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ASIA-PACIFIC INTERESTS IN THE EMERGING ARCTIC

Christopher R. Rossi[*]

ABSTRACT

This article focuses on pelagic opportunities for Asia-Pacific countries in an age of melting Arctic ice. While much attention focuses on the strategic pivot to Asia, a new cycle of Pacific relations indicates that such a turn has implications for the High North as well as for East-West interactions. This Article addresses problems of contested sovereignty in the coming age of the global Arctic with emphasis on Russia's role as gatekeeper to the problematic Northern Sea Route, China's emerging interests, and the role of middle powers such as South Korea in this increasingly congested space.

I. INTRODUCTION

Rapidly receding ice,[1] which once covered huge deposits of living and mineral resources,[2] is turning the Arctic cryosphere into a region of superpower competition and global interest. Formerly construed as an area too remote and inhospitable to sustain human activity, the Anthropocene is transforming this mostly landless geo-space into a gigantic territorial temptation, far beyond the interests of the five Arctic littoral powers – Canada, Denmark, Norway, Russia, and the United States (the Arctic 5).

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[1] *See* Jason Samenow, *Snow and Arctic Sea Ice Extent Plummet Suddenly as Globe Bake*s, WASH. POST, July 18, 2013, http://www.washingtonpost.com/blogs/capital-weather-gang/wp/2013/07/18/snow-and-arctic-ice-extent-plummet-suddenly-as-globe-bakes/.

[2] *See infra* note 22 and accompanying text.

This small group of states claims a unique right to safeguard the Arctic's environment, littoral indigenous communities, and natural resources.[3] However, when they are not staking claims against each other in the Arctic, they are contending with emerging global interests in the High North.

This article investigates Asia-Pacific Arctic developments in light of extant circumpolar power interests, with particular emphasis on competing regional strategies to promote regional cohesion. Like the metaphoric turn of history's grand wheel, international relations presents an assortment of foreign policy rotations as the early twenty-first century unveils its Pacific Century. United States policy marks a pivot to Asia, spanning earlier language of a Trans-Pacific Partnership to the Trump Administration's rhetorical embrace of Free and Open Trade and Investment.[4] Asia's third largest economy, India, now asserts an extended neighborhood to the Association of Southeast Asian Nations (ASEAN) through its Act East Policy.[5] Japan has shifted to East Asia, the Middle East, and Africa through its Free and Open Indo-Pacific Strategy.[6] Since 2012, Russia's turn to the East involves creation of a Far East Development ministry,[7] advanced special economic zones, the proclamation of Vladivostok as a free port, and strengthened economic ties with Asia-Pacific countries.[8] South Korea announced in 2013 its Eurasia Initiative to restructure the geopolitical and security architecture of Northeast Asia, with a

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[3] In 2008, the five circumpolar states issued the Ilulissat Declaration, an eight paragraph statement asserting that the countries' extant stewardship over the Arctic Ocean precluded any "need to develop a new comprehensive international legal regime to govern the Arctic Ocean." The Ilulissat Declaration, Arctic Ocean Conference, Ilulissat, Greenland (May 28, 2008), http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf.

[4] *See* Alyssa Ayres, Want a Free and Open Indo-Pacific? Get India into APEC, Council on Foreign Relations (Nov. 13, 2017), https://www.cfr.org/blog/want-free-and-open-indo-pacific-get-india-apec.

[5] *Act East Policy*, Press Information Bureau, Government of India, Ministry of External Affairs (Dec. 23, 2015), http://pib.nic.in/newsite/PrintRelease.aspx?relid=133837.

[6] *See* Mahesh Langa, *Japan Calls for 'Free and Open Indo-Pacific Strategy,'* THE HINDU, Sept. 14, 2017, http://www.thehindu.com/news/national/japan-calls-for-free-and-open-indo-pacific-strategy/article19685817.ece.

[7] *See Ministry for the Development of the Russian Far East*, THE RUSSIAN GOVERNMENT, http://government.ru/en/department/239/events/ (last visited Jan. 2, 2018).

[8] Jae-Young Lee, *The New Northern Policy and Korean-Russian Cooperation*, RUSSIA IN GLOBAL AFFAIRS (Nov. 15, 2017), http://eng.globalaffairs.ru/valday/The-New-Northern-Policy-and-Korean-Russian-Cooperation-19149.

network of energy connections linking the Korean Peninsula with Central Asia and Europe. Crafted with South Korea's middle power status in mind, which characteristically favors multipolarity, rule-based order, institutional governance, and shared global responsibilities,[9] the initiative has encountered operational difficulty, particularly given the collapse of a key element – the Rajin-Khasan inter-Korean rail link to Russia's ice-free port – and has created friction with China and its attempt to reconfigure the post-war architecture of U.S. regional relations through its massive One Belt, One Road initiative.[10] However, melting Arctic ice may create a pelagic opportunity for Asia-Pacific countries faster than any wishful thaw in polarized inter-Korean relations that middle power strategic thinking attempts. While increasing attention on Pacific Rim issues focuses on strategic rotations turning east and west, interests invariably will turn north and have done so already. A new cycle of Pacific relations will present strategic challenges in the coming age of the global Arctic.

II. AN ALREADY CONGESTED, CONTESTED SPACE

Contested sovereignties in the Arctic already include numerous disputes. Principal conflicts involve boundary disputes, such as in the Beaufort Sea between the United States and Canada,[11] and in the Bering Sea between the United States and Russia.[12] They include conflicting ownership claims over Hans Island,[13] a turtle shell rock-scape claimed by Denmark and Canada, and bilateral and multilateral disputes over the waters adjacent to the Svalbard archipelago.[14] Major disputes seem

[9] Andrew O'Neil, *South Korea as a Middle Power: Global Ambitions and Looming Challenges*, *in* MIDDLE POWER KOREA: CONTRIBUTION TO THE GLOBAL AGENDA 75, 77 (Scott A. Snyder ed., 2015).

[10] *See* Alice Ekman, *China's Rise: The View from South Korea*, EUROPEAN UNION INSTITUTE FOR SECURITY STUDIES (May 2016), https://www.iss.europa.eu/sites/default/files/EUISSFiles/Alert_19_China_ROK.pdf.

[11] James S. Baker & Michael Byers, *Crossed Lines: The Curious Case of the Beaufort Sea Maritime Boundary Dispute*, 43(1) OCEAN DEV. & INT'L L. 70 (2012).

[12] Valery Konyshev & Alexander Sergunin, *Russia's Policies on the Territorial Disputes in the Arctic*, 2 J. INT'L R. & FOR. POL'Y 55, 55-83 (2014).

[13] *See generally* Christopher Stevenson, *Hans Off! The Struggle for Hans Island and the Potential Ramifications for International Border Dispute Resolution*, 30 B.C. INT'L & COMP. L. REV. 263, 263-76 (2007).

[14] *See generally* Christopher R. Rossi, *Norway's Imperiled Sovereignty Claim over*

certain over competing claims to extended Arctic continental shelves. These are mineral and energy-rich areas of seabed and subsoil beyond the 200 nautical mile (nm) breadth allowed by the United Nations Convention on the Law of the Sea (UNCLOS) that may extend up to 350 nm from coastal state baselines.[15] Russia's extended continental shelf claim alone covers an astonishing 1.2 million square kilometers.[16] The outer limits of its claim, which includes the massive Lomonosov Ridge, conflicts with Danish, Norwegian, Canadian, and probably United States claims.[17] The United States is not party to UNCLOS. However, former President Obama acknowledged United States interests, noting that the country's "extended continental shelf claim in the Arctic region could extend more than 600 nm from the north coast of Alaska."[18]

The United States Navy's Arctic Roadmap projects ice-free conditions for the Arctic summer, beginning as early as 2030.[19] By century's end, projections of an almost completely ice-free[20] polar season have stimulated thoughts about transforming the High Arctic[21] into a viable economic and commercial geo-spatial

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Svalbard's Adjacent Waters, 18 GERMAN L. J. 1497, 1498-1530 (2017).

[15] *See* art. 76, U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

[16] *See Continental Shelf Claims in the Arctic*, THE ARCTIC INSTITUTE, http://www.thearcticinstitute.org/wp-content/uploads/2017/06/TAI-Infographic-ContinentalShelfClaims.pdf (July 9, 2018).

[17] *See generally Commission on the Limits of the Continental Shelf (CLCS)*, OCEANS & LAW OF THE SEA, UNITED NATIONS, http://www.un.org/depts/los/clcs_new/clcs_home.htm (last visited Dec. 21, 2017).

[18] THE WHITE HOUSE, NATIONAL STRATEGY FOR THE ARCTIC REGION 9 (2013), http://www.whitehouse.gov/sites/default/files/docs/nat_arctic_strategy.pdf (with a cover letter from President Barack Obama dated May 10, 2013).

[19] *See* David W. Titley & Courtney St. John, *Arctic Security Considerations and the US Navy's Roadmap for the Arctic*, 36 NAVAL WAR COLLEGE REVIEW 63 (2010).

[20] Scientific usage of the term "ice-free" conditions does not necessitate complete lack of ice. For scientific definitions of varieties of sea ice, see *All about Sea Ice: Characteristics*, NATIONAL SNOW & ICE DATA CENTER (2018), http://nsidc.org/cryosphere/seaice/characteristics/index.html.

[21] The Arctic region comprises its landmass, divided into three zones, and the Arctic Ocean (which also admits to fluid differentiations due to distinctions between permanent, seasonal, and marginal ice zones). Definitions vary and are not dispositive of considerations raised here (which deal more with the notional idea of the 'political Arctic'), but it is conceptually helpful to distinguish between the High and Low Arctic and the Subarctic transitional zone separating the two. Zonal separation in terms of landmass distinctions relates to the presence or absence of contiguous boreal forests and vegetation demarcations. Woodlike vegetation does not exist in the High Arctic, although non-contiguous flower plants, grass, sedges, moss, and lichen distinctions can grow. *See*

region. A much-cited study estimates that 22 percent of the world's "undiscovered, technically recoverable resources" exists in the area north of the Arctic Circle, including 13 percent of undiscovered oil reserves, 30 percent of undiscovered natural gas, and 20 percent of undiscovered natural gas liquids.[22] An open waterway across the top of the world presents exceptional commercial rewards, in addition to mineral or energy exploitation. It would be the fastest, most direct surface route between Asia and Europe, the world's two largest regional trading blocs.[23] Such a route would save more than a week of transit time per voyage, thereby significantly reducing energy, environment, and transportation costs as compared to more expensive southern routes through the Indian Ocean and Suez Canal.[24] Although not without safety and security problems of its own,[25] an Arctic route would avoid pirate-infested and politically roiled waters of the Middle East.[26]

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generally What Is the Arctic?, BARENTSWATCH (Jan. 21, 2016), https://www.barentswatch.no/en/articles/Hva-er-Arktis/. For graphic and scientific depictions of the perimeter of the Arctic Ocean and its sub-divisions, see generally LIMITS OF OCEANS AND SEAS 189-215 (Draft 4th ed., International Hydrographic Bureau, 1986), https://www.iho.int/mtg_docs/com_wg/S-23WG/S-23WG_Misc/Draft_1986/S-23_Draft_1986_Headings.pdf.

[22] *See 90 Billion Barrels of Oil and 1,670 Trillion Cubic Feet of Natural Gas Assessed in the Arctic*, U.S. GEOLOGICAL SURVEY (July 23, 2008), https://archive.usgs.gov/archive/sites/www.usgs.gov/newsroom/article.asp-ID=1980.html (noting as well that 84 percent of the estimated resources are thought to be offshore).

[23] *See EU Position in World Trade*, EUROPEAN COMMISSION (Oct. 2, 2014), http://ec.europa.eu/trade/policy/eu-position-in-world-trade/.

[24] *See* Felix H. Tschudi, *Time Equals Money: Developing a Profitable Shipping System Using the Northern Sea Route*, 70(2) PROCEEDINGS (Summer 2013) 17–18, http://www.marcon.com/library/articles/2013/PDF%20Articles/Time%20Equals%20Money.pdf. Estimates indicate a trans-arctic route can shorten travel distances by as much as 60 percent, with up to (US) $600,000 in fuel savings per trip. *See* Stan Jones, *Northern Sea Route Beckons LNG Shippers*, ALASKA NAT. GAS TRANSP. PROJECTS OFF. FED. COORDINATOR (Oct. 9, 2013), http://www.arcticgas.gov/northern-sea-routebeckons-lng-shippers; Tschudi, *supra* note 24.

[25] Despite the landmark 2011 Arctic Search and Rescue Agreement, circumpolar capabilities to launch effective search and rescue responses to exigent circumstances remain "far from robust." Timothy William James Smith, Search and Rescue in the Arctic: Is the U.S. Prepared? 1 (2017) (Ph.D. dissertation, Pardee RAND Graduate School), https://www.rand.org/pubs/rgs_dissertations/RGSD382.html.

[26] *See generally* Jonathan Masters, *The Thawing Arctic: Risks and Opportunities, Council on Foreign Relations*, COUNCIL OF FOREIGN RELATIONS (Dec. 17, 2013), https://www.cfr.org/backgrounder/thawing-arctic-risks-and-opportunities; Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the*

III. RUSSIA AS GATEKEEPER

Turning the melting Arctic seascape into the next frontier for development presents numerous challenges and opportunities. As Russia is the only circumpolar state with millions of its citizens living above the Arctic Circle,[27] and as its Arctic landmass already generates 15-20 percent of its gross domestic product,[28] it is already heavily invested in and well-situated to capitalize on its proximity to these opportunities. Russia also has accelerated its military presence in the Arctic. Since 2014, it has created new Arctic brigades, re-opened Soviet-era military bases, deployed early-warning Arctic-based radar systems, and established the Arctic Joint Strategic Command, a new military district designed to coordinate its expanded northern military presence.[29]

Russia has a deep, emotional attachment to the Arctic.[30] Problematically, the Russian Deputy Prime Minister turned this attachment into a political statement, assertively declaring in 2015 "the Arctic is a Russian Mecca."[31] Its plan to commercialize Arctic resources dates to the Stalin era followed by General Secretary Mikhail Gorbachev's reinvigorated commitment, as outlined in his 1987 Murmansk Initiative.[32] Russian President

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Coast of Somalia, 20 EUR. J. INT'L L. 399, 399-414 (2009).

[27] *Population*, THE ARCTIC, https://arctic.ru/population/ (last visited July 9, 2018) (noting about half of the Arctic's four million population lives in Russia).

[28] Hege Eilertsen, *Wants to Invest Billions in Russian Arctic*, HIGH NORTH NEWS, Mar. 6, 2017, http://www.highnorthnews.com/wants-to-invest-billions-in-russian-arctic/ (accounting for "more than 15 percent"); Lawson W. Brigham, *The Arctic Waterway to Russia's Economic Future*, THE WILSON Q. (Summer/Fall 2017), https://wilsonquarterly.com/quarterly/into-the-arctic/the-arctic-waterway-to-russias-economic-future/ (claiming 15-20 percent of Russian economy).

[29] *See* Andrew Foxall, *Russia's Policies towards a Changing Arctic: Implications for UK Security* (Russia Studies Centre Research Paper no. 12, Henry Jackson Society, 2017), http://henryjacksonsociety.org/wp-content/uploads/2017/09/Russias-Policies-towards-a-Changing-Arctic-1.pdf; *Russia's Militarisation of the Arctic Accelerating*, HENRY JACKSON SOCIETY (Sept. 6, 2017), http://henryjacksonsociety.org/2017/09/06/russias-militarisation-of-the-arctic-accelerating/.

[30] *See* Kathrin Hille, *Russia's Arctic Obsession*, FINANCIAL TIMES, Oct. 21, 2016, https://ig.ft.com/russian-arctic/ (noting "[t]he idea of mastering nature is very much part of Russian identity, as is the myth of conquering the Arctic").

[31] Ishaan Tharoor, *The Arctic is Russia's Mecca, Says Top Moscow Official*, WASH. POST, Apr. 20, 2015, https://www.washingtonpost.com/news/worldviews/wp/2015/04/20/the-arctic-is-russias-mecca-says-top-moscow-official/?utm_term=.06ef0e217953.

[32] Stalin consolidated the Soviets' web of bureaucratic agencies dealing with the Arctic with the establishment of *Glavesvmorput* in 1932. *See* CHARLES

Vladimir Putin continued that commitment with his 2013 pledge to develop the Northeast Passage into a trans-arctic trade route, which he announced in Russia's Arctic development strategy through 2020.[33] This passageway sits atop Eurasia and connects Murmansk on the western Barents Sea with Providence Bay on the Chukchi Peninsula in northeastern Siberia.

Whether the route accomplishes Putin's goal of rivaling the Suez Canal remains to be seen.[34] On average, twenty-three cargo ships transit the entire trans-arctic route yearly as compared to 16,800 ships passing through the Suez Canal in 2016.[35]A leading polar mariner has noted the lack of sufficient hydrographic surveying and charting maps in this remote region, Russia's need to develop marine infrastructures, the need for Russia to bring into compliance its own domestic navigation rules with the International Maritime Organization's new Polar Code, which came into force on January 1, 2017, and the need for modernized icebreaking vessels.[36] Limitations involve consideration of notoriously shallow and narrow straits along the route.[37] This treacherous geomorphology creates underwater chokepoints that may impede the speed and size of transiting vessels, ultimately creating "major obstacles" involving the overall economics of the route.[38] Key strictures include (1) the Matochkin Shar, the Kara

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EMMERSON, THE FUTURE HISTORY OF THE ARCTIC 35–42 (2010). *See also* Ronald Purver, *Arctic Security: The Murmansk Initiative and Its Impact*, 11 CURRENT RES, ON PEACE & VIOLENCE 147, 147–58 (1988).

[33] *Putin Approved the Arctic Development Strategy to 2020*, ARCTIC INFO (Feb. 20, 2013), http://www.arctic-info.com/News/Page/putin-approved-the-arctic-development-strategy-to-2020. The English translation of the document is: "The Strategy for the Development of the Arctic Zone of the Russian Federation and National Security up to 2020." *See* Lassi Heininen et al., *New Russian Arctic Doctrine: From Idealism to Realism?*, VALDAI (July 15, 2013), http://valdaiclub.com/russia_and_the_world/60220.html.

[34] *See* Gleb Bryanski, *Russia's Putin Says Arctic Trade Route to Rival Suez*, REUTERS CAN., Sept. 22, 2011, http://ca.reuters.com/article/topNews/idCATRE78L5TC20110922 (quoting Putin).

[35] *See* Brigham, *supra* note 28.

[36] *See id.* Open water depths in key straits vary from 20 m to 200 m, ranging at the shallowest points from 13 m in the Yugorskiy Shar and Sannikova straits, and 20-25 m in the Matisena and Lenina straits. *See Navigating the Northern Sea Route: Status and Guidance* 4, WILSON CENTER (1996), https://www.wilsoncenter.org/sites/default/files/navigating_the_northern_sea_route_status_and_guidance.pdf.

[37] R. Douglas Brubaker & Willy Østreng, *The Northern Sea Route Regime: Exquisite Superpower Subterfuge?*, 30 OCEAN DEV. & INT'L L. 299, 301 (1999).

[38] Jeroen F.J. Pruyn, *Will the Northern Sea Route Ever Be a Viable Alternative?*, 43 MARITIME POL'Y & MANAGEMENT 661, 662 (2016).

Gate, and the Yugorskiy Shar Straits in the Novaya Zemlya archipelago, which is the easternmost entry point from Europe along the Northeast Passage; (2) the Longa Strait (Proliv Long) off Wrangel Island, and (3) the Dmitriya Lapteva and Sannikova Straits separating the East Siberian Sea from the Laptev Sea en route from Alaska. Given its geo-strategic station, Russia stands as the Northeast Passage's gatekeeper at both eastern and western portals of entry. The Vil'kitskogo (Vilkitsky) and Shokal'skogo (Shokalsky) Straits, situated at the mid-point of the route, separating the Sevemaya Zemlya archipelago from Siberia's Taymyr Peninsula (the northernmost point of the Eurasian landmass), are perhaps the key chokepoints along the entire Northeast Passage. Control over these shortcuts along the route, particularly the Vil'kitskogo Strait, may affect the entire economic viability of the route.[39]

In 2012, Russian President Putin consolidated Russian Arctic policy and defined this area as internal to Russia.[40] Russian Federal Law empowers a specialized administrative agency to license traffic and apply pilotage and safety regulations.[41] The international law on this matter contrasts the United States' 'freedom of the seas' policy against Russia's claim of historic title. However, the remoteness of the region from the world's perspective, and Russia's proximity to it given its expansive Siberian coastline, suggest the pelagic extension and application of international law's principle of *uti possidetis* – as you possess, so you may possess. In a region known for dramatic climate changes that can trap vessels in rapidly growing ice at temperatures plunging to minus 40 degrees Fahrenheit, mariners marvel that such a "maritime highway functions" at all.[42]

However, Russia now has constructed seventeen deepwater ports along its 17,500 km Arctic coastline, including a new

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[39] *See* MICHAEL BYERS, INTERNATIONAL LAW AND THE ARCTIC 145 (2013); Eric Franckx, *New Developments in the North-East Passage*, 6 INT'L J. ESTUARINE & COASTAL L. 33, 36 (1991).

[40] Federal Law of the Russian Federation on Amendments to Specific Legislative Acts of the Russian Federation Related to Governmental Regulation of Merchant Shipping in the Water Area of the Northern Sea Route, N 132-ФЗ, cl. 5.1 (2012), http://www.arctic-lio.com/docs/nsr/legislation/federal_law_nsr.pdf (English translation); *see also Legislation*, N. SEA ROUTE INFO. OFF., http://www.arctic-lio.com/nsr_legislation (posting current Russian legislation on the Northern Sea Route) (last visited Jan. 2, 2018).

[41] *See* FEDERAL STATE INSTITUTION: THE NORTHERN SEA ROUTE ADMINISTRATION, http://www.nsra.ru/en/home.html (last visited Jan. 2, 2018) [English and Russian].

[42] Brigham, *supra* note 28.

multi-billion dollar entrepôt at Sabetta on the Yamal Peninsula.[43] This network links Russia's historic cabotage system (the Northern Sea Route) that moves resources from its Siberian interior to internal and external eastern and western termini. Cargo traffic at these high latitudes increased by 6.7 percent in 2016,[44] reaching the highest tonnage levels ever.[45] If Russia turns the fabled Northeast Passage into an aquatic highway of commerce, it will have demonstrated the ability to maintain a safe and open passageway along the Northern Sea Route, the contested geo-space in the High North, contrasting the United States' claim of freedom of navigation against Russia's claim of sovereignty.[46] Moreover, the United States[47] and Canada[48] join Russia in

[43] *See* Atle Staalesen, *Russian Arctic Ports Have Best Year Ever*, BARENTS OBSERVER, Jan. 16, 2017, https://thebarentsobserver.com/en/industry-and-energy/2017/01/russian-arctic-ports-have-best-year-ever.

[44] RUSSIAN ASSOCIATION OF SEA PORTS, CARGO TURNOVER OF RUSSIAN SEAPORTS FOR JANUARY-DECEMBER 2016, (Jan. 13, 2017), http://www.morport.com/rus/news/document1842.shtml [translated].

[45] *See* Staalesen, *supra* note 43.

[46] *See* Margaret Blunden, *Geopolitics and the Northern Sea Route*, 88 INT'L AFF. 115, 115-129 (2012). Russia bases its formal jurisdiction over the Northern Sea Route on a contested claim of historic title, which it extends into its Exclusive Economic Zone. Russia claims its historic title is of an "integral nature." *See* Christopher R. Rossi, *The Northern Sea Route and the Seaward Extension of Uti Possidetis (Juris)*, 83 NORDIC J. INT'L L. 476, 478 (2014). The Northern Sea Route varies according to changing ice patterns but has generally been described as running through the Kara, Laptev, Vostochno-Sibirskoye (East Siberian), and Chukchi Seas. Its entry portals from the west include the Yugorskiy Shar Strait or the Karskiye Vorota Strait, or by passing north of the Novaya Zemlya Islands around Mys Zhelaniya. Its entry portal from the east is through the Bering Strait. *See Navigating the Northern Sea Route: Status and Guidance* 4, WILSON CENTER, https://www.wilsoncenter.org/sites/default/files/navigating_the_northern_sea_route_status_and_guidance.pdf (last visited Jan. 2, 2018).

[47] THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 40, December 2017, https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905-2.pdf (with a cover letter from President Donald J. Trump). *See also* THE WHITE HOUSE, NATIONAL STRATEGY FOR THE ARCTIC REGION 1–11 (2013), http://www.whitehouse.gov/sites/default/files/docs/nat_arctic_strategy.pdf (with a cover letter from President Barack Obama dated May 10, 2013); H.R. REP. NO. 111–491 (2010) (accompanying H.R. 5136, the National Defense Authorization Act for Fiscal Year 2011), http://www.gpo.gov/fdsys/pkg/CRPT111hrpt491/html/CRPT-111hrpt491.htm; THE WHITE HOUSE, NATIONAL SECURITY PRESIDENTIAL DIRECTIVE AND HOMELAND SECURITY PRESIDENTIAL DIRECTIVE NSPD-66/HSPD-25 (2009), http://fas.org/irp/offdocs/nspd/nspd-66.htm (establishing United States policy with respect to the Arctic region).

[48] *Statement on Canada's Arctic Foreign Policy: Exercising Sovereignty and Promoting Canada's Northern Strategy Abroad*, modified Nov. 25, 2013; http://www.international.gc.ca/arctic-arctique/council-conseil.aspx?lang=eng;

expressing national security interests in the Arctic. In December 2017, President Donald Trump's National Security Strategy restated the United States' "central" commitment to keeping Arctic passageways free and open.[49] With the onset of the Anthropocene, the Arctic could become an ocean of great power rivalry.

IV. THE GLOBAL ARCTIC: WHAT ROOM FOR ASIA?

A high-level membership forum known as the Arctic Council claims preeminent stewardship over non-political governance issues in the High Arctic.[50] Its focus on functional issues of common concern has produced three legally binding agreements.[51] Its six working groups,[52] guided by consensus decision-making, have produced numerous policy-relevant assessments undertaken to promote programmatic ventures.[53] The interests of Russia, the United States, and Canada, the predominant circumpolar powers, are represented in this organization. Permanent membership is limited to the additional Arctic states of Sweden, Norway, Iceland,

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see also Joël Plouffe et al, *Renewing the Arctic Dimension to Canada's National Defence Policy*, CANADIAN GLOBAL AFFAIRS INSTITUTE/INSTITUT CANADIEN DES AFFAIRES MONDIALES (Sep. 2016), https://d3n8a8pro7vhmx.cloudfront.net/cdfai/pages/1085/attachments/original/1477930026/Renewing_the_Arctic_Dimension_-_Joel_Plouffe.pdf?1477930026.

[49] THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 40 (Dec. 2017), https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905-2.pdf (with a cover letter from President Donald J. Trump).

[50] *See Joint Communiqué and Declaration of the Establishment of the Arctic Council,* issued in Ottawa, Canada (Sep. 19, 1996), 35 I.L.M. 1382 (1996) [the Ottawa Declaration]. Art. 1 (a) of the Ottawa Declaration stipulates that the Arctic Council shall deal with common Arctic issues unrelated to military security. *Id*.

[51] *See* Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, 2011, Agreement on Cooperation on Maritime Oil Pollution Preparedness and Response in the Arctic, 2013, and the Agreement on Enhancing International Arctic Scientific Cooperation, 2017.

