places; in fact, the ASEAN Community was not developed on its own account, but collated with other comparable models of integration.[11] The reinforcement of the Southeast Asian regional integration is simply metaphoric, at least in terms of institutionalisation.[12] An observation of the European Union (EU), the MERCOSUR, and the Andean Community provides tacit support to the idea of the institutionalisation of the ASEAN Community.

The ASEAN Charter is the recent development of the status of the ASEAN Community. This basic law establishes the legal personality of the ASEAN Community[13] and sets out its objectives and purposes,[14] which reflect its historical progressive development. The Community consists of three sub-communities, namely, the Economic Community, the Political and Security Community, and the Socio-Cultural Community; however, the functioning of these sub-communities is not supported by the current operating structure. The institutionalisation within the ASEAN Community has not been exhausted and needs to be reinforced. The competence of the Community is extremely limited in all aspects, which makes it difficult to implement policies and laws and enforce them. The enforcement of the law is blocked by a protectionist approach, which to a large extent, is due to the member states' attempt to maintain their sovereignty as a result of the former suppression of outsiders, as mentioned above. This is sometimes called the Eastphalia Effect, which justifies the maintenance, or sometimes the obsession of member states to retain their sovereignty.[15] This concept tends to prevent the institutionalisation of a supranational organisation.

III. PARTICULARITIES AND HETEROGENEITIES IN THE ASEAN INTEGRATION

A. Co-Existence of (Sub-) Communities

The ASEAN Community consists of three (Sub-) Communities, namely the ASEAN Political and Security Community (APSC), the ASEAN Socio-Cultural Community (ASCC), and the ASEAN Economic Community (AEC), none of which plays a greater role than the others. It is true that the Economic Community is extremely focused, as evidenced by the legal and non-legal instruments, which has made the ASEAN Community a freer economic bloc.[16]

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communist, or a particular system may be created. The would-be political regime would become a huge obstacle to the development of an economic bloc at the present time.

11 European Union, Eastern African Community (EAC), MERCOSUR, Andean Community

12 Other aspects than the institutionalisation will be discussed in the next part

13 Article 3 of the ASEAN Charter

14 Preamble and Article 1 of the ASEAN Charter

15 Tom Ginsburg, 'Eastphalia and Asian Regionalism' (2011) 42 University of California Davis 859, 861; David Fidler, 'Eastphalia Emerging?: Asia, International Law and Global governance' (2010) 17 Indiana Journal of Global Legal Studies 1.

16 Furthermore, the economic integration also responds to the theory of neo-functionalism much better than any other, as will be explained in the theoretical part.

However, this fact is inadequate to conclude that the Economic Community is the principal component of the whole ASEAN; in fact, economic integration plays a substantial role, but not an exclusive one, in the ASEAN Community. The other Sub-Communities also operate in their own way and make a number of effective changes. Examples of the work of the Political and Security Sub-Community Practice, including the police and public prosecutors,[17] have been codified in the treaty for mutual legal assistance in criminal matters 2004 – MLAC, which has been ratified by all member states. The ASEAN University Network is an example of the work of the Socio-Cultural Sub-Community, which has generated a handful of cooperative agreements.[18] These two Sub-Communities operate in a similar manner in that infra-community relations are freely operated by the relevant entities in the absence of a mutual legal framework.[19]

The ASEAN Economic Community operates in different way. Thanks to the models of the WTO and the EU, which inspired the ASEAN Economic Community, the framework of economic integration is sufficiently clear to endorse the rights and obligations of member states. Furthermore, a member state may, if necessary, choose to adopt the Dispute Settlement Body (DSB) of the WTO to resolve a dispute that occurs within the ASEAN Community. This relatively clear, substantial and procedural mechanism enables economic integration to be utilised as a catalyst for further integration.

A critical mind-set is needed to determine if economic integration exclusively corresponds with ASEAN integration or if economic integration is separated from the other areas. According to this concept, when examining this subject, the ASEAN Economic Community is often discussed alone, regardless of its coexistence with non-Economic Communities, which are also part of this regional bloc. While it is true that economic integration corresponds to the spillover effects according to the theory of neo-functionalism, as discussed below, the language of the ASEAN Charter and legal and non-legal binding instruments are significantly held by all three pillars of the ASEAN Community.

In other words, they have all endorsed the idea of the interdependence and even-handedness of the operational function of these three pillars. The author uses the terminology ‘soft and hard spillover effects’, as an evolving idea ramified from the theory of neo-functionalism. The traditional concept of the spillover effects by other regions, which regards the role of economic integration to be extremely important, does not sufficiently correspond to the nature of the ASEAN Community. Economic integration may have hard spillover effects, while non-economic integration may have soft ones. Briefly, these three Communities will develop in alignment with one another and they all need to remember their interdependence and even-handedness.

B. Eastphalia Effect[20]

This terminology may be rhetorical but it is meaningful at the same time, since it characterises a common value of the ASEAN Community, which reflects members’ common

17 ASEAN Political-Security Community Blueprint, Jakarta: ASEAN Secretariat, June 2009, 5.

18 This information is available at <http://www.aunsec.org/mouandpartnership.php> accessed 10 November 2015.

19 The entities that operate to enhance infra-community relations are termed *infra-partes* organs or networks as discussed below.

20 In fact, Eastphalia refers to the southern part of the current state of Lower Saxony, eastern Saxony-Anhalt and northern Thringia, which is part of Germany. However, it is defined differently in this context.

experience of the great powers in the past,[21] when all member States, apart from Thailand, were colonised by European countries. From the perspective of the author, this colonisation was positive because, on the one hand, it helped some countries to achieve modernisation,[22] and on the other, it entailed resistance against the means to deprive them of their self-determination. This resistance did not cease with the termination of World War II, but evolved and has been crystallised since then. As mentioned in Part I, these countries have consistently been interfered with and intervened by the superpowers for a long time.

