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## Evaluating the Legal Basis of a Rule-Based Organisation of ASEAN

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### Abstract

This article examines whether the structure of the 2008 ASEAN Charter is still well-suited and appropriate with the intergovernmental organisation of ASEAN. ASEAN has developed and turned into a rule-based organisation. The Charter as the legal basis of the Association is regarded as the constitution of ASEAN, and it has the constitutional character as if all ten ASEAN Member States (AMS) were united as one big country. The design and character of the Charter have placed it above the AMS's constitutions. While ASEAN basically stands firmly to state's sovereignty and non-interference principles which were and will remain the important ASEAN principles, ASEAN has developed into a people-oriented organisation which accommodates the participations of the ASEAN people into the Association. By analysing the normative ASEAN and international legal instruments that are gathered from the official ASEAN website and other publicly available sources, combined with the conceptual and statute approaches, this article found that ASEAN has become a legalised organisation. ASEAN surely cannot be equated with the European Union (EU), considering that the TFEU provides a hierarchical arrangement and the binding effect upon its member countries. The article argues that the Charter has a supremacy at regional level as a part of the indirect aspects of the community law of ASEAN.

**Keywords:** ASEAN; Charter; Community Law; Rule-based Organisation.

### Introduction

The ASEAN Charter is a charter of Southeast Asia's regional level, binding all ten ASEAN Member States (AMS). As a Charter of an organisation, one can observe the ASEAN Charter from two functional relationships: internal relationships and external relationships. The fundamental principles of the ASEAN indicate the internal functional relationship of the ASEAN Charter in achieving the ASEAN goals. Meanwhile, the external functional relationship of the Charter is demonstrated in how ASEAN, as a regional organisation, has

a legal personality separated from the Member States or what kind of power has been given to the ASEAN.<sup>1</sup> As a group of countries, the ASEAN began consolidating itself and moving towards being a rule-based international entity maintaining its role as the core of community development of the Southeast Asian region. Therefore, it requires an international legal instrument or a charter used as a constitution, thereby leading the ASEAN on a concrete path to an essential leadership role.<sup>2</sup> The ASEAN Charter is a constitution that is a document citing norms, affirmations of independence, rights and obligations, and legislative, executive and jurisdictive powers.<sup>3</sup> Furthermore, following the formation of the ASEAN Charter as a ‘constitution’ for ASEAN, all existing mechanisms and regulations are formal and legally binding.<sup>4</sup>

The ASEAN Charter as the constitution has included the phrase ‘ASEAN people’ as the subject of empowerment. The question of the subject is the core point of establishing institutions, such as state institutions and international organisations, and establishing a charter of the organisation can define the subject. For example, the Preamble of the Charter of the UN begins with the phrase “We, the people of the United Nations”. This signifies the legal character of the signatory subject who represents people.<sup>5</sup> AMS heads of state, presidents or heads of government act on behalf of their citizens who have afforded them a representative mandate conducted on behalf of the people of their countries.

In reference to this context, this paper discusses the constitutionalisation that brought order to a fragmented legal domain of AMS, which is the

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<sup>1</sup> Simon Chesterman, ‘Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person’ (2008) 12 Public Law & Legal Theory Research Paper Series Working Paper No. 08-26.[207].

<sup>2</sup> Surin Pitsuwan, ‘Surin: Charter Is Key for ASEAN Revitalization’ (2008) <<https://scholarspace.manoa.hawaii.edu/server/api/core/bitstreams/e98147c1-ddc0-4a76-a0f2-d76dfb491a25/content>> accessed 23 May 2022.

<sup>3</sup> Liona Nanang Supriatna, ‘Piagam ASEAN; Menuju Pemajuan Dan Perlindungan HAM Di Asia Tenggara’ (2007) 4 Indonesian Journal of International Law.[557].

<sup>4</sup> Koesrianti, ‘Analisa Kekuatan Mengikat Piagam Asean Dan Perkembangan Mekanisme Penyelesaian Sengketa Di ASEAN’ (2011) 26 Yuridika.[52].

<sup>5</sup> Katja Freistein, “‘A Living Document’: Promises of the ASEAN Charter’ (2013) 26 The Pacific Review.[8].

inescapable need to accommodate the different values of political nations in the region. This paper proceeds with the following sections. The first section reviews the literature on the ASEAN Charter as Constitution and constitutionalism. The paper then describes the analytical framework used, along with the methodology of this paper. After examining the ASEAN order in the sovereign of the AMS, the paper assesses ASEAN principles as the international norms of the region. In the next section, the paper reviews the legal personality and intergovernmental competence of the ASEAN. Furthermore, it observes the ASEAN Charter's position within the constitutions of the AMS in correlation with ASEAN regional constitutionalism through democratic principles. Last, it draws conclusions.

This paper is based on a normative juridical study that analyses the constitutionalism of ASEAN Charter as a legal document in establishing the 2025 ASEAN Community. In gathering data on ASEAN Charter and its related issues, this paper refers to official data provided by relevant ASEAN sources, such as the ASEAN website, and other official sources available to the public. This paper also provides cross-referencing with relevant previous studies or legal instruments and publicly available articles to further identify the nature of the ASEAN Charter. The paper uses a statutory approach that focuses on all legal products from authoritative lawmakers instead of the study of legislation in a narrow sense. In addition, this paper adopts conceptual and comparative approaches. Once identified, the paper categorises international constitutionalisation, and, in the last section, it draws conclusions.

