



Governance Transfer by the Association of Southeast Asian Nations (ASEAN)

A B2 Case Study Report

Anja Jetschke



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DFG Collaborative Research Center (SFB) 700

Freie Universität Berlin

Alfried-Krupp-Haus Berlin

Binger Straße 40

14197 Berlin

Germany

Phone: +49-30-838 58502

Fax: +49-30-838 58540

E-mail: sfb700@zedat.fu-berlin.de

Web: www.sfb-governance.de/en

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Foreword

Tanja A. Börzel and Vera van Hüllen

This working paper is part of a series of eight case study reports on governance transfer by regional organizations around the world. It was prepared in the framework of the SFB 700 project B2, “Exporting (Good) Governance: Regional Organizations and Areas of Limited Statehood”. Together with regional experts, we have investigated how and under which conditions regional organizations prescribe and promote standards for (legitimate) governance (institutions) at the national level. A comparison of major regional organizations shall enable us to evaluate to what extent we can observe the diffusion of a global governance script. Do regional organizations demand and promote similar criteria for “good governance” institutions, or do regional and local particularities prevail? The B2 case study reports present detailed findings for eight regional organizations in Africa, the Americas, Asia, and the Middle East. They cover the African Union (Julia Leininger), the Economic Community of West African States (Christof Hartmann), the Southern African Development Community (Anna van der Vleuten and Merran Hulse), the Organization of American States (Mathis Lohaus), Mercosur (Andrea Ribeiro Hoffmann), the North American Free Trade Agreement (Francesco Duina), the Association of Southeast Asian Nations (Anja Jetschke), and the League of Arab States (Vera van Hüllen).

The B2 case study reports rely on a common set of analytical categories for mapping the relevant actors, standards, and mechanisms in two dimensions of governance transfer.¹ First, we examine the prescription of standards and the policies for their promotion (objectives, instruments) that create the institutional framework for governance transfer. Second, we investigate the adoption and application of actual measures. Regarding the actors involved in governance transfer, we are interested in the role of regional actors on the one hand, as standard-setters and promoters, and domestic actors on the other, as addressees and targets of governance transfer. Even though the question of which criteria regional organizations establish for legitimate governance institutions is an empirical one, we relate the content and objectives of governance transfer to the broader concepts of human rights, democracy, the rule of law, and good governance. Finally, we classify different instruments of governance transfer according to their underlying mechanism of influence, distinguishing between (1) litigation and military force (coercion), (2) sanctions and rewards (incentives), (3) financial and technical assistance (capacity-building), and (4) fora for dialogue and exchange (persuasion and socialization).

The B2 case study reports result from more than two years of continuous cooperation on the topic, including three workshops in Berlin and joint panels at international conferences. The reports follow the same template: They provide background information on the regional organization, present the findings of a systematic mapping of governance transfer, and suggest an explanation for its specific content, form, and timing. They form the basis for a systematic

¹ For detailed information on our analytical framework, please refer to our research guide for case study authors (Börzel et al. 2011).

comparison of governance transfer by these eight regional organizations (for first results, see Börzel, van Hüllen, Lohaus 2013), as well as further joint publications.

We would like to thank the people who have made this cooperation a pleasant and fruitful endeavor and one that we hope to continue: In particular, we would like to thank our regional experts, Francesco Duina, Christof Hartmann, Anja Jetschke, Julia Leininger, Mathis Lohaus, Andrea Ribeiro Hoffmann, Anna van der Vleuten and Merran Hulse for their willingness to share our interest in governance transfer and for their conceptual and empirical input into the project. We are also grateful to Heba Ahmed, Carina Breschke, Mathis Lohaus, Lea Spörcke, Sören Stapel, and Kai Striebinger for their valuable research assistance and other support to our joint B2 project. Special thanks go to Anne Hehn, Anna Jüschke, Clara Jütte, and the entire “Team Z” of the SFB 700, who have unfailingly smoothed the way in all matters concerning administration and publication. Finally, we gratefully acknowledge the financial support from the German Research Foundation (DFG), which made the project possible.

Governance Transfer by the Association of Southeast Asian Nations (ASEAN)

A B2 Case Study Report

Anja Jetschke

Abstract

This study explores the extent to which members of the Association of Southeast Asian Nations (ASEAN) have established norms and principles for the transfer of legitimate governance institutions in member states. Are there regional norms for legitimate governance in the areas of human rights, democracy, rule of law and good governance within ASEAN? What instruments does ASEAN offer to promote these norms? What explains regional standard setting and implementation? Through a document analysis of 20 mostly constitutional documents, the report maps such standard-setting efforts in three dimensions: prescription, policy and instruments. The study finds that, since 2003, ASEAN has engaged in a deliberate effort to promote such standards, mostly in the dimension of human rights, through a consistent set of mechanisms, such as information sharing and dissemination and the setting of benchmarks. To explain these efforts, the study empirically tests a number of hypotheses and argues that standard-setting is mainly driven by two factors: negative externalities resulting from human rights violations in Myanmar, and Western criticism of ASEAN's silence on human rights violations in this country.

Zusammenfassung

Die Studie untersucht, inwiefern die Assoziation Südostasiatischer Nationen (ASEAN) Normen und Prinzipien für einen Transfer legitimen Regierens in Mitgliedstaaten etabliert hat. Gibt es regionale Normen legitimen Regierens im Bereich der Menschenrechte, Demokratie, Rechtsstaatlichkeit und Good Governance in ASEAN? Welche Instrumente besitzt ASEAN, um solche Normen zu befördern? Und was erklärt regionale Standardsetzung und Implementation? Der Bericht dokumentiert mittels einer Dokumentenanalyse von 20 konstitutionellen Dokumenten zwischen 1967 und 2012 Grad und Ausmaß der Standardsetzung entlang von drei Dimensionen: Präskription, Instrumente und Politiken. Die Studie kommt zu dem Ergebnis, dass seit 2003 eine Hinwendung zu solchen Standards überwiegend im Bereich der Menschenrechte stattfindet; gefördert werden diese Standards durch ein konsistentes Set von – in erster Linie – weichen Mechanismen der Regeleinhaltung, wie die Zusammenstellung von Informationen und Benchmarking. Um diese Entwicklung zu erklären, testet die Studie eine Reihe von Hypothesen zur Standardsetzung. Diese wird durch zwei hauptsächliche Faktoren erklärt: Negative Externalitäten vor allem im Zusammenhang mit Menschenrechtsverletzungen in Myanmar und westliche Kritik an der fehlenden Sanktionierung von Menschenrechtsverletzungen durch ASEAN.

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1. Introduction

Established in 1967, the Association of Southeast Asian Nations (ASEAN) is arguably the world's most successful regional organization among developing countries.¹ It currently comprises ten member states and serves a population of 600 million people: 8.8% of the world population. In comparative perspective, and especially during the early 1990s when most ASEAN members collectively experienced an “economic miracle” and became part of the East Asian development model, ASEAN was commonly perceived to be an alternative to the European model of regionalism (Camroux and Lechervy 1996; Gilson 2005; Söderbaum and Van Langenhove 2005). Whereas the EU appeared to represent “regionalism”, a government-driven process of successive pooling of sovereignty into common institutions (integration), Asia represented “regionalization”, a business and production-network driven process of regional cooperation (Aggarwal 2005; Katzenstein 2005).

This paper is concerned with the question of whether ASEAN as a regional organization engages in governance transfer, i.e. prescribes and promotes standards for domestic governance institutions related to human rights, democracy, the rule of law and good governance. The paper maps ASEAN's governance standards as well as its policy (objectives and instruments) and measures for their active promotion in order to answer this question. The key finding is that ASEAN, over the course of most of its existence, has not acted as a promoter of legitimate governance institutions in the sense specified by Börzel et al. (Börzel, van Hüllen, Lohaus 2013). ASEAN's understanding and conception of legitimate governance emphasizes the nation-state and Westphalian norms of interstate conduct, such as non-interference and the sovereignty of states. ASEAN members have promoted and practiced an inward-looking concept of governance that is directed toward the establishment of “empirical statehood” and governmental authority, not democracy. This policy is deeply embedded in member states' understanding that peace and security can only be achieved through concentrating on national welfare and the creation of functioning nation-states. This has led them to adopt a policy of non-interference in domestic affairs, rather than a policy of interference in order to promote democratic values and human rights.

However, since 2003, ASEAN has made a remarkable transformation. Member states have decided to prescribe standards for domestic governance institutions in terms of human rights and fundamental freedoms, democracy, the rule of law and good governance at the regional level. The ASEAN Charter, which came into force in 2008, explicitly commits member states to respect these standards and foresees a regional human rights body, which was established in 2009 as the ASEAN Intergovernmental Commission on Human Rights. While the regional organization remains cautious not to interfere into the domestic affairs of member states, there has been progress. The main drivers of these processes are threefold: the democratization of some member states, most importantly Indonesia; negative externalities produced by the poli-

¹ The author wishes to thank Ali Buchberger and Angela Osorio for their excellent research assistance, as well as Tanja Börzel and Vera van Hüllen for their thoughtful comments on previous drafts.

