CAN ASEAN FORGE A VIABLE LEGAL REGIME FOR REGIONAL COOPERATION?*

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I. Role of Law in ASEAN

The Bangkok Declaration of 1967 which formally announced the existence of the Association of Southeast Asian Nations (ASEAN) states that one of the basic purposes of the Association is "to promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region.[1] More than mere legal rhetoric, this declaration of intention by the founders may well be the biggest challenge for ASEAN leaders because it posits the forging of a viable legal framework for smooth intra-regional interaction and effective extra-ASEAN relations, clearly a requisite to fulfill if a sense of community within the treaty region is to develop.

This paper intends to identify some of the problems attendant to developing regional law and the prospects for achieving the above stated objective of the Association. The emerging legal framework for regional dispute settlement provided in the Treaty of Amity and Cooperation for Southeast Asia is then analyzed in the context of other regional agreements, an exercise which could be of some usefulness in understanding the ASEAN "legal style" and approach to conflict amelioration.

The key role of law in ASEAN goes beyond the fact that the association itself is a creation of the "law" or agreement among member states for it is both the basis of cooperation as well as the object of such collaboration. The significance that ASEAN leaders put in legal development is reflected in several basic documents. The Declaration of ASEAN Concord adopted as framework for cooperation the "study on how to develop judicial cooperation including the possibility of an ASEAN extradition treaty". It also calls for a "study of the desirability of a new constitutional framework for ASEAN."[2]

For most programs of action to be implemented would necessarily involve legal issues that have not only regional import but, more importantly, national impact. Take for instance the declaration of ZOPFAN

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1 ASEAN Declaration, Bangkok, 8 August 1967.

2 Declaration of ASEAN Concord, Kuala Lumpur, February 24, 1976.

(Zone of Peace, Freedom and Neutrality).[3] Theoretically desirable, the policy if implemented in the Philippines would require not merely policy revisions but a whole series of acts to revamp several treaties and legislation affecting national security and security arrangements.[4] Even the general statement calling for the "strengthening of political solidarity by promoting the harmonization of views, coordinating positions and, where possible and desirable, taking common actions"[5] can have profound legal ramifications. One might even say that all aspects of the program of action provided in the ASEAN Concord, all areas of regional cooperation —economic, political, social, cultural and information, security and improvement of ASEAN machinery—necessarily involve changes or adjustments in member states' national laws, and in some cases call for the enactment of new legislation in order to carry out regional arrangements.

Development of ASEAN law is bound to be a complex and difficult task, given the circumstances in and forces acting upon the region. There are but few predisposing factors to building a community law. Among these is ironically the "common colonial heritage" of Western legal concepts and institutions.

Commonalities in pre-colonial societal organizational patterns and system of values which formed the bases of relational structures have survived imposed colonial legal systems, particularly among some ethnic groups and people in the countryside, so that customary laws often coexist with other legal orders within the Southeast Asian countries. It is these elements in the legal cultures[6] that serve as the connecting links toward an ASEAN legal system. One example of such shared value in the region's legal cultures is preference for certain dispute settlement or conflict management modes which are non-adversary, non-formal in the Western traditional sense, a subject which will be discussed further in relation to the regional law on dispute settlement.

Countervailing forces that militate against communal law for ASEAN are more readily perceivable, partly because it has long been fashionable and politically expedient for dominant powers to stress diversity and downplay any unifying characteristics of the region. Many scholars, taking their cue from the prevailing sentiment and literature on Southeast Asia, had for long looked for and wrote about fragmentation of the region's peoples and cultures. It is somewhat like how one looks at a collage

[3] Declaration of the Zone of Peace, Freedom and Neutrality, Kuala Lumpur, 1971; ASEAN Concord, 1976.

[4] The Philippines has a series of security treaties with the United States of America. For the moment, political and security reality in the region have converged to favor the continuance of American bases in the country.

[5] ASEAN Concord.

[6] Legal cultures, as distinguished from legal systems which refers to the formal system of laws, is used here to mean both the formal and non-formal aspects of the legal order.

or mosaic composition. One could see the elements and never see nor sense the message that is the composition.

This is not to say that differences do not matter. For in the area of legal development for the treaty region, diversities of legal cultures and systems among member nations are proving to be hurdles to be overcome with great care and skill if law is to serve communal concerns and interests.