### **Constitutionalism as Conceptual Legitimacy in the International Sphere**

In its development, the application of constitutionalism falls in the scope of international law. In the formal sense, international law constitutes a system because it contains elements of lawmaking by sovereign states. Constitutionalism defines multilevel constitutionalism aiming to limit 'constitutional failures' at the national

level.<sup>6</sup> International constitutional democracy aims to protect the rights of citizens to the right of democratic self-determination with a consequence of reducing sovereignty over discrimination in goods, services and people while also increasing mutually beneficial cooperation among citizens of all Member States.<sup>7</sup> In this context, the national constitution becomes a partial constitution when encountering the reality of broader multilevel governance. For example, competition law in international business, trade, finance, product standardisation, telecommunications, environmental protection, human rights protection and collective security through national networks and international authorities has developed new forms of multilevel constitutionalism at the regional and national levels.<sup>8</sup>

In a broader context, a constitution not only refers the fundamental laws of a country and all agreed rules, but it also regulates the relationships of social groups in a broader scope. Therefore, constitutionalism is not limited to the scope of a country. In line with this statement, another point of view is that international constitutionalism corresponds to the functions, competencies and distribution of powers of various bodies in international organisations. In addition, constitutionalism also appears to attempt to establish supranational organs with executive authority independent of the unanimous consent of member states and equipped with a judiciary for resolving disputes under community law.<sup>9</sup> Unlike supranational European Union (EU) treaties, the ASEAN Charter adopts multilevel constitutionalism.

### **The ASEAN Charter as the Constitution**

The ASEAN Charter contains fundamental principles of the Bangkok Declaration 1967 as the legitimate base in launching ASEAN and its subsequent

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<sup>6</sup> Ernst-Ulrich Petersmann, 'Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism' in Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance And Social Regulation (Studies in International Trade Law)* (Hart Publishing 2006).[7].

<sup>7</sup> Petersmann (n 6).

<sup>8</sup> *ibid.*[8].

<sup>9</sup> Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press 1966).[153].

agreements. It also emphasises respecting the strengthening of human rights, promotion of social justice, supremacy of law, good governance, democratic principles, and constitutional governance.<sup>10</sup> The ASEAN Charter is rooted in and oriented towards people, meaning that the phrase “the people” in the Preamble to the ASEAN Charter has placed the people as the Charter’s subject. This point of view affirms that the ASEAN Charter is assumed as the constitution of ASEAN that has legitimacy, and is a normatively desirable response to the challenge of the newest role of the ASEAN as a rule-based organisation. However, this has raised questions about whether the ASEAN Charter has sufficient qualifications as a constitution; specifically, can the Charter function as a rule of constitutional law in the region?.

Constitutionalism refers to a restriction governmental under the rule of law and intends to limit government power through boundaries enforced using legal procedures and to encourage respect of government institutions for the constitution and the laws and values that underlie them.<sup>11</sup> Constitutionalism refers to implementing a constitution, which cites limitations on power and the determination of procedures in exercising power.<sup>12</sup> In addition, constitutionalism consists of two types of relationships, *i.e.*, a relationship between the ruler and community and relationships between authorities.<sup>13</sup> In other words, constitutionalisation is commonly associated with the vertical and horizontal allocation of authorities. Constitutionalism is a theory of government limitation which primarily concerns with norms that modern constitutions ought to follow. The norms impose a limitation of exercise of public authority and procedures for how power is applied.<sup>14</sup> Such constitutionalism becomes an ideology in democratic governance traditionally practised in a country.

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<sup>10</sup> Lin Chun Hung, ‘ASEAN Charter: Deeper Regional Integration under International Law?’ (2010) 9 Chinese Journal of International Law.[828].

<sup>11</sup> Monica Claes, ‘Constitutional Law’, *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing, Inc 2006).[188].

<sup>12</sup> William G Andrews, *Constitutions and Constitutionalism* (2nd edn, D Van Nostrand Company, Inc 1963).[13].

<sup>13</sup> *ibid.*[14].

<sup>14</sup> Martin Loughlin, ‘What Is Constitutionalism?’ in Martin Loughlin, John P McCormick and Neil Walker (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2012).[55].

### The ASEAN as a Regional Organisation

The ASEAN is a regional intergovernmental organisation and significantly differs from the EU. Unlike the ASEAN, the EU is a regional supranational organisation. First, this article will discuss the ASEAN Charter as an ASEAN constitution, or specifically an international legal instrument containing an update of the ASEAN order of the presence of sovereignty of Member States. Furthermore, the article examines the position of ASEAN based on internationalism and ASEAN principles, its legal personality, and inter-governmental characteristics. Next, it discusses the position of the ASEAN Charter in the presence of the constitutions of AMS. It concludes that the ASEAN Charter is a means for achieving regional constitutionalism by upholding the principles of democracy since the ASEAN is a ‘people-oriented’ organisation.

The Preamble of the ASEAN Charter asserts, “We, the peoples of the AMS... HEREBY DECIDE to establish, through this Charter, the legal and institutional framework for ASEAN”. The word “people” implies the intention of the Charter to serve as an agreement among the peoples of AMS represented by the agreement among the heads of states. As the Charter’s signatories, the heads of state have authority and politically represent their organisations.<sup>15</sup> The Charter signatories, namely, the heads of states/heads of governments of the AMS, act on behalf of the people of their countries. They have constitutionally received a mandate from their countries to represent their countries. In this case, the signatories are the ‘people’, and the subjects are authorised to ‘decide’. In other words, the people of the ten AMS are represented institutionally through the delegates of the Member States as part of the establishment ASEAN community, establishing an institution and maintaining its sustainability.<sup>16</sup> Therefore, the legitimacy of the ASEAN Charter originates from AMS and their peoples.