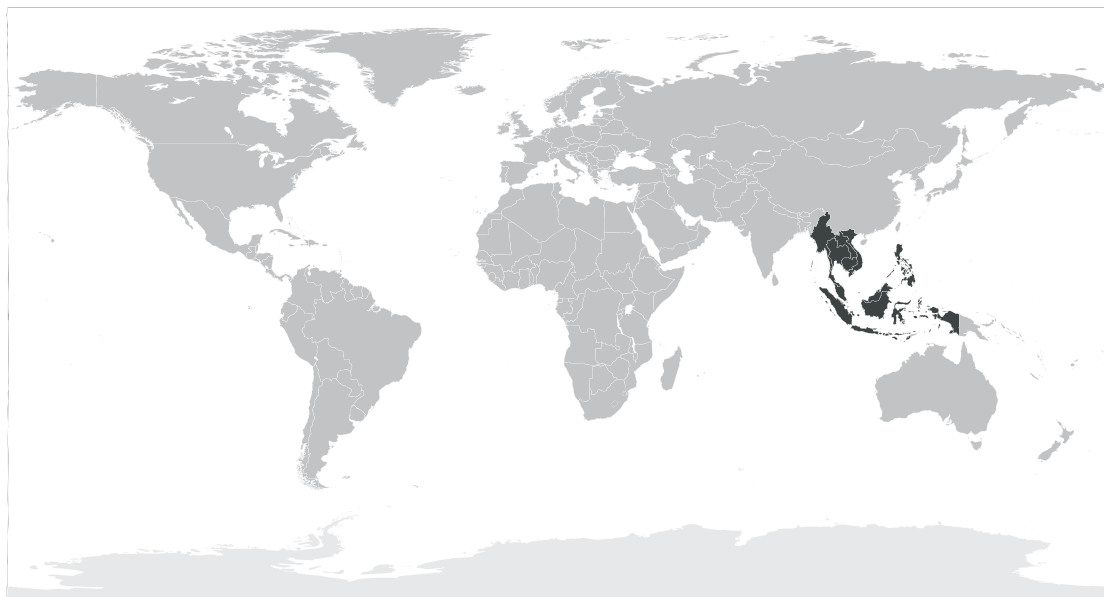
cies of some member states (Myanmar and Indonesia) on other member states and ASEAN as a regional organization; and the rise of a global governance script. In the absence of these factors, given the heterogeneity among the political systems of ASEAN members and the consensus principle, the chance that ASEAN will develop into a more active promoter of regional standards for legitimate governance institutions is small.

The report is structured as follows: the subsequent second part provides a brief overview of ASEAN as a regional organization. It details the historical development of the organization and its major principles. The third part begins by mapping governance transfer. It asks to what extent ASEAN has engaged in governance transfer by prescribing standards, institutionalizing policies and adopting measures for their active promotion in accordance with the definition provided. The fourth part seeks explanations for the observed emergence of a regional governance script in the form of the ASEAN Charter. The conclusion summarizes the key findings.

2. The Association of Southeast Asian Nations: An Overview

ASEAN was established on 8 August 1967 by five Southeast Asian states: Indonesia, Malaysia, the Philippines, Singapore and Thailand. It was the third attempt to establish a regional grouping after similar past endeavors had failed. The Association of Southeast Asia (ASA), established in 1961 by the Philippines, Thailand and Malaya, as well as MAPHILINDO, an organization set up by Malaya, the Philippines and Indonesia in 1963 as an organization between Malay peoples, had previously made little progress because of conflicting territorial claims to the Malay region of Sabah, which could not be resolved by the procedures established by these institutions. Other regional groupings with Asia-Pacific membership, like the Southeast Asian Treaty Organization (SEATO) established in 1954 as a functional equivalent to NATO in Europe, as well as the Asia Pacific Council (ASPAC) established in 1966 and comprised of Australia, Japan, South Korea, South Viet Nam and Thailand, had previously failed due to their heterogeneous memberships.

Figure 1: Member States of ASEAN



The Association has experienced four enlargements: in 1984, Brunei joined the organization as the sixth member, Viet Nam joined on 28 July 1995, Laos and Myanmar on 23 July 1997, and Cambodia on 30 April 1999. The accession of Cambodia had been delayed in 1997 because of the country's political instability. ASEAN has no political membership criteria comparable to the Copenhagen criteria or the *acquis communautaire* of the EU, and it does not require domestic adaptations by member states. The ASEAN Charter of 2008 was the first document to ever spell out explicit membership criteria as follows: members shall be located in the “recognized geographical region of Southeast Asia”; they shall be recognized by all ASEAN member states; agree to be bound and to abide by the Charter; and be able and willing to carry out the obligations of membership (ASEAN 2007a, article 6). Admission requires the consensus of the ASEAN Summit.

Apart from these criteria, it is the understanding of ASEAN that it “accepts member states as the ‘person’ they are” and does not require domestic adaptations (Interview 19-2010 2010). ASEAN members understand their organization as providing a forum for dialogue on regional security among like-minded states with similar external and internal security predicaments (Alagappa 2003). The accession of Myanmar, which was already at the time controversial due to widespread criticism of its state of democracy, caused a brief, public debate on accession criteria.

2.1 Regional Integration in Southeast Asia

Regional integration is defined here as the “emergence or creation over time of collective decision-making processes, i.e., political institutions to which governments delegate decision-making authority and/or through which they decide jointly via more familiar intergovernmental negotiations” (Lindberg 1970: 652). ASEAN is widely regarded as a truly “indigenous” organization built on Asian norms of non-interference, non-alignment and the principle to avoid public discussion of contentious issues, as agreed upon during the Bandung Conference of 1955 (Acharya 2009: 89). The Association's founding document, the Bangkok Declaration – a short document of less than two full pages – defines the goal of the regional organization vaguely: the aim is, most importantly, to “accelerate economic growth, social progress and cultural development in the region through joint endeavors in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community” (ASEAN 1967, article 1). An important goal in 1967 was to provide a unified front against external encroachments, to insulate the region from superpower competition and to provide stability for its members so that they could politically survive and economically thrive (Hoadley 2006).

ASEAN did not make much headway in terms of level and of scope for about ten years, and after its first decade external observers credited the organization with a single achievement: that it had survived (Melchor 1978; Poon-Kim 1977). However, this changed with the onset of the Cambodian conflict and – more importantly – the changed role of the US in Southeast Asia after its defeat in the Vietnamese War in 1975, and the rise of Viet Nam as a Communist state. ASEAN members now feared Vietnamese support for internal Communist subversion movements, which prompted member governments to take action. Their international environment was fundamentally shifting. According to Shaun Narine, “ASEAN truly started to function as

an international organization” (Narine 1997). In the following years, and until the signing of the Paris Peace Accords of 1991, which officially ended the Cambodian conflict, ASEAN carved out for itself a diplomatic role in the management of the Cambodian question, and members managed to maintain their solidarity despite diverging threat perceptions.² ASEAN’s role in the Cambodian civil war made clear that the regional organization was capable of providing a limited role in regional security governance even with its loose institutional structure, and that its level and scope of integration was sufficient to enable the coordination of foreign policies, in the sense that ASEAN represented its members’ interests toward external powers.

After the Cold War, the main regional initiatives aimed at deepening regional integration, especially in the economic realm, and shaping ASEAN’s regional environment in the security realm. In the economic realm, members decided to establish a free trade area amongst themselves (ASEAN Free Trade Area: AFTA). However, the project had to be delayed given the lack of implementation by member states.

In terms of security governance, ASEAN was seen as becoming an essential part and a ‘driver’ of an emerging East Asian regionalism, and started to shape regional institutions. Key factors influencing institution-building in the 1990s were the concerns of ASEAN member states about the continuing US presence in the region, as well as the economic and military rise of China (Beeson 2010). ASEAN became actively involved in the establishment of interregional and intraregional discussion forums (Katsumata 2006; Pempel 2005; Solingen 2008). The institutional design of new institutions occurred according to the ideas and practices of ASEAN, which assumed the ‘drivers’ seat’, a position that fell to it primarily because the regional hegemons, China and Japan, often paralyzed one another in the competition for regional leadership (Shambaugh 2005; Park 2012). The ASEAN Regional Forum (ARF), established in 1994, brings together twenty-eight states in a Forum dealing with Asian security issues (Katsumata 2006)³. Inter-regional dialogue forums like the Asia Europe Meeting (ASEM 1996) and the Asia-Pacific Economic Community (APEC 1989) complemented the web of regional institutions (Aggarwal 1993; Hänggi et al. 2006). ASEAN Plus Three (China, South Korea, Japan) institutionalized a similar discussion forum between ASEAN members and East Asian governments (Nabers 2003).

