ISSUE FOCUS

Rule of Law as a Framework within the ASEAN Community

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As the ASEAN moves towards its vision of a 'Community,' enforceability and consistency of legal standards, broadly the "rule of law," have drawn attention due to their impact on the predictability of social environments, with consequences for markets, people, and policy makers. This paper draws together recent findings and suggests ASEAN States have made significant progress but remain in a state of transition. These findings support Barry Weingast's prediction that developing countries are more likely to create consistent rules and move to "open access orders" in line with requirements for development, rather than install artificial enforcement mechanisms before growth.

Keywords

Rule of Law, ASEAN, Predictability, Human Rights, World Justice Project, ASEAN Community Vision

I. Introduction

The rule of law has drawn increasing attention in Southeast Asia from a variety of sources both internationally and domestically. This is due not only to the differing notions of the concept itself, but also because of the extensive applicability of the concept to a variety of multilateral and domestic programes with fundamental

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implications for human security. John Rawls posited that the rule of law was the fundamental principle that rational people needed in order to create a predictable system that guided behavior, and this implies benefits for economic decision-making, transparent outcomes and justice.[1]

At the regional level, achieving the ASEAN Community vision will depend on implementation of agreements and success of the ASEAN in impressing upon local authorities the importance of adhering to the goals of the ASEAN's Economic, Socio-Cultural and Political-Security pillars. This is particularly important because of the ASEAN's stance of non-interference in domestic affairs of member States, yet requiring actions that would regulate internal socio-economic activities. Domestically, adherence to the rule of law by individual countries is an important factor for producing regularity and predictability with which each State treats its citizens, organizations and businesses, and thus underpins the very notion of human security.[2]

The growing attention to the nature of the rule of law reflects its prominence in the ASEAN Charter and recognition of its importance in mature market-driven economies. This paper seeks to formulate the right idea of the rule of law within the framework of the ASEAN. Part II will discuss competing conceptions of the "rule of law," particularly between 'thick' and 'thin' formulations. Despite these differences, broad consensus will be found with measurable parameters of the "rule of law" outlined in Part III. Part IV will look at country evidence along four broad categories within the rule of law, namely: (a) accountability of government officials; (b) clear, stable and fair laws with due process; (c) fair and equitable enactment, application and enforcement of the law; and (d) administration by independent and competent judicial officials. The paper concludes that the ASEAN is still in a state of transition towards open access orders which place increasing importance on the rule of law, and suggests avenues for future research.

II. Conceptions of the "Rule of Law"

The idea of the "rule of law" has been debated by governments and academia; it has been also used by the public in a variety of ways that have eroded some of the clarity around the concept. At its most basic, the "rule of law" implies that the law should be obeyed.[3] Indonesia's Suharto declared its use of the 'law-State' (*negara hukum*) as a

1 J. Rawls, A Theory of Justice 207 (Rev. ed. 1999).

2 *See, e.g.*, UN, Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance (2008), Guiding Princ. at 2-4.

3 T. Bingham, The Rule of Law 3 (2010).

central tenet of governance even as it was regularly accused of human rights violations,[4] while Malaysia's *Rukunegara* was interpreted "to mean no more than that the rules and regulations made by the government must be followed."[5] Former Singaporean Deputy Prime Minister S. Jayakumar was more substantive:

> The Rule of Law concept, in essence, embodies a number of important interrelated ideas. First, there should be clear limits to the power of the state. A government exercises its authority through publicly disclosed laws that are adopted and enforced by an independent judiciary in accordance with established and accepted procedures. Secondly, no one is above the law; there is equality before the law. Thirdly, there must be protection of the rights of the individual.[6]

The concept has also been contested academically. Joseph Raz stated that: "The "rule of law" means literally what it says: the rule of law," while cautioning against tendencies of using it as a shorthand for all the positive aspects of a legal system.[7] Barry Weingast avoids the problem of inserting aspirational qualities into the concept by focusing on two core aspects of the rule of law:

> First, the impersonal aspects of the law: the certainty or predictability of the law, including the absence of arbitrary actions by the state against individuals; transparency; and the requirement that the state treats individuals as citizens with equality before the law. Second, a dynamic aspect of the rule of law which requires that the state be able to honor these aspects of the rule of law tomorrow even if it experiences turnover in officials.[8]