Currently, every juridical conceptualisation of world politics places peoples and states as its starting point based on their roles ensuring self-determination of

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<sup>15</sup> Freistein (n 5).

<sup>16</sup> *ibid.*

their countries. In addition to people, states are representatives and sources of legitimacy, as they are responsible for preserving and improving the lives of their people.<sup>17</sup> The content of the Charter reflects responsibility of the founders, which includes fundamental principles and several new agreements. The ASEAN Charter utilises fundamental principles as a legal basis both internally from the AMS and externally concerning the other AMS.

### **ASEAN Order in the Sovereign AMS**

The ASEAN Charter is a charter signed by ten AMS on the 13<sup>th</sup> ASEAN Summit held in Singapore. The Charter was officially proposed on the 11th ASEAN Summit held in Malaysia in 2005 through the Declaration on the inception of the ASEAN Charter. Ten representatives were selected as members of the eminent persons from each ASEAN Member State and chosen by the ASEAN leaders and assigned to provide recommendations for preparing the Charter.

At the ASEAN Summit in January 2007 in Cebu, the Philippines, the leaders of ASEAN, based on the Declaration on the ASEAN Charter Blueprint, agreed to establish the high-level task force (HLTF) consisting of ten government representatives from ten Member States on preparing a draft of the ASEAN Charter. The ASEAN Charter was eventually established and agreed upon by all AMS after a complex and time-consuming process of drafting the articles of the Charter. The ASEAN Charter came into force on December 15, 2008, through the consents of ten AMS and the deposit of ratification instruments to the ASEAN Secretary General, which Singapore initiated on January 7, 2008, and which was ended by Thailand on November 15, 2008. Thus, the Charter became a binding agreement for ten AMS. It also signifies that the ASEAN has developed a new legal framework and several new organs to enhance the ASEAN community-building process.<sup>18</sup>

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<sup>17</sup> Jurgen Habermas, 'The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society' (2008) 15 Constellations.[449].

<sup>18</sup> ASEAN Secretariat, 'Significance of the ASEAN Charter' (2020) <<https://asean.org/about-asean/asean-charter/>> accessed 26 April 2021.

The ASEAN Charter represents a significant step by the ASEAN in developing a new regional order. However, one cannot claim that the ASEAN just started its' international legal existence over the binding force and effect of the Charter.<sup>19</sup> The application of the Charter significantly affects integration in various fields, including the economic, political and security fields, and the social and cultural cooperation at ASEAN level. The goals of ASEAN integration are also reflected in the bodies of the Charter itself, consisting the ASEAN Summit (Article 7 of the Charter), as the high-level meeting of the heads of states or the heads of government of each AMS. The ASEAN Coordinating Council (Article 8 of the Charter) is a meeting forum for foreign ministers of AMS that act as coordinators of the Community Council. The Community Council (Article 9 of the Charter) is a meeting of Ministers in charge of the three pillars of the ASEAN Community from all of ten AMS and is divided into three pillars, i.e., ASEAN Political-Security Community (APSC), ASEAN Economic Community (AEC), and ASEAN Socio-Cultural Community (ASCC). All three pillars of ASEAN have to complement one another regardless the often-competing considerations at the national, regional and global levels.<sup>20</sup>

Moreover, there are other bodies, such as the ASEAN Sectoral Ministerial Body (Article 10 of the Charter), which is a meeting of ministers in charge of each sector of ASEAN cooperation. ASEAN Secretariat (Article 11 of the Charter) is an organ led by the Secretary General that coordinates among the bodies of ASEAN and implements various activities and projects within the framework of ASEAN cooperation. Additionally, the Committee of Permanent Representatives to the ASEAN (Article 12 of the Charter) is a forum for Ambassadors or Permanent Representatives of AMS assigned in the ASEAN Secretariat which based in Jakarta.

Furthermore, there are three ASEAN bodies for implementing ASEAN programmes and agreements at the national level. The first is the National Secretariat

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<sup>19</sup> Diane A Desierto, 'ASEAN's Constitutionalization of International Law: Challenges to Evolution Under the New ASEAN Charter' (2011) 49 Columbia Journal of Transnational Law.[43].

<sup>20</sup> Marty Natalegawa, 'ASEAN: Past and Future, CSCAP Regional Security Outlook 2018' (2018).[28].

of ASEAN (Article 13 of the Charter), which serves as an ASEAN focal point at the national level for each ASEAN Member State. The National Secretariat has the task of maintaining information on various ASEAN matters, implementation of ASEAN decisions, and disseminating public awareness about the ASEAN at the national level. The second body is the ASEAN Inter-Governmental Committee of Human Rights or AICHR (Article 14 of the Charter), *i.e.*, the ASEAN Body for Human Rights, which has a role in promoting and protecting human rights of all in the ASEAN region. The last body is the Foundation (Article 15 of the Charter), *i.e.*, the body responsible for providing support to the ASEAN Secretariat on human right matters. Thus, it can be said that the establishment of the ASEAN Community aims at promoting greater awareness of the ASEAN's identity, accommodating people-to-people interactions, and providing close collaboration across the business sectors, civil society, academia, and other stakeholders of the ASEAN. Indeed, ASEAN has adopted and institutionalised the norm of people-centric governance.<sup>21</sup>