[52] The six working groups of the Arctic Council include the Arctic Contaminants Action Program; Arctic Monitoring and Assessment Programme; Conservation of Arctic Flora and Fauna; Emergency Prevention, Preparedness and Response; Protection of the Arctic marine Environment; and, Sustainable Development Working Group. *See Working Groups*, ARCTIC COUNCIL (Sep. 10, 2015), http://www.arctic-council.org/index.php/en/about-us/working-groups.

[53] *See* David Stone & Lars-Otto Reiersen, *The Role of the Working Groups in the Work of the Arctic Council*, UARCTIC (2016), https://www.uarctic.org/shared-voices/shared-voices-magazine-2016-special-issue/the-role-of-the-working-groups-in-the-work-of-the-arctic-council/.

Finland, and Denmark (through its autonomous association with Greenland). To parry criticisms of clubbish behavior,[54] and perceptions of dominance by its sub-set of five Arctic littoral powers (the Arctic 5),[55] the Arctic Council has granted permanent participant status to indigenous groups[56] and observer status to China, South Korea, Japan, Singapore, India, and seven European states.[57] Permanent observer status has encouraged countries bestowed this status to expand their Arctic footprint and intentions.[58] In conjunction with its received permanent observer status in the Arctic Council, South Korea inaugurated the Korea Polar Research Institute with the intention of creating an influential regional presence and a leadership role in polar affairs.[59] Notwithstanding attempts at internal reform, proposals to create a new Arctic treaty,[60] and emerging, more inclusive fora for discussing Arctic issues, such as the Arctic Circle Assembly,[61] competing jurisdictional designs on the increasingly accessible Arctic Ocean keep the Arctic regime soft and within the control of the circumpolar powers.[62]

Geographical circumstances necessitate soft power

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[54] *See generally* Christopher R. Rossi, *The Club within the Club: The Challenge of a Soft Law Framework in a Global Arctic Context*, 5 POLAR JOURNAL 8, 8-34 (2015).

[55] *See generally* Andreas Kuersten, *The Arctic Five Versus the Arctic Council*, ARCTIC YEARBOOK 390-95 (2016). *See supra* note 3 and accompanying text.

[56] *See History of the Arctic Council Permanent Participants*, ARCTIC COUNCIL, https://www.arctic-council.org/index.php/en/acap-home?catid=313&id=313:history-of-the-arctic-council-permanent-participants (last updated Aug. 28, 2015).

[57] *See Observers*, ARCTIC COUNCIL (July 4, 2017), https://www.arctic-council.org/index.php/en/about-us/arctic-council/observers (European observers to the Arctic Council include France, Germany, The Netherlands, Poland, Spain, Switzerland, and the United Kingdom).

[58] *See generally* Seok Hwan Kim, Na Hee-Seung & Park Young-Min, *Changes in the Arctic and Establishment of New Arctic Governance* 14, 14-57 (KIEP Research Paper, 2015) [translation].

[59] *Vision & Mission*, KOPRI, https://eng.kopri.re.kr/home_e/contents/e_1200000/view.cms (last visited Dec. 28, 2017).

[60] *See generally* Timo Koivurova, *Alternatives for an Arctic Treaty – Evaluation and a New Proposal*, 17 RECIEL 14-26 (2008). Despite 17 parts, 320 articles, and 9 annexes, UNCLOS contains only one article affecting polar regions (art. 234, ice-covered areas).

[61] *See generally* ARCTIC CIRCLE, http://www.arcticcircle.org/ (last visited Dec. 28, 2017). The inaugural Arctic Circle Assembly in 2013 convened in Reykjavík with 1,200 participants and more than 35 countries represented. *Id*. The movement to establish the Arctic Circle Assembly evolved from Icelandic President Ólafur Ragnar Grímsson's National Press Club speech in Washington, D.C. on April 17, 2013. *See* Luncheon Series, Ólafur Ragnar Grímsson, NATIONAL PRESS CLUB (Apr. 15, 2013), https://www.youtube.com/watch?v=wW0p_Eh94PI.

[62] *See generally* Rossi, *supra* note 54.

approaches to Asia-Pacific Arctic interests. Contrasted with hard power, which in a legal sense gives rise to precise binding obligations that "delegate authority for interpreting and implementing the law,"[63] soft power reflects the ability to secure objectives through means that avoid coercion or payment.[64] Soft law entered into the corpus of international law through sociological approaches to law, which began to appear in the late nineteenth century.[65] It now forms part of the "complex architecture of international agreements."[66] Soft law approaches are valued for their flexibility, for minimizing costs associated with breaking commitments, for providing governments with decision-making options that avoid the formality of the legalization process, and for securing a degree of political autonomy during periods of rapid change or uncertainty.[67] Soft power arrangements admit of a variety of intentional if not preferred ways for states to promote informal cooperation. However, *Realpolitik* circumstances may also inform reasons for pursuing soft power as a course of action, particularly among Asia-Pacific countries. Russia's northern seaboard stretches along 24,140 km of coastline, accounting for 53 percent of the entire Arctic Ocean landscape.[68] While international law treats terrestrial and pelagic landscapes separately, these spatial regimes share one generic and historically validated point of legal contact: the land dominates the sea.[69] Russia has no intention of relinquishing its role as Arctic gatekeeper for Asia-Pacific countries. Russia's commanding and, in important safety respects, essential presence over this projected waterway instantiates a soft law wait-and-see posture among Asian powers as the emerging

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[63] Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 421 (2000).

[64] JOSEPH S. NYE, JR. SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS (2004).

[65] *See* Georg Schwarzenberer, *Die Glaubwürdigkeit des Völkerrechts*, *in* FESTSCHRIFT FÜR RUDOLF BINDSCHEDLER, 91, 95 (Emanuel Diez et al. eds., 1980).

[66] Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495, 500 (1991).

[67] Abbott & Snidal, *supra* note 63, at 441-44.

[68] *See Russia*, THE ARCTIC INSTITUTE, https://www.thearcticinstitute.org/countries/russia/ (last visited Dec. 29, 2017).

[69] *See* North Sea Continental Shelf Cases (Ger./Den.; Ger./Neth.), 1969 ICJ REP. 3, 51 (Feb. 20); Aegean Sea Continental Shelf Case (Gr/Turk), 1978 ICJ REP.3, 36 (Dec. 19); Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar/Bahr.), 2001 ICJ REP. 40, 97 (Mar. 16); Maritime Delimitation in the Black Sea (Rom./Ukr), 2009 ICJ REP. 61, 89 (Feb. 3).

legal dispute of over the status of the Northeast Passage takes shape.

V. CHANGING ARCTIC DYNAMICS

An expanding interest in the High North and in Arctic governance regimes indicates a new polar dynamic. Propinquity to the pole has invested in the circumpolar few a status and capacity to steer the agenda in the soft law forum of the Arctic Council; however, exogenous factors present new avenues of involvement for non-Arctic states. China has proclaimed itself a "near Arctic state," with a second research icebreaker under construction;[70] the European Union (EU) claims it is an "Arctic entity;" Singapore has an Arctic ambassador; South Korea's icebreaker, *RV Araon*, plies Arctic waters; and, ten countries operate permanent research stations at Ny-Ålesund, in the Svalbard archipelago.[71] South Korea's Daewoo Shipbuilding & Marine Engineering shipyard is manufacturing a new fleet of fifteen icebreaking liquefied natural gas carriers for Russia and other countries: "the most advanced development project today in all of the Arctic."[72] Other South Korean shipbuilders such as Hyundai Heavy Industries and Samsung Heavy Industries "are among the most competitive companies in the world for production of these high-value-added ships.[73] South Korea's largest container carrier company projects shipments along the Northern Sea Route as early as 2020, and high-level discussions at the recent German G-20 summit between Russia and South Korea actively addressed bolstering Arctic cooperation between the two.[74] The intention of this fleet also would be to carry Yamal gas out of the Russian Arctic to global

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[70] Franz-Stefan Gady, *China Begins Construction of Polar Icebreaker*, THE DIPLOMAT (Dec. 22, 2016), thediplomat.com/2016/12/china-begins-construction-of-polar-icebreaker/.

[71] *See* RESEARCH STATIONS IN NY-ÅLESUND, KINGS BAY, http://kingsbay.no/research/research_stations/ (last visited Jan. 3, 2018). Additionally, the University of Groningen in the Netherlands operates a research station. *Id*.

[72] Brigham, *supra* note 28.

[73] Young Kil Park, *South Korea's Interests in the Arctic*, 18 ASIA POLICY 59, 60 (2014).

[74] *See* Atle Staalesen, *Koreans Eye Container Shipping along Russia's Arctic Coast*, BARENTS OBSERVER, Aug. 22, 2017, https://thebarentsobserver.com/en/arctic/2017/08/koreans-eye-container-shipping-along-russias-arctic-coast.

markets, sailing west on the Northern Sea Route to Russian and European ports on a year-round basis, while heading east to Asian markets during the colder, shortened summer season.[75] Japan's special ambassador for Arctic affairs has stated similar interest in accessing Arctic energy resources; as the world's largest importer of liquefied natural gas, Japan has agreed to capitalize Russian natural gas development in a bid to secure future access to energy.[76] China also has substantial interests in securing access to onshore Yamal gas.[77]

Economic throw-weight provides countries such as Japan and South Korea with more leverage in coming Arctic discussions than the foothold provided by observer status in the Arctic Council.[78] Recently, Japan, China, and South Korea agreed to conduct a joint study assessing the functional convergence of interests on pollution and climate issues in the Arctic, although the backdrop of untapped access to Arctic resources looms large in these discussions.[79] Despite the potentially devastating effects of climate change on all Asian Pacific Economic Council (APEC) countries, the energy security benefits appear substantial.[80] Coordinating disparate interests within an international structure of cooperation requires a reformulation of multilateral processes such as ASEAN, where states have been known to step away from multilateral discussions when independent comparative advantages prevail.[81]

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[75] Brigham, *supra* note 28.

[76] *See* Andrew Chater, *What is Japan's Arctic Interest?* THE POLAR CONNECTION (Dec. 6, 2016), http://polarconnection.org/japan-arctic-interest/.

[77] *See generally* Christopher Weidacher Hsiung, *China and Arctic Energy: Drivers and Limitations*, 6 POLAR JOURNAL, 243 243-58 (2016).

[78] *See* Park, *supra* note 73, at 63.

[79] *See Japan, China and South Korea OK Joint Study on Arctic Development*, JAPAN TIMES, June 9, 2017, https://www.japantimes.co.jp/news/2017/06/09/national/science-health/japan-china-south-korea-plan-joint-study-arctic-development/#.WkUVAVWnHb0.

[80] Hooman Peimani, *Melting of the Arctic Sea Ice: Significance for the APEC Economies' Energy Security* 4 (APEC Oil and Gas Security Studies, Series 6, Nov. 2015), https://www.apec.org/-/media/APEC/Publications/2015/12/Melting-of-the-Arctic-Sea-Ice---Significance-for-the-APEC-Economies-Energy-Security/Melting_of_the_Arctic_Sea_Ice_-_Significance_for_the_APEC_Economies__Energy_Security.pdf.

[81] *See* Reid Lidow, *Toward an Arctic Way: Regimes, Realignments, and the ASEAN Analogue*, ARCTIC YEARBOOK 2 (2015).

VI. REALPOLITIK, NORDPOLITIK, AND ARKTIK POLITIK: SOUTH KOREA'S EURASIA INITIATIVE AND ARCTIC MASTER PLAN

In 2013, South Korea's President Park Geun-hye announced an ambitious Eurasia Initiative,[82] recommitting the nation to a Northern Policy forwarded by President Roh Tae-Woo's administration in the late 1980s.[83] Employing the taxonomy of "One Continent," "Creative Continent," and "Peaceful Continent," Park proposed expanded transport, energy, and trade networks; extended culture and human exchanges; and, enhanced regional integration through the "Trust Process on the Korean Peninsula" and the "Northeast Asia Peace and Cooperation Initiative."[84] The reinforcement of multi-level economic ties throughout the region intended to establish a basis for reunification efforts.[85] However, haphazard implementation, decentralized supervision, problems of political access to key decision-makers, Park's political implosion, and an assortment of additional constraints now stall implementation.[86]

Complicating South Korea's Eurasian Initiative was the policy oscillation embedded in a single roadmap that attempted at once to forward security and economic objectives while reframing foreign relations to allow more South Korean autonomy from major power politics. South Korea's vulnerable trading status encourages development of a middle course prophylaxis to buffet against political whipsaws: The percentage of Gross Domestic Product deriving from international trade places South Korea at

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[82] Korean Institute for International Economic Policy Conference on Global Cooperation in the Era of Eurasia Conference on Global Cooperation in the Era of Eurasia (Oct. 18, 2013). *See also* Jae-Young Lee, *Korea's Eurasia Initiative and the Development of Russia's Far East and Siberia*, *in* THE POLITICAL ECONOMY OF PACIFIC RUSSIA 103-25 (Jing Huang & Alexander Korolev eds., 2017).

[83] *See generally* KOREA UNDER ROH TAE-WOO: DEMOCRATISATION, NORTHERN POLICY, AND INTER-KOREAN RELATIONS (James Cotton ed., 1993).

[84] *See* Kim Taehwan, *Beyond Geopolitics: South Korea's Eurasia Initiative as a New Nordpolitik*, THE ASAN FORUM (Feb. 16, 2015), http://www.theasanforum.org/beyond-geopolitics-south-koreas-eurasia-initiative-as-a-new-nordpolitik/.

[85] *See* Jae-Young Lee, *The New Northern Policy and Korean-Russian Cooperation*, RUSSIA IN GLOBAL AFFAIRS (Nov. 15, 2017), http://eng.globalaffairs.ru/valday/The-New-Northern-Policy-and-Korean-Russian-Cooperation-19149.

[86] *See id*.

the top of the G20 economies.[87] Its exports to China and Hong Kong more than double exports to its ally, the United States.[88] This trade dependence and asymmetric regional orientation may outmatch the waning political rhetoric of its middle power autonomy,[89] replaced by a *Realpolitik* reliance on established and enhanced commercial relations as the avenue for continued prosperity. Opening South Korean economic connections with Russia and Central Asia, and reinvigorating its *Nordpolitik*, create discernable and attractive prospects given the country's trading nation status. If managing trilateral aspects of the Eurasian Initiative (as between the two Koreas and Russia with Park's idea to construct a "transnational transport infrastructure") proved too much of a task over land, much more success appears likely with regard to a rotation of interests into the Arctic waters.

An amalgam of seven government ministries and agencies, put forth in December 2013 as South Korea's Master Plan for Arctic Policy, emphasized three policy goals, four strategies, and thirty-one specific Arctic projects covering the period between 2013-2017.[90] The overarching vision of the Master Plan was to situate South Korea as a "reliable and responsible partner in the polar region, opening a sustainable future for the Arctic."[91] In 2015, Japan promulgated its own white paper forwarding its Arctic policy, which similarly emphasized the need to cooperate and participate through the Arctic Council while engaging

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[87] *See* Kim, *supra* note 84.

[88] *See* SOUTH KOREA: TRADE STATISTICS, GLOBALEDGE (2018), https://globaledge.msu.edu/countries/south-korea/tradestats (valuing South Korean 2016 exports to China and Hong Kong at (US) $157 billion and almost (US) $67 billion to the United States).

[89] *See* Jeffrey Robertson, *An End to South Korea's Middle Power Moment?*, EASTASIAFORUM (Dec. 30, 2016), http://www.eastasiaforum.org/2016/12/30/an-end-to-south-koreas-middle-power-moment/.

[90] The seven ministries and agencies included the Ministry of Science, ICT and Future Planning; Ministry of Foreign Affairs; Ministry of Trade, Industry and Energy; Ministry of Environment; Ministry of Land, Infrastructure and Transport; Ministry of Fisheries; and Korea Meteorological Administration. *See* Hyun Jung Kim, *Success in Heading North?: South Korea's Master Plan for Arctic Policy*, 61 MARINE POL'Y 264, 268 (2015). The policy goals included establishing Arctic partnerships, strengthening scientific research, and creating new Arctic industries through economic participation. Strategies included intensified international cooperation through the Arctic Council and private sector engagement, expanded research activities, cooperation in shipping and exploration (including activities in the Northern Sea Route), and institutional preparation relating to polar region policy. *See generally id*.

[91] *See* Kim, *supra* note. 90, at 267.

economically and bilaterally in the development of the Northern Sea Route and offshore natural resource exploitation.[92]

However, China's newfound great power ambition, as demonstrated by its sovereignty designs over Asia's "crucible of conflict" [93] — the South China Sea — draws into question the trajectory of former President Hu Jintao's 2012 quest for maritime security.[94] Timed, as it seems to be,[95] to balance or offset China's 2013 four trillion dollar plan to unite land-based and maritime economies of Eurasian and East Africa (the One Belt, One Road initiative), the quest to exercise *dominium* over the South China Sea reconceptualizes the fifth largest body of water as an antechamber leading through the Malaysian straits and into the greater Indian Ocean in order to project power into East Africa and the Mediterranean Sea. [96] China's ambitious projection of economic power westward also envisions a land-based corridor through Eurasia (the Silk Road Economic Belt), a "signature foreign policy priority of Chinese President Xi Jinping."[97] Part of the interest in a land corridor, and in the energy-rich South China Sea, are the energy hedges that would be secured over reliance on maritime transit passageways through the narrow and vulnerable straits of Malacca, Sunda, Lombok, and Makassar.[98] Over half the

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[92] *See generally* Taisaku Ikeshima, *Japan's Role as an Asian Observer State Within and Outside the Arctic Council's Framework*, 10 POLAR SCIENCE 458, 458-62 (2016).

[93] BILL HAYTON, THE SOUTH CHINA SEA: THE STRUGGLE FOR POWER IN ASIA xvi (2014).

[94] *Full text of Hu Jintao's Report at 18th Party Congress*, XINHUANET, Nov. 17, 2012, 11:45 PM, http://news.xinhuanet.com/english/special/18cpcnc/2012-11/17/c_131981259_10.htm.

[95] Dong-Ching Day, *South Korea's Eurasian Initiative: Balancer vs. Follower*, 5 INT'L MULTILINGUAL J. CONTEMP. RES. 15, 16 (2017) (noting "no coincidence" between Park's Eurasian Initiative and Xi's Silk Road Economic Belt initiative).

[96] *See* Christopher R. Rossi, *Treaty of Tordesillas Syndrome: Sovereignty ad Absurdum and the South China Sea Arbitration*, 50 CORNELL INT'L L.J. 231, 266 (2017).

[97] Prashanth Parameswaran, *The Real Trouble with China's Belt and Road*, THE DIPLOMAT (May 11, 2017), https://thediplomat.com/2017/05/the-real-trouble-with-chinas-belt-and-road/.

[98] Robert D. Kaplan, *Why the South China Sea is so Crucial*, BUSINESS INSIDER AUSTRALIA, Feb. 20 2015, https://www.businessinsider.com.au/why-the-south-china-sea-is-so-crucial-2015-2; Bree Feng, *China Looks North: Carving Out a Role in the Arctic*, ASIA PACIFIC FOUNDATION OF CANADA (Apr. 30, 2015), https://www.asiapacific.ca/canada-asia-agenda/china-looks-north-carving-out-role-arctic (noting a northern route presents strategic value to China as an alternative to the "Malacca dilemma").

volume of global shipping transits this area today.[99] Speculation inclines in the direction that China's grand intention could reduce to a bargaining strategy to exchange sovereignty disputes in the South China Sea (and in the East China Sea) for a relaxation of the United States' security commitment to Taiwan.[100] More likely, however, is China's unfolding interest in securing diverse export pathways as it seeks to become the maritime gatekeeper for Asia-Pacific trade, notwithstanding numerous geostrategic impingements in the crowded and contested waters of the South and East China Seas.[101]

China's historical preoccupation as a dynastic land power takes on added dimensions and rotates northward[102] into the "blue-colored land" of the Yellow and East China Seas[103] and beyond. In May 2017, during its Belt and Road Forum, China formally incorporated the Arctic into its vision of maritime cooperation for the One Belt, One Road Initiative, referencing Arctic cooperation interests nine times.[104] More explicitly, while attempting to build a "blue economic passage" southward from the South China Sea into Oceania and the Pacific, China also envisions "[a]nother blue economic passage . . . leading up to Europe via the Arctic Ocean." This rotation has led to speculation that China's greater design is to circumvent the strictures of Russian coastal dominance over the Northeast Passage, when not partaking in bilateral economic ventures to strengthen Sino-Russian far-east ventures,[105] by positioning itself for the

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[99] *See* Daniel Thomassen, *Lessons from the Arctic for the South China Sea*, CENTER FOR INTERNATIONAL MARITIME SECURITY (Apr. 4, 2017), http://cimsec.org/lessons-arctic-south-china-sea/31092.

[100] *See generally* Charles L. Glaser, *A U.S.-China Grand Bargain?: The Hard Choice between Military Competition and Accommodation*, 39 INT'L SEC. 49 (2015).

[101] China and Japan contest ownership of the disputed Diaoyu/Senkaku Islands in the East China Sea. Jian Zhang, *China's 'New Thinking' of the East China Sea Dispute*, MARITIME ISSUES (July 7, 2017), http://www.maritimeissues.com/politics/chinas-new-thinking-of-the-east-china-sea-dispute.html.

[102] *See* Gang Chen, *China's Emerging Arctic Strategy*, 2 POLAR JOURNAL, 358 358-71 (2012).

[103] *See* Peng Guangqian, *China's Maritime Rights and Interests*, *in* MILITARY ACTIVITIES IN THE EEZ 15, 15-16 (Peter Dutton ed., 2010).

[104] *See Full Text; Vision for Maritime Cooperation under the Belt and Road Initiative*, XINHUA, June 20, 2017, http://news.xinhuanet.com/english/2017-06/20/c_136380414.htm.

[105] *See Chinese in the Russian Far East: A Geopolitical Time Bomb?* SOUTH CHINA MORNING POST, July 8, 2017, http://www.scmp.com/week-asia/geopolitics/article/2100228/chinese-russian-fa

Anthropogenic age of trans-polar transport,[106] beyond the jurisdictional reach of any coastal sovereign claim. If fanciful, it helps to explain China's extensive relations with Iceland and its myriad deep ports. The Chinese embassy in Iceland can accommodate 500 diplomats for a country with a population of 300,000. By comparison, China's mission in New Delhi employs 300 personnel to manage external relations with India's 1.3 billion people.[107]

VII. CONCLUSION

From the Asia-Pacific perspective, Arctic avenues of commercial exchange float like an enticing lure on top of the world. When contrasted with forestalled efforts to penetrate across the Korean Peninsula into Central Asia, or through the increasingly choppy waters of the South China Sea, a northern route presents commercial rewards and bilateral economic opportunities. Arctic ice melt likely will develop along two tracks for Asia-Pacific countries. For middle powers such as Japan and South Korea, the geo-strategic circumstance of Russia's proximity to opening Arctic waterways, coupled by its historical development of its cabotage system involving the Northern Sea Route, requires engagement with Russia. The soft law structure of Arctic governance promotes functional rewards relating to common scientific interests but remains soft in important respects because circumpolar powers have yet to perfect territorial designs. Moreover, circumpolar powers show no willingness to expand UNCLOS or fundamentally reorder the extant soft law Arctic regime because of uncertainty with regard to the speed and extent of the Anthropocene's creation of Arctic blue water. As a consequence, one track for Asia-Pacific countries in the Arctic will be to secure bilateral opportunities for resource extraction and trade in conjunction with Russia's Far East development plan and

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r-east-geopolitical-time-bomb.

[106] *See generally* ANNE-MARIE BRADY, CHINA AS A POLAR GREAT POWER 1-267 (2017).

[107] *See China Opens Its Largest Overseas Embassy in Pakistan*, TIMES OF INDIA, Feb. 15, 2015, https://timesofindia.indiatimes.com/world/china/China-opens-its-largest-overseas-embassy-in-Pakistan/articleshow/46253046.cms; Flavia Lucenti, *China: An Arctic Power, in East Asia*, CSCC (July 23, 2017), http://www.cscc.it/blog/p/china:-an-arctic-power-in-east-asia.

exploitation of its Siberian interior. These opportunities will enhance development of the eastern stretches of the Northeast Passage, which despite enthusiastic portrayals of launching a new transcontinental maritime highway across the top of the world, more likely will merely facilitate the cabotage system that hugs Russia's Eurasian shore.

Here, Asia-Pacific countries can benefit from comparative advantages associated with shipbuilding, technology, and access to capital in exchange for Russian energy and resources while expanding their Arctic foothold in ways that observer status in the Arctic Council cannot promote. While collaborative engagement with the apparatuses of the Arctic Council help to legitimate Asian states' involvement in Arctic affairs, and provide a method for instantiating more active involvement in Arctic governance, the economic prospect of penetrating Central Asian trade through the opening Northern Sea Route passageway to Siberia presents an Anthropogenic opportunity to restart multiple Eurasian initiatives. Developing this relationship balances Asia-Pacific middle power economic and energy interests with strategic commitments that emerging China and Russia would seek to weaken and, consequently, is not without risks. However, Japan and South Korea, and China as well, have now incorporated Arctic strategic policies into their national security calculations, which present pathways for international trade expansion that Asia-Pacific countries intend to promote.

A second Arctic track for Asia-Pacific powers combines the melting polar icecap with long-term great power interests. If indeed a transpolar or mid-ocean (over-the-pole) route develops,[108] not only would it be shorter than the coastal Arctic routes involving the Northern Sea Route and the Northeast Passage, but it would circumvent problems of contested sovereignty and the strictures of navigation that accompany transit along the Eurasian Arctic coast. China seems intent on securing its presence in a transpolar commercial world and appears to be posturing to secure its stakeholder status through Iceland, with access into European and North American markets.

Circumpolar geography and the extant soft law forum of the

[108] For projections between 2015-2030 and 2045-2060, see Jugal K. Patel & Henry Fountain, *As Arctic Ice Vanishes, New Shipping Routes Open*, N.Y. TIMES, May 3, 2017, https://www.nytimes.com/interactive/2017/05/03/science/earth/arctic-shipping.html.

Arctic Council once may have suggested that the High North bore characteristics of a closed sea (*mare clausum*), projecting traits more of a gigantic frozen lake rather than a high seas regime. [109] Policy rotations on three continents draw anthropogenic attention to this once ice-covered landscape, making it more than before an object of increasing international attention. The globalizing Arctic challenges clubbish state behavior and the region's soft law governance, presenting widening pathways for Asian-Pacific involvement amid the ever-diminishing Arctic ice.

Keywords
A High North, Northern Sea Route, Arctic Council, Eurasia Initiative, One Belt One Road

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[109] *See* W. Lakhtine, *Rights over the Arctic*, 24 AM. J. INT'L L. 703, 713 (1930). *See also* Donald R. Rothwell, THE POLAR REGIONS AND THE DEVELOPMENT OF INTERNATIONAL LAW 288-89 (1996).

COURTS AS DEMOCRACY BUILDERS IN ASIA

Po Jen Yap [*]

ABSTRACT

What is the relationship between the strength of a country's democracy and the ability of its courts to address deficiencies in the electoral process? Drawing a distinction between democracies that can be characterized as 'dominant-party' (e.g., Singapore, Malaysia, and Hong Kong), 'dynamic' (e.g., India, South Korea, and Taiwan), and 'fragile' (e.g., Thailand, Pakistan, and Bangladesh), this paper explores how democracy sustains and is sustained by the exercise of judicial power. In dominant-party systems, courts can only pursue 'dialogic' pathways to constrain the government's authoritarian tendencies. On the other hand, in dynamic democracies, courts can more successfully innovate and make systemic changes to the electoral system. Finally, in fragile democracies, where a country regularly oscillates between martial law and civilian rule, their courts consistently tend to overreach, and this often facilitates or precipitates a hostile takeover by the armed forces and leads to the demise of the rule of law.