This position emphasizes the institutional and non-partisan character of good rule of law, as well as its contribution to human security by functioning as a stable and predictable institution for the protection of citizens from arbitrary application of the law.[9]

4 H. Thoolen (ed.), Indonesia and the Rule of Law: Twenty Years of "New Order" Government, (F. Pinter ed., 1987). *See also* Bivitri Susanti, *Indonesia, in* Rule of Law for Human Rights in the ASEAN Region: A Base-line Study 95-96 (D. Cohen, K. Tan & M. Mohan eds., 2011).

5 R. Yatim, Freedom Under Executive Power in Malaysia: A Study of Executive Supremacy 27 (1995).

6 S. Jayakumar, *The Meaning and Importance of the Rule of Law*, Keynote address at the International Bar Association Conference, 2007, *available at* http://app.subcourts.gov.sg/Data/Files/File/Speeches/2007Oct19_IBA_%20MinisterOfLaw.pdf (last visited on Sept. 24, 2012)

7 J. Raz, *The Rule of Law and Its Virtue, in* The Authority of Law: Essays on Law & Morality 210 (J. Raz, ed., 1979).

8 B. Weingast, *Why Developing Countries Prove So Resistant to the Rule of Law*, Stanford Center for International Development Working Paper, no. 382, 18-19 (2009).

9 *Id.*

Positions such as those of Rawls and Raz have sometimes been grouped under the rubric of a 'thin' conception of the rule of law, while others have argued that this strips the idea of its normative strengths and propose a 'thicker' conception.[10] Thom Ringer has shown the possibilities of rhetorical 'capture' of the concept if defined too thinly by corrupt or despotic governments, and causes the term to lose what is appealing about it to begin with – the "elements of justice and fairness."[11]

A separate school of thought looks not at the rule of law, but purported exceptions to its strict application. In his seminal treatise, Giorgio Agamben proposes the "state of exception," that is, where and how the suspension of the law is justified.[12] Studying the genealogy of the state of exception through Western political systems, Agamben defines it as "an anomic space in which what is at stake is a force of law without law. ... Such a [force-of-law-without-law], in which potentiality and act are radically separated, is ... a fictio by means of which law seeks to annex anomie itself."[13] In particular, he considers how the suspension of the law (*e.g.*, in states of emergency and the Roman *iustitium*) could nonetheless become, or be construed as being, 'legal.'[14]

This method is particularly useful when examining the ASEAN – a region in transition towards the rule of law – because as the formal commitment to the rule of law increases, the way in which States then use the law to preserve wide-ranging powers that predate modern normative commitments becomes of interest. It helps explain how authority transforms itself and exposes the nature of particular States. The support for 'thin' conceptions of the rule of law can thus be seen in critical light, potentially preserving discretionary power within the rubric of law, and giving certain types of powers the force of law. Such a position may take a cynical view of the reforms identified in the study that have strengthened the rule of law in the ASEAN, instead of interpreting the reforms as isolating where state power resides and doing what it can to preserve some of its indigenousness within a new political-legal discourse.

M. Mohan, arguing that "A 'thin' conception risks ignoring the moral animus or content of the law altogether," has stated as follows:

> [i]t appears to us that neither conception of the rule of law, 'thin' or 'thick', is presumptively better than the other. Both have strengths and weaknesses. Our survey of the relevant literature and contemporary reception of the rule of law in

[10] T. Ringer, *Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the 'Rule of Law' and its Place in Development Theory and Practice*, 10 YALE HUM. RTS. & DEV. L. J., 131 (2007).

[11] *Id.*

[12] G. Agamben, STATE OF EXCEPTION 39 (2005).