The latest institutional development is the ASEAN Charter, which envisions an integrated ASEAN Community along the lines of the European Community. Initially triggered by the

2 Whereas Thailand and Singapore perceived Viet Nam as a major threat and China as a useful balancer against this threat, for Indonesia and Malaysia the reverse was the case. They regarded China as threat and Viet Nam as an ally against Chinese hegemonic ambitions. ASEAN successfully lobbied the United Nations (UN) for refraining from officially recognizing the Cambodian government installed by Viet Nam and supported the Coalition government of Democratic Kampuchea led by exiled Prince Norodom Sihanouk. This, in effect, meant support for the Khmer Rouge, who were part of the Coalition government (Narine 1997).

3 ARF participants are, as of November 2010 (in alphabetical order): Australia, Bangladesh, Brunei Darussalam, Cambodia, Canada, China, European Union, India, Indonesia, Japan, Democratic Peoples’ Republic of Korea, Republic of Korea, Laos, Malaysia, Myanmar, Mongolia, New Zealand, Pakistan, Papua New Guinea, Philippines, Russian Federation, Singapore, Sri Lanka, Thailand, Timor Leste, United States, Vietnam.

financial crisis of 1997-1998, the ASEAN Charter answers the concerns of ASEAN member states that the Association will disintegrate and become irrelevant, given the economic competition from India and China. The ASEAN Charter (2007a) and the accompanying “Roadmap for an ASEAN Community 2009-2015” (ASEAN 2009d) aspire to develop ASEAN into a more deeply integrated “rules-based community”:

“ASEAN’s cooperation in political development aims 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, so as to ultimately create a rules based Community of shared values and norms.” (ASEAN 2009d, paragraph A12)

2.2 Institutional Design: the “ASEAN Way”

ASEAN is perhaps best known for its specific approach to regional cooperation, also called the “ASEAN Way”. The ASEAN Way has been promoted as a specific form of cooperation emphasizing informal rules, consensual decision-making, loose structure and conflict avoidance instead of conflict management (Acharya 1995). The key words characterizing cooperation are “restraint” in the form of a commitment to non-interference, “respect” for each member state as expressed through frequent consultation and “responsibility” as expressed in the consideration of each member state’s concerns and interests (Narine 1997). Given member states’ post-colonial (“sub-altern”) identity (Ayooob 1995), the Westphalian state is the centerpiece around which standards of appropriate behavior for regional cooperation have been designed; all the organization’s early declarations and official statements emphasize Westphalian norms such as respect for the sovereignty and territorial integrity of member states, as well as non-interference, although this principle was challenged by individual member states at the end of the 1990s and is currently undergoing significant change.

ASEAN prides itself on being a successful organization in its own right, one that does not aspire to become like any other regional organization, especially the EU. Although the EU serves as an example, especially in the area of economic integration, and ASEAN members closely follow developments in Europe, they hardly ever refer to the EU as a “model”. Other influences are also traceable, such as, most importantly, the United Nation and the Organization for Security and Cooperation in Europe (OSCE) (for the European influence in general, see Jetschke 2009; Jetschke 2010a; Jetschke and Rüländ 2009; Katsumata 2010).

With the exception of the Treaty of Amity and Cooperation of 1976 and the ASEAN Charter of 2007, the organization’s formal basis consists of very short, non-legally binding agreements, conventions and protocols. For example, ASEAN’s founding document, the Bangkok Declaration, is a two-page long document. The ASEAN Charter is almost 60 pages long. This number conceals that the Charter only consists of 55 articles, which are still relatively imprecise compared to other regional organizations’ documents.

ASEAN's institutional design of 1967 was originally a virtual copy of the European Free Trade Area (EFTA). When the five original members decided to set up ASEAN, they took over the institutional structure of ASEAN's forerunner institution, the Association of Southeast Asia (ASA) (Jorgensen-Dahl 1982).⁴ Upon establishing ASA in 1961, the three founding members, the Philippines, Malaya and Thailand, had a clear institutional template to draw on, EFTA, which had been established a year earlier.⁵ EFTA did not foresee political goals and institutions or the delegation of sovereignty by its member states, and it promoted a concept of 'open regionalism', since the UK as a founding member was not willing to sever its ties to trading partners within the Commonwealth (Haefs and Ziegler 1972).

The ASEAN Way of cooperation stresses the principle of flexible adaptation and circumvents over-institutionalization and bureaucratization. ASEAN cooperation is strictly intergovernmental. Consensus is the dominant decision rule, although projects in the economic area allow for a departure from the principle to "unanimity", in the form of an ASEAN Minus X-decision rule.

ASEAN initially had a highly decentralized institutional structure. The ASEAN Summit was the highest decision-making organ. The initial plan was to meet every three to five years. However, it took members 10 years to convene the summit after their first meeting in 1967. The Association's core consisted of a council of foreign ministers, the ASEAN Ministerial Meeting (AMM), which convened on a rotational basis in each of the ASEAN capitals. The AMM constituted ASEAN's main decision-making organ. A standing committee attached to the AMM organized work inbetween the council meetings (ASEAN 1967, article III, c). The organization initially did not have a General-Secretariat or a Commission. Instead, a national secretariat was established in each member-state to provide administrative services to ASEAN (ASEAN 1967, article III, d). Each of the national secretariats was in charge of a functional committee, e.g. Singapore for Civil Air Transport Committee, Indonesia for the Food and Agriculture Committee, etc. (Wah 1992: 51). In the absence of a standing secretariat and a chairmanship, ASEAN's institutional design soon contributed to the perception that the organization was too de-centralized, too consensus-oriented and institutionally inefficient (Alagappa 2003; Wah 1992). In effect, the organization lacked an administrative core. In 1981, former ASEAN Secretary-General Narciso G. Reyes dubbed the organization a "flying circus" because representatives of member states were rotating in and out of positions within the institution and there was no standing bureaucracy to service the decision-making bodies (ASEAN 2013b).

However, ASEAN members cautiously started centralizing the Association in the mid-1970s. The Declaration of ASEAN Concord (ASEAN 1976a) established an ASEAN Secretariat, to be

4 The literature frequently refers to ASA as an unsuccessful forerunner of ASEAN, which failed due to the outbreak of a militarized dispute between the Philippines and Malaya and Indonesia and Malaya, respectively, over then British North Borneo (Sabah). The foreign ministers of Malaysia, Indonesia and Thailand did not meet after September 1963 due to their bilateral conflicts, but ASA's national secretariats continued to exist until ASEAN came into existence (Jorgensen-Dahl 1982)

5 According to Sompong Sucharitkul, a close advisor of Thai Foreign Minister Thanat Khoman, members looked at the institutional design of the EEC and EFTA as templates. They eventually decided to take over the less ambitious (EFTA) design (Personal communication with author, 16 September 2010).

based in Jakarta, aimed at assisting the newly established Secretary-General and serving as document depository (ASEAN 1967a, article F, 1). The national ASEAN secretariats remained part of ASEAN's structure.

The Singapore Declaration (ASEAN 1992) further strengthened the office of the Secretary-General. The Secretary-General received an enlarged mandate to "initiate, advise, coordinate and implement" ASEAN activities (ASEAN 1992, art. 8), and he was accorded ministerial status as well. An expanded professional staff in the ASEAN Secretariat was appointed on the basis of open and region-wide competitive recruitment, equally considered a precondition for more autonomy from member states. The Declaration of ASEAN Concord II (ASEAN 2003) formally reorganized ASEAN, by organizing cooperation along three pillars: political and security cooperation, economic cooperation and socio-cultural cooperation. This reorganization occurred without further changes to ASEAN's structure.

The ASEAN Charter of 2007 foresees fundamental changes in the structure of the organization. Cooperation tasks have expanded and now include such areas as economic integration, competition and consumer protection, disaster management and humanitarian assistance, as well as non-traditional security issues like transnational crime and terrorism (Caballero-Anthony 2009; Khong and Nesadurai 2007). Article 1 states the purposes of the organization, among which are the creation of "a single market and production base which is stable, prosperous, highly competitive and economically integrated" (ASEAN 2007a, article 1.5), but also the strengthening of "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" (ASEAN 2007a, article 1.6). ASEAN is going to be renamed the ASEAN Community. The new ASEAN Community is going to consist of three official communities (as already defined by the ASEAN Concord II), each organized along similar lines. The highest decision-making body is the ASEAN Summit (ASEAN 2007a, article 7.2a). It has the competence to "deliberate" and "provide policy guidance", to "instruct the relevant ministers in each of the Councils concerned to hold ad hoc inter-Ministerial meetings, and to address important issues concerning ASEAN that cut across the Community Councils" (ASEAN 2007a, article 7.2b-c). The Summit also makes decisions concerning requests of the United Nations Security Council under Chapters VII and VIII of the UN Charter (ASEAN 2007a, article 7.2e). The Summit is chaired by an ASEAN member, and chairmanship rotates every year in alphabetical order. This modus is also retained in all other ministerial councils.