I. INTRODUCTION

In the past century, as the winds of political change swept across the globe, Asian nations too experienced a wave of democratization as countries in the region gained independence or transitioned from authoritarian military rule toward more participatory politics. In tandem with this democratization trend, we have also witnessed a concomitant expansion of judicial power in Asia, whereby new courts or empowered old ones emerge as independent constraints on governmental authority.[1] The rise of

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[1] Tom Ginsburg, *Courts and New Democracies: Recent Works*, 37 LAW AND SOCIAL INQUIRY 720 (2012); Tom Ginsburg, *Constitutional Courts in East Asia: Understanding Variation*, 3 JOURNAL OF COMPARATIVE LAW 80 (2008); NEW COURTS IN ASIA 1-4 (Andrew Harding & Penelope Nicholson eds., 2010).

the courts, and the accompanying "judicialization of politics,"[2] is as much an Asian phenomenon as it is a prevalent trend in the West.

Asian courts have not only participated in the human rights discourse in their respective countries,[3] but they have also addressed deficiencies in the electoral system whereby political actors devise electoral rules on voting, political parties, electoral boundaries, apportionment, administration of elections, and campaign finance that are designed to entrench themselves in power.[4] The purpose of this article is to focus on how courts in Asia have impeded or enhanced the competitiveness of the political system when addressing this central challenge to democratic governance. In essence, this article seeks to answer one specific research question: What is the relationship between the strength of a country's democracy and the ability of its courts to address deficiencies in the electoral process? To answer this question, we must first draw a distinction between democracies that can be characterized as 'dominant-party' (for example, Singapore, Malaysia, and Hong Kong), 'dynamic' (for example, India, South Korea, and Taiwan), and 'fragile' (for example, Thailand, Pakistan, and Bangladesh). This taxonomy is important as this article seeks to illustrate how democracy sustains and is sustained by the exercise of judicial power.

In dominant-party democracies – democracies which have been wholly or primarily ruled by the same dominant political party or coalition since independence or decolonization – courts can only take a limited range of actions before they outrun the government's "tolerance interval,"[5] as the government can respond to confrontational judicial decisions by deploying constitutional or unconstitutional means to overrule or 'punish' the

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[2] RAN HIRSCHL, TOWARDS JURISTOCRACY 211 (2004); JUDICIALISATION OF POLITICS IN ASIA 1-7 (Björn Dressel ed., 2012).

[3] PO JEN YAP, CONSTITUTIONAL DIALOGUE IN COMMON LAW ASIA 79-106 (2015); PUBLIC INTEREST LITIGATION IN ASIA 1– 9 (Po Jen Yap & Holning Lau eds., 2011); CONSTITUTIONALISM IN ASIA IN THE EARLY TWENTY-FIRST CENTURY 16-31 (Albert Chen ed., 2014).

[4] Yasmin Dawood, *Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review*, 62 UNIVERSITY OF TORONTO LAW JOURNAL 499, 500 (2012).

[5] Lee Epstein, Olga Shvetsova, & Jack Knight, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW AND SOCIETY REVIEW 117, 128 (2001); ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 23-24 (2000).

courts. While their courts are unable to successfully challenge the core interests of their governments and make systemic changes to the electoral scene, they may pursue 'dialogic' pathways to constrain the "structural pathologies"[6] of authoritarian politics. 'Dialogic review' refers to a judicial practice whereby courts enforce constitutional rights in a way that provides sufficient decisional space to the legislature or allows the legislature to respond in disagreement using the ordinary political process.[7]

Bipartisan legislative agreement to overrule or punish judges would be less likely and frequent in dynamic democracies as "the fragmentation of authority across separate institutions makes coordinated attacks on judicial independence more difficult."[8] As Tom Ginsburg has observed, the extent of political diffusion within the legislative and executive structures determines how successfully courts can assert their judicial power.[9] Constitutions are incomplete contracts and while all judges are delegatees tasked with the interpretation of imprecise text,[10] the courts' "zone of discretion"[11] is greater when divided government exists, as opposing parties in the legislature have to cooperate to effectuate any disagreement with the judiciary. Where political power regularly rotates between competing political parties – a cardinal feature of a dynamic democracy – courts can play a bigger role in the country's political life by consolidating the democratic processes and actively facilitating electoral *systemic* change.

Finally, in fragile democracies, where the military is not under the firm control of the civilian government and the country regularly oscillates between martial law and civilian rule, their courts – unlike those in dominant-party democracies – consistently tend to overreach. Such high-octane judicial review by partisan or imprudent judges can easily facilitate or precipitate a hostile takeover by the armed forces and lead to the demise of the rule of

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[6] Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL LAW REVIEW 601, 604 (2006).

[7] PO JEN YAP, CONSTITUTIONAL DIALOGUE IN COMMON LAW ASIA 103-106 (2015).

[8] Georg Vanberg, *Constitutional Courts in Comparative Perspective: A Theoretical Assessment*, 18 ANNUAL REVIEW OF POLITICAL SCIENCE 167, 181 (2015).

[9] TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 19 (2003).

[10] ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 22-23 (2000).

[11] Alec Stone Sweet, *Constitutions and Judicial Power*, *in* COMPARATIVE POLITICS 157 (Daniele Caramani ed., 2014).

law. Courts in brittle democracies should therefore avoid strong-form judicial review unless its institutional independence is under threat.[12]

II. DOMINANT-PARTY DEMOCRACIES

In dominant-party democracies, the main obstacle to electoral competition is not violence typically associated with fragile or unstable democracies but the overwhelming control asserted by a single party/coalition that has successfully consolidated its political apparatus in office.[13] The People's Action Party (PAP) has been the ruling party in Singapore since its independence, and the party has controlled over 90 percent of the elected seats in Parliament since 1968. Since Malaysia's independence in 1957, the country was ruled by the same political coalition – the Alliance Party, later renamed as Barisan Nasional (BN) – until the opposition-led Pakatan Harapan coalition upended its reign in 2018. The courts operating in such dominant-party democracies have generally acquiesced to the state of affairs by playing a more limited role in their countries' political life, as their judges are unable to rely on the support of other strong institutional actors to counter any backlash from the dominant government if they engage in robust judicial review over electoral disputes.

Furthermore, both countries are arguably still reeling from judicial crises that have cast a pall over the state of constitutional review. With regard to Singapore, when the Court of Appeal ruled against the government on *constitutional* grounds for the first and last time in 1989, the government overruled the decision with a series of constitutional and statutory amendments within a month.[14] In Malaysia, its Lord President (now known as Chief

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[12] Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 285 (2015).

[13] Samuel Issacharoff, *Constitutional Courts and Consolidated Power*, 62 AMERICAN JOURNAL OF COMPARATIVE LAW 585, 588 (2014).

[14] In *Chng Suan Tze* v. *Minister of Home Affairs,* [1988] 2 SLR(R) 525, the Singapore Court of Appeal, after surveying a litany of Commonwealth precedents, quashed a preventive detention order issued under the Internal Security Act (ISA) against various alleged Marxist conspirators and concluded that the ministerial discretion to detain personnel under the ISA would be subject to an "objective" test of review by the courts. This decision proved to be sufficiently disquieting to the executive; the government quickly overturned this

Justice), Tun Salleh, and two other judges on the Supreme Court of Malaysia (now, Federal Court of Malaysia) were impeached and removed on trumped-up charges of judicial misconduct in 1988.[15] While it is not uncommon for judges in all countries to act prudentially by seeking to avoid legislative or electoral outrage, this concern about political reprisals is particularly pronounced in these jurisdictions, as dominant-party governments can display their displeasure more easily by ousting judicial review or even the judges themselves.

Therefore, it is perhaps unsurprising that, in the first and only election case ever decided in Singapore, its Court of Appeal conceded that judicial intervention in election disputes would arise in the most "exceptional cases;"[16] and, on the facts of the by-election dispute, so long as the Prime Minister did not openly reject the possibility of a by-election when a casual vacancy arose, it would appear that the Court did not impose any additional limits on the Prime Minister's exercise of his discretion to fill that vacancy.[17] In the same vein, the Malaysian courts have accepted that their state-controlled Election Commission has no statutory obligation to arrange for persons in detention to vote at the requisite polling centers,[18] nor is it obliged to allow Malaysian citizens living abroad to be registered as absentee voters.[19] Furthermore, the Malaysian courts have also consistently refused to review any alleged irregularities in the electoral roll *after* it has been published and certified by the Election Commission.[20] While Singapore and Malaysian courts may be unable to dismantle the systemic cartel regulations imposed by the leviathan state, if judicial review is *not* to be denigrated as "meaningless exercises in political theatre,[21] reform-minded judges must identify dialogic

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decision and henceforth restricted judicial review in ISA cases to only procedural grounds.

[15] For a full discussion, see H.P. LEE, CONSTITUTIONAL CONFLICTS IN CONTEMPORARY MALAYSIA 77-110 (2017).

[16] Vellama d/o Marie Muthu v. Attorney-General, [2013] SGCA 39, [2013] 4 SLR 1, [85] (Court of Appeal of Singapore).

[17] *Id. at* 87.

[18] Yazid bin Sufaat & Ors v. Suruhanjaya Pilihanraya, [2009] 6 MLJ 152 (Federal Court of Malaysia).

[19] Teo Hoon Seong & Ors v. Suruhanjaya Pilihanraya, [2012] 4 MLJ 245 (High Court of Malaysia).

[20] Muhammad Sanusi Md v. Mohd Tajuddin, [2009] 1 CLJ 1 (Federal Court of Malaysia); Charles Anthony Santiago v. Suruhanjaya Pilihan Raya, [2014] 7 MLJ 271 (High Court of Malaysia).

[21] *See* CONSTITUTIONS IN AUTHORITARIAN REGIMES 1-3 (Tom Ginsburg & Alberto

ways of applying "subtle pressure for political reform at the margins"[22] or holding the ground against adverse change, even if they are unable to overturn the core interests of the regime.

With regard to Singapore, two features of Singapore's electoral system are particularly disconcerting and would be ripe for such dialogic judicial review and intervention: First, the potential abuse of the multi-member group constituencies, known as the Group Representative Constituencies (GRC), and, second, the gerrymandering of electoral boundaries by the incumbent ruling regime before every general election. Singapore's electoral system is unique insofar as it provides for both single-member constituencies (SMCs) and multi-member group constituencies in the parliamentary elections. Such multi-member group constituencies are known as Group Representative Constituencies, and each GRC is formed by merging several single wards into one mega-constituency. Currently, a GRC is capped at six persons. The GRC system is widely perceived to be merely an electoral mechanism for the ruling PAP to ensure the election of new, promising, but unknown candidates with ministerial caliber by fielding them in GRC teams alongside party stalwarts with mass electoral appeal. To complicate matters, the electoral boundaries in Singapore are redrawn before every general election; and, the redrawing exercise is performed by the Electoral Boundary Review Committee (EBRC), a committee, which usually comprises five civil servants and is headed by the Secretary to the Prime Minister.[23] There are no public hearings of the delimitation exercise; the minutes of those meetings are not made available to the public; and, the public is not consulted on the recommendations proposed by the EBRC. As SMCs are generally more attractive to opposition candidates as the hurdles for parties intending to contest such single seats are significantly lower, it is no surprise that the slate of SMCs up for grabs is changing before every election, thereby preventing the opposition from gaining a foothold in any single-member ward controlled by the PAP. But, in

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Simpser eds., 2014).

[22] Tamir Moustafa & Tom Ginsburg, *Introduction: The Function of Courts in Authoritarian Politics*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 15 (Tamir Moustafa & Tom Ginsburg eds., 2008).

[23] *Electoral Boundaries Drawn for Next General Election*, CHANNEL NEWS ASIA, July 24, 2015, http://www.channelnewsasia.com/news/singapore/electoral-boundaries/2005186.html.

fairness to the incumbent ruling party, since 1991, it has retained the same electoral boundaries for constituencies *won* by the opposition party in the preceding election.[24]

In view of the above concerns, Singapore courts should enforce constitutional conventions that the ruling party has practiced for decades and prohibit the PAP from creating *bigger* multi-member electoral seats and redrawing electoral boundaries for constituencies won by the opposition in the preceding election. In doing so, the judiciary would be merely crystallizing as law the political customs that the PAP has observed for decades. Such 'soft' constitutional handcuffs on the government are not useless as they can prevent stealth electoral changes by mere executive fiat. Furthermore, with the rise of an electorate that is demanding more political diversity, the PAP is unlikely to pay the political price of openly reversing such judicial decisions by legislation in Parliament. Therefore, insofar as the Singapore government acquiesces and stays the course, the judiciary would have prevented the country from backsliding politically and practicing a more extreme variant of authoritarianism.

The dominant BN's past resilience in Malaysia primarily hinged on its ability to manipulate the apportionment of electoral constituencies before each election. Electoral redistricting in Malaysia is performed by the Election Commission, staffed by government appointees[25] that report directly to the Prime Minister.[26] In the 2013 election, the average population size of constituencies won by the BN was 40 percent smaller than those won by the opposition coalition.[27] In the 2018 election, the BN government ratcheted up the gerrymandering[28] in its desperate but unsuccessful attempt to retain power. Tellingly, these small

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[24] In the 1988 general election, the Anson SMC, which was won by the opposition in the 1984 election, was abolished and the constituency was merged with a neighboring PAP stronghold.

[25] The Members of the Election Commission are appointed by the King, after consultation with the Conference of Rulers, and on the advice of the Cabinet of Ministers. *See* Article 114(1) of the Federal Constitution (read with Article 40(1) of the Federal Constitution).

[26] *See* 13th Schedule of the Federal Constitution.

[27] Bridget Welsh, *Malaysia's Elections: A Step Backward*, 24 JOURNAL OF DEMOCRACY 136 (2013).

[28] Trinna Leong & Nadirah H. Rodzi, *Electoral Maps for Upcoming Malaysia Election Passed in Parliament*, STRAITS TIMES, March 28, 2018, https://www.straitstimes.com/asia/se-asia/malaysian-premier-najib-razak-presents-highly-criticised-new-electoral-maps.

constituencies are mainly found in rural and poorer areas in Malaysia – BN's traditional strongholds – and were "carefully carved out to boost incumbent support."[29] Alongside this direct electoral impediment to political competition, the BN further disadvantaged the opposition by imposing short campaign periods,[30] limiting its access to mainstream media,[31] and enforcing repressive sedition laws against dissidents.[32]

Where the BN's historic party dominance has been reinforced by formal law – as we see with the web of regulations that perpetuate electoral malapportionment, disenfranchise unpopular voter groups, and stifle political speech – it may be understandable if Malaysian judges preferred to look the other way. But, in recent years, there were very disconcerting reports that segments within Malaysian BN governments were engaging in electoral fraud. Human rights groups alleged that, in the 2013 general election, the electoral roll included 'phantom' voters who were deceased or never existed;[33] non-citizens were allowed to cast votes for the incumbent in close races;[34] and, the 'indelible' ink used to identify voters who had already voted proved not so 'indelible.'[35] No outsider really knows how prevalent these electoral irregularities were, or whether they were the consequence of incompetence or corruption, as BN governments expectedly refused to conduct any

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[29] Welsh, *supra* note 27, at 146.

[30] The People's Tribunal on the 13th General Elections, *Findings of the People's Tribunal on Malaysia's 13th General Elections* 32, March 25, 2014, http://www.bersih.org/wp-content/uploads/2014/03/Peoples-Tribunal-on-GE13-Findings-Report.pdf; Lian Cheng, *Minimum Campaign Period Now 11 Days*, BORNEO POST, March 21, 2013, http://www.theborneopost.com/2013/03/21/minimum-campaign-period-now-11-days/.

[31] Tessa Houghton & Zaharom Nain, *Watchdogs or Lapdogs? Monitoring Malaysia's Media Coverage of GE2013*, *in* COALITIONS IN COLLISION: MALAYSIA'S 13TH GENERAL ELECTION 159-180 (Johan Saravanamuttu, Lee Hock Guan & Mohamed Nawab Mohamed Osman eds., 2015).

[32] Amnesty International, *Malaysia Must End Unprecedented Crackdown on Hundreds of Critics through Sedition Act*, January 25, 2016, http://www.amnestyusa.org/news/press-releases/malaysia-must-end-unprecedented-crackdown-on-hundreds-of-critics-through-sedition-act.

[33] *Malaysian Electoral Roll Analysis Project* (2013), http://malaysianelectoralrollproject.blogspot.sg.

[34] The People's Tribunal, *supra* note 30, at 31.

[35] Pemantau Pilihan Raya Rakyat, *Clean & Fair? An Election Observation Report of the 13th Malaysian General Election* iv, (March 2014), http://www.bersih.org/wp-content/uploads/2013/09/Pemantau-Report-English-Final.pdf.

independent inquiries. It is one thing for the Malaysian courts to enforce the unfair electoral rules formally passed by the BN to entrench, until recently, its incumbency; it is another matter altogether if the judiciary were to allow a BN government to break its own laws to steal elections. If the rule of law is to mean anything at all, the courts must ensure that the government – at the very least – abides by the very laws it passes and prevents the government from stealing elections. Consequently, the judiciary must impose a set of principles of legality that constrains the administrative practices of the Election Commission. If the Malaysian judges are reluctant to unseat elected officials ex post, the imposition of ex ante mandates on the Election Commission, and ensuring the integrity of the electoral roll, may be the most dialogic ways for the courts to compel this beleaguered institution to deliver clean elections in the country.

Hong Kong provides yet another fascinating case study. Unlike in Singapore, the Hong Kong judiciary has built up a history of invalidating legislation since the Bill of Rights Ordinance (BORO) was enacted in the territory in 1991. Like all political practices, judicial practices are path-dependent, such that Hong Kong judges can appeal to history and stare decisis for continuing the practice of enforcing human rights against the Hong Kong government. While Beijing is formally empowered to reverse every constitutional decision of the Court of Final Appeal (CFA) by a Legislative Interpretation,[36] Beijing will not reverse every decision by the CFA as it does not want to appear to be rescinding its commitment to allow the Hong Kong Special Administrative Region (HKSAR) to "exercise a high degree of autonomy and enjoy . . . independent judicial power," as this would adversely impact Hong Kong's long-term viability as an international financial center and China's long-term goal of reunifying Taiwan.

The HKSAR government is similarly unable to reverse every adverse decision handed down by the courts. For the functional constituencies' (FC) electoral seats, the individual legislators are only accountable electorally to the voters in their specific sectoral constituencies; for the geographical constituencies' (GC) seats, the use of proportional representation has led to the electoral success of multiple small parties and individual lawmakers. As the Chief

[36] The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, art. 158.

Executive is not drawn from any political party, and with the presence of multiple political parties, independents, and FC representatives in the Legislative Council, the HKSAR government constantly has to broker different interests among competing political forces when it seeks to pass legislation. While this is not difficult when the government is whipping up support for legislation that Beijing considers imperative, the pro-Beijing lawmakers' interests often diverge from the HKSAR government's on issues that are not fundamental to Beijing; and, in such cases, these lawmakers would break ranks with the local government to accommodate their constituents. This fragile coalition between the HKSAR executive government and the pro-Beijing lawmakers therefore limits the former's ability to command a legislative majority on non-core socio-political issues; and, the political impasse in turn provides the Hong Kong judiciary with significant leeway to rule against the government on a modest scale. Therefore, while major electoral systemic overhauls or overturning the high-stakes Chief Executive election are off-limits, the judges can and have ushered in modest changes to Hong Kong's restrictive electoral regime by extending voting rights writ small to disenfranchised prisoners[37] and allowed those who had been convicted of minor offences to stand for elections.[38]

III. DYNAMIC DEMOCRACIES

Judiciaries in dynamic democracies have even more 'policy' space. Where competing political parties have the opportunity to take turns in office, this fragmentation of power reduces the ability and the incentives for the incumbent government to rein in the judges.[39] Correspondingly, the courts are more 'consequential,'[40] and they are able directly to address systemic failures in the

[37] Chan Kin Sum v. Secretary for Justice, [2009] 2 H.K.L.R.D. 166 (C.F.I).

[38] Wong Hin Wai v. Secretary for Justice, [2012] 4 H.K.L.R.D. 70 (C.F.I.).

[39] Ran Hirschl, *The Judicialisation of Politics*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 136 (Keith Whittington, R. Daniel Kelemen & Gregory Caldeira eds., 2010); Georg Vanberg, *Constitutional Courts in Comparative Perspective: A Theoretical Assessment*, 18 ANNUAL REVIEW OF POLITICAL SCIENCE 167, 181 (2015); John Ferejohn, *Judicialising Politics, Politicising Law*, 65 LAW AND CONTEMPORARY PROBLEMS 41, 55 (2002).

[40] *See* CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 1 (Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan eds., 2013).

political system, including but not limited to the anti-competitive "rules of engagement [enacted] to protect established powers from the risk of successful challenge."[41]

The Supreme Court of India gained political space with the rise of minority governments in the 1990s and was able to directly address systemic material corruption and criminality in Indian politics. Accordingly, the Court was able to mandate election candidates to disclose the source of their political donations[42]and their criminal antecedents;[43] and, soon after, the Court even unseated convicted criminals from their elected office.[44] Confronted with a government/bureaucracy that is beset by inertia, the Supreme Court of India has taken upon itself the responsibility of compelling action when the political branches are in serious and chronic default.[45] For better or worse, the Court's judges have taken the failures of the existing democratic institutions as a mandate to "replace these institutions and carry out some or all of their tasks."[46] Similarly, after Taiwan transitioned into a dynamic democracy, its Constitutional Court was even able to successfully invalidate two constitutional amendments that had attempted to extend the term of existing National Assembly delegates and allow elected lawmakers to appoint delegates to the Assembly.[47]

Turning to South Korea, the Constitutional Court of Korea was conceived as an independent safeguard against authoritarian political rule when the current Constitution was passed in 1987. With weak political parties as a cardinal feature of South Korea's modern electoral scene – political parties are largely instruments of their powerful leaders with strong regional appeal, and these parties continuously split, merge, or reconfigure as their party bosses leave the political stage – the Constitutional Court of Korea has ameliorated the effects of systemic political barriers erected to

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[41] Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STANFORD LAW REVIEW 643, 646 (1997-1998).

[42] Common Cause v. Union of India, (1996) 3 SCR 1208 (India).

[43] Union of India v Association for Democratic Reforms, (2002) 3 SCR 696 (India).

[44] BR Kapur v. State of Tamil, (2001) 7 SCC 231 (India); Lily Thomas v. Union of India, (2013) 7 SCC 653 (India).

[45] *See* Manoj Mate, *Public Interest Litigation and the Transformation of the Supreme Court of India*, *in* CONSEQUENTIAL COURTS, *supra* note 40, at 262-288.

[46] David Landau, *A Dynamic Theory of Judicial Role*, 55 BOSTON COLLEGE LAW REVIEW 1501, 1534 (2014).

[47] Judicial Yuan (JY) Interpretation No. 499, March 24, 2000 (Constitutional Court of Taiwan), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=499.

preserve incumbency: excessive deposits for National Assembly[48] and presidential elections, [49] gerrymandering electoral constituencies,[50]and disenfranchising small political parties.[51] A particularly significant decision was handed down in 2001 when the Constitutional Court mandated that each voter be allowed to cast two votes in the National Assembly election: one for his/her preferred individual candidate in the electoral district and the other for the preferred political party that would field the proportional representative in the national legislature.[52] Prior to the 2004 National Assembly election, a voter could only vote for the district representative or the proportional representative.

While courts in these dynamic democracies have creatively consolidated the democratic process by amplifying the competitiveness of elections and electoral institutions, they have also displayed remarkable restraint by strategically not removing top leaders. This was so not only when their courts operated within a dominant-party democracy, as India was when its Supreme Court strategically avoided the removal of Prime Minister Indira Nehru Gandhi from office for an electoral-campaign violation after she was re-elected with a super-majority in Parliament,[53] but such judicial restraint was equally practiced by courts after the nation transitioned to a dynamic democracy.

In Taiwan, after President Chen Shui-bian was re-elected with a razor-thin margin in the 2004 presidential election, the dissatisfied opposition party – the Nationalist Party of China (KMT) – insisted that he had staged an assassination attempt on his life on the eve of the election[54] to gain sympathy votes for his

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[48] [Const. Ct.], 13-2 KCCR 77, 2000 Hun-Ma 91, 2000 Hun-Ma 112 (consol.), July 19, 2001 (S. Kor.).

[49] [Const. Ct.], 20-2(B) KCCR 477, 2007 Hun-Ma 1024 (consol.), Nov. 27, 2008 (S. Kor.).

[50] [Const. Ct.], 2013 Hun-Ma 781, 2014 Hun-Ma 53 (consol.), Oct. 30, 2014 (S. Kor.).

[51] [Const. Ct.], 26-1(A) KCCR 155, 2012 Hun-Ma 431, 2012 Hun-Ka 19 (consol.), Jan. 28, 2014 (S. Kor).

[52] [Const. Ct.], 13-2 KCCR 77, 2000 Hun-Ma 91, 2000 Hun-Ma 112 (consol.), July 19, 2001 (S. Korea). The National Assembly is composed of (1) members elected directly by voters in individual electoral districts and (2) proportional representatives, ranked on a party-list by their own political parties, whom voters elect indirectly when they cast ballots in favor of their preferred political party.

[53] Indira Nehru Gandhi v. Shri Raj Narain, (1976) 2 SCR 347 (India).

[54] A gunman attempted to assassinate both President Chen Shui-bian and Vice President Annette Lu when they were campaigning on March 19, 2004, the eve of Taiwan's presidential election, but both of them suffered only minor injuries. This event has been termed the "319 Shooting" in Taiwan.

re-election. As the KMT retained a parliamentary majority in the Legislative Yuan, it statutorily created a special commission to investigate the foiled assassination attempt.[55] One may note that members on the special commission were primarily KMT affiliates, and the deeply partisan commission was statutorily authorized to launch criminal prosecutions relating to the assassination attempt and overturn any factual findings in a court of law if they differed from the commission's findings. The Constitutional Court accepted that the Legislative Yuan was empowered to create the special commission, but it decisively invalidated the statutory provisions that authorized the commission to launch criminal prosecutions and revoke judicial findings.[56] The Court's decision rendered on December 15, 2004, in essence, prevented the special commission from overturning a High Court's ruling on November 4, 2004, which decided that the assassination attempt was not staged by President Chen and the gunshot incident did not illegally interfere with the conduct of the election.[57]

Likewise, in impeachment proceedings, the Constitutional Court of Korea strategically avoided removing President Roh Moo-hyun from power after Roh's Uri party won resoundingly in the 2004 National Assembly election during the deliberations of the impeachment case.[58] In contrast, the Constitutional Court of Korea in 2017 decisively removed President Park Geun-hye from office.[59] One must note that President Park's approval ratings were in single digits at the time of her impeachment – the lowest for any sitting President in South Korea – and the Court was merely reflecting public opinion when it chose to remove a deeply unpopular President for her role in an influence-peddling scandal.

Whilst these courts in dynamic democracies have achieved moderate success in ushering in *systemic* electoral reforms, their

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[55] *See* Jiunn-rong Yeh, *Presidential Politics and the Judicial Facilitation of Dialogue between Political Actors in New Asian Democracies: Comparing the South Korean and Taiwanese Experiences*, 8(4) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 911, 932 (2010).

[56] Judicial Yuan (JY) Interpretation No. 585, December 15, 2004 (Constitutional Court of Taiwan), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=585.

[57] The High Court's ruling was also confirmed by the Supreme Court in 2005.