Even just a brief survey would readily illustrate the intricate mosaic of legal systems in the region. Indonesian jurisprudence is founded on Islamic, Hindu and Adat law, with selective retention of Dutch law. Malaysia and Singapore share traditions of British law superimposed upon Islamic legal foundations and now modified by modern, indigenous legal innovations. The Philippines has a legal system which is a peculiar blend of Roman and Canon law, Civil law of the Iberian strain, Anglo-American law, Islamic and Adat law (only recently elevated to positive law with the enactment of the Muslim Personal Law Code for Muslim Filipinos). Thailand has its indigenized eclectic legal system which has integrated concepts from Khmer, Indian, French and British legal systems.

Intricate as it is, the mosaic is ever so much more elaborate when seen in detail with the great variety of ethnic and customary laws in each country, laws that had long survived the incursion of alien legal systems imposed by waves of colonizers with major impact in areas proximate to the seats of government.

In hinterlands of SEA countries it is not uncommon that property and personal relations are still governed by long established customs. The result of dualistic or pluralistic legal systems can be politically very explosive in modern context, as illustrated in the case of the Philippine Muslim South where one major cause of the continuing rebellion had been property disputes. It has been often enough alleged that communal lands owned by Muslims from time immemorial had suddenly appeared as registered and titled properties under some outsiders' names, usually Christians. Given the Southeast Asian's way of valuing land, such disputes can cause no less than major revolts, and one might note here that the more serious revolts against the Spanish rule in the Philippines were connected with violation of land rights of the local people.

The Philippines situation appears simple when compared to Indonesia where customary law has long occupied a major position in the dualistic legal system that resulted from Dutch rule. Writing on the formal aspects of the dualism of law in Indonesia today, Professor Koesnoe defines adat law as that

> ... emerging spontaneously from the sense of law and justice of the indigenous Indonesian people without intervention from the state circles.

> It is a popular law ... works without any kind of statement from legislators' circles ... changed without any decisions from the legislature ... a law from and of the people.

With greatest impact in the field of family life, communal or social life and small trade, he says, the Indonesian Adat law is difficult to replace by any other kind of laws since the people are "in touch with and governed by this kind of law since their earliest childhood through education and social life." He hastens to add, however, that there is pluralism of law within the circle of Adat law and differences can be observed in the very practices, both in pattern and in their detail, in the different areas in the Indonesian archipelago.[7]

A dilemma shared by developing nations, including the ASEAN members, focuses on the role of law in development. Should law reflect changes in society or should political leaders legislate change? In fact, can progress be legislated into reality? The imperatives of sheer survival have made the first alternative most impractical, and the second alternative resurrects controversial issues related to "social engineering." These issues are basically being confronted on the national level. But these have important implications on the regional level since ASEAN was organized with the view that cooperation would precisely augment domestic efforts at development.

The solution to the dilemma is not a simplistic one of choosing one or the other alternative, for somewhere in between presumably lies a rational decision to use law to accelerate and inspire change consistent with and reflective of the society's consensual values, sentiments as well as aspiration. Thus, optimal use of law as agent for national progress and peoples' well-being should work to strengthen the fabric of society rather than rip it beyond recognizable identity.

ASEAN may be said to be the product of engineered change. In turn it is hoped that it shall become the catalyzing force that could revitalize the region and its peoples. In this process the forging of a viable legal regime appears absolutely crucial.

Can ASEAN evolve a relevant and responsive legal order in the region? This issue is of course an echo of a problem persistent in most ASEAN states. For example, in the Philippine system, laws are generally "alien" to most people — these are in English, besides being "legalese" (meaning, legalistic jargon not meant for popular communication). Not just concepts but procedures as well are so complex even to one trained in law that the legal maze has the general effect of intimidating rather than protecting the layman. Fortunately, some law reform efforts are being instituted to obviate what could be tyranny of law. And in the area of

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[7] Professor M. Koesnoe, "The Formal Aspects of the Dualism of Law in Indonesia Today," an unpublished paper presented at the Congress of Comparative Law in Lausanne on 13 September 1979.

agrarian law, for instance, law has moved closer to the people—first, it has been simplified, and second, the court has literally been brought out to the fields, thus minimizing the necessity of lawyers' intervention.