The key decision-making body is the ASEAN Foreign Ministers Meeting (which appears to be identical with the ASEAN Coordinating Council). Under ASEAN's old structure, this body was the ASEAN Ministerial Meeting. Most importantly, the AFMM / Coordinating Council prepares the meetings of the ASEAN Summit (ASEAN 2007a, article 8.2a) and coordinates "the implementation of agreements and decisions of the ASEAN Summit" (ASEAN 2007a, article 8.2b). It also coordinates the reports of the community councils with a view to enhancing "policy coherence, efficiency and cooperation among them" (ASEAN 2007a, article 8.2c), considers the reports of

the Secretary-General and approves the appointment of the Deputy Secretary-Generals (ASEAN 2007a, article 8.2d-g).

The ASEAN Community consists of three Communities: the ASEAN Political-Security Community (APSC), the ASEAN Economic Community (AEC) and the ASEAN Socio-Cultural Community (ASCC). Each community is headed by a Ministerial or Community Council. These meet at least twice a year and are responsible for the implementation of the ASEAN Summit decisions (ASEAN 2007a, article 9, 4.a-c).

A new body has also been established, the Committee of Permanent Representatives to ASEAN. It comprises member states' officials with ambassadorial status, who are tasked to support the work of the ASEAN Community Councils as well as their Sectoral Ministerial Bodies, and to coordinate with the ASEAN National Secretariats. Moreover, they also meet with external partners (ASEAN 2007a, article 12, 2.a-e). It is explicitly modeled after the Committee of Permanent Representatives of the EU, a body that has spurred integration within the EU (Bostock 2002; Lewis 2003).

The ASEAN National Secretariats have been retained. They serve as national repositories, coordinate ASEAN decisions at the national level, support the national preparations of ASEAN meetings and promote an ASEAN identity and community building at a national level (ASEAN 2007, article 13a.f).

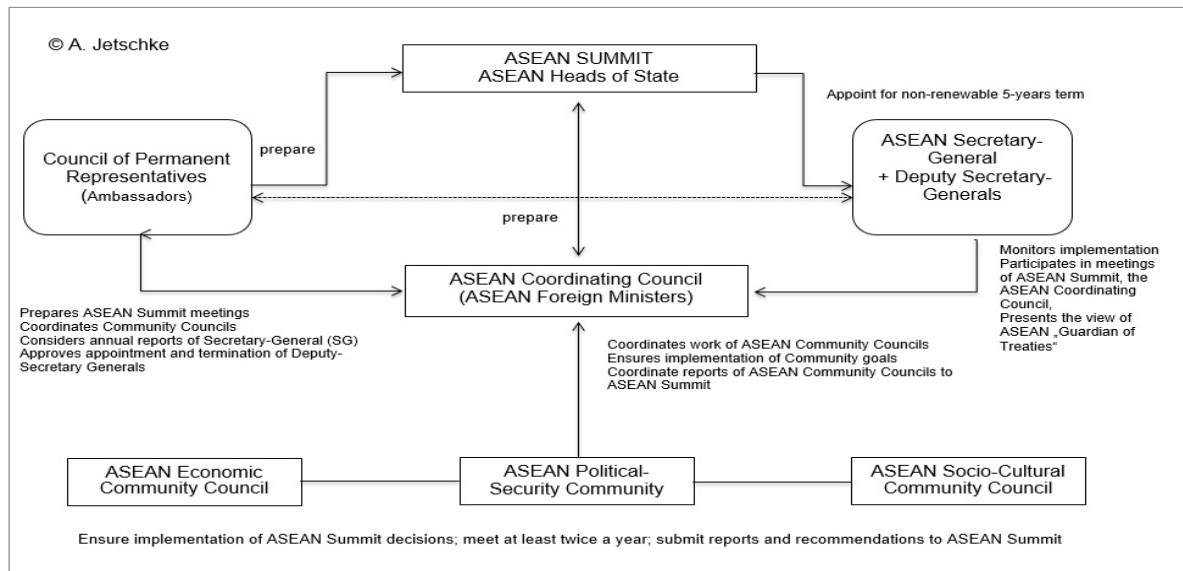
Dispute settlement mechanisms will be established for each community (ASEAN 2007a, article 22), but these dispute settlement mechanisms only have authority to mediate conflicts arising from the ASEAN Charter. It is not intended as a dispute settlement mechanism between member states. For these types of conflicts, member states can call on the Chairman of ASEAN or the ASEAN Secretary-General to provide good offices and mediate in the conflict, but this will be in an "ex-officio" capacity (ASEAN 2007a, article 23).

The ASEAN Secretary-General now acquires the role of a "Chief Administrative Officer" (ASEAN 2007a, article 11.3). He is appointed by the ASEAN Summit for five years (non-renewable). The Secretary-General has the authority to "facilitate and monitor progress in the implementation of ASEAN agreements" (ASEAN 2007a, article 11.b), to "participate in" – most importantly – "meetings of the ASEAN Summit, the ASEAN Community Councils, the ASEAN Coordinating Council" (ASEAN 2007a, article 11.c), "present the views of ASEAN and participate in meetings with external parties" (ASEAN 2007a, article 11.d), and recommend the appointment and termination of the Deputy Secretaries-General to the ASEAN Council for approval (ASEAN 2007a, article 11.e). He relies on the ASEAN Secretariat for administrative support.

The decision-making rule for the ASEAN Summit, the ASEAN Foreign Ministers Meeting and all Community Council is consensus, as in earlier documents (ASEAN 2007a, article 20). If consensus cannot be achieved, the ASEAN Summit "may decide how a specific decision can be made" (ASEAN 2007a, article 20.2). Each ASEAN Community "shall prescribe its own proce-

ture” (ASEAN 2007a, article 21), giving the Councils more flexibility to change their rules independently of the other Communities. In the implementation of “economic commitments”, the Charter explicitly mentions the ASEAN-X principle as a decision-rule “where there is consensus” (ASEAN 2007a, article 21, 2).

Figure 2: ASEAN Organizational Structure⁶



The ASEAN Charter foresees the first regional human rights body (ASEAN 2007a, article 14), which was established as the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009. The ASEAN Charter also provides the Association with a legal personality and promotes an ASEAN identity through a motto (“One Vision, One Identity, One Community”) and an ASEAN anthem.

In sum, ASEAN has experienced an evolutionary development since 1967 in terms of the scope of issues it addresses (Khong and Nesadurai 2007). While the reorganization seems impressive, it is debatable to what extent it gives the organization more autonomy from its member states. The key question from an institutional design perspective is whether this move toward centralization and the acknowledgement of ASEAN by more states in Southeast Asia is accompanied by more independence or autonomy from member states. Evaluating the Association’s legal personality, Simon Chesterman argues that, from a legal perspective, ASEAN still does not exist, as it has practically speaking developed autonomy only in the ASEAN Economic Community and in the dispute settlement for the Southeast Asian Nuclear Weapons Free Zone. ASEAN’s capacity to enter into treaties on behalf of member states is nullified by member states’ practice of signing and ratifying treaties in their individual capacities, not collectively (Chesterman 2008: 205-08).

Several procedural rules seem to point in the direction of greater autonomy and flexibility, however. First of all, each community may establish its own rules of procedure. Hence, in the long

⁶ Source: Author, based on adapted chart provided by Wah 1992: 52.

term there might be different rules for the Economic Community than for the Political and Security Community. The new regional decision-making structure has a new actor, previously absent from decision-making: the Secretary-General. In giving him authority to participate as an actor at ASEAN meetings representing the ASEAN perspective, some integration is taking place. Moreover, the ASEAN Secretariat has adopted a new self-understanding as the “guardian of treaties” and representative of ASEAN community interests (Interview 05-2010 2010). While AICHR is strictly inter-governmental and the Charter gives the body little independent power, it has already spurred the emergence of civil society organizations and provides an important reference point in the work of Southeast Asian civil society associations.

Nevertheless, implementation of all ASEAN decisions including the ones on human rights remains the full responsibility of the individual ASEAN members. The ASEAN-Secretary General does not have the competence to sanction non-compliance with ASEAN Summit decisions by member states. There is a movement toward introducing soft compliance mechanisms, especially in the ASEAN Economic Community (reporting obligations to the Secretariat), but ASEAN still lacks the basic competence to enforce ASEAN rules among member states. This also means that ASEAN as regional organization is determined by ASEAN members in a double way. ASEAN member states and their governments both remain the sources of ASEAN declarations and regulations and are the key addressees in terms of implementation.