The term 'Eastphalia' can be used interchangeably with Hyper-Westphalia (in the eastern context).[23] This can be symbolised as a huge invisible fortress raised against the deprivation of the sovereignty of each state; in effect, it denotes the diminishing of member states' trust and reliance, not only on outsiders, but also neighbouring countries. This makes institutionalisation quite challenging, since the structure of the Community basically requires the transfer of sovereignty as a means to enforce the Community law.

C. The ASEAN Way

It is hard to exactly define the ASEAN Way, since the term is not conclusive by nature. More precisely, it is variable and depends on present and future circumstances. The ASEAN way not only consists of substantive, but also procedural rules, norms and traditions. In a logical sense, it is connected to the common values of the Community to a certain extent, as asserted by the theory of neo-transactionalism, which is described below. Furthermore, the concept accommodates and generates the common values of the ASEAN Community.[24] Although the ASEAN way sometimes fails to acquire the status of a legal principle, its existence has a significant effect on the application of relevant treaties and customary international law, as well as regional treaties and customary (infra-community) law. In effect, the recognition of the ASEAN Way in the process of legal harmonisation facilitates the prescription or enforcement of law in the ASEAN Community.

Although it is hard to define the scope of the ASEAN way, at least it is possible to ascertain some of the derived rules and norms, as may be observed and clarified in treaties, official and unofficial instruments, etc. As mentioned above, whether characterised as substantive or procedural, the ASEAN way includes, *inter alia*, consensus on the regional agenda, inclusive interpretation of the rule of territorial integrity, non-confrontation, compromise as a means of resolution, respect for each other's differences, the maintenance of a loose relationship, etc.[25] Since the ASEAN way is variable, as mentioned above, it is possible that a rule, norm, or tradition is subjugated by another or under an emerging rule, norm or tradition, which may render the enforcement of the ASEAN law.

All of these rules, norms, etc. are not legally derived in the same way as the *droit dérivé* of the EU or the *derecho derivado* of the MERCOSUR. Their function debilitates the reinforcement of the legal system in that they often mitigate the legal force of international

21 cf Ginsburg, Fidler and Laowonsiri (n 15).

22 This rationale is correct for Malaysia and Singapore, but not for Myanmar, Cambodia and Laos. Some aspects of colonisation may be an advantage to countries, but modernisation depends on many other factors.

23 cf Ginsburg (n 15) 867.

24 The term may be compared to common policies or *ordre public communautaire* and *órden public comunitario* in the European Union and MERCOSUR respectively.

25 Nararat Kranrattanasuit, *ASEAN and Human Trafficking: Case Studies of Cambodia, Thailand and Vietnam* (Brill 2014) 25.

and regional rules and any community law. From a European legal-centric perspective, the qualification of these rules, norms, etc. is insignificant or not worth discussing by lawyers; however, from the author's observation, these legal and non-legal concepts are composed of the values of the people and interwoven with one another, which affects infra-community relations. It is inevitable that the ASEAN Community will eventually adopt a rule-based system, but the development of such a system without a profound understanding of the current status of the ASEAN's normative values cannot lead to a secure system in the future; therefore, the ASEAN Way needs to be translated into legal language.

D. Multi-Folded Relations

Unlike the EU's advanced model, the ASEAN does not contain an exclusive competence related to internal and external affairs. Member states may conclude agreements within and outside the Community according to their preference. This gives rise to multi-folded relationships based on bilateral, regional and multilateral treaties.[26] Adopting agreements on a regional dimension is not simple, since it requires the convergence of member states' domestic policies and this takes a long time. Therefore, multi-folded relationships are a common factor of the ASEAN Community.

In order to address these complex relationships and resolve disputes where necessary, reference is made to the basic rules of treaty interpretation under public international law, which include, *inter alia*, *ius cogens* norms, rule of *lex posterior derogat priori*, Article 31 of the Vienna Convention on the Law of Treaties, etc.[27] These rules and principles are employed when applicable treaties and/or rules conflict and where regional and non-regional multi-folded rules are complex. Although the rules of treaty interpretation provide a means to address these complexities, the ASEAN Community still needs to find a way to manage these multi-folded legal directives.

It is better to address multi-folded relationships inside, rather than outside the Community, since the former tends to result in a convergence of policies, whereas the latter results in divergence, which is sometimes an obstacle for future centralisation or institutionalisation. If the ASEAN Community wants to pursue deeper integration in the future, it should be aware of this factor and, thus, work closely with those member states that are ratifying agreements with non-members. Member states also need to play their part in converging with the system, rather than becoming engaged with the outsiders without a clear direction. Instead of adopting agreements alone, they should form a group of member states, or at least consult with each other prior to signing or ratifying agreements. This may indirectly persuade other countries to also sign or ratify such agreements.

If the ASEAN desires to maintain the identity of the region, it will create a system that is appropriate and easily accessible to both ASEAN and non-ASEAN Countries.

E. Infra-Partes Effect

The establishment of a *super-partes* or supranational organisation is a key factor of the development of a Community, as proved by the EU; however, this is truly conditional on the

26 The relationships between member states in the economic community are based on bilateral treaties concluded by member states, ASEAN treaties on trade, services and investment, and WTO multilateral treaties.

27 Nguyen Quoc Din, *Droit International Public* (8e edn, LGDJ 2009) 237-319.

consent of the member states to transfer their sovereignty to a central organ, which, thereafter, is entitled to exercise neutral authority in pursuit of the objective of the whole Community in accordance with the theory of neo-functionalism.