[58] [Const. Ct.], 16-1 KCCR 609, 2004 Hun-Na 1 (consol.), May 14, 2004 (S. Kor.); *see* Wen-chen Chang, *Strategic Judicial Responses in Politically Charged Cases: East Asian Experiences*, 8(4) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 885 (2010).

[59] [Const. Ct.] 2016 Hun-Na1 (consol.), Mar 10, 2017 (S. Kor.).

track records are not without blemish. For the Indian Supreme Court, its animus toward criminals in politics has hardened the judges against the plight of ordinary convicts who are disfranchised completely at the polls.[60] The Constitutional Court of Taiwan was also unmoved by the disparity of voting power for individuals living in differently populated counties,[61] whilst Korea's Constitutional Court has been shockingly tolerant of the highly restrictive rules on election campaigns that hark back to the country's authoritarian past.[62]

IV. FRAGILE DEMOCRACIES

In fragile democracies, courts that actively push their top leaders off the saddle would inevitably facilitate or foment a military coup. In fledgling democracies, the civilian government does not have control over its armed forces, and aggressive judicial review is antithetical to the country's transition to a stable democracy as the generals often respond by aborting the constitution.

As we have seen in Thailand, partisan judges have facilitated hostile take-overs by the military by nullifying two general elections (2006 and 2014), removing three prime ministers, dissolving six political parties, and banning hundreds of party executives – all of which were directed against former Premier Thaksin Shinawatra and his surrogates. In September 2008, the Constitutional Court dismissed Samak Sundaravej as prime minister on the pretext that his guest appearances on a cooking show created a conflict of interest with his ministerial responsibilities. In December 2008, the Constitutional Court removed Somchai Wongsawat from his premiership merely because a senior member in his party was convicted of bribing voters ahead of the 2007 election. Finally, in May 2014, the Constitutional Court dismissed Prime Minister Yingluck for appointing her relative as police chief when she took office in

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[60] Chief Election Commissioner v. Jan Chaukidar (Peoples Watch), (2013) 10 SCR 1163 (India).

[61] Judicial Yuan (JY) Interpretation No. 721, June 6, 2014 (Constitutional Court of Taiwan), www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=721.

[62] [Const. Ct.], 13-2 KCCR 174, 99 Hun-Ba 92, 2000 Hun-Ba 39, 2000 Hun-Ma 167, 168, 199, 205, 280 (consol.), Aug. 30, 2001 (S. Kor.); [Const. Ct.], 17-2 KCCR 160, 2004 Hun-Ba 52 (consol.), Sept. 29, 2005 (S. Kor.).

2011.[63] By stymying elected governments and fostering political gridlock, the Constitutional Court of Thailand, twice in a decade, created power vacuums that enticed the military's intervention. If courts become mere partisan tools that assist one political camp in removing its enemies from the country's political life, as the Constitutional Court in Thailand did, the country's transition to a stable democracy can be easily derailed.

As for Pakistan, since its independence in 1947, the country has been governed for protracted periods by the military; democratic transitions to civilian rule do not last long as they are often soon aborted by military coups.[64] In fact, martial law has been imposed five times in Pakistan, though martial law was not officially declared on the fourth and fifth occasions as General Pervez Musharraf instead declared a state of emergency throughout Pakistan on October 14, 1999 and November 3, 2007. (Even during civilian rule, the elected government has been dissolved on four separate occasions by the President.[65])

It is noteworthy that, during Iftikhar Muhammad Chaudhry's tenure as Chief Justice, the Supreme Court engaged in unprecedented high-octane judicial review insofar as it invalidated Musharraf's privatization of state-owned enterprises [66] and investigated the disappearances of hundreds of persons secretly detained for alleged terrorism links.[67] It should come as no surprise that Chaudhry was eventually suspended by Musharraf in March 2007. But after Chaudhry was reinstated by the Supreme Court in July 2007, he remained undeterred, and the Court agreed to examine the legality of Musharraf's re-election in October 2007 as president. Fearing an adverse outcome, Musharraf declared a state of emergency on November 3, 2007 and dismissed over 60 judges on the superior courts, including Chief Justice Chaudhry.

With regard to Bangladesh, since its independence in 1971, the country has experienced two martial law regimes and undergone four states of emergencies. Interestingly, its Supreme

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[63] [Const. Ct.], No. 34/2557, May 7, 2014.

[64] *See* AQIL SHAH, THE ARMY AND DEMOCRACY: MILITARY POLITICS IN PAKISTAN 254-261 (2014).

[65] *See* Osama Siddique, *The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies under the Pakistan Constitution and its Discontents*, 23 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 615 (2006).

[66] Watan Party v. Federation of Pakistan, (2006) PLD (SC) 697 (Pak.).

[67] *See* Taiyyaba Ahmed Qureshi, *State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan*, 35 NORTH CAROLINA JOURNAL OF INTERNATIONAL AND COMMERCIAL REGULATION 485 (2010).

Court (Appellate Division) only questioned the legitimacy of these extraordinary governmental measures *after* the crises had ceased. In *Anwar Hossain Chowdhury* v. *Bangladesh*,[68] the Appellate Division in 1989 invalidated the Eighth Amendment to the Bangladesh Constitution, which had authorized the establishment of six additional Permanent Benches in different regions of the country that would possess the same powers and functions as the original High Court Division. One may note that these additional Permanent Benches were created in 1982 when Bangladesh was governed under martial law between 1982 and 1986; and, the impugned constitutional amendment was enacted in 1988 to formalize this extra-legal arrangement after martial law was lifted in 1986. In the same vein, the Supreme Court of Bangladesh (Appellate Division) invalidated the Fifth Amendment[69] and the Seventh Amendment[70] to the Bangladesh Constitution, which had attempted to oust the Court's jurisdiction to review laws and orders passed when the country was governed during the two periods of martial law (1975-1979 and 1982-1986). But what is particularly noteworthy is that the Fifth and Seventh Amendments were respectively invalidated in 2010 and 2011, more than a decade after both martial law regimes had ended and upon the request of the civilian government. On May 10, 2011, the Appellate Division also declared in a Short Order that the 13th Amendment, which authorized an interim unelected Non-political Caretaker Government (NCG) to govern Bangladesh before every national election, was unconstitutional.[71]

But the invalidation of the NCG system was again what the

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[68] Anwar Hossain Chowdhury, (1989) BLD (Special) (AD) 1 (Supreme Court of Bangladesh).

[69] The Fifth Amendment provided that all amendments or repeals made to the Bangladesh Constitution, from August 15, 1975 to April 9, 1979 (inclusive), by any proclamation or Proclamation Order of the Martial Law Authorities, were deemed to have been validly made and could not be called into question before any court, tribunal, or other authority. *See* Khondker Delwar Hossain v. Bangladesh Italian Marble Works, (2009) Civil Petition for Leave to Appeal Nos. 1044 & 1045 of 2009 (Supreme Court of Bangladesh).

[70] The Seventh Amendment to the Bangladesh Constitution provided that all proclamations, proclamation orders, Chief Martial Law Administrator's Orders, Martial Law Regulations, Martial Law Orders, Martial Law Instructions, ordinances, and other laws, made from March 24, 1982 to November 11, 1986 (inclusive) had been validly made and could not be called into question before any court, tribunal, or other authority. *See* Siddique Ahmed v. Government of Bangladesh, (May 15, 2011) Civil Appeal No. 48 of 2011 (Supreme Court of Bangladesh).

[71] Abdul Mannan Khan v. Bangladesh, (2005) Civil Appeal No. 139 of 2005 (Supreme Court of Bangladesh).

ruling Awami League (AL) government wanted, and the decision provided the civilian government with the necessary political leverage to pass the 15th Amendment, within two months of the Court's Short Order, to abolish the NCG system once and for all.[72] This is not to say that the Bangladesh superior courts have been mere handmaidens of the government of the day. The most confrontational decisions of the Appellate Division have been instances where it drew a line in the sand to defend its institutional independence.[73] In 1999, the Appellate Division in *Secretary, Ministry of Finance* v. *Masdar Hossain* (1999)[74] invalidated a law that included judicial officers within the civil service, and the Court further directed the government to establish a Judicial Services Commission for the recruitment of judges and a separate Judicial Pay Commission to review the terms of conditions of judges. When the Supreme Judicial Commission Ordinance was subsequently passed, the High Court Division invalidated a statutory provision that authorized the president to reject the Commission's recommendation as that would render the independent appointment mechanism "meaningless, futile, and ineffective."[75]

In countries where the armed forces are not under the firm control of the civilian government, and the country oscillates regularly between military and civilian rule, high-octane judicial review can often facilitate or precipitate a hostile take-over by the armed forces and lead to the demise of the rule of law, as we have observed in both Thailand and Pakistan. Therefore, the judiciary's primary and basic goal in these fragile democracies should arguably *not* be antagonistic strong-form judicial review but the maintenance of its institutional independence,[76] as the Supreme Court of Bangladesh (Appellate Division) has done.

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[72] Adeeba Aziz Khan, *The Politics of Constitutional Amendments in Bangladesh: The Case of the Non-political Caretaker Government*, 9 INTERNATIONAL REVIEW OF LAW (2015), http://dx.doi.org/10.5339/irl.2015.9. One should note that the full judgment was only issued 14 months after the Short Order was issued. By then, the 15th Amendment, which abolished the NCG system, had already been passed.

[73] Secretary, Ministry of Finance v. Masdar Hossain, (1999) 28 CLC (AD) 598 (Supreme Court of Bangladesh); Justice Syed Dastagir Hossain v. Idrisur Rahman, (2009) 38 CLC (AD) 3431 (Supreme Court of Bangladesh).

[74] Secretary, Ministry of Finance, (1999) 28 CLC (AD) 598 (Appellate Division, Supreme Court of Bangladesh).

[75] Idrisur Rahman v. Bangladesh, (2008) 60 DLR (HCD) 714 (High Court Division, Supreme Court of Bangladesh).

[76] Gardbaum, *supra* note 12.

V. CONCLUSION

In essence, there is a symbiotic relationship between a country's state of democratization and the long-term sustainability of the political power that its judges can wield. This paper explored how democracy sustains and is sustained by the exercise of judicial power and how courts impact and are impacted by the state of democratization in their countries. Naturally, the role of any court is not static; it can change and will change, as the state of democracy in that country evolves.

The democratization of a country facilitates the rise of its judiciary, and the exercise of judicial power in turn can further enhance and upgrade the nation's electoral infrastructure. But the converse is also true. In failing democracies, abrasive judicial review is especially perilous, as this would only invite or provoke military dictators to abort the constitution by force. When a democracy is unstable or undermined by a dominant party/coalition, reform-oriented judges must always resist impinging on the core interests of the authoritarian regime. Instead, wise judges must design constitutional rules that safeguard the institutional independence of the courts, keep the nation's democratic development on course, and bide their time in anticipation of the constitutional moment when the dominant party or military regime fades away. As law and politics interact in the construction of constitutional doctrines, Asian courts will continue to play this indispensable role in shaping the democratic order.

Keywords
Dominant-Party Democracies; Dynamic Democracies; Fragile Democracies; Constitutional Dialogue

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ISOLATION AND GLOBALIZATION: THE DAWN OF LEGAL EDUCATION IN BHUTAN

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ABSTRACT

The Kingdom of Bhutan – dubbed by some the "hermit kingdom" – has a famously ambivalent attitude toward globalization. Bhutan's first law school opened its doors in 2017 on the heels of the country's transformation into a "democratic constitutional monarchy," and the creation of the school embodies this ambivalence. On the one hand, Bhutan is keen to preserve its culture and traditions not only as an end in itself, but also as a means of ensuring its continued existence as a tiny nation in the shadow of domineering neighbors. For centuries, isolation from the outside world served these goals.

On the other hand, the Bhutanese recognize that a survival strategy of self-imposed isolation in the Himalayas is increasingly difficult to sustain in the twenty-first century, and that the pragmatic response to globalization is to borrow selectively and deliberately from foreign models according to local needs. Indeed, a degree of borrowing is a matter of necessity. In the absence of raw materials for constructing a system of legal education that could plausibly described as autochthonous, resistance to foreign models is not an option, and necessity is the mother of imitation.

The challenge for Bhutan – if not also other developing countries – is to embrace globalization in a way that does not compromise national identity or distinctiveness. The creation of Bhutan's first law school illustrates that this may in fact be possible because globalization is not simply a process of relentless homogenization. The adoption of a globalized model of legal education leaves meaningful room for choice because the 'global' does not speak with a unified voice. From the

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historical training of lawyers in India to the funding of current educational efforts by US law firms, the global influences on Bhutanese legal education are disparate, and the process of integrating, reconciling, and localizing them has scarcely begun.

I. INTRODUCTION

On July 31, 2017, the first twenty-five students enrolled in Bhutan's first law school held their first day of classes. The Jigme Singye Wangchuck School of Law (JSW), named for the much beloved and now-retired fourth King of Bhutan, is currently housed in a temporary campus adjacent to a resort in the hills overlooking the capital city of Thimphu (the "hills," in this case, happen to be the Himalayas) while a permanent campus undergoes construction a short ride from the country's sole international airport in Paro.

To imagine JSW as a one-room schoolhouse would be inaccurate because it has, in fact, two classrooms. Neither has air conditioning and the lower classroom is cooler, so as the morning progresses, the classes migrate downhill. The Himalayan climate is temperate in the summer, but traditional Bhutanese dress is required of students and faculty alike in the classroom (and in other public buildings), and this garb – a robe-like gho with knee-high socks for men, a dress-like kira for women – can get rather warm.

Tradition and modernity coexist cheek-by-jowl at JSW. The gho and kira are paired with ID cards and lanyards that give the students the appearance of junior government officials (which, in reality, many if not most of them will be). Courtesy of an anonymous donor, every student carries to every class an Acer laptop running Chrome OS, which gives the school's IT administrators maximal control and the ability to push software updates and course materials to students automatically. The crack IT team has also wrangled one of the most reliable broadband connections in the country for JSW's exclusive use. All students take the same classes, which end every day with a vegetarian lunch. Students and faculty alike serve themselves out of giant cauldrons and wash their own dishes on the way out. Separate dormitories house JSW's inaugural class of thirteen female and twelve male students, all fresh out of high school, with a second

class of thirteen women and five men on its way. The student handbook forbids sexual behavior on campus.

In its first year of operation, the total population of the law school consisted of fourteen full-time faculty, sixteen administrators, and the twenty-five students who make up the first-year class. With a single class of first-year students, its annual budget is under (US) $500,000. The only course of study JSW currently offers is a five-year undergraduate LL.B. program. At full strength, the school will have approximately thirty administrators, twenty-five faculty, a total enrollment of 125 students, and an annual operating budget of roughly (US) $1.2 million. The annual intake of students is not expected to grow; the result will be a very favorable student-faculty ratio of better than 6:1. Class size has been designed to match ongoing demand, which JSW officials are confident can be calculated with precision based on the hiring needs of relevant government agencies and limited private-sector employers. The degree of central planning in Bhutan enables JSW leadership to predict legal employment opportunities up to a decade in advance, particularly in the public sector: each ministry can project exactly how many people it will hire and when.

JSW owns a bus that ferries the students into town for shopping trips to the market and on field trips on the weekends. With a population of roughly 150,000, Thimphu is the largest city in Bhutan by some margin, but there are still no chain stores, fast-food restaurants, or even traffic lights. The resulting character and charm of Thimphu reflect not only its small size or its stage of economic development, but also a highly ambivalent attitude toward globalization. Withdrawal from the outside world has partly been a natural byproduct of Bhutan's location in the Himalayas and the inherent inaccessibility of much of the country. But it has also served as a self-preservation strategy for a tiny country of less than one million people trapped between India and China, the two most populous countries in the world.

Against this backdrop, the establishment of Bhutan's first law school feels in many ways like a radical break with the past. JSW is unapologetically outward-looking and up-to-date. Technologically savvy, globally networked, and intent on internationalizing the training of its students, it is the antithesis of the 'hermit kingdom' stereotype. The school also defies all economic logic. With free tuition for all, a five-year interdisciplinary and experiential curriculum, and a student-faculty

ratio to rival Yale Law School, JSW is structurally designed to lose money. The creation of a cosmopolitan, cost-intensive law school deep in the Himalayas, in one of the world's most tradition-conscious and least affluent countries, is rife with incongruities.

And yet, in other ways, the creation of JSW is deeply unsurprising. Its design and development express both global trends and national imperatives. For reasons that are not difficult to fathom, Bhutan has always feared for its continued existence. Withdrawal from the outside world has been one strategy for securing the autonomy and survival of the nation. But these goals are also served by the establishment of institutions that give the nation control over the training of its own elites. In the context of a country like Bhutan, legal education doubles as a form of nation-building. The strategy may have evolved, but the goals remain the same.

The account that follows relies primarily on interviews and discussions conducted in Bhutan in the summer of 2017 with numerous scholars, administrators, judges, and government officials, all of whom were extraordinarily cooperative and generous with their time – even by the high standards of Bhutanese hospitality – but for reasons of confidentiality cannot be identified. Except as indicated otherwise, direct quotations are drawn from these interviews.

II. THREE FACES OF BHUTAN: ISOLATION, TRADITION, ANXIETY

The first impression that Bhutan makes on visitors is jarring – literally so. Planes land hard at the airport in Paro because the runway is short. Modern jet aircraft (such as the five A319 aircraft collectively owned by Bhutan's two airlines) push the outermost limit of what the country's only international airport can accommodate. The thin mountain air and short runway, which has already been extended as far as the surrounding mountains and river will permit, barely allow for an A319; widebody jets are out of the question.[1] Given the mountainous terrain, there are few

[1] The A319 has one of the shortest runway requirements of any medium-range twin-engine jet aircraft. http://aircyber.weebly.com/aircraft-runway-requirements.html.

places to put an airstrip within a reasonable distance of the capital. But building an airstrip that was too short to accommodate a 727 also had the effect, for many years, of perpetuating a certain degree of isolation.

The second impression is of a country that remains deeply enamored of its royal family. A giant portrait of the fifth King with his wife and son faces the tarmac and is the very first sight to greet visitors; several more portraits gaze down upon immigration and baggage claim. This trend continues in every building and every home. Love of royalty in Thailand pales by comparison. On paper, the country transitioned to "Democratic Constitutional Monarchy" with its adoption of a new constitution in 2008,[2] but popular sentiment tells a different story. The magnitude of affection for the monarchy is difficult to convey. Suffice it to say that avoiding the likeness of the current king or his father (after whom JSW is named) is akin to avoiding the sight of the American flag in Texas: it cannot be done.

What one does *not* see at Paro airport – at least, not anymore – is equally telling. There was, until recently, a prominently visible sign from "DANTAK" welcoming visitors to Bhutan. Dantak is the name of the long-running project under which the Border Roads Organisation, an offshoot of the Indian army, has built most of Bhutan's roads. The relationship between India and Bhutan is intimate and complex. Bhutan depends heavily on its southern neighbor for trade and foreign aid. India underwrites much of Bhutan's infrastructure – such as the construction of JSW's permanent campus – and its influence has become a source of local sensitivity. Local vigilantes took it upon themselves to tear down the sign; more recently, Bhutanese officials took the less drastic but still revealing step of having Dantak's name painted over.[3]

This brings us to the third impression that Bhutan makes: it is a country that fears engulfment by its gargantuan neighbors and clings to its distinctiveness as a matter of self-preservation. Isolation, caution toward outsiders, and cultivation of national identity have served as defense mechanisms against overbearing

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[2] Nima Dorji & Michael Peil, *Bhutan*, *in* OXFORD HANDBOOK OF CONSTITUTIONAL LAW IN ASIA (David S. Law et al. eds., forthcoming 2019); David S. Law, *Alternatives to Liberal Constitutional Democracy*, 77 MD. L. REV. 223, 232–33 (2018).

[3] Shashank Bengali, *Caught in Middle of Asian Giants: India and China Agree to Withdraw Troops from Disputed Plateau,* L.A. TIMES (Aug. 29, 2017), at A3.

neighbors. Enclosed on all sides by China and India, the tiny Bhutanese community chose, in effect, to hide in the mountains.[4] China's annexation of Tibet in 1951 – and persistent rumors that Mao himself referred to Bhutan as one of Tibet's "five fingers," which must one day "rejoin" Tibet – were not reassuring.[5]

In the aftermath of Tibet's annexation, Bhutan closed its border with China, and India's prime minister paid a well-timed visit to offer help in protecting the kingdom's borders. The resulting friendship treaty formally ceded control of Bhutan's foreign policy to India for several decades, and the border with China remains closed to this day. But the relationship with India – Bhutan's first-ever diplomatic relationship – also began the process of opening the country to the rest of the world. In the early 1960s, the Indian prime minister laid the foundation for Bhutan's first-ever road. It would be several more years before most Bhutanese would lay eyes for the first time upon an automobile.

Roughly a decade later, in 1974, India annexed the neighboring kingdom of Sikkim, and the protection offered by India began to look like a mixed blessing indeed. Many in Bhutan saw parallels between their own situation and that of the Sikkimese, who had arguably made themselves vulnerable to annexation by allowing themselves to become a minority in their own country. The Lhotsampa – southern Bhutanese residents of Nepali descent – became a focus of such anxieties. Restrictive

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[4] Kinley Dorji, *What is the "Bhutanese-ness" of the Bhutanese People?*, DRUK J. (Spring 2015), http://drukjournal.bt/what-is-the-bhutanese-ness-of-the-bhutanese-people.

[5] Mao Zedong is reputed to have said: "Xizang [Tibet] is China's right hand's palm, which is detached from its five fingers of Ladakh, Nepal, Sikkim, Bhutan, and Arunachal. As all of these five are either occupied by, or under the influence of India, it is China's responsibility to 'liberate' the five to be rejoined with Xizang [Tibet]." *E.g.*, Abhijit Bhattacharyya, *China's Bhutan Push to Fulfill Mao's Old Dream*, ASIAN AGE (June 27, 2017), http://www.asianage.com/opinion/oped/270617/chinas-bhutan-push-to-fulfill-maos-old-dream.html. Whether Mao (or China's leadership) ever expressed such sentiments is a matter of dispute. *Compare, e.g.*, DAVID G. ATWILL, ISLAMIC SHANGRI-LA: INTER-ASIAN RELATIONS AND LHASA'S MUSLIM COMMUNITIES, 1600 TO 1960, at 76 (2018) (describing the supposed Chinese claim on the Himalayan states as "entirely fabricated") *with* Henry S. Bradsher, *Tibet Struggles to Survive*, FOREIGN AFFAIRS, July 1969, at 750, 752 (reporting that in 1959, Chinese "spokesmen in Tibet asserted that the Tibetan 'hand' should be reunited with its 'five fingers,'" but also that this "claim is now dormant").

citizenship laws in place since 1958 have made it difficult for many Lhotshampa to normalize their status, but the 1988 census nevertheless revealed that roughly one-quarter of the population of Bhutan was ethnically Nepali.[6] Bhutan's otherwise idyllic image was sullied by a violent uprising of the Lhotsampa in the early 1990s amidst mass emigration, forced expulsions, and allegations of other rights violations by the government.[7] The treatment of the Lhotsampa remains a sensitive topic in Bhutan.

At this point, the Bhutanese could certainly be forgiven for wanting to retreat into the mountains once again. The external environment remains treacherous. At the very moment that JSW was welcoming its first class in Thimphu, Indian and Chinese troops were hurling rocks at each other a few hours away in Doklam.[8] Little could be more unnerving than the prospect of war between India and China on one's own soil. But hiding is no longer an option.

The natural enemy of self-imposed isolation is globalization, meaning the lowering of barriers – natural, legal, political, and otherwise – to transnational interaction. Bhutan has not escaped globalization, although that is not for lack of trying. The government did not allow television or internet access until 1999. Mobile phone service was only introduced in 2004. Throughout the twentieth century, communication for most Bhutanese meant either sending a letter (which would take one or two weeks to reach from one end of the country to the other) or visiting a nearby military base and using its wireless communications capabilities. The advent of technologies such as satellite TV receivers that could be hidden in one's yard meant, however, that outside influence was coming to Bhutan one way or the other. The end of Bhutan's self-imposed isolation from global information flows has less to do with any newfound embrace of globalization or belief in

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[6] *See* Dorji & Peil, *supra* note 2.

[7] *See, e.g.*, U.S. DEPARTMENT OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – BHUTAN, https://www.state.gov/documents/organization/160057.pdf; Kai Bird, *The Enigma of Bhutan*, THE NATION (Mar. 26, 2012), https://www.thenation.com/article/ enigma-bhutan; Maximillian Mørch, *Bhutan's Dark Secret: The Lhotshampa Expulsion*, THE DIPLOMAT (Sept. 21, 2016), https://thediplomat.com/2016/09/bhutans-dark-secret-the-lhotshampa-expulsion

[8] Nicola Smith, *India-China Border Brawl: Superpowers Throw Stones at Each Other as Tensions Heighten*, TELEGRAPH (Aug. 20, 2017), https://www.telegraph.co.uk/news/2017/08/20/india-china-border-brawl-superpowers-throw-stones-tensions-heighten.

the value of open markets and open borders than with a realization that technological change makes resistance futile, and that the nation is better served by dealing with change on its own terms than trying to ignore it altogether.

JSW is, in many ways, a microcosm of Bhutan's efforts to navigate a dilemma that is familiar to many developing countries. Bhutan is torn between two competing demands – the need for outside assistance and the need for autonomy. On the one hand, it is profoundly dependent on foreign assistance to achieve its development goals or even to balance its books from year to year. Thus, for example, outsiders have been essential to the creation and design of JSW at every step of the way, from the hiring and training of faculty, to the design of the curriculum, to the construction of the campus.

On the other hand, Bhutanese policy is focused intently on maintaining local control of the development process and bolstering national identity and autonomy. JSW is perfectly consistent with these goals: the establishment of a school that can supply the country with elite lawyers, judges, and bureaucrats – and shape their thinking from day one – is tantamount to the creation of national infrastructure that diminishes Bhutan's reliance on India and India's influence over Bhutan. In legal education as in other domains, the challenge for Bhutan is to find ways of obtaining outside help while not only preserving but enhancing local ownership and identity.

III. THE HISTORY OF BHUTAN'S FIRST LAW SCHOOL

In a country with a population of less than 900,000, there are at most 350 people with legal training in the whole country. Roughly half serve in the judiciary, and of the remainder, the majority are civil servants. There are probably fewer than fifty practicing lawyers in the entire country or one lawyer for every 20,000 people. Not surprisingly, legal fees are astronomical by Bhutanese standards, and the United Nations Development Programme has taken the position that Bhutan is in urgent need of lawyers.

Prior to the opening of JSW in 2017, those Bhutanese wishing to study law had no choice but to go abroad, which in practice overwhelmingly meant India. Upon their return to Bhutan, law graduates complete a one-year, government-run conversion

course to 'Bhutanize' their legal training. Graduates of the course earn a Post Graduate Diploma in National Law (PGDNL) and are eligible to sit for the Royal Civil Service Examination, which is the gateway to the most prestigious jobs in the country such as positions in the judiciary and attorney-general's office. JSW is slated to assume responsibility for the conversion course, which has more than doubled in enrollment over the last decade to roughly sixty students per year but is projected to decline in popularity as JSW's main degree program begins to siphon off domestic demand.

A major force behind the creation of JSW was the US-based multinational law firm White & Case (W&C), thanks largely to its willingness and ability to bankroll the development of a law school in an obscure, mountainous corner of the world. W&C's initial involvement is said to have stemmed from contact between the then-head of Bhutan's Royal Education Council (subsequently named ambassador to Kuwait) and a W&C lawyer based in Germany who visited Bhutan and reported favorably on the need and opportunity for creation of a law school to the chair of the firm, Hugh Verrier.