It is heartening to note that there is a growing trend to indigenize law and legal institutions and scholars are responding by concerning themselves more and more with issues and solutions drawn from the wellsprings of home-grown genius. Given the past history of Southeast Asian peoples, this is a most welcome desideratum.

It is within this context that one might understand why ASEAN advocates are quick to point out that the Association is an indigenous effort, a uniqueness (both from previous regionalizing attempts as well as from parallel experiences in other parts of the world) which could well be the best guarantee of its viability and vitality. But, of course, uniqueness in itself need not be a virtue unless it serves some good purpose.

In the case of ASEAN one might well ask whether it in fact is a positive quality rather than a factor that would work against progressive forces within the region. As was discussed above, there is in the various components of the Association definable trends toward indigenizing legal institutions and processes inspired by the pragmatic realization of national leaders that development can be accelerated only if people can relate to the objectives and the approaches.

To the extent that ASEAN lends support to these national trends it serves the useful purpose of reinforcing these laudable changes in the regional context. A growing network of inter-governmental agencies that constantly consult and collaborate on common concerns has been providing ample opportunities to pool ASEAN experiences and insights for possible relevant models for developing their own solutions.

It is encouraging to note that the recent surge to regionalize legal perspectives has gone beyond government elites and academics and the formation of the ASEAN Law Association and the ASEAN Law Librarians Association are evidences that even the generally conservative members of the legal profession see some positive and possibly even profitable things about ASEAN.

Given the pivotal role that law could and does play in the region's development, it would seem imperative to have some basic research work on fundamental legal issues that confront the Association. There is need, for example, to understand the legal nature and character of ASEAN as an international or regional organization.[8] There is need to anticipate the useful ways that law could play in accelerating progress in the treaty

[8] Formally organized in Malaysia, after the concept was discussed and initiated in a conference on "Legal Development in ASEAN" held at Djakarta in 1979, the ASEAN Law Association had its first general conference in Manila in November 1980.

region. The kinds of laws that could best enhance collaboration should perhaps challenge the most creative genius of the region. Legal aspects of regional conflict amelioration, is of crucial importance to the region's survival. Not least of all, the problems of harmonizing national laws and legal institutions in order to facilitate implementation of Association objectives even now obstruct or at least slow down incipient cooperative efforts.

The problem of an entity's "legal personality" is always a fundamental one in law because it determines status and capacitation. Quite unlike other regional organizations, ASEAN has *deliberately* chosen not to adopt a formal "charter". A standard charter generally would contain provisions on machinery and institutions with defined duties, powers and functions; provide for the legal capacity of the organization; mandate the creation of a secretariat empowered to act in behalf of the Association in its concourse with other international entities; prescribe an amendatory procedure and perhaps even specify the lifetime of the organization. That all these are not part of ASEAN initial development was surely not a result of incompetence—one might even say that it was a stroke of genius—because it is now beyond doubt that it was the lack of rigid structures in the organizational setup that allowed for the necessary flexibility and resilience which ASEAN needed in responding to the many buffeting forces interacting in the region. Subsequent to the Bangkok Declaration there was in fact a move to adopt a formal charter for ASEAN. But after careful deliberation and consultation, the idea was set aside and the Council of Ministers reaffirmed that the original Declaration and other subsequent basic documents were adequate to constitute the foundation of the Association.[9]

The legal nature and personality of ASEAN has, however, since evolved from an amorphous beginning. One manifestation of significance is the landmark signing of the ASEAN-EEC (European Economic Community) Agreement signed at Kuala Lumpur on 7 March 1980.[10] News items have pointed out that the event was precedent-setting for the European Community because it has for the first time made such a cooperative agreement with a non-associated organization, and for ASEAN because it is the first agreement that it has signed as an international entity. Whether this import was indeed intended or merely imputed by enthusiastic observers need verification, but for the moment the important thing is that the assertion has raised a fundamental question, that is: What does this portend for ASEAN's legal development? For instance, if the foreign ministers of ASEAN had signed the Agreement as separate representatives of

[9] This decision is reflected in the Joint Communiques issued by the Foreign Ministers Council.