From the previous part of this section, it can be concluded that there are three groups of ASEAN bodies outside the ASEAN Summit. The first group consists of bodies whose functions are to coordinate national interests of each AMS in the forum of ASEAN, including the ASEAN Coordinating Council, ASEAN Community Council, ASEAN Sectoral Ministerial Body, and Committee of Permanent Representatives to the ASEAN. The second group consists of the ASEAN Secretariat and ASEAN Foundation, *i.e.*, the administrative function at the ASEAN level, and the ASEAN National Secretariat, which is the ASEAN administrative body at the national level of the AMS. The third group comprises the ASEAN Intergovernmental Commission on Human Rights (AICHR), a relatively independent body.

The number of ASEAN coordinating bodies supported by these administrative bodies indicates the ASEAN's expectation to move towards integrating the AMS. Meanwhile, the existence of the AICHR and the recognition of entities associated

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<sup>21</sup> Aarie Glas and Emmanuel Balogun, 'Norms in Practice: People-Centric Governance in ASEAN and ECOWAS' (2020) 96 International Affairs.[1019].

with ASEAN have changed the ASEAN, which was initially state-oriented, into a more people-oriented organisation. The vital points of the ASEAN organisational structure are the competence, authority and broad functions of the Summit, including executive, legislative and judicial functions. As a multifunctional institution, the ASEAN Summit has a central role regulated in the ASEAN Charter.

Although the Charter has regulated dispute resolution mechanisms between the AMS, the ASEAN Summit remains the body for resolving unresolved disputes in ASEAN. The settlement shall refer to the ASEAN Charter and the Treaty on Amity and Cooperation (TAC) for disputes between the AMS concerning the interpretation of the Charter. Meanwhile, for trade or economic disputes settlement, AMS shall refer to the ASEAN Protocol on enhanced dispute settlement mechanisms (ASEAN EDSM). When the AMS cannot solve the disputes (unresolved disputes), the parties can submit to the ASEAN Summit as the highest decision-making forum in the ASEAN.<sup>22</sup> The centrality of the ASEAN Summit in ASEAN institutions indicates the strength of intergovernmentalism rooted in principles of sovereignty and non-intervention of the ASEAN.

### **The ASEAN Principles as International Norms**

The structure of the ASEAN Charter includes the Preamble, thirteen chapters, and fifty-five articles. The ASEAN Charter consists of four annexes, including Annex I, which lists the ASEAN Sectoral Ministerial Bodies; Annex II, which covers the entities associated with the ASEAN; Annex III, which provides an explanation of the ASEAN Flag; and Annex IV, which contains the ASEAN Emblem. Based on the structure mentioned above, it is evident that the ASEAN Charter has complete regulatory documents. However, it should be noted that the constitution is a legal basis serving as the highest rule of law that binds all branches of executive, legislative, and judicial authority. It is generally stated briefly and fundamentally.<sup>23</sup>

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<sup>22</sup> Intan Soeparna, 'The Role of the ASEAN Summit in the ASEAN Economic Dispute Settlement' (2021) 9 Journal of ASEAN Studies.[105].

<sup>23</sup> KC Wheare, *Konstitusi Konstitusi Modern (Terjemahan)* (Bandung 1996).[78].

According to Article 2 of the Charter, the principles are to achieve all of ASEAN's goals. They were previously provided in ASEAN declarations, arrangements, conventions, pacts, treaties and other ASEAN legal instruments. These principles were then integrated and incorporated into the Charter. The principles include, among others, the principle of being respectful to the independence, sovereignty, equality, territorial integrity and national identity of AMS. Additionally, they include the principle of maintaining peace, security and prosperity in the ASEAN region. Others include rejecting invasion and threats inconsistent with international law, promoting peaceful dispute resolution and adhering to the rule of law, good governance, democratic principles, and constitutional governance. Furthermore, it also covers principles for respecting, promoting and protecting human rights; upholding the United Nations Charter and international law; emphasising shared values in the spirit of unity in diversity; the centrality of ASEAN in external relations, politic, economy, socio-culture sectors while playing an active, visionary, wide-ranging, and non-discriminatory role; and adhering to multilateral trade rules to implement economic commitments towards market-driven regional economic integration effectively.

These principles form the basis of ASEAN activities in achieving the ASEAN goals stipulated in Article 1 of the Charter. ASEAN has supported the functional constitutionalisation of international law, including international customary law, human rights law, and multilateral trade policies. In a broader sense, the ASEAN's attempts at internationalism have been challenging. At the same time, the ASEAN intends to maintain and emphasise the principles of sovereign independence and non-intervention. It is understandable that Southeast Asian countries have historically maintained principles of non-intervention, respect for national sovereignty, and deliberation and consensus in the Charter, even though it encompasses many international principles and norms.<sup>24</sup>

The correlation between aims and principles of ASEAN and the way AMS carry out their activities related to the achievement of common goals always

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<sup>24</sup> Desierto (n 19).[318].

intersects with the national activities of each AMS and those intertwined with the national interests of each AMS. Therefore, the ASEAN goals cannot conflict with the objectives of each ASEAN Member State since the Charter was prepared by all representatives of AMS and approved by all AMS. The ASEAN Charter has also accommodated universal international norms, which can unify and address norm gaps and forge relations between the AMS.