As explained in the historical part, the member states of the ASEAN Community insist on maintaining their sovereignty, which could delay the establishment of a *super-partes* or supranational organisation. Therefore, in this context, it can be hypothesised that the *super-partes* organs are not the single model for the enlargement of the ASEAN Community, but in the absence of, or in parallel with, the functioning of such organs, a set of complementary organs may be qualified to perform comparable tasks, which also contribute to the integration. These complementary organs are called *infra-partes* organs, which is a term interchangeably used with '*contra-partes'*[28] organs. The both denote state and non-state organs that exercise a specific function, which could lead to the enlargement of the Community. In fact, this idea is supported by the co-existence of three sub-communities, namely, the AEC, the APSC, and the ASCC, as reflected in Articles 1 and 9 of the ASEAN Charter.

In line with their complementary role, the *infra-partes* organs maintain their operation on an infra-community level fulfilling different functional tasks for public and private spheres.[29] Their function is not subjected to the jurisdiction of a member state when they operate as a network of *infra-partes* organs. For example, the network of police and public prosecutors in the ASEAN Community develops common rules and practices regarding their cooperation in criminal matters and the submission of evidence and witnesses. As a second example, the legal execution departments of all member states collaborate in the execution of the judgment of a national Court, and in transnational cases, the assets of the defendant. Their mutual collaboration benefits the functioning of the Community, the member states, and the creditors as the ultimate beneficiaries. Moreover, the Constitutional Court[30] of each member state adopts the methodology as a precedent in the judgment of each other and applies it to cases containing similar problems. This connotes the process of transconstitutionalisation,[31] enabling the assimilation of knowledge and the convergence of constitutional methodologies. The first two examples are evidence of the *infra-partes* organs that have direct contact, and the third of those that have indirect contact.

The function of *infra-partes* organs is not a new phenomenon. It has long been discussed among scholars in public and private international law,[32] but unfortunately less in community

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28 This doctrine was introduced and discussed in Thailand as a means to enhance the integration of the ASEAN Community. The Latin terminology was used to accredit the origin of this idea, which is European. Reflections of the existence of these complementary organs are endorsed in many instruments of the ASEAN Community, especially in the AEC, APSC and ASCC blueprints. Akawat Laowonsiri, 'Uniqueness of the ASEAN Legal System' (2014) 32 Chulalongkorn Law Journal 41.

29 Please compare with the notion delivered by Daine A. Desierto, 'ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter' (2011) 49 Columbia Journal of Transnational Law 280.

30 The Constitutional Court is also considered to be an *infra-partes* organ, even though it plays the role of rectifying legislative, executive and judicial acts. The court is not competent to represent its state and does not make an inter-governmental body, which is actually the role of ministers of foreign affairs, prime ministers, or any others with full authority. However, the court has a functional task to maintain the constitutionality of the system of the member states.

31 Marcelo Neves, *Transconstitutionalism* (Hart Publishing 2013) 1-10.

32 This concept was introduced by Jessup and has been long discussed among scholars of public and private international law. Phillip C. Jessup, *Transnational Law* (Yale University Press 1956); Anne-Marie Slaughter and William Burke-White, 'The Future of International Law is Domestic (or, The

law. However, in the context of the ASEAN Community, the *infra-partes* organs contain remarkable features, some aspects of which prevail over inter-governmental and/or regional organs.

Firstly, they operate close to the problems or at least closer than those at inter-governmental level, and this enables them to impact the ASEAN people much sooner than an inter-governmental body. Secondly, *infra-partes* organs have experts in areas in which inter-governmental bodies have less knowledge, including, among others, diplomats, ministers of foreign affairs and prime ministers. The former truly excels at performing the same tasks.[33] Last, but not least, in the absence of *super-partes*, *infra-partes* organs maintain a complementary function in this transitional period. Despite the fact that *super-partes* organs will be established in the future, the *infra-partes* may still play a competing role, and this may continue until the formation of a clear legal institution.

However, the *infra-partes* organs have a limited capacity to negotiate and conclude an agreement, since this is a task for the governmental authority. The role of the *infra-partes* organs is to enforce and/or apply an agreement, since they are close to the subject of the agreement. A restructure of the functions of the *infra-partes* organs is necessary and feasible, as explained below.

IV. REUNION OF THE THEORIES AND DOCTRINES FOR THE INTEGRATION OF THE ASEAN COMMUNITY

Fundamental theories and doctrines, such as functionalism, transnationalism, federalism, realism and institutionalism, to name but a few, together with derivatives that are relevant to regional integration, are regularly referred to for an evaluation of the *status quo*, solutions to problems, justification for choosing a specific model, and forecasting the future legal entity of regional integration.[34] These theories contributed to the development of advanced models of regional integration to a great extent, especially the EU, the EAC and the MERCOSUR, which contain relatively advanced institutions. These theories are synthesised and supported by practice and experience.[35]

Integration is not coincidental; rather, it is designated by a group in pursuit of common objectives, and the ASEAN Community is no exception. Since the establishment of a possible model will affect society on a large scale, say, a regional scale, the development of the ASEAN Community must not be taken for granted; rather, it must be based on a feasible and foreseeable configuration of the actual benefits of the people in the Community and the Community itself, since the former are the ultimate beneficiaries of the integration and the latter possibly guarantees the welfare of the former. This ideology is not satisfied by the *status quo* of the ASEAN Community, which gives little weight to the people and the Community, but great weight to the governments of the member states. This reality is a huge challenge for the ASEAN Community compared to the advanced model of the EU.

European Way of Law)' (2006) 47 Harvard International Law Journal 334; cf Laowonsiri (n 26); Dominique Carreau et Fabrizio Marrella, *Droit International* (11e Edn Pedone 2012) Chapitre I.