2.3 Budget and Staff

ASEAN finances itself from member contributions, which are determined by the financial capabilities of the least wealthy state, in this case both Laos and Cambodia. Members pay US\$ 1.0 million per year into an ASEAN Fund. The Fund was established in 1969 and membership contributions have not changed since then. Originally, the contributions were to remain part of the national budget of each member state, and were also to be administered by the national governments. In 1994 the Fund was renamed the ASEAN Development Fund and reoriented to support ASEAN projects like the Vientiane Program of Action. It was also decided that the fund would henceforth be administered by the ASEAN Secretariat (ASEAN 1994). Members are free to make voluntary contributions to the fund. The fund is also open to contributions by other international organizations, funding agencies and business. It is unclear what the total budget of ASEAN is, and ASEAN staff is reluctant to reveal budgetary figures. In 2012, according to information provided by the ASEAN Secretariat, its budget amounted to US\$15.763 million (“ASEAN Secretariat must be strengthened”, *The Irrawaddy*, May 21, 2012). This “official” budget is based on member states’ contributions only. Because the ASEAN Secretariat receives financial assistance from international donors, the actual budget is likely to be much higher.⁷ The following calculation (Table 1) of ASEAN’s budget is based on a data published by donors of ASEAN.

⁷ For a study on the outside funding of regional organizations in comparative perspective, see Gray (2011).

Table 1: Sources of ASEAN Funding⁸

Source	Amount
Member state contributions, 2012	15.763 Mio US\$
EuropeAid (various projects) 2000-2007 2008-2010	97.2 Mio € (1.279 Mio US\$ in 2012) 37.2 Mio € (48.96 Mio US\$ in 2012)
Asian Development Bank, Japan (2004)	310.0 Mio US\$
AusAid (Australia) (2009-2015)	61.7 Mio A\$ (65.18 Mio US\$ in 2012)

ASEAN staff amounts to 260 persons according to press reports, including 79 members that are openly recruited from member states (Chongkittavorn 2012). According to the ASEAN official website, ASEAN has increased its staff since 1992, especially at the level of Senior Officers and Programme Officers (Table 2).

Table 2: ASEAN Staff⁹

Positions	1992-1999	1999-2012
Secretary General	1	1
Deputy Secretary-General	2	2
Director	4	4
Assistant Director & Programme Coordinator	16	14
Senior Officer	15	23
Programme Officer	5	27
Assistant Programme Officer	21	28
Total	64	99

3. Mapping Governance Transfer by ASEAN

3.1 The Framework of Governance Transfer: Prescription and Policy

In comparison to many other regional organizations, ASEAN can perhaps be described as a late-comer when it comes to the prescription of domestic governance standards concerning human rights, democracy, the rule of law, good governance and the adoption of policies and instruments for the active promotion of these norms and standards. Table 3 provides an analytical and chronological overview of the development in this area, based on key agreements among ASEAN members issued between 1967 and 2012. What becomes evident from these documents is the little to non-existent independence that ASEAN as a regional organization has from its member states. The pledge to promote the prescribed standards is mostly a self-commitment by its member states. Until 2004, there only exist vague references to human rights promo-

⁸ Sources: EU Commission 2009: v; Asian Development Bank 2012; AusAid 2012

⁹ Source: ASEAN Secretariat (2012)

tion in the area of economic and social rights, and even these are not framed in the language of “rights” and do not concern civil and political rights. Only from 2004 onwards do members speak of a commitment to human rights at all, starting with women’s and children’s rights and the rights of migrant workers. Moreover, with the Vientiane Action Programme of 2004, and more pronouncedly in the Roadmap for an ASEAN Community (ASEAN 2009d), ASEAN assumes a promotional role in the sense that it is tasked to conduct analytical studies to establish benchmarks for best practices on governance (ASEAN 2009a, A1.4). Despite this limited role for ASEAN as regional organization, the main actors in ASEAN’s governance transfer are its member states, which control the process as both standard-setters and promoters, on the one hand, and the main targets of governance transfer, on the other. The following table provides an overview of ASEAN documents’ inclusion of the concepts of ‘human rights’, ‘democracy’, ‘rule of law’ and ‘good governance’ (Table 3).

Table 3: Governance Transfer by ASEAN: Prescription and Policy¹⁰

Year	Title	Human Rights	Democracy	Rule of Law	Good Governance
1967	ASEAN Declaration (or Bangkok Declaration)	-	-	-	-
1976	ASEAN Concord	(X)	-	-	-
1976	Treaty of Amity and Cooperation	-	-	-	-
1987	Manila Declaration	-	-	-	-
1993	Joint Communiqué of the 26th ASEAN Ministerial Meeting	(X)	-	-	-
1997	ASEAN Vision 2020	(X)	-	(X)	
2003	Second ASEAN Concord (Bali Concord)	(X)	(X)	-	
2004	Vientiane Action Programme	X	(X)	X	X
2004	Declaration on the Elimination of Violence Against Women in the ASEAN Region (DEVW)	X	-	-	-
2004	ASEAN Declaration Against Trafficking in Persons Particularly Women and Children (DATPPWC)	X	-	-	-

¹⁰ Source: Own Compilation, based on Text analysis

2007	ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (DPPRMW)	X	-	-	-
2007	ASEAN Charter	X	X	X	X
2009	Cha-Am Hua Hin Declaration on the Intergovernmental Commission on Human Rights	X	-	-	-
2009	Terms of Reference for the ASEAN Intergovernmental Commission on Human Rights	X	-	-	-
2009	Roadmap for the ASEAN Community (2009-2015)	X	X	X	X
2012	ASEAN Declaration on Human Rights	X	X	X	X

Some authors contend that the principles that ASEAN members subscribe to legitimate an illiberal peace and prevent changes in democracy and human rights (Kuhonta 2006). It is important to realize, however, that ASEAN members in general do not grant the organization autonomy and that the areas of democracy and human rights promotion are no exception. Therefore, there seems to be a principled approach behind this policy that puts the autonomy of member states before the organization, so that the alleged support for authoritarian regimes is an unintended outcome, rather the result of an active policy.

ASEAN Declaration (or Bangkok Declaration, 1967)

The ASEAN Declaration (ASEAN 1967) established ASEAN as an association for regional cooperation among founding member states Indonesia, Singapore, Malaysia, Thailand and the Philippines. In the declaration, the aims and purposes of ASEAN are outlined, one of them being the promotion of regional peace and stability “through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter” (ASEAN 1967, paragraph 2).

One might interpret an output-oriented concept of good governance in the statement that “the countries of Southeast Asia share primary responsibility for strengthening the economic and social stability of the region and ensuring their peaceful and progressive national development” (Preamble), but this does not correspond with the definition used in this report. The rule of law is mentioned, but is understood as adherence to international law (ASEAN 1967, II, 2). Neither human rights nor democracy are mentioned in ASEAN’s founding document, and no policy measures are adopted. In sum, there are no prescriptions of domestic standards concerning

human rights, democracy, the rule of law or good governance or measures for their policy implementation.

Declaration of ASEAN Concord (1976)

The ASEAN Concord of 1976 (ASEAN 1976a) is the first of two ASEAN Concords that were adopted in 1976 as a non-binding law document by the five founding members of ASEAN, who comprise its signatories. The document is foremost concerned with establishing regional stability through the pursuit of a “Zone of Peace, Freedom and Neutrality” (ASEAN 1976a, paragraph 2), the peaceful resolution of disputes (ASEAN 1976a, paragraph 6) and economic development (ASEAN 1976a, paragraphs. 3 & 5).

A “program of action” is adopted to further these aims. It does not mention any of our concepts as standards for domestic governance institutions, rendering the question of adoption of governance measures futile. However, there are some phrases that could be interpreted as indirectly setting some standards in the human rights area. ASEAN member states vow to promote social measures, including the promotion of the participation of women and youth in development efforts (ASEAN 1976a, article C.2), as well as the expansion of opportunities for productive employment and fair remuneration for rural and low-income groups (ASEAN 1976a, article C.1), thus reflecting (although not explicitly stated as such) second and third generation human rights. Significantly, however, paragraph 8 constitutes the first articulation of non-interference, sovereignty and self-determination principles in an ASEAN document. No standards for democracy promotion, the rule of law or good governance are mentioned.

Treaty of Amity and Cooperation (1976)

The legally binding Treaty of Amity and Cooperation (ASEAN 1976b) commits the five founding members of ASEAN to “perpetual peace, everlasting amity and cooperation among their peoples” (ASEAN 1976b, article 1) through adherence to the principles of independence, sovereignty, equality, territorial integrity (ASEAN 1976b, article 2.a), non-interference (articles 2.b, 2.c) and the renunciation of the threat or use of force (ASEAN 1976b, article 2.e). Articles 10 and 11 articulate these principles in more detail, prohibiting those activities that constitute a threat to the political and economic stability, sovereignty, or territorial integrity of other member states, and freedom to cultivate national identities without external interference, respectively. This treaty is therefore significant as ASEAN’s most thorough legal expression of those principles often thought to exist in tension with the protection of human rights and the transfer of good governance and democracy.