[13] *Id.*

[14] *Id.*

> ASEAN countries suggests that the rule of law should not be unduly crimped by governments nor become a 'proxy battleground' for disputes of broader social political issues, and in the process empty the concept of any distinctive meaning. To have meaning in ASEAN, the rule of law cannot be an abstract notion. It must be independently framed, have practical benchmarks for assessment, and be analyzed in the context of its real-world implementation.[15]

The key is for framing the rule of law to avoid the problem of being "an empty vessel into which any law could be poured."[16] Regardless of the debate, Bingham offers two reasons why the concept must be taken on its own terms: First, it is increasingly referred to in judgments and official rhetoric; and, second, that references are increasingly made in international instruments.[17] Article 1(7) of the ASEAN Charter states that the object and purpose of the ASEAN are:

> 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.[18]

These obligations are further elaborated in the Cha-am Hua Hin Roadmap for an ASEAN Community 2009-2015 as intended:

> ...to ultimately create a Rules-Based Community of shared values and norms. In the shaping and sharing of norms, ASEAN aims to achieve a standard of common adherence to norms of good conduct among member states of the ASEAN Community.[19]

Nested between democracy, good governance, human rights and fundamental freedoms, and with the intended goal of creating a normative standard of good conduct within a rules-based community, it is clear that the ASEAN position on the rule of law goes beyond 'thin' conceptions of the rule of law, while leaving open the 'thicker' interpretations of what else the concept encompasses. This suggests that precedents will play an important role in defining the concept moving forward, and monitoring judgments, legislation and policies that affect the rule of law will be also crucial to the

15 M. Mohan, *Rule of Law for Human Rights in the ASEAN Region: A Base-line Study, in* Cohen, Tan & Mohan eds., *supra* note 4, at 8.

16 The World Justice Project, Rule of Law Index 2011, at 9, *available at* http://worldjusticeproject.org/sites/default/files/WJP_Rule_of_Law_Index_2011_Report.pdf (last visited on Oct. 17, 2012).

17 *Supra* note 3, at 6.

18 ASEAN Charter art. 7(1).

19 ASEAN, ROADMAP FOR AN ASEAN COMMUNITY 2009-2015 (2009), *available at* http://www.aseansec.org/publications/RoadmapASEANCommunity.pdf (last visited on Aug. 29, 2012) at 6.

evolution towards a rules-based community. Rule of law is particularly important as a framework in the ASEAN because of the organization's commitment to non-interference and the sovereignty of its members. Implementation must thus come from internal political initiative and "rule of law" functions as the clarion call from the ASEAN for national compliance.[20]

III. Principles of the Rule of Law

The practical benchmarks of the rule of law – that is, the component parts that give it force – then become important in assessing progress towards the goal of a rules-based community.[21] A number of indicators have been proposed with different strengths and weaknesses in the following.

The most comprehensive study in terms of country coverage is that of the World Justice Project ("WJP") Rule of Law Index which lists nine factors to which it assigns numerical scores in a number of subcategories. The factors are limited government powers, absence of corruption, order and security, fundamental rights, open government, regulatory enforcement, access to civil justice, effective criminal justice, and the strength of informal justice mechanisms. It also refers to four 'universal' principles of the rule of law (updated slightly from 2010), namely:

> The government and its officials and agents are accountable under the law;
> The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property;
> The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient; and
> Access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.[22]

Illustrating growing consensus on operational indicators, an ASEAN study on rule of

[20] R. Severino, *The ASEAN Way and the Rule of Law*, speech presented at the International Law Conference on ASEAN Legal Systems and Regional Integration, Sept. 3, 2011, *available at* http://www.aseansec.org/2849.htm (last visited on Oct. 17, 2012).

[21] As Kelsen argues, descriptive observations of a system of rules can be formulated that avo*id* sociological jurisprudence. Nevertheless, the selection of indicators may emphasize certain aspects of law such that jurisprudent norms are implicit. *See* H. Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 52 (1941).

[22] *Supra* note 16, at 1.

law utilized a similar set of principles, while opting away from a quantitative 'ranking' methodology.[23] Both studies also agreed that more robust conceptions were possible, but limited their measures to provide more functional tools.