### **The Legal Personality and Intergovernmental Competence of ASEAN**

The ASEAN Charter is a formal charter which transformed ASEAN from a loose organisation into an organisation with legal personality.<sup>25</sup> The ASEAN Charter affirms that “ASEAN, as an intergovernmental organisation, is hereby conferred legal personality” (Article 3 of the Charter) and expressly states that the personality of the ASEAN organisation, the immunities and privileges of officials, rules and decisions that are self-binding, and regional identities and goals shall represent the legal personality of the ASEAN under international law.<sup>26</sup> Legal personality constantly associates with competence. ‘Competence’ defines proficiency or authority, including decision-making authority, which can be qualified as a normative concept based on norms.<sup>27</sup>

As a regional organisation that reserves legal personality in general, one can compare the ASEAN to the European Union (EU), which has the same qualifications as a regional organisation with legal personality. A comparison between the ASEAN and the EU in this context refers to the issue of international legal person of an organisation. Particularly, Article 3 of the Charter stipulates the competence of ASEAN as a regional organisation, which asserts that ASEAN is an intergovernmental organisation through conferred legal personality.<sup>28</sup> Meanwhile,

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<sup>25</sup> Koesrianti, *Association of South East Asian Nations (ASEAN) Sejarah Konstitusi Dan Integrasi Kawasan* (Airlangga University Press 2014).[97].

<sup>26</sup> Hung (n 10).[826].

<sup>27</sup> Torben Spaak, ‘The Concept of Legal Competence’, *Concepts in Law* (2009).[1].

<sup>28</sup> Dhezya Pandu Satesna, ‘Legal Personality ASEAN as the Subject of International Law: Contemporary Developments’ (2022) 1 *International Law Discourse in Southeast Asia*. [67].

Article 47 of the Treaty of the EU (TEU) upholds the international legal person of the EU.

The Articles of the Charter specifying that regional organisations have legal personality are not independent but are derived from other articles relating to the competencies. ASEAN Charter Article 41, paragraph 7 states that ASEAN may have agreements with other countries, organisations, or institutions at the subregional, regional, and international levels.<sup>29</sup> The ASEAN Coordinating Council regulates the procedure for constructing agreement upon consultation with the ASEAN Community Council. This arrangement indicates that the ASEAN legal personality differs from the character of the EU.<sup>30</sup> As the Coordinating Council determines the implementation of the legal personality of ASEAN can be consulted with the Community Council of ASEAN, there is functional correlation relatively externally. However, one can interpret Article 3 of the ASEAN Charter as a full provision, meaning that ASEAN is an organisation of government with international character and has its own legal personality; ASEAN is not a regional supranational organisation.

The term coordination refers to the intergovernmental nature, namely, an international organisation whose actions are decided based on coordination between its member countries. Following supranational principles, the organisation directly carries out all actions of the organisation that are separate from the Member States without coordination between countries.<sup>31</sup> Accordingly, the regulation concerning the construction of the agreement, as mentioned earlier, has been regulated by the ASEAN Coordinating Council in coordination with the ASEAN Community Council as a natural aspect of intergovernmental organisations. Moreover, ASEAN practically has exercised its legal personality in terms of the ASEAN core position as the driver seat in its relation with other entities, which shows the ASEAN centrality as an organisation.

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<sup>29</sup> Adzka Haneefa, 'ASEAN as a Subject of International Law: Its Role in the Formation of International Treaties' (2022) 3 Journal ASEAN Dynamics and Beyond.[110].

<sup>30</sup> Laura Allison, *The EU, ASEAN and Interregionalism: Regionalism Support and Norm Diffusion Between the EU and ASEAN* (Palgrave Macmillan 2015).[17-18].

<sup>31</sup> Natalia Yeti Puspita, *Hukum Regional: ASEAN Dan Uni Eropa* (Universitas Katolik Indonesia Atma Jaya 2019).[72].

There is similar authority to prepare international treaties, both in the ASEAN and the EU, without eliminating the treaty-making authority of Member States under international law in such way that Member States remain to reserve the right to conclude international treaties within the scope of the EU legal order.<sup>32</sup> Initially ASEAN had held the EU as a model, this right, however, is severely restricted in the EU.<sup>33</sup> Article 351 of the Treaty on the Functioning of the EU (TFEU) provides restrictions. It states that the accession to the Treaty shall not affect the rights and obligations arising from agreements that conclude prior to the accession, provided such agreements are compatible with the Treaty's provisions. In the case of incompatibilities, the Member States shall take every appropriate measure, and the clause shall strongly reflect the supranational nature of the EU.<sup>34</sup> In some cases, the EU shall only act within the limits of competence as stated in the TEU and TFEU to achieve the established goals. The capability of the EU as an organisation that is independent, both outside and inside the EU, is rooted in the international legal personality of the EU itself. The European Court of Justice (ECJ) in the ERTA case confirmed this competency.<sup>35</sup>

The positional power sources established to run and regulate the organisation of the ASEAN are different from those of EU institutions. Intergovernmental actors (AMS) mostly assume the political leadership role in the ASEAN. In contrast, this kind of leadership is absent from supranational institutions. On the ASEAN side, the heads of states or government and AMS are ASEAN bodies that have policy and decision-making authority, as well as authority over regional governance. This fact is not surprising since the AMS do not hand over political power or delegate sovereignty to the ASEAN Secretariat or ASEAN Secretary-General to carry out

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<sup>32</sup> Robert Schutze, *Foreign Affairs and the EU Constitution (Selected Essays): European Law and Member State* (Cambridge University Press 2014).[135].