Manila Declaration (1987)

The non-binding Manila Declaration was adopted at the third ASEAN Summit. The declaration outlines the aims of member states for their cooperation. These are to strengthen national and regional resilience (ASEAN 1987, article 1) and to pursue regional solidarity, peaceful conflict

resolution and foreign policy coordination (ASEAN 1987, article 3 & 4). Member states also vow to eradicate drug abuse and illicit trafficking (ASEAN 1987, article 9). The aims of cooperation are described in greater detail under the headings of “Political cooperation” and “Economic Cooperation”; in the political realm, ASEAN aims to strengthen solidarity, find a solution to the Kampuchean problem, which is regarded as destabilizing the region, and the Indochinese refugee problem, and to further the goals of the Zone of Peace, Freedom and Neutrality. Economic cooperation aims at the intensification of intra-ASEAN trade through adoption of a set of measures for preferential trading (ASEAN 1987, article 7). ASEAN members do not mention standards of human rights, democracy or the rule of law and good governance and consequently, no policy measures are adopted.

Joint Communiqué of the 26th ASEAN Ministerial Meeting (1993)

The Joint Communiqué of 1993 is the first document in which members explicitly refer to human rights. In the document, foreign ministers welcome “the international consensus achieved during the World Conference on Human Rights in Vienna” and affirm ASEAN’s commitment to and respect for human rights and fundamental freedoms. They stress the indivisibility of human rights and their equal importance. These rights should be addressed in a “balanced and integrated manner”, and “the promotion and protection of human rights should not be politicized” (ASEAN 1993, paragraph 16). The document foresees an active role for ASEAN in the sense that “ASEAN should coordinate a common approach on human rights and actively participate and contribute to the application, promotion and protection of human rights” (ASEAN 1993, paragraph 17).

While the references to human rights appear to indicate an early human rights commitment by ASEAN members, the historical context does not allow such a far-reaching conclusion. The non-binding declaration was issued briefly after the Vienna Human Rights Conference, which was characterized by a debate on human rights as a Western concept versus Asian values (Kausikan 1994; Kausikan 1997; Ng 1997). At the time of its issuance, the Communiqué was interpreted as an offensive reaction to Western policies of actively promoting human rights and democracy (Heinz 1994). This becomes clear in the reference that the promotion of human rights should occur in the spirit of international cooperation, that is, not involve pressures or conditionality. “[T]he 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” (ASEAN 1993). Consequently, the declaration also emphasizes principles of respect for national sovereignty, territorial integrity and non-interference in the internal affairs of states, and does not adopt any policy measures.

ASEAN Vision 2020 (1997)

The ASEAN Vision 2020 (ASEAN 1997) is a non-legally binding aspirational document adopted in 1997 by the then nine (with the accession of Brunei, Vietnam, Laos, and Myanmar) member states of ASEAN. It broadly outlines a vague roadmap for ASEAN’s development. Members envi-

sion, among other things, “a peaceful and stable Southeast Asia ... where the causes for conflict have been eliminated through abiding respect for justice and the rule of law” (ASEAN 1997: 1) and “a socially cohesive and caring ASEAN ... where civil society is empowered ... and where social justice and the rule of law reign” (ASEAN 1997: 4). It echoes international human rights documents in its hope for “vibrant and open ASEAN societies ... where people enjoy equitable access to opportunities for total human development regardless of gender, race, religion, language, or social and cultural background” (ASEAN 1997: 4). It also envisions “a clean and green ASEAN with fully established mechanisms for sustainable development to ensure the protection of the region’s environment, the sustainability of its natural resources, and the high quality of life of its peoples” (ASEAN 1997: 4), thus reflecting the right to a healthy environment as expressed in international environmental and human rights law.

There are no prescriptions for human rights, democracy, the rule of law or good governance. Again, there is a vague reference to second and third generation human rights, as member states explicitly acknowledge their responsibility to eradicate hunger, malnutrition, deprivation and poverty. However, the concept of democracy is not mentioned, and while member states envision an ASEAN where “social justice and the rule of law reign”, it is not clear whether this refers to international relations or domestic structures, leaving the scope of this aim deliberately vague.. Good governance is not mentioned, and no measures for the promotion of these concepts are adopted.

Second ASEAN Concord (or Bali Concord, 2003)

The significance of the second ASEAN Concord (ASEAN 2003) reflects debates at the end of the 1990s and the turn of the millennium on ASEAN’s future development after the ASEAN financial crisis. It indicates major changes in the organization’s purpose, culminating in the ASEAN Charter (2007). Member states reorganize the structure of the organization along three pillars of cooperation: the ASEAN Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community (ASEAN 2003, paragraph 1). The Concord was adopted by ASEAN’s current membership of ten states, including Cambodia. The Bali Concord envisages that the security community will “bring ASEAN’s political and security cooperation to a higher plane to ensure that countries in the region live at peace with one another and with the world at large in a just, democratic and harmonious environment” (article A.1). As in the ASEAN Vision document, it is left vague as to whether this indicates a prescription of domestic standards for democracy and the rule of law or for international relations (ASEAN 2003, articles A.2, A.4). The documents mentions that the ASEAN Security Community “shall fully utilize the existing institutions and mechanisms within ASEAN with a view to strengthening national and regional capacities to counter terrorism, drug trafficking, trafficking in persons and other transnational crimes” (ASEAN 2003, article 10). Article 11 indicates that ASEAN shall in the future engage in “norm-setting”. There is no explicit prescription of standards related to democracy, the rule of law or good governance. Second and third generation human rights are again mentioned, such as the alleviation of poverty, reduction of socio-economic disparities and promotion of economic equity (ASEAN 2003, article C.3), the active participation of women, youth and local com-

munities in development programmes (ASEAN 2003, article C.2), access to affordable medicine and adequate health care (article C.4) and the right to a clean environment (ASEAN 2003, article C.6). As in previous documents, however, these are not explicitly expressed as human rights.

ASEAN members again outline their own concept of good governance, which they define as member states' responsibility to promote stability and economic development. This definition is not consistent with the definition used in this report and therefore will not be coded as prescription of Good Governance standards.

“ASEAN Member Countries share primary responsibility for strengthening the economic and social stability in the region and ensuring their peaceful and progressive national development, and that they are determined to ensure their stability and security from external interference” (ASEAN 2003, Preamble)

While the concepts of governance transfer are mentioned, they are not formulated in a way that implies they should be promoted by the regional organizations. It is rather member states that pledge to contribute to democracy, human rights and the rule of law.

Vientiane Action Programme (2004)

The Vientiane Action Programme (ASEAN 2004c) is a non-binding detailed action plan for the implementation of the broader goals set out in the ASEAN Concord II. The Vientiane Action Programme is an implementation plan for the ASEAN Communities and spells out in more detail the standards and policies that ASEAN members set for themselves and that should be realized by 2020. Each introduction to a Community starts with a section titled “strategic thrusts”. In contrast to the other documents, the plan has a distinct section on the policies that ASEAN will adopt to further the goals which also defines policy measures to be taken.

References to human rights, democracy and the rule of law can be found in the description for the ASEAN Security Community and the ASEAN Social and Cultural Community, where they are described as “strategies for political development” in “support of” a “commitment to enhance a political environment in which ASEAN Member Countries have strong adherence to peaceful ways of settling intra-regional differences” (ASEAN 2004c, 1.1). Hence, the standards are defined as goals to be realized in the future, not as standards set by ASEAN to be implemented vis-à-vis member states. The realization of democracy, the rule of law and good governance are mentioned, but – as in earlier documents – it is not clear whether these standards relate to the domestic structures of member states, their international relations or both. Article 1.1 ii mentions the promotion of human rights and the need to establish programmes for mutual support and assistance to strengthen the rule of law, judiciary systems and legal infrastructure, effective and efficient civil services and good governance in public and private sectors (ASEAN 2004c, 1.1., iv). Here, for the first time, all concepts are mentioned, but the scope of implementation is vague.

The ASEAN Socio-Cultural Community develops the theme of second and third generation human rights in greater detail (ASEAN 2004c, 3). The focus of the Community is on achieving sustained economic growth and social equity to maintain political stability. The goal is to build a community of caring societies, and the document foresees a clear role for ASEAN in the form of “regional interventions” (ASEAN 2004c, 3.1). These relate to raising the standard of living, facilitating universal access to education, women’s and children’s well-being and the effective participation of private actors (family and civil society). Later articles deal with the environment and natural resource management as third generation rights.

In sum, the goals of promoting human rights, democracy (implicitly), the rule of law and good governance are mentioned, but they are not formulated in a way that constitute legal rights or enforceable obligations. The programme foresees an explicit monitoring role for ASEAN (ASEAN 2004c, 5) with a view to the policies and projects that are defined in the Annex. As it appears, there is no permanent monitoring role implied for the ASEAN Secretariat, but the monitoring of the implementation of specific projects is indicated (ASEAN 2004c, 5.3).

The Annex defines specific projects outlining how the rule of law and judiciary systems shall be promoted, meaning there are – for the first time – specific policies. Here, the important finding is that these policies establish an information collection and sharing role for ASEAN, thus allowing it to promote forums, networks and institutions for the promotion of these goals.