33 For example, medical professions are experts in healthcare management, rather than diplomats or politicians. René Schwok, *Théories de l'Intégration Européene* (LGDJ 2005) 41-42.

34 Theories of regional integration are often discussed among political scientists, but very rarely among lawyers. This article will demonstrate a linkage between the theories and legal institutions.

35 Experiences are both positive and negative.

When searching for a parallel model for the integration of the ASEAN Community, scholars and practitioners need to agree on an appropriate configuration to shape a coherent system for the ASEAN Community. As reflected in the previous part, the particularities of the settings of the ASEAN regional bloc are in need of the application of practical theories and doctrines. There is sometimes a preoccupation with refuting theories and doctrines simply because of their foreign origins.[36] From the author's perspective, the extensive refutation on this ground does little to contribute to the prolonged enhancement of the Community.[37] The actual or metaphorical components of the advanced models should be observed and, where appropriate, transposed into the ongoing configuration of the ASEAN Community. On this point, it is assumed that, only a few of the many options available for the course of integration are right for the ASEAN Community.

A. Development of a Functional Legal Framework from the Theories of Functionalism, Transnationalism, Neo-Functionalism and Neo-Transnationalism

The theories of functionalism and neo-functionalism[38] should be mentioned first, since the phenomenon of regional integration is basically grounded on these two theories. Functionalism assumes that the government, which includes, *inter alia*, politicians and diplomats, fails to operate effectively in the international arena, since it tends to maintain its power instead of rightfully resolving the problem. This is likely to be a barrier to the peace and prosperity of mankind and in the case of a regional bloc, to the pursuit of the desired objectives.[39] Both theories provide that each sector incumbent with a specific function should be entitled and empowered to pursue the greatest good of the people, and regionalisation or economic integration, where the movement of productive factors is guaranteed, appears to fulfil this hypothesis. Due to the interdependence of all sectors and areas in the community, vertical and horizontal harmonisation may undergo a 'spillover effects', which is expected to pursue the objectives of the region. Employed as a neo-functionalist pivot, economic integration, rather than social or political integration, appears to effectively generate such spillover effects.

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36 The formation of the European Union was evidently supported by some doctrines that originated in US. Federalism and these, in conjunction with the Swiss format of confederation, contributed much to the construction of European Federation, on which the European Union of today was partially configured. Maurice Croisat, *Le Fédéralisme en Europe* (LGDJ 2010) 12-21. Functionalism is also a theory that does not have a European origin, even though David Mitrany, the scholar who introduced it, came from a German speaking family in the Czech Republic. His teaching during his stay in the US was world-renowned. These two examples demonstrate that the transfer of an idea from one place to another is not offensive, as long as it is not repugnant to the system in which it is to be transposed; however, coherence needs to be ensured. This is sometimes a sensitive issue among some scholars in Southeast Asia, who view foreign doctrines and theories with caution.

37 The discussion took place in a conference at the Faculty of Law, Thammasat University. Akawat Laowonsiri, 'Transactionalism and Legal Architecture of the ASEAN Community' (TU Law Conference: In Memoir of Prof. Dr. Arun Panupong, Bangkok, 30 November 2013)

38 These theories are slightly different. Neo-functionalism was established to unleash the rigidity of functionalism, which, to a large extent, overlooks the political force and the role of institutions. However, the enhancement of regional integration by neo-functionalism sometimes gives a retrospective effect, in which once the spillover takes place inside the regional bloc, the integration with the outside world becomes arduous, which would not be a big problem for functionalism. The particularity of the legal system in the European Union reflects this logic quite well.

39 Schwok (n 33) 39-70.

The logic of both theories has been tested for half a century in the course of European integration. These theories can also enhance the ASEAN integration when the surroundings and factors in the ASEAN Community are regarded during the course of the translation, transposition, and adaptation of theories and doctrines in the region. The ASEAN Community also has the functional organs to render the performance functional at the regional level. This is clearly reflected in the policy of the free movement of services in the prioritised areas. For example, according to neo-functionalism, the free movement of medical services may cause a spillover effect on the competition of physicians, which includes, *inter alia*, the improvement of medical education, the efficient management of hospitals, and the lower cost of the service. Moreover, the free movement of medical services may trigger the inclusion of neighbouring areas, for example, psychologists, pharmacists, etc., in the future list of the trade in services.

During the course of integration, the theories of transactionalism and neo-transactionalism play the role of intensifying all sorts of communication in the region, including all possible activities, say, transactions made at an infra-community level.[40] In this sense, these transactions may sometimes cause problems that cannot be resolved at the national level, which will necessarily lead to a dialogue for a solution at the regional level. Such dialogue will contribute to deepening the integration.[41] The core objective of both theories is to ascertain and reinforce the common values of the regional bloc, which may be developed into a common policy and *acquis communautaire* in the future. The transactions entail an observation of the problem and a solution.

For example, in terms of the medical services in the previous paragraph, if doctors have children, they will presumably accompany their parents in the move across the region. Therefore, schooling needs to be made available, which requires further rearrangement at the regional level with regard to admission criteria, credit transfer, students' welfare, etc. This will also apply to the accompanying children of parents of other professions, as recognised in the mutual agreements. Moreover, the free movement of trade in services is not an isolated issue; for example, it may trigger a preoccupation with the possible occurrence of crime being committed by immigrants. This resulted in the conclusion and ratification of the Treaty on Mutual Legal Assistance in Criminal Matters 2004, which facilitates the task of the police and public prosecutors during the course of the ASEAN integration.