<sup>33</sup> Taku Yukawa, 'European Integration through the Eyes of ASEAN: Rethinking Eurocentrism in Comparative Regionalism' (2018) 21 *International Area Studies Review*. [325].

<sup>34</sup> Frank Mattheis, 'Repositioning Europe in the Study of Regions: Comparative Regionalism, Interregionalism and Decentered Regionalism' (2017) 39 *Journal of European Integration*. [477 – 482].

<sup>35</sup> *Judgment of the Court of 31 March 1971 - Commission of the European Communities v Council of the European Communities - European Agreement on Road Transport - Case 22-70*.

leadership roles in the ASEAN. The AMS retain their sovereignty to decide on joining or withdrawal from an international treaty, for instance the Philippines withdrew from the Rome Statute of the International Criminal Court in 2018.<sup>36</sup> Meanwhile, among the EU, national, supranational and inter-governmental institutions exercise balanced shared political leadership. The joint leadership of the EU constitutes a strategy to enforce and recognise state sovereignty, which is employed to accommodate inequalities and differences in the national interests of its Member States.<sup>37</sup> However, these differences are understandable due to the ASEAN's intergovernmental character. One cannot find this in supranational regionalism, such as in the EU.

### **ASEAN Charter as Regional Governance**

The discussion of the ASEAN Charter as regional governance mainly concerns with the position of ASEAN Charter analysis within the Constitutions of the AMS. According to Article 47 of the ASEAN Charter, concerning Signatory, Ratification, Deposit, and Entry into Force of agreements, all of the AMS shall sign the ASEAN Charter and the Charter is subjected to ratification by all AMS under the respective internal procedures of each AMS. The AMS then must deposit the instruments of ratification to the Secretary-General of the ASEAN. Every deposit shall be promptly notified to all AMS by the Secretary – General. After 30 days of the tenth instrument of ratification having been deposited to the Secretary-General of ASEAN, the Charter entered into force on December 15, 2018, and thereafter was legally binding to all Member States.

This regulation differs from that of the EU, considering that TFEU has provided hierarchical regulations of methods for binding EU legal acts for its Member States. Article 288 of TFEU states that to exercise the EU's competence,

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<sup>36</sup> Jay L Batongbacal, 'State Practice of Asian Countries in International Law' in Seokwoo Lee and Hee Eun Lee (eds), *Asian Yearbook of International Law*, vol 24 (Brill 2018).[411].

<sup>37</sup> Siti Darwinda Mohamed Pero, *Leadership in Regional Community-Building: Comparing ASEAN and the European Union* (Palgrave Macmillan 2019).[64].

such regulations, directives, decisions, recommendations and opinions shall be adopted by EU bodies. The descriptions of all legal products of these bodies in the EU are as follows: the regulations are legal instruments that have a general regulatory scope, have legally binding character to all Member States, and apply directly to them.<sup>38</sup> The directives refer to rules that are binding on each Member State. Unlike the regulations, the directives allow each Member State to determine the form and method of implementation. In addition, the decisions result in rules that are binding only for the certain addressed Member States, except for the general substance of decisions. Furthermore, the last two legal instrument products, *i.e.*, the recommendations and opinions, both have no binding force. The recommendations require the addressee to take specific actions without providing any legal obligation. In contrast, the opinions issued by EU institutions provide an assessment of the situation or developments in the EU or individual Member States in preparation for further legally binding actions. It should be noted that both recommendations and opinions, although not legally binding, hold moral and political content. Accordingly, the implementation of the abovementioned rules involves certainty and uniformity between the EU Member States and institutions. In addition, the Constitutions of each EU Member State provide regulations regarding the legal bindingness of the EU at the national level.

ASEAN and EU legal instruments have significant differences. The ASEAN Charter cannot be equated with EU treaties because the ASEAN Charter was placed in the legal structure of each AMS; it then becomes a statutory regulation under the Constitution of each AMS. In this context, the ASEAN Charter constitutes the constitution or supreme law of ASEAN as a regional organisation that binds the AMS, as confirmed in Article 52 of the Charter. It states that every ASEAN legal instrument which was in effect before the Charter entered into force, including treaties, conventions, agreements, concord, declarations, protocols and other ASEAN instruments, shall remain valid. The Charter shall prevail if there is an

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<sup>38</sup> Paul Craig and Grainne De Búrca, *EU Law: Text, Cases, and Materials* (5th edn, Oxford University Press 2011).[106-107].

inconsistency between the provisions under the other ASEAN legal instruments and this Charter. This fact has demonstrated the supremacy of the ASEAN Charter over the other ASEAN instruments.

### **Achieving the ASEAN Regional Constitutionalism**

Increasing economic integration, on the one hand, makes increasing discipline over national regulatory autonomy useful, but on the other hand, exposes lacunae in the international regulatory structure.<sup>39</sup> From an economic point of view, international constitutionalisation becomes important in filling this lacuna, which would have facilitated not only the legislature of welfare-improving restrictions on protectionist but also overcome other inefficient domestic regulation. This phenomenon also occurs in the ASEAN context, as economic integration has increased in the region of Southeast Asia. The constitutionalisation of ASEAN – a structure that facilitates the production of law – would mean transforming the ASEAN into an organisation that acquires power to construct all organisation regulations and policies.