Bhutan's current king, Jigme Khesar Namgyel Wangchuck (not to be confused with his father and predecessor, Jigme Singye Wangchuck, after whom the law school is named), invited Verrier to his coronation in 2008. Verrier, in turn, committed W&C to assist Bhutan on a pro bono basis in a variety of ways, which eventually included support for the establishment of JSW. W&C subsequently dispatched Lou O'Neill, of counsel and coordinator of the firm's global pro bono efforts, to Bhutan for three months in 2009 to perform a needs assessment. On the basis of that assessment, W&C prepared a lengthy report that recommended, among other things, the establishment of a law school in due course.

Other would-be advisors from abroad sounded a less encouraging note. Faculty at Stanford Law School counseled against the creation of a freestanding law school, especially one that would be targeted solely at a small market of Bhutanese students while at the same time disconnected from Bhutan's existing universities and thus unable to leverage a broader set of resources. They argued that it would be more cost-effective to continue sending students to India and elsewhere for study, and to invest in supplementing and improving that foreign training rather than replacing it.

The King favored an immediate start on the establishment of a law school and assigned responsibility for the task to his younger sister, Princess Sonam Dechan Wangchuck, a Stanford graduate and LL.M. graduate of Harvard Law School who also spearheads a number of other initiatives relating to the justice sector, such as creation of a bar association. Thereafter, O'Neill returned to Bhutan almost every year to work with the Royal Education Council and help lay the groundwork for the creation of JSW.

The initial planning process took four years. The luminaries on the planning group used this time to think about curricular design and canvass all stakeholders, ranging from members of parliament to prospective employers. With the benefit of a clean slate, they were able to explore foundational questions and options that are usually foreclosed. What should be taught? What do people need from lawyers? In what ways should Bhutanese lawyers be different from, say, Indian lawyers or Singaporean lawyers? And so forth.

In their discussions, they were fortunate to have not only the luxury of time to think about the curriculum but also freedom from exogenous requirements as to what must be taught, or concerns about revenue, or even the job market for law graduates. The relatively underdeveloped legal profession and institutional environment also meant that they did not need to deal with many of the stakeholders that might otherwise stand in the way of optimal pedagogical design. For example, they did not have to address the demands of the bar association or bar exam because neither exists yet in Bhutan.

The result has been a law school that is distinctive, if not also progressive, by international standards. JSW charges students no tuition or fees. Indeed, it is not even willing to fine students for violating its code of conduct. Such policies reflect the overarching goals of enhancing access to the legal profession and producing a bench and bar that mirror Bhutanese society, not just the Bhutanese elite. The curriculum is unusual by Asian standards: it is deeply interdisciplinary and incorporates heavy doses of compulsory experiential learning and alternative dispute resolution, with an eye to producing well-rounded judges and civil servants as well as practice-ready private attorneys.

The creation of JSW – or, as it was known in the planning stages, the Royal Institute of Law – soon demanded the hiring of key personnel, especially administrators and specialists in legal education capable of making granular decisions, hiring faculty and

staff, and implementing high-level policies decided at the planning stage. By late 2012, Princess Sonam Dechan and W&C were ready to pull the trigger on hiring JSW's senior leadership. Given that much of the point of creating a Bhutanese law school was to ensure that the school would have a strongly Bhutanese identity, the new school would need to have a Bhutanese face. But it would also need the specialized knowledge and skills in legal education and the actual operation of a law school that, by definition, were lacking in Bhutan.

Given these conflicting needs, the unsurprising outcome was the eventual selection of a Bhutanese dean and a foreign vice dean. The dean, Sangay Dorjee, is a Bhutanese government administrator with no law background but previous experience at the Ministry of Labor and, most recently, the Royal Education Council (the main vehicle of the early planning stages). The vice dean, Michael Peil, had been approached by W&C while serving as associate dean for international programs at Washington University School of Law. Both were initially recruited in 2013 – Dorjee as project director, Peil as foreign consultant – and were subsequently tapped in 2016 to lead the school they had helped to plan.

Formal establishment of JSW as a legal entity occurred in 2015 with the King's issuance of a royal charter, which is arguably constitutional in the sense that it is entrenched (it can only be amended by royal decree, not legislation) and confers power upon a governing body to enact statutes and regulations pertaining to JSW's operation. The charter establishes JSW as an "autonomous" entity, which makes it almost unique among higher education institutions. Bhutan's other higher education institutions were consolidated under the aegis of the Royal University of Bhutan (RUB) in 2000, with the exception of JSW and the medical school. RUB reportedly was not keen to absorb either a law school or a medical school, both of which it considered outside its core competence.

The content and, indeed, the mere existence of the royal charter accord JSW a degree of privilege. The fact that it possesses its own charter gives JSW a basis for asserting its independence from the civil service, which is the largest employer in Bhutan and will in all likelihood be the largest consumer of JSW graduates. Other language in the charter guarantees JSW academic freedom, for purpose of enabling it to serve as a nonpartisan, apolitical engine for improvement of law. Institutional autonomy is further

reinforced by the explicit guarantee of adequate government funding found in article 1(3) of the charter, which provides that "[t]he State shall make adequate financial provisions for the sustainable operation of the law school." JSW's mandate under the royal charter explicitly includes both research and teaching: the official objectives of the school are to "provide legal education, facilitate research in law and related fields, [and] promote cultural enrichment and traditional values." [9] Of particular interest to comparative law scholars is the fact that the charter explicitly affirms and acknowledges the value of comparative legal scholarship and pedagogy.[10]

In terms of organizational structure, the charter provides that the King appoints the President of JSW (namely, Princess Sonam Dechan), and it packs the school's "highest governing authority," the eleven-member Governing Council, with a variety of luminaries. Pursuant to the charter, the Governing Council is chaired by the Chief Justice of Bhutan and also includes the Attorney-General, the Secretary of the Ministry of Education, a member of the Bar Council (which does not yet exist as of this writing), the Dean, one representative elected by the faculty (at present, the Vice Dean), one representative elected by the students, and up to three additional members appointed by the President (currently including a representative of the Royal Civil Service Commission, a member of His Majesty's Secretariat, and the Secretary of the Ministry of Finance). Although the charter does not spell out the relationship between the Council and the President, it is hard to imagine the Council telling the Princess what to do.

IV. CURRICULUM

With respect to the design of the curriculum, the planning process confronted a number of fundamental and interdependent design questions. What kind of degree would JSW confer? What would be the duration of studies? What courses would the school require? The broader the desired scope of substantive coverage, the longer the course of study would need to be and the higher the cost. The answer to these questions would need to be consistent

[9] ROYAL CHARTER art. 2 (2015).
[10] *Id.* pmbl.

with Bhutanese development policies, resource availability, and the needs and interests of relevant stakeholders.

The curricular advisory committee convened by the Princess made a point of evaluating a range of foreign models. These included:

(1) Australia or Singapore (a four-year undergraduate LL.B., with the option of a second graduate-level degree);
(2) the EU single-degree model (a single three-year first degree in law);
(3) the Bologna Process model (a three-year first degree, followed by an optional two-year graduate degree);
(4) India's post-1985 National Law School model (a five-year combined B.A./LL.B. undergraduate program); and,
(5) the United States model (a three-year graduate degree in law).

Notwithstanding its growing traction in other parts of Asia,[11] the American model was quickly and decisively rejected. The stated reasoning behind the rejection was twofold. First, a graduate-only model of legal education was wasteful from the perspective of Bhutan's human resources development strategy, which prioritizes the most efficient acquisition of essential skills over investment in nonessential breadth of training. It was viewed as an inefficient use of scarce resources to equip students with two different skill sets – one at the undergraduate level, the other at the graduate level – only one of which would ordinarily be used. While additional breadth of training might be needed in some cases, it was deemed more efficient simply to send selected individuals to India for the extra training than to invest in giving all lawyers training in an additional field.

The key decision-makers settled initially on a five-year undergraduate program resembling India's National Law School model.[12] Several explanations were offered for this choice (and a desire to emulate India was not one of them). First, a longer course

[11] *See* David S. Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. PA. L. REV. 927, 1015-20 (2015) (discussing the adoption of graduate law degree programs in Korea, Japan, and Hong Kong).

[12] As recently as 2018, the JSW website indicated that graduates would receive both a B.A. and an LL.B., in line with the Indian model.

of study gives JSW the opportunity to "do what we really want in terms of inputs": it creates space both for training practice-ready graduates, and for making a JSW education "uniquely Bhutanese" by giving students the time and opportunity to imbibe their "rich culture and traditions." Second, a five-year degree program would align at least somewhat with the Bologna Process, which calls for participating states (mostly in Europe) to facilitate student and labor mobility by standardizing their higher-education credentials. Under the Bologna Process, universities are to offer a three-year first-degree followed by an optional two-year second degree, meaning that five years of study in the same field leads to both an undergraduate and a graduate degree (such as an LL.B. and an LL.M.).

In the end, JSW's Governing Council settled upon the combination of an undergraduate law degree (LL.B.) and a post-graduate diploma in national law (PGDNL), which is the same diploma awarded to graduates of the one-year conversion course. This combination does not precisely duplicate the Indian model, in that JSW does not award a second undergraduate degree. Nor, however, does it track the Bologna Process model, as the five-year course of study is indivisible and does not lead to a graduate degree. JSW is also developing an LL.M. program that is likely to be targeted at foreign students with an interest in Bhutan.

The first three years of the curriculum consist entirely of compulsory courses. Over their fourth and fifth years, students take a total of four electives and engage in experiential learning. For comparative purposes, the defining characteristics of the curriculum are (1) its interdisciplinarity, (2) its emphasis on practical skills, and (3) its simultaneous and competing tendencies toward both internationalization and Bhutanization.

The interdisciplinary and practical dimensions of the curriculum are interrelated and justified by the country's need to train elite civil servants as well as practicing attorneys. Discussions with stakeholders during the planning process established the starting point that, unlike leading US law schools, Bhutan's sole law school cannot afford to produce lawyers who are merely 'book smart' then expect them to learn the rest on the job – in part because opportunities for on-the-job training scarcely exist in a country that lacks a well-developed legal profession in the first place. JSW graduates must hit the ground running, and in many cases, they must also be prepared to occupy positions of public trust from day one.

The resulting curriculum is in some ways reminiscent of what Oxford calls "PPE" – a course of study so ubiquitous among British political elites that it has been dubbed "the degree that runs Britain"[13] – and aims to acquaint the future elites of Bhutan with a smattering of the following:

(1) economics, to help them draft agreements and advise businesses;
(2) political science, because they are future elite civil servants and/or members of parliament; and,
(3) philosophy (in addition to mandatory coursework in Buddhist philosophy more specifically), for a variety of reasons. First, philosophy is akin to a "national sport" in Bhutan and thus an essential part of any educated person's upbringing. Second, it is viewed as a form of ethical training that lawyers ought to possess. The palace is wary, and perhaps rightly so, of the idea of lawyers who lack a strong ethical foundation. In due time, it will almost certainly fall upon JSW graduates to give life and meaning to the 2008 constitution. To place silver-tongued lawyers with excellent communication skills and poor ethical mooring in control of the nation's nascent legal and political infrastructure is considered dangerous.

There is ample preparation for private practice as well, in the form of:

(1) two semesters of moot court (one in English, one in Dzongkha);
(2) three semesters of legal research and writing;
(3) two semesters of mandatory live-client clinical experience;
(4) a mandatory course in law practice management (in addition to the professional responsibility course familiar to US law students); and,
(5) a tenth and final semester consisting wholly of a mandatory full-time externship (off campus, if not overseas, with a goal of landing international

[13] PPE is short for Philosophy, Politics, and Economics. Andy Beckett, *The Degree that Runs Britain*, GUARDIAN, Feb. 23, 2017, at 25.

placements to the greatest extent possible).

Befitting a tiny, far-from-autarkic country that speaks the global lingua franca of law and business, the curriculum also exposes students to a healthy dose of international and comparative law. Indeed, as noted previously, JSW's royal charter explicitly affirms the importance and value of comparative approaches to law. International law and international commercial law are both compulsory. By contrast, unlike many American law schools, JSW offers no course explicitly entitled "Comparative Law." But its absence most definitely does not signal a lack of commitment to comparative law.

There is more than one way of introducing comparative law into the curriculum. One approach is to wall off the comparative study of law in a dedicated, specially labeled course or two, which is the American approach (or, more accurately, the approach among those American law schools that offer comparative training at all). Doing so runs the risk of implying, however, that comparative law is a distinct enterprise that can be segregated from the study of the core legal subjects that are tested on bar exams, and that core legal subjects need not be approached in a comparative manner.[14] The second approach is to treat comparative legal analysis as a basic skill that all lawyers should possess, and to integrate and promote it throughout the curriculum.

The JSW curriculum adopts the latter approach. The absence of a dedicated "Comparative Law" course is indicative of how comparative approaches pervade the overall curriculum, to the point that comparative law cannot be segregated or disentangled from everything else that JSW students learn. For example, Constitutional Law is designed as a two-semester course, the idea being that students will spend the first semester studying constitutional law from a comparative perspective, which will equip them with the comparative skills and substantive framework to approach domestic constitutional law in the second semester in an informed and sophisticated way. Likewise, other core courses such as torts, contracts, and jurisprudence are all comparative by design. The curricular design signals implicitly that the comparative and the domestic are of equal importance and, indeed, that the comparative is a prerequisite to the study of the domestic rather than an addendum.

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[14] *See* Law, *supra* note 11, at 1017.

Last but definitely not least, from the Bhutanese perspective, are the (many) aspects of the curriculum that give it a uniquely Bhutanese flavor. There is widespread agreement on the desirability of a law school that meets international standards (and thus can credibly claim to produce world-class lawyers ready for transnational practice) yet is also local and unique (and thus satisfies the nation-building imperative). The desire to avoid choosing the global over the local (or vice versa), and instead to fashion a curriculum that is simultaneously globalized and localized, is not difficult to understand.

The problem is that these goals seem facially contradictory. How can a curriculum be both global and local? In other words, how can a country like Bhutan have its cake and eat it too? In theory, the desire for legal education that is both globalized and localized would appear to set up an intractable conflict. By definition, what is local in character cannot also be international and vice versa. Some aspects of local and global practice seem difficult to reconcile. For example, whereas Bhutan has a longstanding tradition of relatively consensual, community-based mediation, the dominant model of legal education at the international level emphasizes and valorizes formalized, courtroom-centered dispute resolution. Likewise, tort law has never been a part of local practice, as Bhutan has traditionally lacked the very concept of tort law. But it is difficult to imagine that a twenty-first-century law school, operating in accordance with international standards and expectations, could fail to offer tort law altogether.

In practice, however, JSW has not experienced much of a quandary. The solution has involved little more than a tolerance for juxtaposition and bricolage and – not least of all – a willingness to adopt a longer program of study. To the extent that there is an international or global version of some subject on the curricular wish list, JSW has been happy to embrace that version. And to the extent that there is not, JSW has been happy to develop unique offerings of its own. Rather than choosing between the global and the local, JSW has chosen both. In other words, the solution to the dilemma has simply been to spend more money.

The importance attached to the Bhutanization of the curriculum highlights the nation-building imperatives behind the creation and financing of a costly, labor-intensive law school from scratch in lieu of continued outsourcing to India. Highly Bhutanese elements of the curriculum include:

(1) A compulsory course entitled "Law and Gross National Happiness." The question of what is uniquely Bhutanese is in practice almost synonymous with the question of what advances Gross National Happiness, or GNH for short. The concept of GNH traces its origins to a casual comment by the fourth King (the eponymous JSW) in response to a question from an Indian reporter, circa 1974. Asked about Bhutan's gross national product – a comparative metric that obviously does not favor a tiny country of less than one million people – the fourth King responded that Bhutan does "not believe in Gross National Product. Because Gross National Happiness is more important." The concept of GNH has since become a source of national pride as well as national identity (if not also a national obsession that surfaces even in graffiti). It is now entrenched in Bhutan's constitution as an official goal of the state.[15] Fleshing out the concept of GNH, and using it as a basis for exploring competing constitutional conceptions of the aims of the state, promise to be a cottage industry for Bhutanese constitutional law and have the potential to become Bhutan's trademark contribution to the field of comparative constitutional law.

(2) A compulsory upper-year course on "law, religion, and culture" (in addition to Dzongkha language, legal history, and Buddhist philosophy courses). An important contributor to GNH is the sense of identity and belonging that comes with the celebration and cultivation of heritage and tradition.

(3) The designation of environmental law as a compulsory second-year course. The importance attached by JSW to environmental law mirrors the attachment of the country as a whole to environmentalism, which is in turn a direct

[15] BHUTAN CONST. art. 9(2) ("The State shall strive to promote those conditions that will enable the pursuit of Gross National Happiness.").

manifestation of GNH, because GNH demands environmental protection and sustainability (among many other things).

(4) A course entitled "Penal Code & Restorative Justice," rather than "Criminal Law," because the framing of the course should reflect the fact that social harmony is another important dimension of GNH.

(5) A "Human Rights and Human Duties" course – soon to be retitled "Human Dignity" – which is akin to a sociology course animated by a combination of conventional human rights ideology and a Bhutanese emphasis on social responsibility.

(6) Five semesters of compulsory Dzongkha, because Dzongkha is Bhutan's official language (and thus the language of the courts) and a matter of national heritage.

The need for Dzongkha instruction is real and illustrates the nation-building aspects of JSW. Most Bhutanese lawyers have only limited ability to work professionally in Dzongkha, notwithstanding its official status, because they studied law in India and, in the best-case scenario, might have gone on to obtain an LL.M. from Australia, the US, or the UK. Under any plausible educational scenario, the only legal vocabulary they will have acquired is in English. Thus, for example, even justices of the Bhutanese Supreme Court have been known to write their opinions in English, then turn them over to others for translation into Dzongkha, with the result that the justices themselves may be taken by surprise at something in the unfamiliar, but controlling, Dzongkha version.

The difficulty of working in Dzongkha is aggravated by the fact that, compared to English, Dzongkha is a language with a relatively small vocabulary and has not historically been applied in legal contexts, with the result that many legal terms do not already have clearly established Dzongkha equivalents. For this reason, the Supreme Court's Secretariat had a specialist in Dzongkha who spent fifteen years developing an

indigenous Dzongkha legal vocabulary that rises above the level of mere transliteration. He was responsible for determining, for example, which Dzongkha word would be adopted as the term of art for "contract." It was part of his job to appear before an official committee on the Dzongkha language to argue in favor of his translation choices (for example, by pointing out that the term had previously been used in an analogous context). JSW poached this very person from the Supreme Court to teach its Dzongkha courses.

(7) Eighteen units of instruction in Buddhist philosophy.

The obligation imposed by the Royal Charter upon JSW to promote "cultural enrichment and traditional values" has been interpreted as calling upon JSW to provide instruction in both Dzongkha (Bhutan's official language) and Buddhist philosophy. The Bhutanese Constitution explicitly provides that "religion remains separate from politics," but also specifies that "Buddhism is the spiritual heritage of Bhutan." Because Buddhism is part of the nation's heritage, its advancement promotes GNH.

(8) A two-semester alternative dispute resolution course that has deliberately been christened "Appropriate Dispute Resolution" to reflect Bhutan's deeply rooted tradition of community-based mediation.

The American, Bhutanese, and Indian National Law School curricula all share in common a high degree of interdisciplinarity by Asian standards. The significant clinical and externship components are points of differentiation from the Indian model and similarity to the American model. So too is the extensive four-week orientation program for incoming students, which is deliberately modeled on the orientation courses that US law schools mandate for foreign LL.M. students.

Pedagogy at JSW is, like Bhutanese law itself, an eclectic mix: it reflects the heterogeneity of the faculty and ranges from lecturing (in philosophy), to almost fully Socratic instruction (in torts), to simulation and experiential learning (in contracts), with little effort at uniformity.

V. FACULTY

The job description for all faculty is the 'three-legged stool' familiar to US academics – namely, research, teaching, and administration. As in the US, there is no specialization so far in terms of orientation toward teaching and research (in terms of either individual faculty focusing on one or other, or formally differentiated career tracks for teaching faculty and research faculty). Moreover, the leadership at JSW anticipates that it will always be the only law school in Bhutan and will consequently remain free of competitive pressure (from rankings, research assessment exercises, and so forth) that might force a shift in one direction or the other.

Of the fourteen full-time faculty, ten are Bhutanese and four are from the United States. At the time of the law school's launch, they were complemented by visiting faculty from the University of Vienna, and by two short-term visitors from the United States who obtained Fulbright grants to provide temporary assistance with student skills training and pedagogy. The expansion plans for the faculty call for the hiring of two more faculty to cover mandatory courses in Dzongkha (Bhutan's official language) and property law.

JSW's Bhutanese overseers are conflicted as to the desired mix of local and foreign faculty. On the one hand, in an ideal world, they would probably prefer to rely mostly or wholly on Bhutanese faculty. As one official explained, Bhutan is still "to a certain extent…a feudal society with hierarchy" that "doesn't want western professors with western ideas.…At the end of the day, we are still a monarchy. There are certain etiquettes and customs we follow that must continue. We are very passionate about our culture, our traditions, our unique identity."

On the other hand, the Bhutanese realize as a practical matter that full localization of the faculty is a "dream" that "will never happen," and they would be "very happy" to take a gradualist approach with a "half-and-half" mix. First, they realize that they are unlikely to cover all of their teaching needs with only local faculty, especially in the short term. Although JSW has already hired almost of its permanent faculty, it is temporarily short-handed because many of the Bhutanese faculty are currently overseas, or will soon be sent overseas, to obtain advanced degrees. Most of the Bhutanese faculty hold five-year undergraduate law degrees from India and are hired with the

understanding that they will be sent overseas for further training. Second, visiting foreign faculty are viewed as an intellectual resource and a source of enrichment for the Bhutanese faculty. As the Chief Justice (and chair of the Governing Council) observes: "Experts will bring their own knowledge; we will have our own knowledge. We can marry the two together."

A. Faculty Training

JSW's goal is for all of its Bhutanese faculty to possess at least an LL.M. or master's degree in addition to the usual undergraduate degree in law from India. The local faculty are sent abroad to obtain LL.M. degrees from various countries in the English-speaking world, mainly the United States and Australia. Funding for this overseas study comes from a combination of scholarship aid (in the form of full-tuition scholarships) and foreign aid (to cover travel and living expenses), much of which has been provided by the Austrian government. Of the ten Bhutanese faculty, four are US-trained (with LL.M. degrees from George Washington University (GW) and Lewis & Clark); a Master's in Legal Studies from Washington University in St. Louis, and an M.A. in Philosophy from Fordham); three are Australian-trained (with LL.M. degrees from Sydney, UNSW, and Canberra); and one who already holds an LL.M. is pursuing a Ph.D. in law at the University of Victoria in Canada.

GW's appearance on the list is no fluke but instead reflects a longstanding presence in Bhutan established by its former associate dean for international and comparative studies, Susan Karamanian, who secured an informal and semi-exclusive arrangement for GW to accept a judge from Bhutan each year into the LL.M. program on a full-tuition scholarship. With Karamanian's recent departure from GW, the door opened for Washington University in St. Louis (the former affiliation of JSW's Vice Dean, as well as the current affiliation of the author) to offer the Bhutanese judiciary a similar arrangement.

B. Faculty Recruitment

Hiring key personnel for a country's first-ever law school runs into a 'chicken-and-egg' problem: a law school must be created because the country lacks lawyers, but the creation of a law school requires the recruitment of lawyers. A country that has

never had a law school is likely to find legal scholars in short supply. Lateral hiring is not an option because there are no other law schools. Experienced law school administrators do not exist, while those capable of running a law school are in high demand for other positions; a small country has only so many elites to go around. Another complicating factor is that the Bhutanese are, by some accounts, not especially keen on teaching as a profession. A partial solution was to hire foreign faculty, but heavy reliance on foreign faculty was not viewed as a desirable long-term solution. The scarcity of Bhutanese candidates led JSW to adopt an approach of hiring people with the potential to teach law, then investing in the training they would need to actually teach law by sending them abroad (as described above).

For domestic candidates, the mechanics of the hiring process are similar to what happens elsewhere. At the start of each year, JSW identifies its needs, and the dean appoints a faculty selection committee, which puts out an "informal call" for prospective applicants. (An informal call suffices in lieu of formal advertisement because, as one administrator notes, "we know all the lawyers in Bhutan.") Existing faculty in roughly the relevant area of interest take the candidate to lunch, which serves as a de facto initial interview. The names of promising candidates then go to the committee, which interviews finalists. Finally, candidates give a job talk to the full academic council. The job talks diverge from traditional job talks in the US sense because no papers are presented (and that is because no one in Bhutan has any academic papers), but, otherwise, it comes close in form: thirty to forty-five minutes of substantive presentation are followed by a question-and-answer session.

The hiring of JSW's initial four international faculty members was, by comparison, "relatively easy." Two (husband and wife) were proactively recruited by JSW with the help of W&C. For the other two (also husband and wife), the process bore a greater resemblance to an "international NGO" search than a law faculty recruitment process. Vacancies were advertised through "PIL Net, AALS, everything." In total, JSW fielded sixty applicants from twenty countries, at all levels of seniority. With the exception of two francophone applicants, all were native English speakers. The applicants ranged from very junior candidates to nearly retired or retired practitioners wanting to use JSW as a springboard into law teaching (and to run the law school "like a little law firm"). Now that the school is already established,

any hiring of further international faculty is likely to follow a process similar to that for domestic candidates (with the substitution of video conferencing for the lunch and in-person job talk).

The applicant pool for clinical positions is distinctive. A typical candidate is a lawyer from the US or possibly India, in his or her forties, who has been teaching short courses at a variety of law schools and is hoping to exit legal practice by parlaying that prior experience into a permanent position somewhere. The mere fact that a position is clinical in nature "automatically self-selects for Americans" because the United States has the longest and most extensive experience with clinical legal education. The majority of the candidates are Americans with prior clinical teaching experience whose interest has perhaps been piqued by somewhat romanticizing and patronizing media coverage that portrays JSW as the pet project of Americans venturing abroad like modern-day missionaries to modernize (or globalize, or Americanize – take your pick) an adorably tiny and oddball hermit kingdom.[16] Most of the remaining applicants are Indian practitioners with some law teaching experience (which is unsurprising, given the size and proximity of the labor pool). The Indian applicants typically offer in their applications to teach other courses if not hired for a clinical position.

VI. ADMISSIONS

Traditionally, Bhutanese students know where they will end up based entirely on their academic performance in grade twelve. The top students in the country are called to Thimphu by the Department of Adult and Higher Education (DAHE) and choose in order of their nationwide ranking from a list of available foreign scholarships. Students must either decide on the spot or go to the back of the line and choose from whatever is left after everyone else has picked. Number one typically picks a Fulbright scholarship, which is then crossed off the list, while numbers two and three usually snap up the Australian equivalent. The next few

[16] *See, e.g.*, Craig Kielburger & Marc Kielburger, *The Unique Law School Coming Soon to Happy-Centric Bhutan*, HUFFINGTON POST (June 2, 2015), http://www.huffingtonpost.ca/craig-and-marc-kielburger/bhutan-law-school_b_6993082.html; Kai Schultz, *A Law School in a Kingdom of Buddhism*, N.Y. TIMES (Oct. 8, 2016), at A6.

take spots in India. Once the eighty or so foreign scholarships are gone, another four hundred students accept places in Sherubtse College (the 'Harvard of Bhutan'); another eight hundred or so choose the College of Science and Technology, also in Bhutan; and so on, until all slots are filled.