IV. Country Evidences

Although the ASEAN is a relatively small regional grouping, its ten member States have diverse legal traditions. This has been a challenge for integration plans as the legal systems need to be brought into conformity to meet trade standards and implement multilateral agreements. Nevertheless, the ASEAN has been gradually promoting and building the rule of law, though with some flexibility for the newer countries of Cambodia, Laos, Myanmar and Vietnam (collectively known as the "CLMV" countries).[24] Even among the original members of the ASEAN, progress has not been even; rapid progress in Indonesia following a successful democratic transition can be contrasted with regression in Thailand due to political instability and the succession of political regimes and military coups.[25]

Country-specific evidence was gathered in a baseline ASEAN-wide study on the rule of law for human rights in which this author was principal research coordinator.[26] Findings suggested that there was growing consensus in the ASEAN about the importance of the rule of law as well as the need to devise institutional mechanisms to strengthen it as implementation was still uneven. Separately, the WJP surveyed seven of ten ASEAN countries[27] and placed them on a global ranking of 66 countries in eight categories. The scope of both surveys also suggested that continual and systematic monitoring of justice sector institutions was increasingly of interest not just for human rights promotion, but also for businesses and individuals seeking to operate in these countries.[28]

Despite the relatively recent inclusion of rule of law formally in the ASEAN legislation, most countries had traditions supporting the rule of law that predate

[23] Mohan, *supra* note 15, at 13, 24-25.

[24] *Supra* note 21.

[25] K. Jayangakula, *The Kingdom of Thailand, in* Cohen, Tan & Mohan eds., *supra* note 4, at 256.

[26] Joel Ng, *The State of Brunei Darussalam*; Joel Ng & Giao Vu Cong, *The Socialist Republic of Vietnam, in* Cohen, Tan & Mohan eds., *supra* note 4.

[27] The WJP survey increased the number of the ASEAN countries surveyed from four in 2010 to seven in 2011. Only Brunei, Lao PDR and Myanmar are not tracked at present.

[28] The World Justice Project, Effective Regulatory Enforcement, *available at* http://worldjusticeproject.org/factors/effective-regulatory-enforcement (last visited on Aug. 29, 2012).

independence. Vietnam's experience with the concept stretched as far back as the Chinese period in the first millennium A.D.[29] Nevertheless, turbulent post-independent years had seen numerous swings due to conflicts and coups that had eroded the rule of law, especially in the CLMV countries. In recent years, the situation has changed, correlated with the entry of the CLMV countries into the ASEAN. Strong growth in the region had required strengthening of judicial institutions to keep pace with developments.[30] At the same time, stronger legislative standards had not necessarily translated into stronger enforcement and consistency across the board in the less developed or newer ASEAN members.[31]

These findings bear out Weingast's prediction that developing States are more likely to create consistent rules and transition to "open access orders" in line with requirements for long-term economic growth, rather than install artificial institutions for enforcement before the growth stage.[32] In his typology, 'natural states' or "limited access orders" are the systems that have emerged throughout human history to deal with the problem of violence by allocating rents to those with violence potential (autocrats, kings, tyrants, etc.), thereby reducing their propensity to violence.[33] "Open access orders" rely on competition in both the political and economic systems to provide order. These systems first emerged in the industrial revolution where the rule of law is paramount in order to sustain competition.[34] Rule of law is thus best strengthened in line with economic development. The transition between the two systems is important for understanding the evolution of a developing nation-state and how human security derives within them.[35] We turn now to the four core components of the rule of law, looking at evidence in ASEAN.

A. Accountability of Government Officials

Separation of powers serves as a safeguard to ensure accountability of the different branches of government. However, this may not preclude effective accountability in countries where separation does not exist.[36] Technical separation of powers exists in most of the ASEAN countries with the exceptions of Laos, Myanmar and Brunei. In all

29 Ng & Cong, *supra* note 26, at 284.

30 Mohan, *supra* note 15, at 16, 19.

31 *Id.*

32 Weingast, *supra note* 8, at 10.

33 *Id.*

34 *Id.*

35 *Id.*

36 G. Helmke & F. Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 Annu. Rev. Polit. Sci. 348 (2009).

three countries, the judiciary is formally subordinate to the executive.

Thus, while the Sultan of Brunei is formally above the law[37] and the country has technically been in a state of emergency since 1962, there is no evidence of interference in the operation of the judiciary and cases have been instituted against senior officials including the Sultan's brother and a former Minister of Development.[38] Conversely, Myanmar has faced international criticism for the absolute powers of the military junta and their immunity from prosecution under the recent 2008 Constitution that replaced martial law. Yet, the first appearance of checks in the 2008 Constitution provide for impeachment proceedings against senior officials including the President, Vice-President, union ministers, the attorney-general and chief justice,[39] although no part of the military is subordinate to civil institutions.