For the promotion of human rights, ASEAN is tasked to collect information on existing human rights mechanisms, to establish a network among existing human rights mechanisms, to formulate a work programme for this network, to promote education and public awareness on human rights, to elaborate an ASEAN instrument on the protection and promotion of the rights of migrant workers (no other human rights are mentioned) and to establish an ASEAN commission on the promotion and protection of the rights of women and children (ASEAN 2004c, Annex 1, 1.1.4). A similar workplan is developed for the promotion of rule of law, which includes the completion of annual comparative studies for lawmakers, the organization of annual conferences, seminars, and training workshops, a university curriculum on the legal system of ASEAN member states and measures aimed at increasing the partnership between public and private sectors (ASEAN 2004c, Annex 1, 1.1.3). No comparable measures for the promotion of democracy or good governance are defined.

As can be seen, the measures to be taken are promotional and confined to collecting and sharing information among member states, a task in accordance with the limited mandate of the ASEAN Secretary-General. The organization has fulfilled that role by establishing various commissions and committees on women, children and migrant workers that are explicitly tasked with promoting the rights of these groups (ASEAN 2013a).

Declaration on the Elimination of Violence Against Women (2004)

The ten member states of ASEAN adopted the Declaration on the Elimination of Violence Against Women in the ASEAN Region (DEVW) in 2004. The document sets standards for fighting violence against women and against the discrimination of women. It is one of the few documents to refer to activities of the United Nations in the area, in this case the Fourth World Conference on Women. Significant provisions include article 5, which commits signatories “to take all necessary measures to eliminate all forms of discrimination against women” and “to enact and, where necessary, reinforce or amend domestic legislation to prevent violence against women, to enhance the protection, healing, recovery and reintegration of victims/survivors” (ASEAN 2004b). Hence, the document explicitly sets standards for member states concerning the human rights of women.

The declaration also spells out a number of policy measures, primarily promotional, in the form of information collection and dissemination (ASEAN 2004b: paragraph 1), that “each member state, individually or collectively, in ASEAN” (ASEAN 2004b) should adopt. Measures include the collection of information and data, the formulation of mechanisms “providing services to fulfill the needs of survivors, formulating and taking appropriate responses to offenders and perpetrators, understanding the nature and causes of violence against women and changing societal attitudes and behaviour” (ASEAN 2004b, paragraph 1), the introduction of gender mainstreaming programs and the reinforcement or amending of “domestic legislation to prevent violence against women, to enhance the protection, healing, recovery and reintegration of victims/survivors”. The document also suggests including “measures to investigate, prosecute, punish and where appropriate rehabilitate perpetrators” (ASEAN 2004b, paragraph 4).

As appears evident, it is member states that commit themselves to implement measures against violence of women (prescription), whereas ASEAN assumes a role as a forum (policy), in which member states exchange information and promote a better understanding of women’s rights (measures). Hence, there is standard setting in human rights and measures aiming at the promotion of these rights.

ASEAN Declaration Against Trafficking in Persons, Particularly Women and Children (2004)

In 2004, the member states of ASEAN also adopted the ASEAN Declaration Against Trafficking in Persons Particularly Women and Children (DATPPWC, ASEAN 2004a), hence setting a standard in the area of women’s and children’s human rights. Member states refer to the Universal Declaration on Human Rights (1948) and other “appropriate international instruments” which all the ASEAN member states have acceded to, and to ASEAN’s own Vientiane Action Programme of 2004.

Significant measures to achieve the goal of limiting trafficking include article 6, which commits states to act to respect and safeguard the dignity and human rights of victims. In article 7 of the declaration, member states commit themselves to adopt coercive measures to be taken against

individuals and/or syndicates engaged in trafficking, but these measures refer to legislation and sanctions taken by member states' governments themselves, not by ASEAN against any member state. In sum, the document constitutes prescription in the area of human rights and a commitment to implement specific measures.

ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007)

The ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (DPPRMW) was adopted by ASEAN member states in 2007 (ASEAN 2007b). After recalling the UDHR and other international human rights conventions in the preamble, the DPPRMW outlines general principles (including taking into account “the fundamental rights and dignity of migrant workers and family members”, article 3). It then expresses separately the obligations of states in the role of senders of migrant workers and those in the role of receiving migrant workers. Receiving states are obliged to intensify efforts “to protect the fundamental human rights, promote the welfare and uphold human dignity of migrant workers” (article 5), and to provide “migrant workers, who may be victims of discrimination, abuse, exploitation, violence, with adequate access to the legal and judicial system of the receiving states” (article 9). Here, an obligation is being established that governments grant citizens from other states specific rights (legal access). Sending states are obliged to adopt “measures related to the promotion and protection of the rights of migrant workers” (article 11) and to establish and promote “legal practices to regulate the recruitment of migrant workers” (article 14). Hence, there is further standard setting concerning the human rights of migrant workers. While the document lists a number of measures to be taken by member states (efforts of protection, facilitation of access to information and legal remedies, promotion of fair and appropriate employment situation, etc.), these are no legal obligations.

ASEAN Charter (2007)

The ASEAN Charter, ratified in 2007 by the ten members of ASEAN and entered into force in 2008, provides the legal status and institutional framework for ASEAN (ASEAN 2007a). It also codifies the norms, rules and values of ASEAN, and sets standards for accountability and compliance. Indeed, this is the first occasion in which democracy, human rights, good governance and the rule of law are given legal force in an ASEAN document.

The (non-binding) preamble commits signatories “to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms” (ASEAN 2007a: 2). Within the legally-binding body of the Charter, article 1.7 requires member states “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”. These norms are emphasized again in article 2.h, which states that member states shall accord with the principle of “adherence to the rule of law, good governance, the principles of democracy and constitutional government”, and article 2.i, which commits states to “respect for fundamental freedoms, the promotion and pro-

tection of human rights, and the promotion of social justice”. Article 2.j refers to international law, requiring ASEAN states to uphold “the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States”.

Standards for second and third generation human rights are set (but not explicitly stated as such). Article 1.6 cites as a purpose of ASEAN a desire “to alleviate poverty and narrow the development gap within ASEAN”, article 1.9 to promote sustainable development, the sustainability of natural resources, the preservation of cultural heritage and the high quality of life of its peoples, and article 1.11 to provide equitable access to opportunities for human development, social welfare and justice.

Predictably, the Charter also reiterates principles of sovereignty and territorial integrity (ASEAN 2007a: Preamble page 2, article 2.a), and non-interference (preamble page 2, article 2.e-f).

As a concrete measures to implement the human rights provisions of the Charter, article 14 commits states to establish an ASEAN human rights body.

In sum, the concepts of human rights, democracy, rule of law and good governance are mentioned, but their content is not defined. The only concrete but significant measure is the establishment of the human rights commission.

Cha-Am Hua Hin Declaration on the Intergovernmental Commission on Human Rights (2009)

The Cha-Am Hua Hin Declaration establishes the ASEAN Intergovernmental Commission on Human Rights (AICHR). It was adopted in 2009 by the ten member states of ASEAN. It is envisaged that the AICHR will be the overarching institution responsible for the promotion and protection of human rights in ASEAN (ASEAN 2009a, article 8). AICHR adopted so-called Terms of References for their work (ASEAN 2009e), which are included in this description.

Terms of Reference for the ASEAN Inter-Governmental Commission on Human Rights (2009)

The Terms of Reference for the ASEAN Inter-Governmental Commission on Human Rights, adopted by ASEAN member states in July 2009, explicitly spell out the mandate of the Intergovernmental Commission (ASEAN 2009e). The Commission receives the mandate to promote human rights (article 1.1), to uphold the rights of the peoples of ASEAN (article 1.2) and to contribute to the realization of the purposes of ASEAN to “promote stability and harmony in the region” (article 1.3). These standards are qualified: promotion occurs by “bearing in mind national and regional particularities” and balancing rights and responsibilities (article 1.4). The terms refer to the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action (article 1.6). The terms accord member states “primary responsibility in the promotion of human rights” (article 2.3).

Section two reiterates key principles of ASEAN along the lines of the Vientiane Action Programme and the ASEAN Charter. The Commission is designed as a consultative body. It is mandated to develop strategies for the promotion and protection of human rights, an ASEAN Human Rights Declaration (article 4.2) and to enhance public awareness (article 4.3), to engage in capacity building (article 4.4), to encourage member states to accede to international human rights instruments (article 4.5) and to promote the full implementation of ASEAN instruments related to human rights (which are promotional). Concerning the instruments, the terms of reference foresee regular consultations on human rights issues and the elaboration of a common position on human rights issues that are of concern for all members. AICHR also receives a mandate to consult with other civil society organizations in the region and on an international level (article 4.12). It can prepare thematic studies on human rights and submit reports to the ASEAN Foreign Ministers Meeting (article 4.13) and promote capacity building (article 4.4).

As for the staffing of the Commission, it is almost revolutionary that members of AICHR “shall act impartially in accordance with the ASEAN Charter” and the terms of reference (ASEAN 2010, article 5.4). This is the first time that ASEAN members grant an ASEAN body at least some discretion. At the same time, however, representatives are “accountable to the appointing government” (ASEAN 2010, article 5.2). The Commission will have its own budget, which comes from membership contributions. Given that the membership contributions to ASEAN are quite low, it remains to be seen how significant AICHRs funding will be. External funding by non-ASEAN members is strictly limited to the promotion of human rights, human rights education and capacity building (ASEAN 2009e, article 8.6).