[10] ASEAN-EEC Economic Agreement, 7 March 1980.

their respective states, what would be the legal implications in the event of one government abrogating the agreement?[11]

Had they so chosen, ASEAN leaders had available models of cooperation—ranging from informal arrangements of different kinds, free trade area, customs union, to economic union—depending on the degree of integration they might have preferred. And while the European Community is generally cited as an example of a custom union, Benelux as economic union, ASEAN is described as having "characteristics of the preferential trading concept."[12] The issue of integration has an important legal aspect but for the moment must remain outside the scope of this study. It was raised here only in order to point out that there are concomitant legal issues that have to be studied whatever type and degree of cooperative ASEAN decides to pursue.

Still another research area must deal with an investigation of the lead role of law in development. Much basic work needs to be done in anticipating problems in resolving antimonies between national law and regional law, and among divergent legal systems of the region. "Soft" areas in this regard would include laws in taxation, business incentives, foreign investment, patent, environmental protection, dangerous drugs, labor, travel and immigration, and even conflict of law rules.

Ever so slowly, but just as surely, adjustments to reconcile differences in legal systems will occur not so much because of an *a priori* common will to do so but more as a result of necessity and the emerging open attitude of the leaders and their predisposition to pragmatic approaches in seeking solution to common problems. One might cite as an example of legal development through actual cooperation the ASEAN Aceh (Indonesia) Urea Project. After some three years of difficult negotiations, the framework of what might well be the first "ASEAN corporation" was hammered out, and divergent legal requirements stemming from individual national laws, i.e. corporate and equity requirements, among others, were reconciled. In some instances, this required some "stretching" of legal construction; in others, agreements on specific points were predicated on the passage of future legislation on the matter. When the venture becomes fully operative, more legal issues will surely emerge and the concept of an ASEAN corporation might have to be clarified, for how does one treat it: as a member state even if all the other ASEAN governments are part owners? How are the employees to be regarded, their earnings, etc.? Being the first of at least, three other ASEAN Industrial Projects in the

[11] This same issue confronted the United States government when it began to deal with ASEAN as an entity, according to Arthur Rovine, head of the Treaty section at the US State Department.

[12] The Aceh Urea Project is one of five initially identified regional complementation projects of ASEAN.

offing, the Aceh Urea projects has broken grounds setting some "legal" precedents for future transactions.

Clearly, ASEAN law has two components, regional and national. Changes in each will more and more affect the other. Legal problems and issues related to and arising from intra-regional transactions as well as those involving extra-ASEAN elements promise to become more complex as interaction become intensive. At this stage it is not appropriate to speak of an ASEAN community law originating from a supra-national level and having direct import and binding effect on individuals and legal persons in member states. And unless it is to better explain ASEAN's uniqueness —as a regional arrangement, comparison with the European Communities and its law emanating from the various community institutions would not only be odious but misleading. However, if ASEAN law as used here refers to the body of agreements, treaties and declarations which guide and shape the patterns of interaction within and of the Association, it is the position of this paper that such a law is emerging and one important component is the Treaty of Amity and Cooperation if only because it contains the seed that might well spring forth as the legal framework for regional dispute settlement in Southeast Asia.

II. ASEAN Treaty of Amity and Cooperation; Toward a Legal Framework of Dispute Settlement in Southeast Asia

That no community can long continue to exist without a conflict amelioration mechanism is axiomatic. Speaking recently on his idea of an incipient Pacific Community, former East-West Center President Klienjans identified what he considers the ten basic characteristics of any kind of community:

> First, a community is made of people, who secondly, inhabit a territory. Third, these people share a fund of knowledge. Fourth, they have a vehicle of communication—a language. Fifth, they have a common heritable—a history. Sixth, they respond to a set of symbols. Seventh, they share a core of common values. Eighth, they are linked in a network of institutions. Ninth, they have ways of settling conflicts among themselves, and tenth, their society has form or order.[13]

An ASEAN community undoubtedly is being forged into existence. One only has to examine the basic documents which predicate the Association on the region's common culture, history, aspirations, and common will. Taking the position that viable mechanism for settling disputes and ameliorating conflicts within the community is a *sine qua non* to the community's survival, this paper proceeds to examine what ASEAN has done toward developing regional law to bring this about.