Elsewhere however, there appears to be greater agreement that legal structures that place checks on various arms of government are important. The relatively new constitutions in place in countries such as Cambodia (1993), Laos (1991 with major amendments in 2003), and Vietnam (1992 with major amendments in 2001) formalize the limitation of powers and explicitly recognize the importance of the rule of law. In Cambodia, *e.g.*, the head of State, the King, is subject to the Constitution, while the three arms of government - the National Assembly, Royal Government and Judiciary - are formally separated.[40] This structure is similar in the common law countries of Malaysia and Singapore, which have a King and President respectively, and three organs of the state in the Parliament, the Cabinet and Judiciary.

In some cases, equality between these branches does not conform with Western democratic models. In Vietnam, the judiciary is formally subordinate to the National Assembly. Meanwhile, newly democratizing Indonesia has established several new institutions since the fall of Suharto. These include a Human Rights Court, an Anti-Corruption Commission (*Komisi Pemberantasan Korupsi*), a witness protection agency (*Lembaga Perlindungan saksi dan Korban*) and the national human rights commission (*Komnas HAM*), all of which provide additional layers of checks and balances on the instruments of government.[41]

Beyond the formal structures, the effectiveness of implementation and enforcement

37 BRUNEI CONST. (2008), SEC. 84B(1), *available at* http://www.wipo.int/clea/docs_new/pdf/en/bn/bn016en.pdf (last visited on Oct. 18, 2012).

38 Ng, *supra* note 26, at 40.

39 MYANMAR CONST. (2008) SECS. 71, 233, 238 & 302, *available at* http://upload.wikimedia.org/wikipedia/commons/a/a1/Constitution_of_Myanmar_of_2008.pdf (last visited on Oct. 18,2012).

40 CAMBODIA CONST. (1993) arts. 1 & 51, *available at* http://cambodia.ohchr.org/klc_pages/KLC_files/section_001/section_01_01_ENG.pdf (last visited on Oct. 18,2012).

41 Susanti, *supra* note 4, at 93-94.

that provides for day-to-day accountability of officials is more difficult to ascertain. Corruption has been widely cited in many ASEAN countries to be a major problem. Transparency International's widely-cited Corruption Perception Index had the ASEAN countries all across the board, ranking them between first (Singapore, 1st position) and last (Myanmar, in 176th position) globally in 2010. Countries that fared badly in this index such as Cambodia (ranked 154th) nevertheless seemed to enjoy the confidence of its citizens in Transparency International's sister survey, the Global Corruption Barometer, where 72 percent of respondents said they found the government's efforts to fight corruption 'effective.'[42] Such ambiguous results are indicative of a rapidly growing region where legislative reforms and implementation have not kept pace with economic growth and the needs of transparency for efficient markets.

B. Clear, Stable and Fair Laws with Due Process

The ASEAN has been the target of human rights campaigners for not addressing issues of regional concern and creating mechanisms for redress.[43] Nevertheless, the region is also in the midst of considerable reforms to its laws, most notably in the introduction of the ASEAN Charter in 2007 and the creation of the ASEAN Intergovernmental Commission on Human Rights ("AICHR")[44] that is committed to uphold the ASEAN's commitment to rule of law and fundamental rights. Indonesia explicitly introduced Law No. 39 of 1999 for the protection of human rights, as well as instituting a human rights court subsequently.[45] Human rights commissions also exist in Malaysia, Indonesia, and the Philippines, which serve as mechanisms to seek redress outside more formal systems. The most recent national human rights commission was established by Myanmar in September 2011 (among a host of other reforms that signal rapprochement with political opposition in the country), while Cambodia's process of establishing one is currently stalled.

All the ASEAN countries have signed the Convention for the Elimination of All Forms of Discrimination against Women ("CEDAW") and the Convention on the Rights of the Child ("CRC"). Discussions are known to be taking place in several countries to ratify the Convention on the Rights of Persons with Disabilities. In addition,

[42] For both sources, *see* Transparency International, The Global Corruption Barometer is the only worldwide public opinion survey on corruption, *available at* http://gcb.transparency.org/gcb201011 (last visited on Sept. 6, 2012).