B. Allocation of Power by the Theories of Federalism, Consociationalism, Inter-Governmentalism, and Realism

The theory of federalism inspired the very early stage of contemporary regional integration and provided a basis for the institutional arrangement of the economic integration. Despite the fact that federalisation requires the transfer of sovereignty to a large extent, partial or subject-orientated federalisation is still beneficial for the integration process. The application of federalism in terms of the EU was mainly influenced by the federalism in the US and confederalism in Switzerland.[42] By transposing the theory, the EU has developed a particular system, which is not federalism, but a derivative of it. The quasi-federalisation of the EU consisted of the conferral of power from the Member States to the central authority, which entailed a system of exercising power, as well as monitoring, to ensure that the

40 Karl Deutsch, The Propensity to International Transaction, Political Studies 8(2), 1960, p. 147-155, cited in Schwok (n 33) 47.

41 Andres Malamud, 'Theories of Regional Integration and the Origin of MERCOSUR' in Marcilio Toscano Franca Filho et al. (eds), *The Law of MERCOSUR* (Hart Publishing 2010) 9-13.

42 Croisat (n 36).

sovereign rights and/or sovereignty of the member states was not abused during the course of integration.

Consociationalism is a concept of modern integration that goes hand in hand with federalism. While federalism distinguishes the areas under the competence of the member state and the Community and focuses on the allocation of power between regional and national levels, consociationalism pursues the adoption of compromised areas, in which societies with different backgrounds consent to change their values, practices and rules to further reinforce the integration. Consociationalism finds its role when federalisation has taken place.

In terms of the ASEAN Community, federalisation, where applicable, would seem to also benefit the course of ASEAN integration; however, it is clear that, historically, member states have been obsessed with maintaining their sovereignty. Thus, the Federation of, the Confederation of, or the United States of the ASEAN, has never been the subject of a discussion, but perhaps it may need to be before long.[43] However, the ASEAN heavily relies on the doctrine of inter-governmentalism, whereby member states generally maintain their sovereignty to prescribe and enforce policy, law, and decisions regarding the regional agenda. Of course, the application of inter-governmentalism guarantees the maintenance of sovereignty, limits the possibility of generating particular norms of integration, and subjects member states to public international law. It can be said that, as yet, the derivative of this doctrine that is currently in operation is 'Inclusive Inter-Governmentalism.'

The operation of consociationalism also appears in the context of the ASEAN integration, but it is different from that of the EU, where consociationalising occurs in a vertical regulatory process to a large extent. Through a change of regional values, consociationalising in the ASEAN Community generally requires the consensus of each member state, in conjunction with that of its people, to enable the government to make a decision; thus, it is principally horizontal by nature. In effect, consociationalisation, as a means to integrate the ASEAN Community, would take a longer period of time, whereas in retrospect, the integration process of the consociationalised regional bloc was rather faster and more feasible. It is necessary to observe the application of this theory with the theories of functionalism, transactionalism, and their neo----------isms, as recently mentioned in a), which currently have a forceful impact on the ASEAN Community together and are further related to a more comprehensive federalised and consociationalised framework of the ASEAN Community in the future.

Realism is the basic theory of international relations. This theory considers that states tend to maintain their power and pursue their own interests, rather than morality, ethics and the rule of international law.[44] However, realism finds its own limits when it is referred to in the context of the EU; in other words, after the establishment of a supranational organisation, the states transferred their competence to the centralised organ and subsequently, the common values and objectives of the regional bloc were ascertained, while the entitlement of states to strike a political balance was at best restricted. In brief, the logic of realism is limited in intra- and inter-regional relationships.

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43 However, if the ASEAN becomes a federation or, at least, an EU-like entity, it will necessitate a balance of power, which will entail the application of a number of general principles of law, including, but not limited to, the Principle of Subsidiarity and the Principle of Proportionality. Guy Isaac et Marc Blanquet, *Droit Général de l'Union Européenne* (10e Edn 2012) 355.

44 Schwok (n 33) 72-79.

Unlike the EU,[45] a supranational organisation, the ASEAN context leaves room for the realist approach, to a large extent, in its current setting. The Eastphalia Effect assumes that member states reaffirm the justification to uphold the transfer of their sovereignty. Meanwhile, the Concept of *Mufakat* (consensus) or the Principle of Non-Interference[46] clearly reflects the fact that states, in conjunction with their leaders, resist the submission of their role to the central authority. They prefer to maintain the possibility of preserving their own comfort zone of power and only recognise the power of the regional organisation in cases of overlapped areas where their national interests are concurrently satisfied. It is possible to unravel this complexity by establishing an appropriate legal institution, which is agreed by member states and, of course, is compatible with their common behaviour. This means that the maintenance of their power will be synchronised with the reinforcement of the legal institution of the ASEAN Community. The means to resolve this complexity will be proposed later in this paper.

V. ASEAN LAW IN TRANSITION

A. Derivation of ASEAN Law

The ASEAN Community was established as an international organisation. The public international law and principles of international economic law referred to in the ASEAN agreements mainly apply to the infra-community relationships between member states. The regional bloc has not confronted the gap-in-law situation, but at least it is regulated by, *inter alia*, international law (public international law vis-à-vis international economic law), international criminal law, and private international law rather than ASEAN Community Law, ASEAN Criminal Law or ASEAN Private Law. A particular legal system has not yet emerged in the ASEAN Community, which merits a discussion on whether international law should continue its role, regardless of the derivation of a particular legal system. The answer to this question may lie in an examination of the difference between the international society (société internationale)[47] and a regional bloc. The nature of a regional bloc is different from that of the international society in many respects, since the latter is generally regulated by a decentralised regime of public international law.

The international society consists of a variety of state and non-state entities, the benefits and backgrounds of which are extremely diverse in terms of geographical, political and cultural factors. As a result, it encounters different kinds of problems that require different solutions, and in response to this diversity, international law is a set of rules and principles, in which the differences between them are negotiable in pursuit of a peaceful co-existence. The legal system corresponds to the decentralised traits of international legal orders, since the entire system is not directed by a single set of policies and rules or one fully competent institution.