[13] Extracted from President Everett Kleinjan's talk to the Asian/Pacific Roundtable in Washington, D.C. and his letter to Richard Mallery. (Emphasis supplied)

Promulgated in February 1976, the Treaty of Amity and Cooperation contains the basic law on the pacific settlement of disputes for the treaty region.[14]

Formal Aspects of the Law on Dispute Settlement

Chapter IV of the ASEAN Treaty of Amity, titled "Pacific Dispute Settlement", has five articles providing for the establishment of "regional processes" for settling disputes and managing conflicts and broadly outlines the framework of that process, i.e. parties and their obligations, disputes within the jurisdiction of the mechanism, and the mechanism of dispute settlement itself. It also sets the rule of construction and controlling language. For purposes of the workshop's objective—to discuss cultural development in the treaty region—these provisions are analyzed here not for their legal import as for the light they might throw on understanding ASEAN's legal style. Attempt is made to reflect on the Association's preferences for certain approaches to dispute settlement and the cultural moorings of such choices.

Parties and Their Obligations

Thus far the high contracting parties to the Treaty include only the five charter members of ASEAN—Indonesia, Malaysia, the Philippines, Singapore and Thailand—all of whom ratified it in accordance with the constitutional procedures of each signatory state.[15] The intent to have the Treaty include entities outside of the treaty of Amity and Cooperation in Southeast Asia, and second, from the provision that the Treaty "shall be open for accession by other states in Southeast Asia."[16] Significantly, this is the first document that implements a basic principle in the Bangkok Declaration, "that the Association Asian Region subscribing to the aforementioned aims, principles, and purposes."[17] Theoretically, the Treaty admits of the legal possibility of non-ASEAN states acceding to the agreement without the prior requisite of membership to the Association.

The contracting states had undertaken certain legal obligations judging from their commitment that they "shall fulfill in good faith the obligations assumed under this Treaty."[18] Other more specific undertakings include their "determination and good faith to prevent disputes from arising," "to settle disputes through regional processes;" for all parties to a dispute

[14] Treaty of Amity and Cooperation, Denpasar, Bali, Indonesia, 24 February 1976. The Joint Communique of the Ninth ASEAN Ministerial Meeting, Manila, June 24-26, paragraph 8, expressed gratification at the ratification of the Treaty by all signatories.

[15] It is interesting to note that the five signatories have varying provisions on ratification of treaties—some do not require certain agreements to be ratified, in fact. In the Philippines, under martial rule, and the Constitution as amended, the President/Prime Minister ratifies the treaty and the Interim Assembly does not exercise the power of the projected regular Assembly.

[16] ASEAN Treaty of Amity and Cooperation, Art. 18.

[17] Bangkok Declaration, Fourth Declared Principle.

[18] Amity Treaty, Art. 3 (emphasis supplied).

to "be well disposed" towards offers of all possible assistance to settle such disputes. Also, those high contracting parties which are parties to a dispute "should be encouraged to take initiatives to solve it by "friendly negotiations before resorting to the other procedures provided for in the Charter of the United Nations."[19]

Types of Disputes Contemplated

What disputes fall within the contemplation of Charter IV upon which the regional processes of pacific settlement might be brought to bear? From the treaty provisions one might discern two types of disputes, the distinction based on the development stage of the conflict—one kind being actual, the other imminent. Article 13 speaks of "disputes on matters directly affecting them [the contracting parties] . . . especially disputes likely to disturb regional peace and harmony." The subsequent article alludes to another type when it — provides that the High Council "shall be constituted . . . to take cognizance of the existence of *disputes* or *situations* likely to disturb regional peace and harmony." Article 15 likewise mentions and deals with "situations."[20] It would seen clear that in addition to actual disputes, potentially disruptive conflictive situations in the region would be within the competence of the High Council.