[43] *See e.g.*, Amnesty International, *Human rights should dominate ASEAN agenda* (2009), *available at* http://www.amnesty.org/en/for-media/press-releases/human-rights-should-dominate-asean-agenda-20090225 (last visited on Mar. 20, 2012).

[44] For details on the activities of the Commission, *see* AICHR, *available at*, http://www.aseansec.org/22769.htm (last visited on Aug. 1, 2012).

[45] Susanti, *supra* note 4, at 94.

regional mechanisms for the protection of migrant workers are being established. However, commitment to other international conventions is less forthcoming, even though the possibility of invoking reservations is allowed for in the ratification process.

Criticisms of the ASEAN countries will also remain as long as the governments reserve significant discretionary powers. Singapore and Brunei[46] continue to use the Internal Security Act ("ISA") that provides for detention without trial. Contestation over the legality of preventive detention and its relevance to the rule of law is well illustrated in Singapore, where multiple appeals have been made against the ISA. In *Chng Suan Tze v. Minister for Home Affairs* (1988), the Court of Appeal stated that: "The notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power."[47] Nevertheless, the Singapore parliament amended the Constitution in 1989 to hold that the President's decision in detention cases involving national security would not be justifiable.[48]

It is thus argued that these laws "are *substantively* arbitrary as they derogate from guaranteed due process rights."[49] It is here particularly that the clearest deployment of the "state of exception" in Agamben's sense can be seen, using threats to national security as legal justifications for the withdrawal of certain kinds of rights (such as *habeas corpus*), while replacing it with an administrative layer (judicial review) which nonetheless defers identification of threats to the executive. Since the September 11 attack, the ISA's application has found justification in the fight against terrorism. Legally, however, the powers provide for much more than detention of suspected terrorists alone. Nevertheless, public aversion to its use has seen that its deployment increasingly limited, with Brunei believed to hold no detainees under the Act at the present time.[50] The expansion or preservation of similar laws in other ASEAN States must similarly be scrutinized.

Despite some progress of legislation, Vietnam and Myanmar have faced the sternest criticisms from human rights groups for their treatment of political opponents, ethnic minorities, and religious figures (especially in Vietnam). Powers of detention for unspecific crimes against the State – sometimes without explicit requirements for

[46] Malaysia has since repealed its Internal Security Act.

[47] Li-Ann Thio, *The Theory and Practice of Judicial Review of Administrative Action in Singapore: Trends and Perspectives, in* DEVELOPMENTS IN SINGAPORE LAW 2006-2010: TRENDS AND PERSPECTIVES 732 (SAL Conference PROC., Singapore, Feb. 2011).

[48] *Id.*

[49] Mohan, *supra* note 15. [Emphasis added]

[50] C. Roberts & Poh On Lee, *Brunei Darussalam: Cautious on Political Reform, Comfortable in ASEAN, Pushing for Economic Diversification, in* 2009 SOUTHEAST ASIAN AFFAIRS 63(2009).

making charges or subject to trials – are extensive in Vietnam's Penal Code,[51] while the complex layer of administrative decrees and ordinances issued by the Communist Party (separate from the judiciary) make for a confusing situation as to which laws take precedence.[52] Vietnam argues that: "There are no so-called prisoners of conscience" and "no one is arrested for criticizing the Government," and that: "These laws are strictly related to national security and social stability."[53] However, the use of ambiguous language in these sections of the Penal Code relating to crimes against the State echo the ISA laws of Singapore and Brunei where States circularly define the threats to themselves, although these are common law nations. Thus, their continued preservation despite other reforms in the legislative environment shows the threat perceptions that still revolve around some ASEAN countries.