The ASEAN Charter can be categorised as a regional constitution at the Southeast Asian level that binds all AMS and contains provisions regarding ASEAN bodies and regulations on the relations between the bodies and AMS. In this correlation, it is necessary to specify the constitution's definition and the meaning of constitutionalism. In general, a constitution specifies fundamental principles and laws of a nation, state, or social group that determines the powers and obligations of the government and guarantees certain rights for the people governed by it.<sup>40</sup> Constitutionalism is an ideology that adheres to obedience, where the government must conduct governmental actions under the constitution. Indeed, the goal is the obedience of government according to constitutional principles. Etymologically, constitutionalism derives from the word 'constitution', which refers to a set of

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<sup>39</sup> Joel P Trachtman, 'Constitutional Economics of the World Trade Organization' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009).[207].

<sup>40</sup> Merriam-Webster, 'Constitution Definition & Meaning' (*Merriam-Webster Dictionary*, 2022) <<https://www.merriam-webster.com/dictionary/constitution>> accessed 23 May 2022.

norms, consisting of rule, principle, or value that creates, composes and defines the government power limitation. Based on these definitions and understandings, briefly, a constitution is a means to formulate and determine the limits of government power,<sup>41</sup> while constitutionalism means significance related to the notion of a system of government based on a set of legal norms.

Constitutionalism, in this context, is referred to as a process of constitutional governance, meaning an attempt to subdue all government actions to mechanisms, including structures, processes, principles and constitutional norms. In brief, constitutionalisation signifies efforts to implement full public powers based on constitutional procedures and norms.<sup>42</sup> In this case, an internationalised constitution cannot be analogous to a constitution of national laws, as the latter denotes the construction of a social contract. Nonetheless, the political empowerment of global civil society consisting of citizens from various countries is another matter. This result arises as we cannot disregard the legitimacy of the nation-state under the rule of law and revert back to the initial condition before the state was established.<sup>43</sup> Therefore, involving peoples of the Member States of the regional organisation will result in a balancing of state sovereignty and people's sovereignty within the regional constitutionalisation context, which requires a democracy with people as the ultimate holders of power.

Upholding ASEAN centrality through the ASEAN Charter is complex, considering the domestic political instability in several AMS accompanied by the rivalry between the USA and the PRC, which more or less influences ASEAN centrality.<sup>44</sup> However, the existence of the ASEAN Charter, especially the clause on ASEAN centrality, will facilitate ASEAN's steps towards a better organisational order by the initial objectives of ASEAN's establishment. ASEAN's centrality has

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<sup>41</sup> Wil Waluchow, 'Constitutionalism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 201, Metaphysics Research Lab, Stanford University 2018).[2].

<sup>42</sup> Loughlin (n 14).[47].

<sup>43</sup> Habermas (n 17).[448].

<sup>44</sup> Asan Institute for Policy Studies, 'Asan Institute for Policy Studies Report Part Title: Rebuilding ASEAN Centrality? Report Title: Rebuilding Report Author(s): Asan Institute for Policy Studies' (2021).[85].

placed ASEAN at the core of other regional institutions in Asia and the Asia-Pacific; this is because ASEAN has provided an institutional platform for broader regional institutions in the Asia Pacific and East Asia. In other words, building regional bodies with broader membership with ASEAN is only possible.<sup>45</sup>

The ASEAN Charter is a regulatory instrument outlining the institutional framework for the ASEAN that binds all AMS. Apart from this, the ASEAN Charter has transformed ASEAN into an organisation with an international legal personality. Thus, in this case, the ASEAN Charter serves as a legal foundation regulating cooperation among the AMS to clarify and provide direction towards its goals and objectives. Furthermore, the ASEAN Way feature maintained in the ASEAN Charter must be understood as something other than a static feature. The ASEAN Way must be considered a strategic tool to respond to various socio-political developments and challenges in managing regional tensions and disputes among the AMS.<sup>46</sup> In addition, the ASEAN Way is a means for the AMS to maintain multilateral relations and peace in the region.<sup>47</sup> Therefore, it is expected to be a solution to any issues experienced within the ASEAN to achieve its goals. In this context, constitutionalism is inseparable from the concept of democracy in the ASEAN region, regardless of the lack of centralised legislative and adjudicative institutions in the ASEAN.

The term democracy in the ASEAN context was first introduced by the Declaration of ASEAN Concord II in October 2003. The Declaration cites states' commitments to raise the cooperation on political and security sectors in ASEAN region to a different level to provide assurance that the countries in this region live peacefully and wishes for the broader global community have conducive environment which is a just, democratic, and harmonious. Furthermore, the word 'democracy' is restated in the Vientiane Action Plan, denoting that AMS can

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<sup>45</sup> Amitav Acharya, 'The Myth of ASEAN Centrality?' (2017) 39 Contemporary Southeast Asia.[274].

<sup>46</sup> SC Padmakumara, 'A Conceptual Analysis on "ASEAN Way" as a Normative Approach for Conducting Regional Affairs' (2021) 06 FGS - CJMR Journal.[6].