JSW's approach to admissions departs significantly from this system. First, as a new institution, it has treated affirmative outreach as a necessity. JSW faculty and staff personally visit all of Bhutan's fifty-eight high schools, which represents considerable effort. Notwithstanding Bhutan's small size – roughly half the size of Indiana – domestic travel between most points is grueling. There is no rail system, airports are few and far between (and not always operational), and the winding mountain roads are arduous and often in poor condition, to the point that a journey of thirty miles can easily take the better part of a day. JSW is then presented to potential students as a challenge: "This will be the hardest thing you've ever done."

Second, JSW devised a unique admissions process that combines elements of the global and the local. High school grades are weighted only 30% rather than 100%. Standardized test scores – discussed below – count for 45%. Finally, interviews count for the last 25%. From JSW's first-ever pool of applicants, fifty candidates were shortlisted for interviews based on a combination of their grades and standardized test scores. The inaugural class of twenty-five students was filled over the course of three rounds.

The standardized test in question is a version of the LSAT designed specifically for Bhutan. It is called, simply, the "Bhutan-LSAT" and was developed by the creators of the regular LSAT, the US-based Law School Admission Council (LSAC). Applicants are urged to familiarize themselves with the format of the test and sample materials available on JSW's admissions webpage, but they are also told that there is no real way of studying for this test. The Bhutan-LSAT is a microcosm of Bhutan's approach to the choice between global and local approaches: whenever possible, it chooses both. In legal education as in other areas, Bhutan is characterized by a contradictory desire for institutions that are global (and thus credibility-building) yet also local (and thus identity-building). What better way to do so than a bespoke version of a foreign-made test?

Third, JSW pursued an unorthodox interview strategy. In the run-up to the admission of its inaugural class, JSW was taken by

surprise when DAHE unexpectedly accelerated its schedule by two weeks due to holidays. This gave JSW a total of four days to plan its strategy. Knowing that the top students were already in Thimphu to attend the DAHE interviews, JSW reconstructed DAHE's rankings and spent two days interviewing candidates in roughly that order at the rate of ten or eleven candidates per day, before the DAHE interviews began. Its stated rationale was to give students a backup in case they preferred not to take a risk on a new and untested institution. Unlike DAHE, JSW gave students two weeks to decide, on the view that "we don't want you unless you want to be here." As a strategic matter, however, waiting to conduct interviews until students had already accepted foreign scholarship offers from DAHE on the spot would have likely decimated JSW's prospects for recruiting the very best students.

This approach bore fruit. For JSW's inaugural class, six of the top twenty-five students in the country accepted admissions offers from JSW, including the presumptive Fulbright recipient at the very top of the list. At the same time, however, over half of the students admitted by JSW would not have qualified for the most elite scholarships offered by DAHE. In response to JSW's decision to interview the top candidates first, DAHE has taken the view that it will still fill every available scholarship slot, and that JSW's entry merely means more satisfied students and families.

VII. INTERNATIONAL INFLUENCES

As a minuscule developing country wedged between two superpowers, Bhutan faces its fair share of challenges, but, in the area of legal education, it has enjoyed a rare advantage – namely, a blank slate. The lack of existing domestic institutions, combined with the mature state of foreign institutions, presented a best-case scenario for a fully rational and deliberative approach to the design of a legal education system that reflects best practices. On the one hand, they were relatively unconstrained by path dependence and historical accident. On the other hand, they faced a wealth of existing systems from which they could learn and draw inspiration.

Conscious choice among competing models has indeed played a significant role in the design of JSW. Relevant design considerations have included dissatisfaction with the most obvious model – the Indian system – as well as a degree of sensitivity to

Indian influence. Even under such favorable conditions, however, conscious design cannot account fully for the particular manner in which JSW has developed. Its design has inevitably also reflected a combination of resource constraints, human foibles, and sheer happenstance.

The architects of JSW set out very deliberately to canvass the entire world for the best possible ideas and practices. At one level, globalization facilitated this task by placing an entire world of experience at their disposal. At another level, however, globalization made the task impossible. The bigger and more complex the world, and the more models from which to choose, the harder it becomes for decision-makers to make optimal choices based on command of all relevant information. Which models manage to capture their attention, and which do not, can reflect the quirks of personal acquaintance, or foreign aid, or sheer luck.

In this situation, the architects of JSW could not help but behave like everyone else. To some degree, they fell back on personal knowledge and personal networks, and they were constrained by the fact that funding was, and remains, in short supply. The funding environment played a critical role in determining what models and influences would find traction in Bhutan. Those with money to offer at the outset wielded disproportionate influence that has embedded itself in the form of first-mover advantage. Upstream involvement early in the process shows strong signs of translating into lasting impact with the help of path dependence.

Financial constraints and lack of existing infrastructure leave Bhutan little practical choice but to seek international partners in developing its legal education system. And in Bhutan, international support has historically meant reliance on India, which accounts for over two-thirds of all foreign aid received by Bhutan[17] as well as nearly 80% of all imports and 90% of all exports.[18] Acceptance of the inevitability and desirability of an extremely close relationship with India coexists with ambivalence toward the scope and degree of Indian assistance. Diversification

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[17] Dipanjan Roy Chaudhury, *Bhutan May Receive More Financial Assistance*, ECON. TIMES (Oct. 22, 2018), https://economictimes.indiatimes.com/news/politics-and-nation/bhutan-may-receive-more-financial-assistance/articleshow/66309757.cms.

[18] Sudha Ramachandran, *Can Bhutan's New Government Avoid Doklam 2.0?*, THE DIPLOMAT (Oct. 29, 2018), https://thediplomat.com/2018/10/can-bhutans-new-government-avoid-doklam-2-0.

of the country's international partnerships and sources of support is a key element of Bhutanese development and nation-building strategy.

These dynamics have been evident in the creation of JSW. Through the 1960s and 1970s, the vast majority of skilled professionals in Bhutan – from doctors and accountants to teachers and civil servants – hailed from India. The existence of a domestic law school is intended to reduce the country's reliance on India for human capital. Nation-building goals are inseparable from educational goals: in the words of one JSW official, "no matter how benign or generous" India may be, "if Bhutan doesn't have its own experts and resources, Bhutan will cease to exist in any meaningful way." Matters such as the design of the curriculum and the choice of international partners reflect deliberation not only over how best to design a system of legal education, but also how to advance Bhutan's development, distinctiveness, and self-preservation as a state.

A variety of law schools from around the world have expressed interest in partnering with JSW but usually for the purpose of student exchange. The stereotypical approach is to seek a memorandum of understanding that can be collected "like a trophy" and trumpeted in brochures to students as another overseas study opportunity, without much real engagement or commitment of resources. It is not difficult to see why schools elsewhere might value opportunities for their students (and perhaps also their faculty) to spend time in a hermit kingdom that they have read about in the *New York Times*.[19]

Partnerships of this variety hold little obvious benefit for JSW. As the only law school in the country, it has no need to compete for students by offering study-abroad programs, and in any event, overseas travel and living expenses are prohibitively costly for most Bhutanese students. At the same time, an incoming flow of foreign students would burden a developing institution without the administrative apparatus needed to accommodate a regular flow of visitors. JSW lacks the manpower to handle multiple institutional relationships, particularly at a time when key personnel are themselves pursuing advanced studies abroad. By comparison, the kind of partner most valuable to JSW – namely, those willing to bear the cost of hosting and training JSW faculty – has been scarce.

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[19] *See* Schultz, *supra* note 16.

Expressed in national terms, the two biggest outside players in shaping Bhutan's new legal education system thus far have probably been the United States and Austria, in that order. India's influence is significant yet difficult to unpack. On the one hand, the Bhutanese have no desire to simply imitate the Indian model. On the other hand, there are strong practical reasons to pursue compatibility with the Indian system, and the actual result bears more than a passing resemblance to the Indian model.

A. India

Aversion to the Indian model of legal education reflects not only sensitivity about excessive Indian influence in general, but also dissatisfaction with Indian legal education in particular. In light of the fact that all of Bhutan's current lawyers and judges were at least partly trained in India, it may seem striking that Indian legal education is held in low regard, but, in this case, familiarity has bred contempt. The term used to describe traditional Indian pedagogy is 'chalk and talk': an instructor stands at a chalkboard and speaks from "dusty yellow notes" that have barely changed in decades. India's elite National Law Schools sought to address these ills in the late 1990s with a significantly revamped and interdisciplinary curriculum that expanded the course of study from three to five years, but they are still afflicted by what one graduate described as "low-paid, bad instructors."

Notwithstanding this aversion to the Indian model of legal education, the reality is that India has played a massive role in the development of Bhutanese legal education and will continue to do so for years to come. JSW is, like Bhutan more generally, dependent on India for infrastructure of both the tangible and intangible varieties. In a literal sense, India is building legal education in Bhutan by funding the construction of the new permanent JSW campus in Paro. More importantly, however, all of Bhutan's existing lawyers and judges received some or all of their legal training in India. Thus, given JSW's emphasis on recruiting local faculty as heavily as possible, Indian legal education will continue to be a formative intellectual influence on Bhutanese law faculty for years to come.

It is probably no coincidence that the JSW curriculum resembles that of India's National Law Schools in key respects, including its length, its interdisciplinarity, and its dual-degree character. The notion that JSW has modeled its curriculum on an

Indian model does not sit well in Bhutan; the preferred narrative is that JSW has followed the Bologna Process model, which also calls for a similar curriculum. Ironically, however, the logic behind the Bologna Process – which is essentially a regional harmonization project – suggests that Bhutan should be pursuing harmonization not with faraway Europe, but with its own neighbor India, an overwhelmingly important trading partner and source of human capital that already shares an open border with Bhutan.[20]

B. The United States

The United States is a major source of key personnel, funding, technical assistance, scholarships, and inspiration for Bhutanese legal education. The support that comes from the United States is fundamentally unlike the support that comes from various European countries, however, in that it has primarily taken the form of uncoordinated private initiative rather than systematic and strategic governmental sponsorship.[21] Indeed, American actors have on occasion pursued competing objectives and given conflicting advice. For example, while W&C was recommending the establishment of a law school and providing crucial financial and technical assistance for the launch of JSW, advisors from Stanford Law School were arguing against the creation of a law school – especially a free-standing one.

Many a law school might value the bragging rights of having a partnership with Bhutan's first law school, but the partnerships that have actually materialized share two common threads. The first is a personal connection of some kind. Stanford Law School's early involvement, for example, was attributable to the fact that Princess Sonam Dechan had attended Stanford as an undergraduate (and was not the only member of the royal family to do so). GW's substantial footprint in the Bhutanese judiciary stemmed from an encounter between former Chief Justice Sonam Tobgye and an American Bar Association administrator who, in turn, introduced the Chief Justice to Susan Karamanian at GW.

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[20] Bhutan's second largest city, Phuntsoling, and the adjoining Indian city of Jaigaon are separated by an open gate through which Bhutanese and Indians pass freely.

[21] Although there is no Fulbright scholarship specifically earmarked for Bhutan, the Fulbright Scholars program has provided financial support for Americans to teach on a temporary basis at JSW, and it remains free to entertain further Bhutanese requests.

Likewise, Washington University's role in educating JSW faculty and Bhutanese judges is attributable to connections between faculty at JSW and Washington University.

The second common thread is a willingness to commit resources that the Bhutanese themselves want. For example, Stanford expressed interest in student exchange and also offered in-kind assistance in the form of faculty and student manpower to help write Bhutanese legal textbooks and advice on how to build a cost-effective legal education system. Ultimately, however, the strategic advice foundered on the Bhutanese view of JSW as part of a nation-building strategy, while the teaching materials were never adopted. It was also unlikely that a brand-new institution gearing up to teach its own inaugural class would commit the resources needed to deal with foreign students (much less the expectations that American law students in particular bring to the table). By contrast, other schools such as GW, Washington University in St. Louis, and Lewis & Clark enjoyed fortuitous connections with JSW and have since endeared themselves simply by offering scholarships to Bhutanese scholars and judges. Given the extent to which the upper ranks of the Bhutanese judiciary are already populated by GW graduates, such scholarship schemes seem likely to pay reputational dividends in the long term.

At the intangible level, American influence is now embedded in JSW's pedagogy and curriculum in self-perpetuating ways. JSW's heavy dose of clinical education, in particular, seems likely to ensure ongoing demand for the kind of faculty who are more prevalent in the United States than in Europe or elsewhere in Asia. Given the role that personal connections and networks have played thus far in JSW's development, the existence of a continuing faculty pipeline from the United States to Bhutan suggests that American influence will remain considerable, albeit unsystematic and uncoordinated.

C. Austria

The Austrian government has invested heavily and deliberately in Bhutan. The Austrian Development Agency (ADA), which maintains an office in Thimphu, has funneled both financial and in-kind support to JSW, although its enthusiasm has fluctuated. JSW has also made initial contact with Eurasia-Pacific Uninet, an international network of research institutions that is led and financed by Austria, with the goal of exploring potential funding

and research collaboration opportunities.

The in-kind support from Austria takes the form of exchanges with the University of Vienna that occur on terms highly favorable to JSW. As ADA funding is conditional upon identification of a suitable partner institution in Austria, ADA paid for JSW officials to conduct a fact-finding visit to Austria. Relevant considerations for JSW included the partner institution's willingness to invest resources and ability to offer courses in English. Whereas the University of Salzburg scored poorly on both dimensions, the University of Vienna seized the opportunity. Pursuant to a memorandum of understanding, the University of Vienna has hosted JSW faculty as visitors and sent its own faculty to JSW to cover areas of teaching need identified by JSW (which thus far has meant courses in human dignity and political science), all at its own expense.

More extensive collaboration with the Austrians is hindered by a factor absent from dealings with the United States or India – namely, the language barrier. Because Austrian faculty offer most of their courses in German, the range of courses that they can cover for JSW is limited. Likewise, the language barrier limits Bhutanese desire and need for instruction in Austria.

D. Other Countries

Other actual or prospective sources of support include Canada, Singapore, and Germany. Canada is, like the United States, a suitable and desirable locale for Bhutanese faculty as well as judges to obtain advanced training. A Dalhousie LL.M. sits on the Bhutanese Supreme Court, while the University of Victoria's law school has enrolled JSW's constitutional law professor in its Ph.D. program and will conduct additional scholarly exchange with Bhutan thanks to a governmental scholarship scheme, the Queen Elizabeth II Diamond Jubilee Advance Scholars program.[22] Canadian involvement thus combines elements of the American and European approaches: like the American approach, it is driven by the initiative of specific individuals and institutions, but like the European approach, it enjoys governmental backing.

Waiting in the wings is National University of Singapore,

[22] Jonathan Woods, *Unique Partnership Between UVic Law and Bhutan's First Law School*, VISTAS (Summer 2018), at 12, 13-14, https://issuu.com/uviclawalumni/docs/vistassummer2018-final-web.

which has offered to be of assistance and thus far has sent a lawyering skills specialist to conduct training sessions for JSW faculty. Another potential player is Germany. Although its impact has thus far been minimal, Germany's well-known academic exchange service, the Deutscher Akademischer Austausch Dienst (DAAD),[23] is fielding a fact-finding mission to Bhutan. While DAAD has the organization and wherewithal to fund bilateral faculty exchanges and scholarships for JSW faculty, the Germans ultimately face the same constraint as the Austrians – namely, any support or training that they provide must be in English, which limits the available options.

VIII. CONCLUSION

The dawn of legal education in Bhutan poses something of a paradox. Dwarfed by mammoth neighbors on all sides and consequently fearful of absorption, Bhutan has long resorted to withdrawal, insularity, and cultivation of a distinctive identity as national survival strategies. Yet this tiny developing country that has for centuries made a point of isolating itself from the rest of the world for the sake of its own survival has now embraced a resource-intensive model of legal education that relies heavily in both design and execution on international advisers and sponsors. The adoption of a globalized model of legal education by the so-called hermit kingdom makes for a striking juxtaposition of isolation and globalization, if not a degree of incoherence or outright contradiction. Nevertheless, the decision is open to a combination of political, cultural, and functional explanations.

The most obvious and important explanation for the existence of JSW is political: the creation of a domestic system of legal education is explicitly part of an overall nation-building strategy. JSW may not be cost-effective or self-sustaining, but for a country in Bhutan's vulnerable position, it is understandable that nation-building might be given priority over penny-pinching. Law being the lifeblood and the language of the state, a domestic institution that enables Bhutan to produce its own legal experts is

[23] David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523, 577 & n. 267 (2011) (discussing the DAAD scholarship program, and noting its high participation rate among Taiwanese academics and judges).

both a form of infrastructure and a way of promoting national self-sufficiency and distinctiveness. And in reality, JSW has in fact functioned as a site of production for national identity. Among other things, it is quite literally an institutional locus for the invention of a national language: Dzongkha as a legal language is being invented through the process of being taught at JSW.

To say that nation-building goals motivated the creation of JSW, however, begs the question of why the Bhutanese concluded that these goals called for the establishment of a full-blown, freestanding law school (as opposed to, say, a series of add-on courses designed and offered by an existing university). From a cultural or sociological perspective, this policy choice might be said to demonstrate the irresistible pull of what sociologists have called "world culture" – namely, a common set of understandings and expectations concerning what countries must do in order to thrive and win acceptance.[24] On this view, national development and educational policies tend to be "enactments of conventionalized scripts" that nation-states learn to follow as members of "world society"[25] Putting aside any functional justifications, a law school may simply be something that every country is supposed to have – an essential accoutrement of any self-respecting and respectable nation. A national law school is arguably a "trapping of statehood, like an anthem or flag or paper money."[26] In other words, Bhutanese state sponsorship of a law school may be understood at least partly as a form of norm-driven behavior. The logic of globalization is not strictly economic; it is also normative and cultural. To view JSW as a mere national vanity project is to discount the power and ubiquity of the norms in question.

Functional considerations, in turn, help to explain JSW's heavy reliance on foreign models. It seems neither realistic nor sensible for any country today to construct a wholly unique system of legal education from scratch. Such an undertaking would be not only costly, but also maladaptive: at a time of increasing economic globalization, an idiosyncratic form of training and credentialing only makes it harder for lawyers to operate transnationally. All of this holds especially true for a tiny, developing country like Bhutan. In the absence of raw materials for constructing a system

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[24] John W. Meyer et al., *World Society and the Nation-State*, 103 AM. J. SOC. 144, 163, 166-68 (1997).
[25] *Id.* at 159, 149–50, 155.
[26] David S. Law, *Constitutional Archetypes*, 95 TEX. L. REV. 153, 156 (2016)

of law or legal education that could plausibly described as autochthonous, resistance to foreign models is not an option, and necessity is the mother of imitation. The case of legal education in Bhutan illustrates the extent to which globalization is often not a matter of choice but of necessity.

A critical question from the Bhutanese perspective is whether and to what extent these choices might compromise the country's distinctive identity and traditions and thus undermine the very goals that they are intended to achieve. By definition, national identity and traditions cannot be mere echoes of a global template. Is there a natural and unavoidable tension, if not contradiction, between identity-building and globalization? Or can Bhutan enjoy the best of both worlds, in the form of a law school that advances a distinctive national identity yet also commands the international acceptance and prestige that come with the adoption of global standards and practices?

To some extent, Bhutan has been able to have its cake and eat it too because the pursuit of a globalized model of legal education still leaves room for choice. Globalization cannot be reduced to imitation and harmonization; it also involves competition and pluralism.[27] The 'global' does not speak with a unified voice in Bhutan: from India to Austria to the United States, the influences are disparate, and the process of integrating and reconciling them has scarcely begun. The world of legal education offers a buffet of options, which has enabled Bhutan to diversify the range of influences at work. From a nation-building perspective, embracing a diverse mix of countervailing influences is a perfectly plausible strategy for avoiding excessive influence from a particular direction (in this case, India).

Globalization is also consistent with a degree of localization. "Glocalization" – the adaptation of global phenomena to local conditions – is not a contradiction in terms but rather a widespread phenomenon.[28] If even McDonald's – the epitome of all that critics of globalization love to hate – makes a point of customizing

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[27] *See, e.g.*, David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1289, 1293, 1334-35 (2008) (discussing ways in which globalization can drive competition and divergence rather than convergence); Roland Robertson, *Glocalization: Time-Space and Homogeneity-Heterogeneity*, *in* GLOBAL MODERNITIES 25, 27 (Mike Featherstone et al. eds., 1995) (arguing that both "homogenizing and heterogenizing tendencies" are "features of life across much of the late-twentieth-century world").

[28] Robertson, *supra* note 27, at 28–29.

its offerings from one country to the next, the legal education industry can surely do the same. Reliance on foreign models has not prevented JSW from supplementing its curriculum with courses built to address local needs and interests. By choosing to shoulder the cost of an elaborate, resource-intensive curriculum, Bhutan has avoided a zero-sum choice between a law school that is distinctively Bhutanese and a law school that is compatible with the outside world. Not all dilemmas can be solved with money, but some can – at least until the money runs out. The resulting pastiche of foreign and local elements may not be fully coherent or original, but it is certainly different.

Keywords
Legal Education, Law Schools, Curriculum, Graduate Education, Law School Admissions, Faculty Recruitment, Comparative Law, Accreditation, Globalization, Glocalization, Glocalism, Law and Development, Nation-Building, Foreign Aid, Bhutan, India, United States, Austria

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CONSOCIATIONALISM VS. INCENTIVISM IN DIVIDED SOCIETIES: A QUESTION OF THRESHOLD DESIGN OR OF SEQUENCING?

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ABSTRACT

Scholarship on constitutional design for post-conflict or divided societies focuses a great deal of attention on two issues: (1) the processes and timing by which constitutional rules should be established and (2) whether constitutions should reflect a consociationalist or incentivist approach to governance. Scholars are increasingly willing to entertain the possibility that constitutions drafted during period of transition from civil war or authoritarianism need not, and often should not, answer immediately all questions that constitutions tend to answer; however, they tend to assume that the question of whether constitutions should be consociationalist or incentivist is one that should not be deferred. And, as a practical matter, most constitutions make an initial choice between the two and seem to assume that the initial choice will be a permanent one. This article explores Afghanistan's constitutional history since the fall of the Taliban. It argues that Afghanistan's history sheds light on the strengths and weaknesses of consociationalism and incentivism and provides tantalizing evidence that, as in Afghanistan, people drafting democratic constitutions for a post-conflict or divided society should have prescribed a transition from one type of governance to the other. During a period in which civil wars are raging in many continents and post-conflict constitutions will need to be drafted, the lessons of Afghanistan should prove enormously valuable.

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I. INTRODUCTION

Within the U.S. and international legal academy, there is growing interest in questions of constitutional design for post-conflict societies or for other divided societies undergoing democratic transition. Recent scholarship in this field has focused on several types of questions. Some works compare different types of constitutional drafting processes and try to identify the ones most likely to result in a successful constitution.[1] A second group of works contrasts the different goals that constitution drafters might aim for when they set out to draft an initial constitution for a divided society.[2] Some suggest that drafters should avoid answering in an initial constitution divisive questions about national identity and government structure.[3] A third set of works explores what types of government structure and voting process are most likely to minimize societal divisions over time and lead to an effective deliberative democracy.[4] This article contributes to

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[1] *See, e.g.,* Mark Tus net, *Constitution Making: An Introduction*, 91 TEXAS L. R. 1983 (1984); John Lester, *Forces and Mechanisms in the Constitution Making Process*, 45 DUKE L. J. (1995); Rosalind Dixon, *Constitutional Drafting and Distrust*, 13 I-CON: THE INT'L J. CONST. L. 819 (2016).

[2] Much of this literature responds to the work of liberal constitutional theorists, such as Bruce Ackerman, who have argued that the moment in which a country emerges from a civil war, and/or overthrows an authoritarian regime, the so-called "constitutional moment," really is the best time to write up a detailed and entrenched constitution – one whose rules will be difficult to amend? *See* BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION (1992). Among those who challenge Ackerman are those who argue that, in divided societies, it is advisable to draft a transitional constitution. For an overview of these critiques, *see* Vicki C. Jackson, *What's in a Name—Reflections on Timing, Naming and Constitution-Making*, 49 WM & MARY L. R. 1249 (2008); *See, e.g.*, Heinz Klug, CONSTITUTING DEMOCRACY: LAW, GLOBALIZATION AND SOUTH AFRICA'S POLITICAL DEVELOPMENT (2000); Heinz Klug, C*onstitution-making, Democracy and the "Civilizing" of Irreconcilable Conflict: What Might We Learn from the South African Model?*, 25 WISC. INT'L L. J. (2007); ROTI TITLE, TRANSITIONAL JUSTICE (2008). Other critics have advocated for constitutional deferral, a process by which drafters leave important questions open for later resolution. *See, e.g.*, HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES (2011); *see also* CONSTITUTION WRITING, RELIGION AND DEMOCRACY (Ashli Bâli & Hanna Lerner eds., 2017).

[3] Rosalind Dixon & Tom Ginsburg, *Deciding not to Decide: Deferral in Constitutional Design* 9 INT'L J. CONSUL L. 636 (2011).

[4] For an overview of this body of scholarship, *see* Suit Choudhry, *Bridging Comparative Politics and Comparative Constitutional Law, in* CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION (Suit Choudhry ed., 2008), and, for examples, see the contributions in

this third body of scholarship.

Scholars who focus on government structure and electoral systems for divided societies have broken into two camps. One group insists that the only feasible approach is "consociationalism."[5] Opposed to this are scholars who argue that consociationalism only exacerbates the problems that it is supposed to solve. They prescribe, instead, an approach of "centripetalism" or "incentivism" (this article will use the second term). [6] Seeing their approaches as mutually exclusive, consociationalists and incentivists have rejected the possibility that one could ever create an effective hybrid.[7]

In recent years, some scholars have cautiously begun to question whether the choice between a consociationalist and incentivist system needs really be as stark as the leading scholars in the field have suggested. Such outliers suggest that, in practice, many divided societies *do* adopt constitutions that include both consociational and incentivist elements, and some have suggested this may be wise.[8] It is beyond the scope of this article to summarize the hybrid consociational-incentivist systems of governance that these outliers have identified or to evaluate the

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CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION (Suit Choudhry ed., 2008).

[5] *See* Arendt Lijphart, *Consociational Democracy*, 21 WORLD POLITICS 207 (1969); AREND LIJPHART, THINKING ABOUT DEMOCRACY: POWER SHARING AND MAJORITY RULE IN THEORY AND PRACTICE (2008).

[6] *See generally* DONALD HOROWITZ, ETHNIC GROUPS IN CONFLICT (1985).

[7] *See, e.g.,* Donald L. Horowitz, *Constitutional Design: An Oxymoron?, in* *DESIGNING DEMOCRATIC INSTITUTIONS* 253, 261 (Ian Shapiro & Stephen Macedon eds., 2000).

[8] *See, e.g.,* Stefan Wolff, *Review Essay: Building Democratic States after Conflict: Institutional Design Revisited*," 12 INTERNATIONAL STUDIES 128-214, 137 (2010); *compare with* Anna Jars tad, *Power Sharing: Former Enemies in Joint Government, in* FROM WAR TO DEMOCRACY: DILEMMAS IN PEACEBUILDING (Anna Jars tad & Timothy D, Sisk eds., 2008), PIPPA NORRIS, DRIVING DEMOCRACY: DO POWER SHARING INSTITUTIONS WORK? (2008), Katia Papa Gianni, *Participation and State Legitimation, in* BUILDING STATES TO BUILD PEACE (Charles T. Call & V. Wyeth eds., 2008), William Reno, *Bottom-up State building?, in* BUILDING STATES TO BUILD PEACE (Charles T. Call & V. Wyeth eds., 2008), Mimi Soderbergh-Kovacs, *When Rebels Change Their Stripes: Armed Insurgents in Post War Politics, in* FROM WAR TO DEMOCRACY: DILEMMAS IN PEACEBUILDING (Anna Jarstad & Timothy D, Sisk eds., 2008), Stephen Tierney, *Giving with One Hand: Scottish Devolution within a Unitary State, in* CONSTITUTIONAL DESIGN (Choudhry ed., 2008); *cf.* John Ejobowah, *Integrationist and Accommodationist Measures in Nigeria's Constitutional Engineering: Successes and Failures, in* CONSTITUTIONAL DESIGN (Choudhry ed., 2008).

viability of such systems. This article will, thus, assume that hybrids are, indeed, unworkable. It will explore, instead, another possible approach to compromise – constitutional sequencing.