Unlike the international society, a regional bloc has common values and interests that are shared by member states that have an adjacent geographical context, consonant political ideologies, compatible cultural and social backgrounds, and are economically interdependent. They are often confronted with identical problems, are in need of and pursue common policies.

45 Besides the EU, the EAC is a regional bloc with great potential to become another supranational organisation in the near future. See Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011) 24-25.

46 Min Hyung Kim, 'Theorizing ASEAN Integration' (2011) 35 Asian Perspective 407, 414.

47 Nguyen Quoc Dinh (n 27) 47-49.

In effect, the nature of a regional bloc system is generally centralised.[48] These also reflect the features of the ASEAN Community, which looks forward to corresponding legal orders.

The process of establishing a particular system of legal orders for the ASEAN Community has not been exhausted. The infra-community relationships in the ASEAN are still mainly governed by public international law. Likewise, the advanced models of regional integration are established and governed by public international law in the transitional period. Once the systems are crystallised into a particular legal system, say Community Law, a law that prevails over the mechanism of public international law will have been established.

The current status of ASEAN law in the transitional period denotes legal harmonisation, in which it is possible to derive particular norms, rules and a legal order. In the author's view, it is worth mentioning this legal fundamental in this phase of the transition. The legal order has been categorised and stratified, if not systemised during the course of this phase, and a substantive law is being derived from non-legal values and methodology; also, the interpretation of existing norms, rules and legal order if not harmonised, are directed in a particular way.[49] A demonstration of the derivation of ASEAN law in the next section (B. Source of ASEAN Law) will substantiate the author's conviction in this respect.

B. Source of ASEAN Law

As already mentioned, the rules of the ASEAN legal system are evolving toward centralisation in the future in response to the characteristics of the Community system. However, the current source of the ASEAN law has not yet reached this level of development, nor is it merely constituted of public international law. The ASEAN law in transition consists of community law and international law in the categories illustrated below.

1. *ASEAN Charter and Other Rules of Constitutional Significance*

The ASEAN Charter is stratified as the Constitution of the ASEAN Community. This instrument establishes the status of the ASEAN Community and ASEAN organs as an international organisation and provided a set of main objectives and policies related to common values and fundamental principles that govern the relationship between the member states of the ASEAN Community. The structure of the ASEAN Community as an international organisation is, as yet, imperfect. It is incompetent in many respects, and mainly operates on the basis of a consensus. However, the objectives, policies, common values and fundamental principles subscribed in this Charter, at least, provide a direction for the ASEAN Community and the member states and will be respected as legal and non-legal orders of constitutional value.

Furthermore, the Charter refers to a number of rules of international law, for example, non-intervention, international human rights, etc. This implies that some rules of international law provided in the Charter have become part of the ASEAN law. New (unwritten) rules, the customary international law or general principles of law recognised in the Charter may be generated or crystallised as in the process of international law. These rules will automatically

48 Guy Isaac and Marc Blanquet (n 43) 281-82.

49 To a large extent, the interpretation of ASEAN law depends on the decision of the national authorities, which include legislative, governmental and judicial organs, whereas the EU has a system of legal harmonisation, at least for the interpretation of EU law, supported by the EU Commission and the CJEU.

become part of the ASEAN legal order, say, at the constitutional level and may have a **'**vertical and/or horizontal effect' within the jurisdiction of member states.[50] Furthermore, certain rules have been modified from their original version and interpreted differently in the context of the ASEAN Community. For example, the principle of non-interference is extensively interpreted to respond to the obsession with sovereignty.

It is of great significance that the ASEAN charter has introduced a concept, connoted in this paper, as the 'principle of maintenance and non-degradation'**,** which appears in the preamble and Article 1 of the charter, where the words 'preserve, maintain, enhance, promote and strengthen' are repeated in a number of areas with special implications for integration. According to the principle of *ut res magis valeat quam pereat*, the language used may be inadequate to ascertain the positive obligations of the member states because the provision to impose duties on them is not precise. Rather, it softens the obligation of member states in terms of the maintenance and non-degradation of its current standard. However, the concept of maintenance and non-degradation has to be read in conjunction with the language used in the provisions to subscribe the principles.[51]

For example, in terms of the issue of human rights, the language used in Article 1(7) makes it clear that, under the Charter, member states are not obliged to conform to an international standard or indeed an ASEAN standard if there is one, but rather to their own standard of protection. Therefore, each member state is obliged to enhance its standard of protection. Having elevated its own standard, it will not degrade it by turning back to the former status. Moreover, this corresponds with the way the domestic legal system operates in that states should not act incoherently inside their own systems. They are violating the ASEAN Charter if they make their own systems incoherent or defragment them or degrade them. This is not a matter for the domestic legal system alone, since the person affected by the state's act may be a citizen of any other country in the ASEAN. Although no enforcers exist at the regional level as yet, the governmental sectors and courts of all member states are expected to be mindful of this concept and it is, of course, feasible to be so. In addition, the concept of non-degradation is not clearly elucidated in the Charter in terms of the extent to which the standard member states are obliged to maintain may be elevated. This may be an open-ended topic for a future discussion.