<sup>47</sup> *ibid.*[8].

achieve an ASEAN Security Community by building a democratic community in the Southeast Asia region that is democratic, open-minded, sharing and transparent and ASEAN has emerged as a distinct model of security institution.<sup>48</sup> It is finally reaffirmed in the ASEAN Charter, albeit the democratisation spirit encounters the vital principles of sovereignty and non-interference.<sup>49</sup> However, if the principle of non-interference is considered the main obstacle to enforcing human rights in ASEAN at this time, and if the principle of non-interference vanishes, then drastic empowerment of civil society in AMS is needed.<sup>50</sup> The democracy concept and democratisation spirit are challenging to apply, since each country interprets and positions democracy terminology differently due to varied political systems and social values, which affect the variety of sociopolitical order.<sup>51</sup> Such a challenge is made more complex by a sceptical view of the implementation of democracy itself, namely, values existing in society, regarded as inherited by colonialism, including primordialism, patrons and others.<sup>52</sup> Nevertheless, one still finds a more optimistic view of democracy in the ASEAN.

There is a saying that different ponds have different fish. In the context of regional democracy, one can say that the EU differs from the ASEAN. All the EU Member States are democratic states, as democracy is a requirement for countries to join the EU. The forms of government found in the ten AMS vary widely, from democracies to military dictatorships and from absolute monarchies to communist governments. The diversity of government systems renders regional cooperation a complicated task. Nevertheless, the pragmatic work culture of ASEAN countries has thus far managed to overcome these differences.<sup>53</sup>

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<sup>48</sup> Hitoshi Nasu, [et.,al.], *The Legal Authority of ASEAN as a Security Institution* (Cambridge University Press 2019).[xvii].

<sup>49</sup> Shofwan Al Banna Choiruzzad, *ASEAN Di Persimpangan Sejarah: Politik Global, Demokrasi & Integrasi Ekonomi* (Yayasan Pustaka Obor Indonesia 2015).[9].

<sup>50</sup> Ali Khan Ghumro, Parvaiz Ali Mahesar and Abdul Rehman Nizamani, 'Coping with Human Rights Challenge: A Perspective from ASEAN' (2019) 37 Asia Pacific.[97].

<sup>51</sup> Ali Maksum, *Potret Demokrasi Di Asia Tenggara Pasca Perang Dingin: Analisa, Dinamika, Dan Harapan* (The Phinisi Press 2018).[1].

<sup>52</sup> *ibid.*[175].

<sup>53</sup> Kishore Mahbubani and Jeffery Sng, *Keajaiban ASEAN: Penggerak Perdamaian* (Gramedia Pustaka Utama 2017).[196].

The democratisation process with a universal interpretation will be achieved through the ASEAN Charter, primarily by establishing more people-oriented bodies under this charter. People-oriented ASEAN bodies have played a very important role in the constitutionalism of ASEAN Charter since they are established based on the people of all AMS. The bodies that qualify as people-oriented bodies include the AICHR, established at the 15<sup>th</sup> ASEAN Summit on October 23, 2009, in Cha-Am Hua Hin, Thailand. This body is responsible to promote and protect the human rights of all people in the ASEAN region. In addition, the ASEAN Human Rights Declaration (AHRD) of 2012 has reinforced this body. The AHRD contains basic human rights principles and serves as a reference for implementing human rights in the region.

Another ASEAN body that focuses on people-centred is the ASEAN Foundation which has duties giving support to the Secretary-General of the ASEAN and building a community that promotes the ASEAN identity awareness, encourages interaction among people, upholds closed-cooperation among business people, civil society, academics and others patrons of ASEAN. In addition, a National Secretariat serves as the ASEAN focal point at the national level in each ASEAN Member State, acting as a people-oriented ASEAN institution. The National Secretariat is responsible for maintaining information on matters concerning ASEAN affairs, implementing of decisions at the ASEAN level, and disseminating public awareness about the ASEAN at the national level. Thus, the ASEAN is a people-oriented organisation, as it recognises entities in association with it.

## **Conclusion**

The ASEAN Charter can be categorised as a constitution at the ASEAN level, as it adopts centrality regulation and institutions that reflect the strength of the intergovernmentalism of the ASEAN, which is grounded in sovereignty and non-interference principles. The Charter, especially concerning its legal personality, provides positional strength to ASEAN institutions to run and regulate. The international legal person of ASEAN, as the basis for ASEAN's competence, is

incomparable to the legal personality of the EU and its institutional competence. The ASEAN's competence correlates with its international legal personality and intergovernmental character. Furthermore, it concerns the position of the ASEAN Charter before the constitutions of AMS.

Under the Constitution of each AMS, the legal structure of each AMS serves as legislation of the Charter. In addition, all parties have regarded the ASEAN Charter as the highest constitution or law of the ASEAN, which binds all AMS. Furthermore, in the ASEAN context, a constitution must be understood as a comprehensive order of the whole system that is hierarchically superior to other legal rules. It obtains its legal sources itself from the ultimate source of legitimacy, namely, the people of the Member States as reflected in the Preamble of the Charter. Thus, constitutionalisation would add a different and better quality to community law in the ASEAN instead of being a mere assertion of its bindingness. Thus, the ASEAN Charter serves to achieve regional constitutionalism by upholding democratic principles. It facilitates the achievement of the democratisation process with a universal interpretation and establishes bodies that are more people-oriented, signifying the progress of institutional frameworks compared to the period before the Charter came into effect.

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