To date, few, if any, countries have written constitutions that prescribe a "sequence" from a consociational system of government to an incentivist one, or vice versa.[9] Drawing on the experience of Afghanistan, this article will argue that under some circumstances, this type of sequencing may be the only viable option. Part II of this article outlines the current state of the debate about constitutional design for a democratizing divided society. Part III describes the constitutional experience of Afghanistan since the fall of the Taliban in 2001. Part III asks what lessons can be drawn from this history. It concludes that, on its face, Afghanistan's recent experience is a sobering one. It supports much of the criticism that consociationalists level at incentivism; but, at the same time, it supports the incentivists' critique of consociationalism. Recent Afghan history suggests that each party has leveled damning criticism at the other, without offering a viable alternative. From this, a pessimist might conclude that divided societies simply cannot be governed democratically. Part IV argues such a conclusion would be premature. Whether or not their constitutions formally require it, divided democratizing countries can, and occasionally do, switch from one approach to another. In Afghanistan's case, an extra-constitutional, ad-hoc move from incentivism to consociationalism has not solved Afghanistan's deeper problem. This forces us to ask, however, whether divided societies like Afghanistan might benefit from a constitutionally-mandated switch in the other direction – from consociationalist to incentivist government.

II. SCHOLARSHIP ON DESIGNING DEMOCRATIC CONSTITUTIONS FOR DIVIDED SOCIETIES

Interest in divided societies has grown steadily in recent

[9] Ginsburg and Dixon point to one case study in which a country resolved a debate about consociational versus incentivist structures by a constitutional "revisit" approach. The initial constitution included provisions that reflected an incentivist philosophy, as well as a provision calling for the country after a period of time to review those provisions and, if they had been counterproductive, to abandon them for consociationalist provisions. Dixon & Ginsburg, *supra* note 3, at 651 (discussing Brazil's 1988 Constitution).

decades. It was initially provoked questions about the mixed record that formerly authoritarian European countries racked up during the last quarter of the twentieth century as they tried to move from authoritarian to democratic governance.[10] In those decades, a number of European countries abandoned authoritarian forms of government in favor of a democratic parliamentary form of government either on the Westminster model or a modified Westminster model.[11] Only some of these transplantations, however, resulted in effective democratization. Those that took place in the 1970s and 80s tended almost uniformly to be successful, resulting in parliamentary democracies with strong legitimacy and effective governance; by contrast, the democratic transitions that took place in Central and Eastern Europe after the fall of the Soviet Union often failed.[12]

When scholars sought to explain the different outcomes in different countries, they noticed an interesting pattern. Westminster/quasi-Westminster parliamentary democracies tended to succeed in countries that were not "divided societies" and tended to fail in countries that were "divided societies." A divided society, as they saw it, was one in which two factors are simultaneously in play. First, the polity is diverse. Second, crucially, its diverse ethno-cultural, religious, or other communities are politically mobilized.[13] That is to say, political and economic decisions are dictated primarily by a person's communal identity. In other words, a citizen's primary loyalty is to her community rather than to her fellow citizens. In such a society, citizens can reliably be expected to vote only for a candidate who came from their community. Once in office, an elected official tends to promote the interests only of citizens who belong to her community.[14] In a series of works, scholars like Arend Lijphart and Donald Horowitz explained convincingly why Westminster parliamentary democracy tended to fail in divided societies. They disagreed, however, on the solution to the problem. That is to say,

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[10] *See* Choudhry, *Bridging Comparative Politics*, *supra* note 4, at 5.

[11] On the distinctions between these, *see generally* Bruce Ackerman, *The New Separation of Powers*, 113 Harv. L.R. 633 (2000).

[12] Arend Lijphart, *The Wave of Power-Sharing Democracy, in* THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY 37 (Andrew Reynolds ed., 2002).

[13] Ian Lustick, *Stability in Deeply Divided Societies: Constitutionalism versus Control*, 31 WORLD POLITICS 325, 325 (1979).

[14] *See* Choudhry, *Bridging Comparative Politics*, *supra* note 4, at 5; Lustick, *supra* note 13, at 325.

they disagreed on the question of what sort of democratic political system would succeed in the divided societies that could not be governed by Westminster-style parliamentary democracy.

In a Westminster system, elections to parliament take place on the basis of single-member, plurality voting, also referred to as "first-past-the-post" or FPTP voting.[15] (Each registered voter in a defined area is allotted one vote, which they can cast for their preferred candidate. At the conclusion of the election, the candidate with the most votes wins.) Usually, though not always, a single party commands a majority in the legislature. The majority party (or coalition) selects the prime minister, who serves as head of the executive branch, along with the rest of the cabinet. Such a system is well suited to produce stable elected governments for a society that is not communally "divided." In such societies, electoral losers are willing to accept the legitimacy of the overall political system because they feel that the system is not irretrievably rigged against them. Parties differentiate themselves on the basis of policy, and a party that loses an election can tweak its policy platform in future years to win votes from people who had previously voted for their opponents. A party that loses in one year can reasonably expect to win a future election and thus has an incentive not to resist election results by force. Conversely, parties in power govern in full knowledge that they will at some point lose; and, accordingly, the party in power at any particular point in time has incentives not to abuse its power.[16] By contrast, a Westminster-style parliamentary system is unlikely to produce a stable democratic regime in a divided society. This is because in a divided society parties associated with a minority group may reasonably doubt that they will ever win a democratic election. In these societies, people tend to vote on the basis of their ethnicity (which never changes) or religious affiliation (which tends to change slowly, if at all). A party or coalition that runs candidates from a majority community and promotes the interests of that community will be able to win every election, no matter how abusive their policies are.[17] By extension, parties representing the interests of minority communities will permanently be excluded from political office, and members of their community will suffer.

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[15] Choudhry, *Bridging Comparative Politics, supra note* 4, at 17.

[16] *See id.*

[17] AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION 3-4 (1977), *compare with* Choudhry, *Bridging Comparative Politics, supra* note 4, at 17.

In such a system, the interests of minority communities, even large ones, can be ignored. Since minority groups cannot protect their interests through the regular political process, members of small communities cease to see the advantage of participating in the democratic process at all. When possible, they resort to extra-constitutional resistance, and in many cases civil war breaks out. Lijphart said in 1985 that for all practical purposes, when it comes to the members of a minority community in a divided society, Westminster democracy is basically "no democracy at all,"[18] and Horowitz agreed.[19]

Seeing that Westminster and quasi-Westminster democracy are doomed to fail in a divided society, scholars like Lijphart and Horowitz struggled to imagine a different type of democratic system that might fare better. All agreed that effective democratic constitutions will have to address three distinctive challenges.[20] Great care must be taken to ensure that (1) an elected government will be trusted by all communities and will represent the interests of all; (2) the political system will encourage, over time, political cooperation across community lines – cooperation of a sort that is likely to build further trust between members of rival communities; and, (3) the experience of electing governments and being governed under them will, ideally, lead people to value their identity as citizens of the diverse state as much as they value their identity as members of their ethnic or religious community.

If they agreed on the qualities that the government of a divided society should have, however, Lijphart and Horowitz disagreed deeply about what sort of government would best realize those qualities. Each championed a very different approach to electing and organizing the government of a divided society.

A. Rival Solutions: Consociationalism vs. Incentivism

Scholars of divided societies have proposed two contrasting approaches to democratic governance in a divided society.[21] A

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[18] *See* AREND LIJPHART, POWER-SHARING IN SOUTH AFRICA 13 (1985).

[19] Donald Horowitz, *Conciliatory Institutions and Constitutional Processes in Post Conflict States*, 49 WILLIAM & MARY L. R. 1213, 1215 (2008).

[20] For a discussion of some questions, *see generally* Clark B. Lombardi & Shamshad Pasarlay, *Constitution-Making for Divided Societies: Lessons from Afghanistan, in* CONSTITUTIONALISM IN CONTEXT (David Law ed., forthcoming 2019).

[21] *See, e.g.*, Katherine Belmont, Scott Mainwaring & Andrew Reynolds,

group of scholars, associated with Lijphart and his students, insist that divided societies can be governed democratically only through a form of "consociational" government.[22] The argument for consociationalism is premised on the idea that divided societies are most likely to be governed democratically when the constitution establishes a structure of government and election rules that together guarantee each of the country's politically important communities the ability to influence government policies in areas of serious concern to the community.[23] According to Lijphart and like-minded scholars, consociational government is absolutely necessary whenever one community in a divided society has more than 50% of the voting population and can effectively govern. Consociational government is effective in many other types of divided society too.

What is consociational government? Such governments always include a grand coalition executive, meaning that all important rival groups should be included and allowed to exercise some meaningful power in government.[24] It usually includes, as well, segmental autonomy in either a territorial or corporate form.[25] That is to say, the state will delegate power to a territory that is dominated by a particular community or alternatively it will guarantee a certain degree of executive or legislative power to community leaders. Through such mechanisms communities gain control over issues of particular concern to them. Two additional features that consociationalists often favor are mutual veto rights on matters of vital importance to rival communities and proportionality in political representation, including in the legislature, civil service appointments, and the allocation of public funds.[26] By giving mutually distrustful communities guarantees of political power, usually including veto rights, Lijphart's "consociational" model of governance tries to create the

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Institutional Design, Conflict Management and Democracy, in THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT AND DEMOCRACY (Andrew Reynolds ed., 2002); Choudhry, *Bridging Comparative Politics, supra* note 4.

[22] *See,* e.g., LIJPHART, *supra* note 18.

[23] Arend Lijphart, *Constitutional Design for Divided Societies*, 15 J. DEMOCRACY 96, 97 (2004).

[24] LIJPHART, *supra* note 18, at 25–47.

[25] *Id.*

[26] *See Id.* at 25–47; Arend Lijphart, *Consociational Democracy*, *in* THE OXFORD COMPANION TO POLITICS OF THE WORLD 188–89 (Joel Krieger ed., 1993); *compare with* Choudhry, *Bridging Comparative Politics, supra* note 4, at 18–19.

conditions in which communities will be willing, however grudgingly, to work together. This will hopefully allow these communities to experience the benefits of cooperating rather than fighting. On this foundation, consociationalists argue, trust and more effective cooperation can be built. Over time, ideally, consociational guarantees will no longer be needed.

Challenging the claims of consociationalists are "incentivists," a group associated with Donald Horowitz and his students. Incentivists reject consociationalism as impractical and ultimately counterproductive.[27] They point out that in many divided societies, important communities have little incentive to participate in a consociational democracy.[28] Most importantly, if any communal group in a country makes up more than 50% of the population, that group will rarely have any reason to agree to a consociational compromise. Incentivists argue, therefore, that consociation is likely to be accepted only where (1) minorities have taken up arms and have forced a majority group to compromise or where (2) there is no clear majority and when the structure of government precludes coalitions of ethnic groups from cooperating politically to the detriment of others.[29] Furthermore, even in these rare cases, some parties will come to regret their agreement to participate in consociational government. For example, if a majority is compelled by violence to accept a consociational form of governance, that majority is likely to resent the situation going forward and to undermine or repudiate the consociational bargain as soon as it thinks it has the military power to impose its will. In countries with no dominant community, consociationalism might last longer. In such countries, however, incentivists argue that consociational government always devolves over time in a way that renders the government ineffective, illegitimate, or both.[30]

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[27] *See generally* Donald Horowitz, *Democracy in Divided Societies*, 4 J. OF DEMOCRACY 18 (1993). For a detailed response to Horowitz's criticisms, *see* Lijphart, *The Wave of Power-Sharing Democracy , supra* note 12, at 40–45.

[28] Horowitz, *Constitutional Design, supra* note 7, at 20.

[29] Horowitz, *Conciliatory Institutions and Constitutional Processes, supra* note 19, at 40–48; Choudhry, *supra* note 4, at 20.

[30] In consociational democracies, the electoral systems are structured in a way that guarantees that communities will be represented by a member of their own community, and this person is understood to be the figure who will have responsibility for promoting their interests against the interests of other communities. Members of a particular community thus have every incentive to make sure that this seat is held by someone who will represent their interests most vigorously. Choudhry, *Bridging Comparative Politics, supra* note 4, at 20–21.

For one, federalism and proportional representation (PR) in parliamentary elections each tend to result in the election of extremists rather than moderates from rival ethnic or religious parties.[31]Furthermore, minority vetoes tend to be abused and to promote gridlock that will in turn lead people to question the effectiveness and legitimacy of their government.

To incentivists like Horowitz, then, consociationalism is a poor solution to the problem of democratic governance in a divided society. It is unlikely to be adopted in the first place, and, where it is adopted, it will exacerbate the communal tensions that it is supposed to solve.[32] Instead of dividing political offices among people based on the community that they come from, the system should reward parties and politicians who are willing to reach out to members of communities outside their own and establish policies that promote the interests of people who belong to rival communities. As an alternative to consociation, incentivists propose that divided societies establish highly centralized, unitary governments headed by a strong president. Importantly, however, those presidents must be elected through voting systems that benefit moderate politicians who are able and willing to work with politicians representing rival communities.[33]

What voting systems are likely to incentivize moderate politicians to seek votes from members of other communities and likely to provide moderates with more votes from other communities than they lose from communal extremists who abandon them? The best such system was said to be the "alternative vote: system" (AV).[34] The possibility of vote transfers in such a system encourages candidates to appeal for support across ethnic lines. It thus creates incentives for moderation.

The battle between consociationalists and incentivists continues to resonate to this day, both within the academy and

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[31] PR systems penalize rather than incentivize moderate political behavior across ethnic lines.

[32] Horowitz, *Constitutional Design: An Oxymoron?, supra* note 7, at 256-257.

[33] DONALD HOROWITZ, A DEMOCRATIC SOUTH AFRICA?: CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY 461 (1991).

[34] In such a system, voters are asked to rank candidates in order of preference. If no candidate is successful after first preferences have been counted, the bottom candidate is dropped from the ballot and votes cast for that candidate are distributed according to the second preferences. AV gives parties that represent a majority community a compelling reason to seek votes from members of minority communities. Doing so will allow them to get an absolute majority through second preferences.

among people who draft constitutions for divided societies.

B. Must a Constitution Choose Consociationalism or Incentivism?

No constitution ever answers all possible questions about the nature of the country or the structure of government. Some scholars have suggested that, in divided societies emerging from crisis, constitutions should not provide answers to the most divisive questions about national identity, rights, or, even sometimes, governmental structure.[35] To this end, some scholars have proposed drafting "transitional constitutions" designed to operate for only a short period of time, after which they will be replaced by a permanent constitution.[36] Even if people feel compelled to draft a permanent constitution at the outset, they can draft it in a way that 'defers' on important questions.[37] That is to say, drafters can identify questions that are particularly divisive at the time of drafting and can delegate to the political branches the power to resolve those questions in the future – simply by enacting a law to deal with the issue. Alternatively, those who draft constitutions for a divided society can choose in places to use deliberately ambiguous language, leaving it for constitutional interpreters (possibly legislators and possibly judges) to resolve the divisive issues at a later date.[38]

As we have discussed in another work, scholars have in recent years produced a number of interesting works on constitutional deferral. Tom Ginsburg and Rosalind Dixon have used large (n) studies to create typologies of deferral and to draw some initial lessons about which types of deferral are productive and which are likely instead to create stress and potentially shorten the lifespan of a constitutional regime.[39] Lombardi, Pasarlay, Lerner, and Bâli have each used case studies to explain why under certain conditions, certain types of divided societies have benefited from a practice of constitutional deferral.[40] Taken

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[35] LERNER, MAKING CONSTITUTIONS, *supra* note 2; *see also* CONSTITUTION WRITING, RELIGION AND DEMOCRACY (Asli Bâli & Hanna Lerner eds., 2017).
[36] *See* the texts in *supra* note 2 above.
[37] Hanna Lerner, *Constitution Writing in Deeply Divided Societies: The Incrementalist Approach* 16 NATIONS AND NATIONALISM 68 (2010).
[38] Lombardi & Pasarlay, *supra* note 20.
[39] *See* Ginsburg & Dixon, *supra* note 3.
[40] Clark B. Lombardi, *The Constitution as Agreement to Agree: The Social and*

together, these studies suggest that deferral can, under certain circumstances, make sense. Sounding a cautionary note, however, Dixon and Ginsburg point out that deferral can also overtax political institutions.[41] While more case studies are needed, the limited evidence available suggests that a divided society which aspires to be ruled democratically may reasonably choose to defer on a number of questions, but it should resolve very early (in the constitution or shortly afterwards) the question of whether the state should be governed according to a philosophy of consociationalism or incentivism.[42]

Certainly, at the time they sat down to write a new constitution in 2004, Afghanistan's elites shared the intuitions of Ginsburg and Dixon. Apparently feeling that the choice of consociationalism vs. incentivism was an either/or choice, they debated and selected one approach to governance – one that, supposedly, they expected to apply indefinitely. Ultimately, they chose an incentivist system. Afghanistan's experience living under that system sheds important light on the relative advantages of consociationalism or incentivism for divided societies, and it suggests an innovative new approach to constitutional drafting that might allow countries over time to enjoy the best of each system.

III. AFGHANISTAN'S RECENT CONSTITUTIONAL HISTORY

Afghanistan provides us with a textbook example of a state

Political Foundations (and Effects) of the 1971 Egyptian Constitution, in THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 398 (Dennis Galligan & Mila Versteeg eds., 2013), Shamshad Pasarlay, "Making the 2004 Constitution of Afghanistan: A History and Analysis through the Lens of Coordination and Deferral Theory" (Ph.D. dissertation, University of Washington School of Law, 2016); Asli Bâli & Hanna Lerner, *Constitutional Design without Constitutional Moment: Lessons from Religiously Divided Societies,* 49 CORNELL INT'L. L. J. 227 (2016); Shamshad Pasarlay, *Rethinking Afghanistan's Longest-Lived Constitution: The 1931 Constitution through the Lens of Constitutional Endurance and Performance Literature*, 10 ELON L. REV. 283 (2016).

[41] To illustrate the problem, Ginsburg and Dixon point to the example of Iraq after the U.S. Invasion of 2003, which illustrates, to their minds, the dangers of deferral on questions of voting systems—a deferral that leaves open the question of whether the government will be consociational or incentivist. *See* Ginsburg & Dixon, *supra* note 3, at 661–665.

[42] *Id.*

that is supposed to regulate a deeply divided polity. From the time Afghanistan was recognized as a nation in the late 19th century, its citizens have identified with one of a multitude of distinct communities – ethnic communities, linguistic communities, and religious communities.[43] Communal identity has always had political salience. Afghans have tended to trust members of their community more than members of other communities. And their trust has generally been rewarded. Leaders have generally promoted the interests of the communities from which they hailed.[44]

Communal divisions deepened during 25 years of civil war between 1976 and 2001, a period in which communities came to rely on their communal militias for protection.[45] In 2001, U.S.-led forces invaded Afghanistan; and, in the wake of this invasion, the international community sought to help Afghans establish a democratic government.[46] After years of communal fighting, Afghans tended to look to the leaders of communal militias or figures close to these leaders. They looked to these figures to represent their interests in the new government.

From 2001 to 2004, representatives of Afghanistan's mistrustful communities drafted, debated, and ratified a constitution that was supposed to usher in a period of democratic governance.

A. The Drafting of Afghanistan's 2004 Constitution

In 2001 after the invasion of Afghanistan by an international force led by the United States, the international community

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[43] Among the various major Afghan ethnic/linguistic groups are the Pashtuns and Tajiks (the two largest) followed by Hazaras, Uzbeks, and a host of smaller, but regionally significant, minorities, such as Baluch and Turkmen. VARTAN GREGORIAN, THE EMERGENCE OF MODERN AFGHANISTAN: POLITICS OF REFORM AND MODERNIZATION, 1880–1946, 25–38 (1967). THOMAS J. BARFIELD, AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY 23–32 (2010). (In addition, Afghanistan is deeply divided along religious lines. Even within a single ethnic group, one can find communities embracing different sects (Sunni or Shi`a); and, within a particular sect, one can find dramatically different approaches to the faith. *See generally* AFGHANISTAN'S ISLAM: FROM CONVERSION TO THE TALIBAN xiii (Nile Green ed., 2016).

[44] *See* Lombardi & Pasarlay, *Constitution-Making, supra* note 20.

[45] *See generally* LARRY GOODSON, AFGHANISTAN'S ENDLESS WAR (2001); *see also* WILLIAM MALEY, THE AFGHANISTAN WARS (2009).

[46] *See* Barnett Rubin, *Crafting a Constitution for Afghanistan*, 15 J. OF DEMOCRACY 5 (2004).

committed itself to promote a new regime of stable, democratic government in Kabul. With the assistance of powerful international actors, a meeting was held in Bonn, Germany, where powerful figures represented a variety of mutually hostile communities with militias.[47]

At the meeting in Germany, the participants signed a power-sharing agreement, the Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, commonly known as the Bonn Agreement.[48] This Agreement set a timetable for a two-year transitional period in which a transitional administration would be set up and would supervise the drafting of a new constitution.[49] Hamid Karzai, the hereditary head of a Pashtun tribe that had been active in Afghanistan's civil war, was appointed president of the Transitional Administration.

In October 2002, Karzai appointed by decree a nine-member commission to prepare the first draft of the constitution.[50] The nine-member Constitutional Drafting Commission (CDC) included representatives from the most powerful political and military factions in Afghanistan, except for the Taliban. Its members represented groups with different and rival ideological, political, ethnic and regional commitments.[51] The CDC identified a number of key questions of constitutional design that would ideally be resolved before a constitution was drafted. These included (1) if and how power should be separated – both horizontally or vertically; (2) whether the state should recognize Islam as an official religion, if so, how specifically should the state identify the particular version of Islam that would serve as the official religion, and should principles embedded in the official religion constrain the legislative, executive, or judicial discretion of the state; (3) what fundamental rights should the state be

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[47] J. Alexander Thier, *The Making of a Constitution in Afghanistan*, 51 NEW YORK LAW SCHOOL LAW REVIEW 557, 559 (2006-07).

[48] *Id*.

[49] Special Representative of the Secretary-General for Afghanistan, Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, transmitted to the Security Council by the Secretary-General, Art. I: 6, U.N. DOC. S/2001/1154, 1155 (Dec. 5, 2001), http:/www.un.org/News/dh/latest/afghan-agree.html.

[50] Decree No. 141 of the President of the Transitional Administration of Afghanistan, Hamid Karzai, on the Appointment of the Constitutional Drafting Commission (Oct. 2002).

[51] Thier, *supra* note 47, 566–567.

obliged to respect; and, finally, (4) what institutions should be entrusted with the power to interpret and enforce the constitution.[52]

Failing to form a minimum consensus on the last three questions, and worried that time was running out, the CDC decided temporarily to defer consideration of these questions. This decision enabled the members of the commission to prepare a first draft of a constitution – albeit one with significant lacunae. Karzai then appointed a larger Constitutional Review Commission (CRC), which revised the CDC draft and submitted it to a Constitutional *Loya Jirga* (CLJ) – a constituent assembly that would have the authority to debate, revise if necessary, and ultimately adopt Afghanistan's first constitution of the twenty-first century in 2004.[53]

In revising the CDC's initial draft constitution, the Constitutional Review Commission remained deeply divided on questions of Islam, national values, and judicial review. In another work, Pasarlay has recently discussed in detail how the deadlock was broken only when the CRC agreed to engage in constitutional deferral, leaving unanswered a number of controversial questions about Islam, rights, and judicial review.[54] Because the political branches were given enormous freedom to answer questions that would normally be answered in a constitutional text, the CRC felt compelled to design carefully the country's political institutions. The CRC debated at length questions of government structure and electoral system. After much discussion, it rejected consociationalism and prescribed for the country an incentivist style of government.

To understand the debate within the CRC and the Commission's final decision, it is important to remember that in Afghanistan Pashtuns are slightly under 50% of the population. Tajik, Hazara, and Uzbek communities make up most of the remainder, alongside some smaller communities.[55] Everyone assumed, correctly it turns out, that voting in post-Taliban

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[52] Lombardi & Pasarlay, *supra* note 20.

[53] Pasarlay, "Making the 2004 Constitution," *supra* note 40, at 172–255; Shamshad Pasarlay, *The Limits of Constitutional Deferral: Lessons from the History of the 2004 Constitution of Afghanistan*, 27 WASHINGTON INT'L. L. J. 683 (2018).

[54] *See generally* Lombardi & Pasarlay, *supra* note 20; Pasarlay, *Limits of Constitutional Deferral, supra* note 53.

[55] BARFIELD, AFGHANISTAN: *supra* note 43, at 23–32.

Afghanistan would proceed as it typically does in divided societies, with members of a community invariably voting for candidates who came from their community. At both the CRC and, eventually at the CLJ, the popular body that formally adopted the 2004 Constitution, members allied with the Pashtun acting president, Hamid Karzai, predictably favored a strong presidential system with a president elected by a simple majority/plurality. They assumed that Pashtuns, who were the largest ethno-linguistic community in Afghanistan, would vote uniformly for a Pashtun president. A Pashtun would always hold the presidency; and, in order to maintain his support among fellow community members, s/he would promote their interests at the expense of others.[56] For obvious reasons, members of other communities were skeptical about a strong presidency elected through a simple majority/plurality vote.[57] They insisted that the constitution should include provisions to soften the impact of a permanent Pashtun presidency. They were internally divided, however, on whether the constitution should achieve this end by adopting consociational guarantees or, instead, by requiring incentivist voting systems.

Some CRC non-Pashtun members wanted to include a number of consociational elements in the government.[58] For example, federalism or expansive grants of regional autonomy were proposed.[59] Among the CRC members who favored such provisions, some also wanted to use a form of list PR to elect the legislature.[60] Others pushed for communal vetoes over important issues of concern for minority groups. Finally, some proposed a semi-presidential model with the prime-ministership reserved for a non-Pashtun.[61] Partly on their own and partly after pressure from

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[56] Golnaz Esfandiari, *Loya Jirga Approves Constitution, But Hard Part May Have Only Just Begun*, RADIO FREE EUROPE, 2004, https://www.rferl.org/a/1340558.html(accessed Dec. 4, 2018).

[57] *Id*.

[58] Pasarlay, "Making the 2004 Constitution," *supra* note 40, at 231–34.

[59] During the civil war, Afghanistan effectively had been partitioned into regions controlled by 'warlords.' It was felt that delegations of *de jure* power to regions would be, for all practical purposes, delegations of de jure power to warlords and might embolden them to threaten the government or to push for secession. The framers believed that a centralized state with a powerful president at its head could counter the influence of powerful warlords and help hold the country together.

[60] Andrew Reynolds, *Electoral Systems Today: The Curious Case of Afghanistan,* 17 J. DEMOCRACY 104, 106 (2006).