2. *ASEAN Agreements – Agreements on Economic Integration*

Member states have recently concluded a handful of agreements on economic integration related to, *inter alia*, trade in goods, trade in services and investment, as evidenced in the

50 The application of rules is not limited by a non-democratic regime in ASEAN countries which, to a large extent, imposes legal measures that are inconsistent with the rules of international human rights. Since the author is citizen of a temporarily non-democratic country, Thailand, which is currently governed by a military political regime and undergoing the deconstruction of constitutional law, the absence of a constitution, which would otherwise protect fundamental rights, is not obstacle to the protection of human rights. (To be precise, on the 23rd May 2015 when this article was being written.) Thailand is bound, but not limited to, the ASEAN Charter, which makes reference to the principles of human rights. The non-democratic government is still obliged, according their legal measures, to maintain the minimum standard of protection.

51 The application of the principle of non-degradation is comparable with the principle of fair and equitable treatment in International Investment Law. Likewise, the application of the proposed concept is contingent on the context of each member state.

ATIGA, AFAS and ACIA respectively.[52] These agreements impose specific obligations on the member states for the freer movement of economic factors. In addition, WTO Agreements are binding on all member states, since they are all members of the WTO. The WTO law may also be considered as part of the ASEAN law to regulate infra-community economic relationships. Moreover, bilateralism is much supported in the ASEAN Community in pursuit of further economic integration. All member states are free to form bilateral agreements with each other. This reflects the *status quo* of the ASEAN Community, where member states are diversified and not ready altogether at the same time to develop a general regional framework. In other words, bilateralisation rather than fragmentation is the way to deeper harmonisation.

Economic integration appears to outweigh other areas of integration; for example, socio-cultural, political and security are evident in very few binding instruments. In other words, economic integration is a catalyst of the spillover effect in the light of the theory of neo-functionalism. In fact, the advantage of it serving in this position is that it corresponds to various dimensions of citizens' lives and it is especially hardly repugnant to the political ideologies of the member states.

Nevertheless, these agreements are not of the highest rank of ASEAN law. They simply provide specific obligations and are open to further arrangement. They elaborate the objectives set out in the ASEAN Charter and are still subjective to the Charter. Their interpretation must be consistent with the relevant principles provided in the Charter, for example, international human rights, environmental law, etc.

3. *ASEAN Agreements – Agreements on Neighbouring Areas*

Besides the agreement on economic integration, the agreement on other spheres, for example, other pillars such as socio-cultural, political and security have recently been limited to a number of binding instruments. For instance, the Treaty on Mutual Legal Assistance in Criminal Matters 2004 may be counted as a source of ASEAN law in the political and security context.[53] The political and security areas are different in that they were the foundation of the ASEAN Community because this pillar corresponded quite well to the preoccupation of all member states at the early stage of development of this regional bloc. However, the idea of maintaining political and security values has significantly lost weight today, but is merely the outcome of historical development, as mentioned before. However, there are a few agreements on this aspect, for example, the Treaty of Amity and Co-operation in Southeast Asia (TAC) and the Southeast Asian Nuclear-Weapon-Free Zone Treaty (SEANWFZ).

In summary, the number of agreements on neighbouring areas is limited, but this does not imply that there is a gap-in-law situation in this area. Rules on the neighbouring areas may appear in many other forms than regional agreements.

4. *ASEAN Agreements – Unilateral Acts of the ASEAN Community?*

Unilateral acts generally operate in infra-community relations by translating the abstract context of the foundation law of the community into concrete legal measures. This mechanism enables the regional bloc to pursue its objectives, which may lead to deeper integration.

52 However, all member states have declared their reservation in terms of a significant number of provisions. The declaration may be seen on the ASEAN's website.

53 ASEAN Secretariat, *ASEAN Political-Security Community Blueprint* (ASEAN Secretariat 2009) 5 and 12.

Member states are not obliged to operate these unilateral acts, but have the option of tasking community institutions to enact and enforce them. Unilateral acts may appear in the form of legislative or executive acts of the community, which are enforceable by all member states. They may be acts of the community addressed to outsiders, for example, ratifying a treaty with third parties or other regional blocs.

While the EU, the EAC and MERCOSUR have a relatively strong system of employing unilateral acts as a legal means,[54] the ASEAN Community does not have unilateral acts of a similar value. Its institutions have not been empowered with legal authority and the instruments they prescribe often lack authority and sanction. However, the ASEAN instruments should still be observed, since they may reflect common values necessary for the interpretation of legal texts and concepts or principles that may be practiced by member states and *infra-partes* organs and subsequently crystallised as general legal principles or customary law in the future. These unilateral acts consist of decisions, recommendations, opinions, etc.

5. *General Principles of Law*

General principles of law are also a source of the ASEAN law, but they are different from those of the EU, where the Court of Justice of the European Union (CJEU) is tasked with ascertaining the general principles of law applicable to infra-community relations. In theory, the law is already there to be discovered but, in practice, it is often created by the court.[55] In the EU, the court has a significant role to ascertain the general principles of law, whereas no community court has been established to perform this task in the ASEAN Community. Even though the ASEAN Community has alternative dispute settlement mechanisms, they do not play a role to that level;[56] rather the existing member states refer to this source of law for any purpose and the court of each member state has the authority to ascertain them.

However, the absence of a solid institution in the ASEAN Community does not signify a lack of general principles of law. These definitely exist, but they are not broadly recognised due to institutional constraints; otherwise, they would have been established. The ASEAN general principles of law may be inspired and deduced in three possible ways, namely, from the rules that exist in international[57] and national legal orders, and from logical bases and principal instruments of the ASEAN Community. In addition, they may pursue at least three possible objectives, the first of which is regional integration, the second is to guarantee the legality of the transposed measures, and the third is to reflect the fundamental values of the community. Moreover, the general principles of law should correspond to the nature of the community.

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54 Guy Isaac et Marc Blanquet (n 43); Richard Frimpong Oppong (n 45); Marcilio Toscano Franca Filho et al. (eds) (n 41).