C. Fair or Equitable Enactment, Application and Enforcement of the Law

Fair and equitable laws are a foundation for human security, providing predictability that illegal deeds will be punished and legal activities may be conducted unhindered. Removing ambiguities allowed by the law also functions to limit arbitrary power of individuals and sustain a rich civil society eventually moving towards open access orders.[54]

The principle of stability of laws as defined by the WJP in the above section refers to the predictability that stability confers, so that arbitrary legislation cannot be created at the whim of the authorities. Where new laws are implemented to improve the stability, remove ambiguities or enhance the predictability of a system, these changes are positive and contribute to the rule of law and human security. Many of the recent changes to laws in the ASEAN relate to its Community blueprint that would harmonize inter-ASEAN trade standards and aim to narrow the gap between the more and less developed countries within the ASEAN in handling of goods and services.[55]

Countries in a relative state of transition (such as the CLMV countries with Indonesia) have introduced numerous and wide-ranging reforms to their laws. This can

[51] Vietnam Penal Code arts. 79, 80, 86, 87, 88, 91 & 258.

[52] M. Saloman, M. & Vu Doan Ket, *Achievements and challenges in developing a law-based state in contemporary Vietnam: How to shoe a turtle, in* LEGAL REFORMS IN CHINA AND VIETNAM: A COMPARISON OF ASIAN COMMUNIST REGIMES 141 (J. Gillespie & A. Chen, eds., 2010).

[53] UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Vietnam,* ¶ 75, U.N. Doc. A/HRC/12/11 (Sept. 17, 2009), *available at* http://www.fidh.org/IMG/pdf/vietnam_upr_report_of_wg.pdf (last visited on Sept. 21, 2012).

[54] Weingast, *supra* note 8, at 10.

[55] ASEAN, ROADMAP FOR AN ASEAN COMMUNITY 2009-2015, 21-25 (2009).

be seen in Cambodia after the 1993 elections, Vietnam since 1986 under the *Doi Moi* (Renovation), and Indonesia after the fall of President Suharto. Among the ASEAN countries, Cambodia alone has ratified the International Convention against Torture, meaning that it has signed all major international human rights instruments. The Vietnamese government claims that it has enacted or revised some 13,000 laws since 1986, and these changes were mostly made to effect market-oriented reforms for the socialist nation.[56] Indonesia in particular enacted Constitutional amendments every year between 1999 and 2002 which expanded freedoms and rights while limiting arbitrary powers of the State.[57]

Formal guidelines exist for the amendment of laws in most of the ASEAN countries, such as majority rules for parliament. However, States with large majorities such as Singapore are able to amend these rapidly without much public discussion. Furthermore, not all laws are consistent with the international obligations committed by ratification of the CEDAW, the CRC and other human rights instruments that individual States have signed.

Concerns that laws enacted are substantively unfair especially revolve around minority rights. All four CLMV countries had constant and recurring reports of discrimination and marginalization of ethnic or religious minorities. According to Mohan, some domestic interpretations of *Sharia* laws, often locally regulated, could be in violation of the countries' commitments to the CEDAW as they discriminate against women.[58]

However, problems remain over transparency and access to court proceedings and judgments, as well as information on key statistics such as the types of punishments meted out can be very difficult to obtain because of poor data collection or even prohibition. In Vietnam, it was reported that statistics on capital punishment are considered national secrets by some officials.[59] This makes independent oversight and assessment very difficult, and requires further study as to how systematic the problems may be.

D. Administration by Independent and Competent Judicial Officials

As discussed above, the degree of judiciary independence is related to the separation of

[56] Ng & Cong, *supra* note 26, at 285.
[57] Susanti, *supra* note 4, at 95-97.
[58] Mohan, *supra* note 15, at 18.
[59] Ng & Cong, *supra* note 26, at 291.

powers. In countries such as Vietnam and Brunei where the Judiciary is formally subordinate to the Executive, this could be *prima facie* evidence of non-independence. Yet, Brunei's unique system of sharing its Chief Justice with Hong Kong (prior to independence) set in place a sound legal system and evidence of Executive interference in its judiciary has not been found.[60] Although Malaysia has a Judicial Appointments Commission on whose advice the Prime Minister must act in making appointments, this has not prevented accusations of judicial bias by critics, especially in relation to the prosecution of members of the opposition.[61]

Perceptions about the ability and competence of the judiciary tended to be correlated with levels of development. Singapore's Chief Justice, Sek-keong Chen, was awarded the International Jurists Award in 2009 in recognition of his contributions to Asian jurists.[62] On the other hand, the qualifications of jurists, where statistics were available, were very low in Vietnam, with nearly two-thirds of judges holding in-house "law degree certificates" issued by national training institutes, but not equivalent to a bachelor of laws.[63] Access to civil justice was also a common concern of the seven ASEAN countries ranked by the WJP; only Singapore ranked outside the bottom third among 66 countries worldwide. As the ASEAN develops more as a regional community, the need for training for its judicial officials to keep pace with economic growth will expand rapidly.