Mechanism of Settlement

The Treaty provides for the creation of a formal mechanism to settle disputes through the regional processes and directs the high contracting parties to "constitute, as a continuing body, a High Council comprising a representative at ministerial level from each of the high contracting parties."[21]

The mandate of the High Council is to take cognizance of the dispute or situation "only in the event that no solution is reached through direct negotiations," and "when deemed necessary, shall recommend appropriate measures for the prevention of a deterioration of the dispute or the situation."[22]

When the High Council takes cognizance of a dispute or situation, it is directed to take any of three possible courses of action. First, it may recommend to the parties in dispute appropriate means of settlement "such as good offices, mediation, inquiry or conciliation." Second, it may offer its good offices. Third, it may constitute itself into a committee of mediation, inquiry or conciliation.[23]

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19 *Id.* Art. 13, Art. 14, Art. 16, Art. 17, Art. 18, respectively.
20 *Id.* Art. 15.
21 *Id.* Art. 15.
22 *Ibid.*
23 *Ibid.*

There are at least two general limitations to the competence of the High Council to exercise its jurisdiction. It would seem that it can not take cognizance of any dispute or situation without a showing that direct negotiations had been attempted but had failed. Then there is the jurisdictional requisite imposed through the proviso that the treaty provisions on dispute settlement by the High Council shall not apply to a dispute unless all the parties to the dispute agree to their application to that dispute."[24] This politically inspired provision could prove crucial to the efficacy of the settlement mechanism.[25]

Recognizing the technical bottleneck in the process, the treaty framers added another possible channel of settlement. Article 15 provides that the High Council's lack of competence resulting from the absence of the requisite unanimous prior consent of all parties to submit to its jurisdiction "shall not preclude the other high contracting parties not party to the dispute from offering all possible assistance to settle the dispute." Thus, the disputing parties are urged to be well disposed towards such offers of assistance.[26]

Presumably, if regional processes fail to produce settlement or solutions, extra-regional recourse may be resorted to. Article 17 states that nothing in the Treaty shall preclude recourse to the modes of peaceful settlement contained in Article 33(1) of the Charter of the United Nations, but only after ASEAN mechanisms failed.

Language and Legal Construction Rule

The Treaty is the only ASEAN document to date that provides for a rule of legal construction and authoritative language. Reflecting the document's character as a multi-lateral, multi-lingual agreement, Article 20 states:

> This Treaty is drawn up in the languages of the high contracting parties, all of which are equally authoritative. There shall be an agreed common translation of the texts in the English language. Any divergent interpretation of the common texts shall be *settled by negotiation.*[27]

This provision has some interesting implications, legally and culturally. One of the standard formal elements of a treaty, particularly one of a multilateral, multilingual character, is a provision on the authoritative textual language of the treaty which becomes crucial in cases of antinomies not only of translation but also of concepts. This becomes even more important when the member states have widely varying legal cul-

[24] *Id.*

[25] *Ibid.* In the negotiation of this provision, Malaysia took the position that the Sabah case is not within the purview of this process in ASEAN but a compromise was reached and this provision was the result.

[26] Art. 15, Amity Treaty.

[27] Art. 20.

tures and legal styles which would make the expected problems of linguistic variations even more complex.

In the ASEAN Treaty, however, it might be that regular rules of legal construction would be applied since they have adopted an agreed common translation of the texts in the English language thus possibly minimizing the linguistic translation issues that might otherwise be expected. The usefulness of this approach is better appreciated if one recalls that the Sabah dispute between Malaysia and the Philippines over the issue of who is the rightful sovereign of the northern Borneo territory focuses on the translation of the term *padyak.* The Philippines claims that it means "lease" and as such, it is asserted that the territory continues to belong to the Philippine claimants and the parties in succession; Malaysia translates it as "sale" on which basis it is claimed that there was transfer of ownership and sovereignty over the area.[28] The ramifications of this century old dispute are still felt to this day.

Earlier in this paper, it was pointed out that the diversity of legal cultures in ASEAN constitutes one of the factors in shaping regional law. Thus far, the pattern of ASEAN practice on intra-association matters show that English has been the effective tool of communication in discussions, in drawing up documents, and in record keeping. Given the assertive cultural nationalism of the member states, however, some national leaders, including Heads of Government during Summit meetings, deliver their major addresses in their national lagnuages. In all but the Treaty of Amity, English has been the only textual language of other agreements, joint communiques, and declarations.

What this could suggest is that the Treaty is intended to be *sui generis* among ASEAN agreements, meant to have more than mere moral import; legal in nature and in effect, and creating specific enforceable rights and obligations. Viewed in this manner, then it makes sense to have an explicit statement on rule of language and interpretation as the Treaty provides.