55 Guy Isaac et Marc Blanquet (n 43) 353.

56 The ASEAN Community has binding and non-binding dispute settlement mechanisms, including, but not limited to, the ASEAN Consultation to Solve Trade and Investment Issues (ACT), ASEAN Compliance Monitoring Body (ACMB), and Enhanced Dispute Settlement Mechanism (EDSM). Please see Stefano Inama and Edmund W. Sim, The Foundation of the ASEAN Economic Community: An Institutional and Legal Profile (Cambridge University Press 2015) 129-137.

57 The application of general principles of international law is generally less regarded in the context of the community legal system. However, due to the current status of the ASEAN Community, which has not reached the advanced model, the mechanism of the general principles of international law is not repugnant to the nature of the ASEAN and, hence, it plays a complementary role until the ASEAN Community becomes a supranational organisation. Guy Isaac et Marc Blanquet (n 43) 354.

It can be deduced from the public international law that these general principles of law originate from the rules of international economic law, as endorsed in the principal instruments related to trade, finance and investment inside the internal market. Moreover, the ASEAN Charter refers to the existing general principles of international law in other areas, such as the international human rights law and the international environmental law, etc.

The deduction from the domestic legal system may be restrained in some respects due to variety of the political regimes of the member states, ranging from totalitarianism and absolute monarchy to democracy, which has a significant effect on the configuration of legal systems inside member states. In addition, if the subtracted principles are repugnant to some countries, they will not amount to the general principles of law on the ASEAN level. The deduction of the general principles of law from the domestic legal systems of member states requires further research into the comparative law of ASEAN member states.

The last group of general principles of law may be deduced from the ASEAN Charter and principal instruments, taking account of the nature of the community. From the author's observation, these principles are the principle of maintenance and non-degradation, the principle of territorial integrity, the principle of non-interference, and the principle of non-discrimination, etc. Some principles have not appeared at the regional level, but should be closely observed, since they may be general principles of the law in future; for example, the principle of subsidiarity and the principle of proportionality used to strike a balance between regional and national levels in terms of the exercise of power, are not considered to be applicable to the law, since the ASEAN Community has not been vested with the competence to impose unilateral acts on member states. Although ASEAN organs do not have the power and are not logically subjected to both of these principles, they may metaphorically provide some derivative norms, which may also be applied in the ASEAN Community; however, this requires further research.

6. *Customary Community Law*

It is not clear whether the unwritten law of the legal system in the EU includes customary (community) law. This problem was rarely discussed in the EU Treatises, except for German treatises, according to which the practices of the member states or the EU organs may be transformed into the EU customary law.[58] This idea has not been endorsed in the jurisprudence of the CJEU so far.

Regardless of the lack of settlement of this matter, customary (community) law logically exists in the ASEAN Community and its application is grounded on justification. Firstly, the mechanism of customary law ensures that the member states participate in making the rules, the *infra-partes* organs and the ASEAN organs, which is consistent with the concept of *mufakat* or consensus, which is underlined as a common value of the ASEAN Community. Secondly, customary (community) law will be applied as long as the ASEAN Community lacks a written law.

The customary (community) law of the ASEAN Community may be compared with that of the other areas of law that share common characteristics. In effect, the customary

58 Roland Bieber, Astrid Epiney und Marcel Haag, *Die Europäische Union* (10. Auflage Nomos 2013) 185-87; Klaus Borchardt, *The ABC of European Union Law* (EU Publications Office 2010) 86; Walter Frenz, *Europarecht* (Springer 2011) 179; Stephan Hobe, *Europarecht* (8. Auflage Vahlen 2014) 92-93; Thomas Oppermann, Claus Dieter Classen und Martin Nettesheim, *Europarecht* (5. Auflage C.H. Beck 2011) 111-112; Jürgen Schwarze (Hrsg.) *EU-Kommentar* (2. Auflage Nomos 2009) 1719.

international law in the public international law is an appropriate model to consult to seek the rules applicable to the relationship between member states. The administrative customary law is an analogy for ascertaining the applicable rules that govern the operation of the *infra-partes* organs that are administrative authorities within the member states. The private international law, transnational law or international business law, would provide an analogy for the customary (community) law for the *infra-partes* private entities. However, the role of customary (community) law should just be filling the gap in the law; thus, it should not overrule the written law or any objective-orientated policy.[59]

VI. CONCLUSION

Like other regional blocs, the ASEAN Community does not stand alone as a policy-based system. Having undergone decades of historical evolution, member states and people have tremendously participated in maintaining the particularities of the group and clarified the ASEAN's heterogeneity. The aim of this article is to be a part of a self-appraisal process, which can contribute to a further step of legal harmonisation. More precisely, it does not disregard the continual operational role of the relevant doctrines and theories, which may clarify the picture of the ASEAN Community, even more so after the non-legal perspectives have been translated into legal perspectives; thus, the legal fundamentals have been reflected in this regard.

The source of ASEAN law has been ascertained as fundamental among other legal issues. The ASEAN law is characterised as transitional; nevertheless, the legal system from which is derived is gradually, if not totally, touchable. The ASEAN law has been grouped into categories and stratified where, as evidenced by its principal instruments, the increasingly centralised nature of the Community and non-static vertical and horizontal harmonisation have been reflected within the ASEAN Community. Although the legislation and enforcement of supranational authorities have not been created in pursuit of the objectives of the Community, the legal fundamentals, including legislative, governmental and judicial organs, can, at least, be perceived and developed by the relevant national authorities.

59 The idea is proposed in alignment with the theory of neo-functionalism, which ensures the centralising characteristic of the entire Community. This particularly, makes the customary (community) law different from the regional customary international law in the public international law regime, although the latter is still crystallised in the system, leading to decentralisation and inconsistence with regional policy.