[61] Pasarlay, "Making the 2004 Constitution," *supra* note 40, at 174–235

the international community, a majority of the members of the CLJ rejected almost all of these consociational proposals.[62] Echoing the arguments of incentivists like Donald Horowitz, a majority of CRC members ultimately concluded that consociational arrangements would politicize ethnic differences and threaten Afghanistan's fragile stability. Instead of granting consociational guarantees, then, they instead put their faith in incentivism.[63]

Among its incentivist strategies, the 2004 constitution prohibits ethnic and sectarian political parties.[64] This rule was designed to encourage multiethnic political parties, with the hope that this would encourage institutions that promoted compromise among political leaders from different communities. Similarly, the government rejected a proportional electoral system, which facilitates segmental appeals.[65] Instead, the constitution requires the president to run with two vice-presidential candidates.[66] In theory, a team with representatives from three different ethnic and sectarian groups should always beat a team that had representatives from less than three. In the most likely scenario, the president would be from the largest ethnic group, the Pashtuns, while his vice-presidents would be from other ethnic groups (chiefly, the Tajiks, Uzbeks, or Hazaras). Such a system encourages pre-election pacts across ethnic and sectarian lines that would promote political allegiances that transcend groups. It would also lead the president from the largest ethnic groups to moderate his/her behavior while in office and require the vice-presidential candidates to do exactly the same for their political pacts.

(discussing the post of a prime minister in the earlier drafts of the 2004 constitution).

[62] Western powers wanted Afghanistan to be governed by a strong executive who had unilateral discretion to sign agreements with foreign countries. Without such a figure at the center of the government, Western powers indicated they might be unable or unwilling to finance Afghanistan's rebuilding or negotiate the terms under which Western powers would provide security in the new state. On this point, see the discussions in ZALMAY KHALILZAD THE ENVOY: FROM KABUL TO THE WHITE HOUSE, MY JOURNEY THROUGH A TURBULENT WORLD (2016).

[63] The few exceptions were limited ones designed to answer non-negotiable demands by smaller ethnic and religious minorities such as the Uzbeks and the primarily Shi`a Hazara. For example, the constitution includes limited provisions for the devolution of power to localities and gives Shi`a the right to be governed by a special family law.

[64] Constitution of Afghanistan, Art. 35.

[65] Reynolds, *supra* note 60, at 107.

[66] Constitution of Afghanistan, Art. 60.

Finally, and most importantly, the presidential ticket is to be elected according to a majority run-off system.[67] This is not an alternative vote (AV) which Horowitz proposed, but one designed to achieve similar goals. If no candidate wins 50% plus one of the votes, the constitution also requires a second run-off election between the number one and number two finishers.[68] As Lijphart has noted, for all practical purposes, AV simply accomplishes in one round of voting what requires two ballots in the majority-run-off system.[69] As in AV, in majority run-off, the lower ranked candidates are eliminated in the first round, and the leading two candidates, who go through to the run-off, have to compete for the votes of the eliminated candidates in the first round. The competition for these votes in the run-off should result in political pacts before the second run-off, thereby leading to moderate behavior on the part of the front-runners.

The decision to adopt an incentivist structure of government rather than a consociational was contested, albeit unsuccessfully. The CRC draft could only become law after being debated and ratified by the CLJ, an elected body that served as the official constituent assembly. CLJ members representing minority communities opposed the draft constitution precisely because it contained almost no consociational guarantees. In particular, they protested the decision to adopt a strong presidential system, rather than a semi-presidential system in which the prime minister would be a non-Pashtun.[70] Ultimately, the CLJ agreed to ratify the constitution, but only on the express condition that the decision to adopt a presidential system would be revisited after two to three terms—and, if appropriate, the constitution would be amended to include a post for a prime minister. President Karzai gave a speech stating that he accepted this condition and that the review would take place, and the constitution passed.[71] Nevertheless, the promise to reconsider the question of semi-presidential government was the only nod towards consociationalism in the 2004 constitution.

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[67] Constitution of Afghanistan, Art. 61.
[68] *Id*.
[69] Lijphart, *The Wave of Power-Sharing Democracy, supra* note 12, at 48.
[70] Pasarlay, "Making the 2004 Constitution," *supra* note 40, at 233; Hamid Karzai, "Address to the Constitutional Loya Jirga Closing Session by the President of the Transitional Administration of Afghanistan, Hamid Karzai" (Jan. 4, 2004).
[71] Pasarlay, "Making the 2004 Constitution," *supra* note 40, at 233.

B. The Failure of Incentivism and Incremental Embrace of Consociation

As good as they may have seemed on paper, Afghanistan's incentivist institutions failed to achieve the results that Afghanistan's constitution-makers had hoped. Apparently, communal enmities had hardened so much during the course of the brutal civil war of the 1990s that they simply could not be overcome. Although the 2004 constitution largely rejects consociationalism in favor of incentivism, the leaders of Afghanistan's rival communities never really trusted government officials to represent the interests of anyone other than members of their own community.[72] In practice, a *de facto* system of consociational democracy emerged, and recently the country has taken a large step towards formalizing that turn to consociationalism.[73]

Because no community has an overwhelming demographic majority in Afghanistan and because minority groups are heavily armed, consociationalism looks attractive to many Afghans.[74] And notwithstanding the constitution's rejection of it, *de-facto* consociationalism began to appear. Despite significant efforts by candidates to moderate their language and platforms and reach out to ethnic groups other than their own, voters in both legislative and presidential elections remained unswayed. Recent data shows that in legislative elections they continue almost uniformly to cast their votes for candidates of their own ethnicity and religion. Because Hazaras and Uzbeks tend to vote as their communal leaders recommend, Hazara and Uzbek leaders tended to offer their support to candidates from their community or—in regions where they were a minority—to candidates who were willing to support the programs of their communities' representatives in parliament.[75] Not surprisingly, despite the constitution's clear prohibition of ethnic and sectarian political parties, *de facto* ethnic

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[72] Lombardi & Pasarlay, *supra* note 20.

[73] *See Afghan Leaders Sign Power Sharing Deal,* THE GUARDIAN, Sept. 21, 2014, https://www.theguardian.com/world/2014/sep/21/afghanistan-power-sharing-deal-abdullah-ashraf-ghani-ahmadzai.

[74] *See* the discussion above in the text accompanying notes 55–57.

[75] Mohammad Bashir Mobasher, *Understanding Ethnic-Electoral Dynamics: How Ethnic Politics Affect Electoral Laws and Election Outcomes in Afghanistan*, 51 GONZAGA L. R. 355, 355–415 (2016).

and sectarian political parties began to emerge.[76]

A similar pattern has held true in presidential elections: individuals mostly cast their votes for the candidate of their own ethnic and sectarian group.[77] To stand a chance of winning, one must be a member of one of Afghanistan's two largest ethnic groups, the Pashtuns and Tajiks. Members of smaller communities, such as the Hazaras and Uzbeks, vote only for candidates who have nominated a member of their community as a vice-president. Hazara and Uzbek leaders have formed political pacts with former Pashtun president, Hamid Karzai, not because Karzai was moderate on divisive issues but because Karzai was likely to win and offered them powerful positions in his cabinet – effectively offering them a share of executive power that they could use to ensure that they had a say in policy-making.[78]

Notwithstanding the constitution-makers' rejection of consociationalism, presidential cabinets now take the form, for all practical purposes, of grand coalitions with representatives from nearly all ethnic and sectarian groups whose leaders would enter into a political pact with the president of the state. As a culture of *de facto* consociationalism took root, the government has taken steps to involve all sizable communities in executive institutions and promote proportionality in the bureaucracy.[79]

The drift towards *de facto* consociationalism has led to something more dramatic – the establishment of a *de jure* consociationalist presidency.[80] The majority winner-take-all electoral system adopted to elect presidents in Afghanistan created severe crisis every time the country has had a presidential election.[81] Its most recent 2014 presidential election led to a

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[76] For instance, the *Junbish-i Islami* Afghanistan (Islamic Movement of Afghanistan) is almost exclusively an Uzbek ethnic political party. The *Hizb-i Wahdat-iIslami* is another ethno-sectarian party — comprised only of the Hazara and the *Shia* populations of Afghanistan.

[77] Mohammad Bashir Mobasher*, Electoral Choices, Ethnic Accommodations and the Consolidation of Coalitions: Critiquing the Runoff Clauses of the Afghan Constitution*, 26 WASHINGTON INT'L L. J. 413 (2017).

[78] Lombardi & Pasarlay, *supra* note 20.

[79] *See generally* Mobasher, *supra* note 75; Mobasher, *supra* note 77.

[80] *Afghan Leaders Sign Power Sharing Deal*, THE GUARDIAN, *supra* note 73.

[81] Shamshad Pasarlay, Mohammad Qadamshah & Clark B. Lombardi, *Reforming the Afghanistan Electoral System: The Current Debate and Its Implications for the Plans to Amend the Afghan Constitution*, I-CONNECT: BLOG OF THE INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, May 8, 2015, http://www.iconnectblog.com/2015/05/reforming-the-afghan-electoral-system-the-current-debate-and-its-implications-for-the-plans-to-amend-the-afghan-const

political crisis that put the country on the brink of violent civil war and partition when both second-round candidates, Ashraf Ghani, a Pashtun candidate, and Abdullah, a Tajik candidate, claimed victory.[82] Initially, Ashraf Ghani was declared the winner of the second round of the elections. However, Abdullah and his supporters, mostly powerful Tajik elites, accused the Independent Electoral Commission (IEC) of systematic fraud, corruption, and electoral engineering. In the end, they declared that the IEC was illegitimate and preemptively refused to recognize any finding that he had lost.[83] Thereafter, Abdullah and his supporters engaged in street protests and threatened violence in case the IEC did not revise the result. The Pashtuns in turn protested in support of Ashraf Ghani in many provinces. The stalemate makes clear that, going forward, neither of Afghanistan's leading communal groups is willing to relinquish their claim to the powerful presidency and see it occupied by the other group no matter how moderate the candidates are.

Although the U.S. had lobbied strenuously in 2004 to prevent a consociationalist government, the 2014 crisis was finally resolved through a US-brokered power-sharing agreement that resulted in what is, for all practical purposes, a consociationalist presidency.[84] The power-sharing agreement created a government of national unity and provided that Ghani would be recognized as president of Afghanistan and Abdullah as its chief executive – a position not envisioned in the 2004 Constitution.[85] The vice-presidential candidates from two different ethnic groups who had run on Abdullah's ticket were to be recognized as deputy chief executive officers. The president would cooperate with the chief executive in appointing ministers and setting policy. The cabinet posts were henceforth to be equally divided between the president and the chief executive who would appoint them with the consent of their deputies from two other ethnic groups.[86] Furthermore, the parties agreed that the move towards consociationalism would not

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[82] *Id.*

[83] *Id*.

[84] *Agreement between the Two Campaign Teams Regarding the Structure of the National Unity Government*, L.A. TIMES, Sept. 21, 2014, http://documents.latimes.com/agreement-between-two-campaign-teams-regardingstructure- national-unity-government/.

[85] *Id.*

[86] *Id.*

be a one-off. To constitutionalize the move away from incentivism, the president and the chief executive agreed to appoint a commission to draft proposed amendments to the constitution that will be debated and approved by a *Loya Jirga*, Afghanistan's constitutional amendment convention.[87]

Taken together, Afghanistan's voting patterns, its practice of allotting bureaucratic positions on a proportional basis, and its 2014 power-sharing agreement all suggest that Lijphart was on to something. Afghanistan's ethnic and sectarian groups are simply unwilling to accept a system that does not guarantee them the chance to be represented by their own leaders. At the same time, though, if Afghanistan seems to support Lijphart's claim that consociationalism is a necessary evil in at least certain types of divided societies, it may provide some support for Horowitz's claim that it is not an effective long-term solution. The distrust that leads Afghans to vote only for members of their own community infects the leaders that they bring to power. The members of the National Unity Government mistrust each other so much that they have regularly failed to agree on questions that must, according to the agreement, be reached by consensus. The result has been delay and gridlock.[88]

IV. AFGHANISTAN'S LESSONS FOR CONSTITUTIONAL DESIGNERS

Afghanistan's recent constitutional history provides information that helps us evaluate some theories about constitutional design for divided societies and suggest some productive avenues for future research and experimentation. In divided societies, political behavior is prone to follow ethnic and religious lines. Thus, simple majoritarian democracy risks turning into domination by a more populous ethnic or religious faction over all others.[89] Because ethno-political groups apparently do not trust each other, they find it hard to reach consensus on important

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[87] Pasarlay, Qadamshah & Lombardi, *supra* note 81.

[88] *See generally* Mobasher, *supra* note 77; Richard Ghiasy, *Afghanistan's Political Elite Continues to Jeopardize Stability,* STOCKHOLM PEACE RESEARCH INSTITUTE BLOG, https://www.sipri.org/commentary/blog/2017/afghanistans-political-elite (accessed Nov. 3, 2018).

[89] Choudhry, *Bridging Comparative Politics, supra note* 4, at 17.

questions of public policy. The challenge is to create a system in which all relevant communities feel sufficiently represented that they will accept that their concerns are appreciated and rights respected and as a result will accept governmental decisions as legitimate.[90]

The drafters of Afghanistan's 2004 constitution considered carefully whether they should institutionalize a consociational form of government of the sort championed by Lijphart or, instead, a government of the sort championed by Donald Horowitz and like-minded 'incentivists.' [91] They deliberately adopted an incentivist approach. Since that choice was made, Afghanistan's history suggests that any initial and permanent choice in favor of either of these propositions is likely to be problematic. The initial choice in favor of an incentivist system failed to get 'buy-in' from a critical mass of Afghanistan's communities over the short-to medium-term. Because some of the dissenters were heavily armed, government officials were compelled to establish a *de facto* regime of consociationalism; and, eventually in the aftermath of a disputed election, the government agreed to an extra-constitutional, *de jure* regime that consociationally guaranteed one of Afghanistan's largest minority communities a share of executive power.

The first part of this story seems to support Arend Lijphart's suggestion that if (a) you live in a divided democratizing society where (b) there is no majority community or minority communities have the power to disrupt society, and (c) if you have to make an initial and permanent choice between consociationalism and incentivism, then consociationalism is probably the least bad option. Indeed, in the immediate term, it is the only viable solution. On the other hand, in contemporary Afghanistan, as a long-term prospect, the least bad option appears to be quite bad indeed. The poor performance of the new consociational government supports Horowitz's view that consociational governments rarely lead in the long-term to effective, stable governance.

Neither consociationalists nor incentivists have 'cracked the code' for constitutional design for post-Taliban Afghanistan. Afghanistan's recent history suggests, instead, some interesting but unsettling broad conclusions about constitutional design for

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[90] Lombardi & Pasarlay, *supra* note 20.

[91] *See* Pasarlay, "Making the 2004 Constitution," *supra* note 40, chap. 4.

divided societies. Apparently, each side in the consociationalist/ incentivist debate is correct to argue that the other's proposal is unrealistic—at least as a permanent solution to the challenges of governing a divided society. But, if both of the current options are flawed, Afghanistan's suggests that there might be a productive, alternative approach. While the answer of experimenting with hybrids springs immediately to mind, the champions of each approach have to date agreed that their approaches are mutually exclusive, and nothing in Afghanistan's history suggests that they are wrong. On the other hand, the fact that Afghanistan has transitioned from one mode of governance to another reminds us that perhaps one does *not* have to make an initial permanent choice.

Based on the example of Afghanistan, it is probably unwise to engage in constitutional deferral when it comes to the question of basic governmental structure or on voting systems because it is probably risky. But perhaps a pre-planned constitutional program of sequencing may be useful – albeit not the type of sequencing that Afghanistan has tried. Afghanistan needed consociationalism to build trust and to build up habits of living together. But, having achieved the consociational state that Afghanistan needed at the outset, Afghans do not seem to have thought seriously about how they might use a period of consociational governance to build trust between communities sufficient that the country could transition again back to an incentivist system that would be more stable in the long-term. If the constitution had adopted consociational guarantees along with a sunset provision, politicians could, in theory, have established a habit of working with members of other communities to provide for their constituents, while putting them on notice that they would, within a fixed period of time, need to appeal beyond their ethnic group. One cannot say for certain that such an approach would have left Afghanistan in a better position than it is now. But it is certainly possible, and it suggests a possible approach to governing Afghanistan going forward.

The history of Afghanistan suggests that at different stages of its political development the advantages of consociationalism are likely to outweigh the advantages of incentivism and vice versa. If consociationalism is the least bad option at the outset, it can become the worst at some point in the future. If this is true, then scholars should explore whether it is possible to develop constitutions that would permit or even encourage transitions from consociational government to incentivist government. It appears

that scholars who want to develop effective approaches to constitutional design should be asking questions about where, how, and when transitions should occur. They should be asking: "what sorts of countries are ones that, like Afghanistan, require consociational government at the outset?;" "how can one draft a constitution that ensures that consociational government does not continue past the moment where its benefits outweigh its harms?;" and "how should a transition from consociationalism to incentivism take place, and on what schedule?."

If they do, their work may have practical ramifications for Afghanistan. Afghans are now considering the possibility that they may soon have to amend their constitution.[92] As they do, Afghans could consider changes not only to formalize and legitimize the consociational form of government that was negotiated and established through an extra-legal 'power-sharing pact'; and, at the same time, create sunset provisions according to which, after a period of consociational governance (and, hopefully, stability), Afghanistan would transition in relatively short order to an incentivist system.

V. CONCLUSION

The history of Afghanistan after the fall of the Taliban provides us with some insight into the merits of consociational vs. incentivist approaches to governance in a divided society. The insights are not entirely happy ones. It appears that Lijphart and Horowitz have each identified fatal flaws in their rival's approach. Lijphart is right to assume that in post-conflict states such as Afghanistan, a country may have to be governed, at least in the short term, in a consociational fashion. Horowitz is correct to say that consociational government perpetuates and, in the intermediate term, exacerbates the divisions that it was designed to overcome, leading to paralyzing gridlock. While consociational government may for a time be necessary, it contains the seeds of its own destruction. In other words, in deeply divided societies there may not be one system of government and voting that will

[92] *A. Constitutional Amendment Can Be on Agenda in Peace Process: HPC,* TOLO NEWS, Dec. 2, 2018, https://www.tolonews.com/afghanistan/constitutional-amendment-can-be-agenda-peace-process-hpc.

both (i) be recognized immediately as legitimate and trustworthy by a broad cross-section of rival communities and (ii) be likely to establish, over time, a track record of stable, effective governance that is seen as legitimate and fair. Lest one become too pessimistic, though, Afghanistan's recent history suggests that the question of consociationalism vs. incentivism does not have to be a question that is answered once and for all at the constitution's founding. And perhaps it should not be. The solution to the quandary might lie in sequencing.

Keywords
Afghanistan, Constitutional Design, Consociationalism, Incentivism, Sequencing.

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

Eugene K B Tan[*]

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

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

I. INTRODUCTION

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

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

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

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

II. ASEAN AND THE IMPERATIVE OF ADAPTATION

ASEAN was born out of strategic idealism and necessity in

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[11] Article 54 of the Charter provides for the Charter to be "registered by the Secretary-General of ASEAN with the Secretariat of the United Nations, pursuant to Article 102, paragraph 1 of the Charter of the United Nations."

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

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

transgression and non-compliance (sanctions).

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

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

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

[14] As such, it cannot be relied upon as a basis for deterrence, enforcement action and punitive sanctions.

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

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

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

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

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

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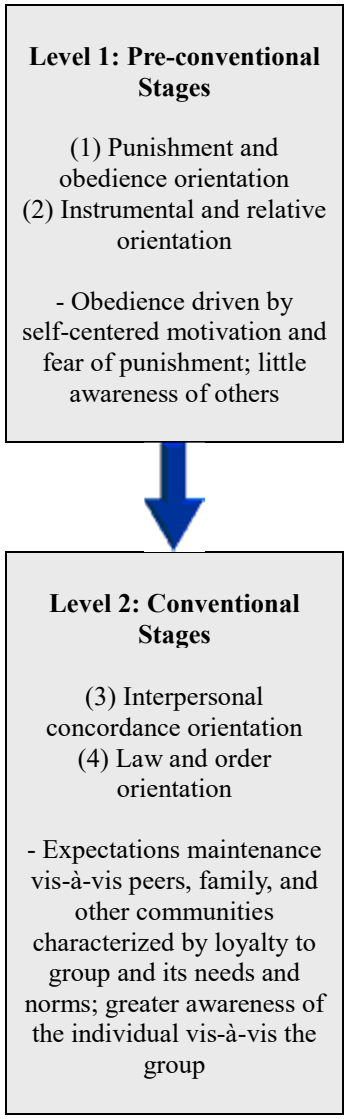
[16] For the argument that the ASEAN Charter has engendered only institutional change but not changes in behavioral practices, see A. Jetschke and P. Murray, *Diffusing Regional Integration: The EU and Southeast Asia*, 35 WEST EUROPEAN POLITICS 174-191 (2012).

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

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



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

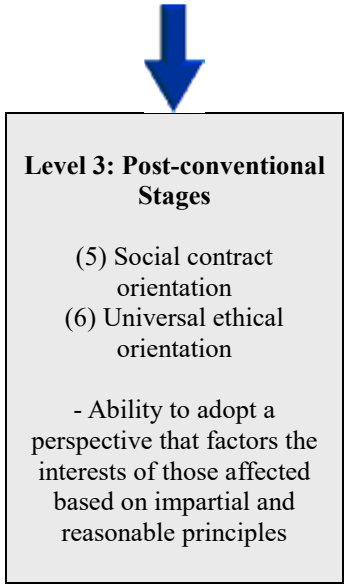


Figure 1: Kohlberg's Stages of Moral Development

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

[19] All that the Charter provides for is that "Any Member State affected by non-compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, may refer the matter to the ASEAN Summit for a decision." *See* Article 27(2).

the common understanding of all the parties to a treaty.[20]

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

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

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

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

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

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

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

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

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

IV. ADAPTING THE ASEAN WAY TO STAY RELEVANT

A. Affirming and Tweaking National Sovereignty

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[34] Article 5(1), ASEAN Charter.

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

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

a shared vision of the purpose of its existence, of its place in the world.[37]

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

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

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

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

[38] Article 2(2)(l), ASEAN Charter.

matters at all times, especially on controversial issues.[39]

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

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

The original founding members of ASEAN, viz Indonesia,

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

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

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

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

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

> ASEAN and its Member-states shall act in accordance with the following Principles:
> (a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member-states; …
> (e) non-interference in the internal affairs of ASEAN Member-states; ….

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

[41] Brunei joined ASEAN in January 1984, Vietnam in July 1995, Myanmar and Laos in July 1997, and Cambodia in April 1999.

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

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

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

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

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

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

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

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

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

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

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

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

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[44] Article 20(2), ASEAN Charter.

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

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

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

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

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

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

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[46] *See also* Article 21(2), ASEAN Charter.

[47] The Charter, however, requires ratification by all member-states (Article 47(2)).

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

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

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

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

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

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

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

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

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

B. ASEAN and Human Rights: Mutually Exclusive?

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

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

[51] Article 21(2) states: "In the implementation of economic commitments, a formula for flexible participation, including the ASEAN minus X formula, may be applied where there is a consensus to do so."

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

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

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

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

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

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

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

18. The Foreign Ministers reviewed with satisfaction the considerable and continuing progress of ASEAN in freeing its peoples from fear and want, enabling them to live in dignity. They stressed that the violations of basic human rights must be redressed and should not be tolerated under any pretext. They further stressed the importance of strengthening international cooperation on all aspects of human rights and that all governments should uphold humane standards and respect human dignity. In this regard and in support of the Vienna Declaration and Programme of Action of 25 June 1993, they agreed that ASEAN should also consider the establishment of an appropriate regional mechanism on human rights.[53]

[53] Joint Communiqué of the Twenty-Sixth ASEAN Ministerial Meeting in

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

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

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

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

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

[56] *See* ASEAN Human Rights Declaration of Nov. 18, 2012, http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration.

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

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

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

More than just creating greater awareness of human rights,

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

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

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

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

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

regionally.[59]

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

C. ASEAN and the Constructive Engagement of Myanmar

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

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

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

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

[62] In recent years, "constructive engagement" has not been used by ASEAN and its member-states.

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

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

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

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

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

[66] *Asia's Former Tigers are Flirting with Irrelevance,* FINANCIAL TIMES – ASIA, Aug. 3, 2006, at 11.

beneficial changes for ASEAN.[67] Expelling Myanmar from ASEAN would not only exacerbate the problem for ASEAN but undermine the inclusive community aspiration of ASEAN.

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

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

This is notwithstanding ASEAN's pragmatic assessment that

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

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

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

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

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

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

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

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

[71] Response in Parliament to Supplementary Questions during Committee of Supply Debate, Feb. 28, 2008.

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

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

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

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[72] Singapore Ministry of Foreign Affairs (MFA), MFA Spokesman's Comments on PM Lee Hsien Loong calls to ASEAN leaders on the Myanmar issue, Sept. 27, 2007.

[73] PM Lee's letter was in Singapore's capacity as the ASEAN Chair. Than Shwe was then the Chairman of Myanmar's State Peace and Development Council (SPDC).

[74] *See* ASEAN Chairman's Statement Issued by Thailand, May 19, 2009, http://www.aseansec.org/PR-ASEANChairmanStatementonMyanmar.pdf.

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

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

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

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[75] During the 2007-08 trouble in Myanmar, ASEAN sought the United Nation's assistance, aware that it had little leverage and given how Myanmar has repudiated ASEAN in preference for the United Nations. The UN Secretary-General then appointed Special Envoy Ibrahim Gambari to be a neutral interlocutor to all parties in Myanmar. In October 2008, Tomás Ojea Quintana, the UN Special Rapporteur on the situation of human rights in Myanmar, reported to the UN General Assembly that democracy would take decades to take root in Myanmar, and, in the meantime tangible, step-by-step benchmarks should be set up to spur progress towards national reconciliation and promotion of democracy there. *See* UN General Assembly (Third Committee - Social, Humanitarian, Cultural), Press Release (GA/SHC/3926), Oct. 23, 2008. The special procedure's mandate on human rights in Myanmar began in 1992. At a press conference, Tomás Ojea Quintana, said in response to reporters' questions, "To get a civil Government will take time. They [Myanmar] are not prepared for that. They are prepared for war." He added that the process to democracy can be helped by tackling the country's human rights challenges. He also urged the international community to speak in one voice as they nudged Myanmar towards a democratic Government and the elections then scheduled for 2010. *See* Press Conference Report,
http://www.un.org/News/briefings/docs/2008/081023_Quintana.doc.htm. Of course, the changes in Myanmar could not have been predicted in 2008. For an assessment, see DAVID I. STEINBERG, BURMA/MYANMAR: WHAT EVERYONE NEEDS TO KNOW 188-218 (2nd ed., 2013).

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

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

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

D. Strengthening Dispute Resolution within ASEAN

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

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

[78] *Id.*

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

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

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

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

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

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[80] Article 26 of the Charter.

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

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

specifically provide for dispute settlement mechanisms.

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

V. NUDGING THE LIMITED POOLING OF SOVEREIGNTY IN ASEAN

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

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

control while the former are not.

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

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

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

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

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

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

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

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

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

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

[86] Simon Tay argues that the espousal of the responsive Asian Way has enabled

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

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

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

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

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

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

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

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

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

VI. CONCLUSION: NUDGING TO RELEVANCE

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

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

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

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

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

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

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[90] LEE KUAN YEW, FROM THIRD WORLD TO FIRST: THE SINGAPORE STORY 1965-2000, MEMOIRS OF LEE KUAN YEW (2000), 369.

[91] L.T. Huong, *China's Dual Strategy of Coercion and Inducement towards ASEAN*, PACIFIC REVIEW (forthcoming).

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

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

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

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

[92] K. Freistein, *A Living Document': Promises of the ASEAN Charter,* 26 THE PACIFIC REVIEW 407-429 (2013).

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

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

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

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

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

Keywords
ASEAN, Southeast Asia, Soft Law, Sovereignty, Regionalism

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