In legal contemplation, the formula "equally authoritative" means that all texts, having equal status, can be cited as the authoritative" statement of the law and that no one text takes precedence over the others. The problem arises when discrepancies arise not merely from translations of equally authentic texts, but rather when the interpretation involves meaning of words attributable to legal concepts and institutions in which case the question is reduced into an issue of determining the parties' intention. No doubt the ASEAN states may involve established international law rules when need arises. However, an emerging ASEAN legal style may be discerned from the express provision that any divergent interpretation of the common text shall be settled by negotiation.

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[28] ORTIZ, LEGAL ASPECTS OF THE NORTH BORNEO QUESTION (1964). NOBLE, PHILIPPINE POLICY TOWARD SABAH, A CLAIM TO INDEPENDENCE (1977). M. O. ARIFF, THE PHILIPPINES' CLAIM TO SABAH (1970) for the Malaysia case.

III. Law and Culture in ASEAN

The Amity Treaty has been called a benchmark in ASEAN development and for good reason when viewed against the history of the region. There are however those who point out that five years have passed since the signing of the agreement and implementation has not gotten underway. Both views are of course not mutually exclusive for they both describe different aspects of the document.

The mere act of successfully concluding the Treaty held great significance for ASEAN for it marked a maturation stage for the Association where the members had sufficiently become confident of the stability and strength of their relations *inter se*. By providing a framework for settling disputes, moreover, the members in effect had acknowledged the existence of disruptive forces within the region which, if not confronted, would erode whatever gains had been attained. They had gone past the stage of building and nursing the fragile foundations of the early stages and in the now familiar "step-by-step ASEAN approach" to region-building they set out to shape the framework for peaceful solutions to outstanding conflicts. Thus, as an event the Treaty might well represent one of the major achievements of ASEAN.

On the other hand, half a decade after the event, one would expect that some of the structures mandated in the Treaty would have been set up and the processes set in motion. There is however very little evidence that this has happened. The High Council which is supposed to be the dispute settlement body has not been constituted. Any possible objection to the theoretical underpinnings of the legal framework for dispute settlement might well be premature.

But for this forum's purpose, it would be worth discussing some points. For example one might make the point that a High Council composed of ministerial level officials from the five member states would tend to be more politically inclined rather than objective "jurists" that they probably ought to be. There would be no substantial difference between this body and the Foreign Ministers Council or the Economic Ministers body that is now meeting regularly. To pursue the point would however anticipate a problem that might not even occur if, in the implementation of the Treaty, the appointing powers choose to put in the High Council some of their distinguished jurists rather than politicians, an event that is not precluded in the formal provisions of the Treaty.

Another problem regarding the legal framework on regional dispute settlement is that the mechanism and process provided for are too vague and general to be of any practical value. However, it is suggested that within the context of the emerging ASEAN style, and if Chapter V is read in the context of the entire Treaty, the shortcoming might be miti-

gated and it might even be precisely the virtue of the entire scheme. In the Preamble, for instance, one notes how the objective of peaceful dispute settlement is couched:

> Convinced that the settlement of differences or disputes between their countries should be regulated by *rational, effective* and *sufficiently flexible procedures.* avoiding negative attitudes which might endanger or hinder cooperation ...[29]

This clearly shows that flexibility was a deliberate choice over a rigid, objective, well-defined procedure characteristic of other regional arrangements for dispute settlement. One only has to look at the preference of the European Communities for a formal Court[30] given not only supra-national and exclusive jurisdiction over Treaty matters, to appreciate the distinct approach of the ASEAN Treaty.

Some provisions in Chapter III, on "Cooperation", would be helpful in grasping the essense of the ASEAN approach. The word "resilience" appears in Article 11 and 12, a term which has been repeatedly used in previous ASEAN documents as well as leaders' speeches and pronouncements.[31] Article 11 provides:

> The high contracting parties shall endeavor to strengthen their respective *national resilience* in their political, economic, socio-cultural as well as security fields in conformity with their respective ideals and aspirations, free from external interference as well as internal subversive activities in order to preserve their respective national identities.[32]

Then Article 12 speaks of cooperation in all fields "for the promotion of *regional resilience,* based on the principles of self-confidence, self-reliance, mutual respect, cooperation and solidarity which will constitute the foundation for a strong and viable community of nations in Southeast Asia."[33]

These terms—national and regional resilience—are novelties in international legal documents; the concept could well be ASEAN's contribution to international relations especially as the Association is able to demonstrate that their approach to regional community development can and does work. Some ASEAN watchers in fact do speak of the ASEAN model and see it as a possible option for newly emerging regional arrangements in the Third World.