V. Conclusion

The overall impression given by recent rule of law studies thus suggests that most of the ASEAN countries are in a state of transition. Rapid growth has exposed the region to burgeoning numbers of economic actors competing in global markets. This has required stronger institutional safeguards in the economic and financial sections of the legal system. Although the four CLMV countries are the poorest, they have made the most rapid changes to their legal systems in the last decade in order to match standards with the rest of the ASEAN. Nonetheless, their capacity remains low and legislative reform on paper has not always translated into real reforms in the courts and other civic institutions. While the findings bear out Weingast's prediction of States moving towards

60 *Id.* at 46.

61 A. Sharom, *Malaysia, in* Cohen, Tan & Mohan eds., *supra* note 4, at 148.

62 ASEAN Law Association, The Honourable Chief Justice, Chen Sek Keong, *available at* http://www.aseanlawassociation.org/chairman-sing.html (last visited on Oct. 15, 2012).

63 Ng & Cong, *supra* note 26, at 294.

open-access orders, an important caveat remains where perceived threats to national security exist. The formalization of economic rules is not necessarily followed by the development of rule of law in the political space.[64]

The use of wide-ranging indicators around a "rule of law" index would thus have controversial findings in places. In the WJP index, *e.g.*, Singapore ranked second globally for providing security to its citizens, but 61st of 66 countries for freedom of assembly.[65] A similar picture held for Malaysia and Vietnam, scoring individually well in order and security, but poorly on fundamental rights. Balancing arguably contrasting objectives such as these may prove a tough task for some countries and subject to national priorities according to their perceived stage of development.

The gap between legislation and implementation remains significant but difficult to quantify. Weingast has suggested that the institutional mechanics of the rule of law must also be considered to avoid too much focus on the specifications of the law, but instead examine how these institutions protect themselves from abuse and individuals in power.[66] The ease at which some autocratic rulers have been able to dismantle institutions when necessary for their agendas (Weingast cites Adolf Hitler, Vladimir Putin, Hugo Chavez and Robert Mugabe) demonstrates that the resilience of institutions must be considered aside from the laws themselves.[67] Herewith, the States of exception (especially discretionary powers) preserved in spite of legal reforms are of interest, if they do indeed define the nature of the state, as Agamben suggests.[68] Research in this area specific to the ASEAN may also yield insights as to why implementation remains weak despite legislative and rhetorical support for the rule of law.

Finally, understanding the complimentarity of the political and economic systems will shed new light on how rule of law takes root in a country. Efficient markets need predictable operational environments guarded by the rule of law. Providing strong rules for markets has been an ASEAN strength, where it has withstood recent shocks caused by the global financial turmoil. However, weaknesses in the political structures could undermine it, as seen in the political instability of Thailand that has eroded much of the rule of law there.

Future research must thus look at ways in which the ASEAN and, in particular, the AICHR can complement, sustain and deepen positive developments in the region with respect to the rule of law. Furthermore, this paper does not address the nature of rule of

64 Weingast, *supra* note 8.

65 World Justice Project, Singapore, *available at* http://worldjusticeproject.org/country/singapore (last visited on Oct. 15, 2012).

66 Weingast, *supra* note 8.

67 *Id.*

68 G. Agamben, State of Exception 39 (2005).

law as it pertains to enforcement of regional agreements and institutions, which is a major part of the ASEAN integration. Initial observations in the study suggest that this aspect of regional enforcement is much weaker among member States than internal rule of law within individual member States of the ASEAN. Systematic and thematic studies of major issues such as the role of businesses, protection of minorities as well as forced and economic migrants, and rights to development should be undertaken within the rubric of the rule of law and human security. Such research would inform the way institutions in the ASEAN can contribute to the political-security and socio-cultural pillars of the ASEAN Community vision.