It may be noted that in some Southeast Asian sub-cultures, flexibility and resilience are positive qualities. In the Philippines, strength is often-

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[29] Amity Treaty, Preamble.
[30] D. LASOK, ET AL., AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES (1973).
[31] Amity Treaty, Art. 11 and Art. 12.
[32] *Ibid.*
[33] *Ibid.*

times likened to a bamboo tree which will not break in a storm because it sways but does not give in to the forces. Interestingly enough, Professor Koesnoe, speaking from the perspective of Adat law in Indonesia, has suggested that resilience is like a banyan tree because it has variegated useful qualities which may be applied to the administration of justice—it is shady and thus provides "coolness" (no justice can come in the heat of anger); it is big and gives support (the law must be source of protection); its durability signifies the enduring characteristic of a viable system of justice and equity.[34]

It would seem therefore that resilience is not without meaning in Southeast Asia and some cultural values are deeply reflected in the term. If this is so, then it offers a key to understanding the nuances and underpinnings of the Treaty provisions on dispute settlement in Southeast Asia. It may even suggest some factors that may determine the degree to which one can reasonably expect an optimistic prospect for actual implementation of the Treaty and its application to actual regional disputes. The law after all is only as good as the intent and spirit behind it, and the formal aspects are merely skeletal beginnings.

It is to be hoped that in the preoccupation to preserve the ASEAN style, a dynamic regional identity shall not be stunted; that in developing regional law, faithfulness to traditional values will not unnecessarily arrest the visionary momentum that inspired the ASEAN founders.

CONCLUSION

Allow us now to refer back to the question we posed: Can ASEAN forge a viable legal regime for effective regional cooperation?

In the above presentation, we have tried to establish the following premises: first, that law is crucial to a dynamic ASEAN; second, that a legal regime for the region and for ASEAN's meaningful concourse with the rest of the world is indeed in its embryonic stage; third, that to nurture that embryo, all relevant sectors, public as well as private, need to pool resources and genius in the search for approaches to develop institutions of law and legal resources in the region.

Now, if you will allow these premises, the conclusion to this presentation appears clear, and that is, that concerted and deliberate plans of action are in order.

Let me now conclude by making suggestions toward a blueprint for action:

[34] Dr. Moh Koesnoe, Research Professor in Adat Law. Airlangga University and Syeah Kuala University, Indonesia, who discussed the idea with the paper writer during his visit to East-West Center in May, 1980.

1. Government level:

The creation of an ASEAN COMMITTEE ON LAW AND LEGAL RESOURCES. This would study legal problems, identify areas where law would play a meaningful role in ASEAN cooperation, anticipate issues and recommend possible approaches to perceive legal problems. It would also study ways and means of planning future harmonization of laws and legal systems, drawing from the rich tapestry of legal cultures in the region.

Working Groups in the Committee might be organized along the lines of Judicial, Legislative, and Administrative concerns.

2. Private Sector/Professional Groups

The ASEAN Law Association could play a very dynamic role in complementing and supplementing Governments' efforts. Here is where creativeness and innovation could be introduced since by its nature, the organization is not stymied by the demands of policy and decision-making as well as the strictures of bureaucracies. The outlined programs of the ALA should be given full support. Focus should be on facilitating professional interchanges.

3. Academic institutions

The academe is in a very unique position to lay the foundations of a regional community. It is here one must produce the experts of tomorrow, imbued with a commitment to regional values. There must be even now in curricular offerings some courses on comparative ASEAN laws as well as exchange of scholars. And because of the particular importance of culture in law and legal resources in Southeast Asia, other discipline such as anthropology and sociology need to be co-opted in a total effort to forge a viable legal regime in ASEAN.