The **Five-Year-Work Plan of AICHR (2010-2015)** details the specific steps that should be taken by 2015, which proceed along the lines of the blueprints: information gathering on human rights instruments in member states, workshops, seminars and capacity building. The thematic reports will be dealing with corporate social responsibility, migration, child soldiers, etc., but not civil or political rights (ASEAN 2009b).

Roadmap for the ASEAN Community (2009)

The **Declaration on the Roadmap for the ASEAN Community (2009-2015)** is an aspirational document outlining a future trajectory for regional integration. Member states agree to adopt separate roadmaps for each of ASEAN’s pillars, the so-called “blueprints”, as well as the second Initiative for ASEAN Integration (IAI) work plan. While this document is not legally binding, together with the roadmaps (attached as Annex to the declaration) it constitutes the most detailed account of policy measures for the implementation of the ASEAN Charter.

The Charter sets norms for democracy, human rights, good governance and the rule of law. The ASEAN Political and Security Community (APSC) blueprint prescribes in greater detail how these standards are to be defined and implemented. Section 2, article 7 prescribes that the “APSC shall promote political development in adherence to the principles of democracy, the rule of law and good governance, respect for and promotion and protection of human rights

and fundamental freedoms” (ASEAN 2009d). The same article makes clear that the Community “shall be a means” by which member states can “forge shared norms and create common mechanisms to achieve ASEAN’s goals and objectives” (ASEAN 2009d, Section II, article 7). Hence, defining the standard precisely is a future task. Some measures are explicitly mentioned, such as support for “gender-mainstreaming, tolerance, respect for diversity, equality and mutual understanding.” (ASEAN 2009d, Section II, article 7). More measures to be adopted concerning human rights, democracy, the rule of law and good governance are enumerated in sections A.1.1-6. of the Roadmap: members seek to promote “understanding and appreciation of political systems, culture and history of ASEAN member states” (A 1.1.), to support the free flow of information (A 1.2.), capacity building for strengthening the rule of law and judiciary systems and the legal structure (A 1.3.), the promotion of good governance and human rights (A 1.4.-1.5.) and a measure to increase the participation of “relevant entities” such as academics, parliamentarians and sectoral groups (A 1.7.). Measures to prevent and combat corruption are also mentioned (A 1.7.). For each standard, specific “actions” are assigned which are promotional throughout. These include holding seminars and workshops to share experiences and set benchmarks (e.g. on democratic institutions, gender mainstreaming, popular participation), but also to “compile best practices of voluntary electoral observations” (A 1.1. iii). Notably, in case of the rule of law, the ASEAN Law Ministers Meeting is tasked to “develop cooperation to strengthen the rule of law, judicial systems and legal infrastructure” (A 1.3. iv). For the promotion of human rights, the Roadmap prescribes the establishment of an ASEAN human rights body and an ASEAN commission on the promotion and protection of the rights of women and children (A 1.5. vii). It also encourages cooperation between existing human rights mechanisms (A 1.5. i).

Human rights standards are also described in the ASEAN Socio-Cultural Community (ASCC) blueprint. These concern “human development” (educational standards, work standards), but also “access to health care” (ASEAN 2009d, B 4), in section C.1., “social justice and rights”, especially for the disadvantaged, vulnerable and marginalized groups and in section C.2 standards for the promotion of rights of migrant workers. Here again, promotional activities dominate, but the blueprint also mentions establishing a commission on the promotion and protection of the rights of women and children (ASEAN 2009d, C 1, i-ii).

A section on “building civil service capability” (ASEAN 2009d, A.7) might be associated with good governance standards. The “strategic objective” is to “establish effective, efficient, transparent, responsive and accountable civil service systems” (ASEAN 2009d, A 7). The specific measures to be adopted are capacity-building, the enhancement of public human resource competencies and increased collaboration among member states. The actions to be adopted include developing strategies for an ASEAN Conference on Civil Service Matters, the holding of workshops and training seminars and capacity building for the ASEAN Resource Center (ASEAN 2009d, A 7, i-vi).

The Community blueprint also outlines specific measures designed to further the implementation of these goals. These address the ASEAN level and accord ASEAN a limited role in the implementation and review of these standards, but also individual member

states. Actions encompass the “mainstreaming strategies, targets and actions” with a view to incorporating them in the national development plans of ASEAN members, the ratification of ASEAN agreements and the setting of timelines, and on a regional level capacity building of the ASEAN Secretariat and of member states (ASEAN 2009d, III, A, i-vii). In a section titled “review mechanisms” ASEAN is specifically tasked with the monitoring of these activities (ASEAN 2009d, 92).

The **Initiative for ASEAN Integration (IAI) Work Plan** is a work plan specifically addressing the development gap among ASEAN members. It is designed as a work plan of the old members (ASEAN-6) to help the new members (ASEAN-4) in their development efforts. The work plan does not prescribe specific standards for human rights and democracy, but does some standard setting and promotion in the areas of the rule of law (strengthening legal systems) and good governance (promoting civil service capacity). Interestingly, the Work Plan establishes specific reporting obligations by the ASEAN-4 to the other ASEAN members (ASEAN 2009c, 98).

ASEAN Human Rights Declaration (2012)

On 18 November 2012, ASEAN member states adopted the ASEAN Human Rights Declaration during their 21st Summit in Phnom Penh, Cambodia. The Charter is a milestone document in the development of ASEAN in the sense that it prescribes for the first time explicitly the promotion and protection of human rights. These are Civil and Political Rights, including the right to be free from torture (articles 10-25), Economic, Social and Cultural Rights (articles 26-34), the Right to Development (articles 35-37) and the Right to Peace (article 38) (ASEAN 2012). Concerning the concrete measure to be taken and ASEAN’s role, the Declaration does foresee “cooperation with one another as well as with relevant national, regional and international institutions” (article 39). The Declaration was criticized by human rights organizations in the region, which lamented the secrecy of the negotiation process. The United Nations High Commissioner on Human Rights, Navanethem Pillay, had called on ASEAN leaders to suspend the adoption because the draft fell short of universal values and the public had not been consulted (Ririhena & Sraragih, 2012). Also, 62 human rights groups, including Amnesty International and Human Rights Watch, criticized the draft of the Declaration on the grounds that it risked “creating a sub-standard level of human rights protection in the region” (Amnesty International, 2012).

Summary

The analysis of ASEAN documents suggests that members have included standards for legitimate governance institutions since 2003, culminating in the ASEAN Declaration on Human Rights of 2012. However, there is differential treatment of the relevant concepts in these documents. While human rights have become an accepted standard, the rule of law and good governance are much less developed as governance standards. The least developed are standards relating to democracy. For all concepts it is relevant that ASEAN’s role is limited to the promotion of these standards, primarily through the holding of workshops and seminars. It acts as a forum

for the exchange of information, but not as a monitoring agency with sanctioning capabilities toward ASEAN member states.

The following sections provide an overview of ASEAN's provisions for governance transfer in the fields of human rights, democracy, the rule of law and good governance over time.

Human Rights

ASEAN experienced a revolutionary development of human rights standards after 2003. Before 2003, no document (except for the statement of ASEAN Foreign Ministers of 1993) mentioned human rights standards, although there was an implicit commitment to second and third generation human rights, such as, most importantly, the right to development. Some references to the rights of women existed. The Vientiane Action Programme of 2004, for the first time, sets standards for human rights and establishes promotional instruments on a regional level to further human rights. Over the course of 2003-2007 ASEAN member states committed themselves to the elimination of discrimination against women and migrant workers. The Declaration on the Elimination of Violence Against Women in the ASEAN Region (2003), the ASEAN Declaration Against Trafficking in Persons Particularly Women and Children (2003) and the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007) all seek to promote the protection of vulnerable groups. Significantly, the declarations accord member states primary responsibility to promote these norms.

The ASEAN Charter (2007) explicitly foresees the promotion and protection of human rights and a regional human rights mechanism, but it does not yet define the content of human rights. The ASEAN Inter-Governmental Commission on Human Rights (AICHR) was indeed established in 2009 through the adoption of the Cha-Am Hua Hin Declaration (2009). The Roadmap for an ASEAN Community (2009) and the Terms of Reference for the ASEAN Intergovernmental Commission on Human Rights (2009) establish comprehensive instruments for information dissemination and the development of shared standards among ASEAN member states. With the ASEAN Human Rights Declaration (2012), the content of human rights is defined for the first time with greater precision. However, the primary responsibility for the promotion of human rights rests with member states, and AICHR is not mandated to monitor the human rights situations of member states. It is envisaged that the AICHR will be the overarching institution responsible for the promotion and protection of human rights in ASEAN (Cha-Am Hua Hin Declaration, article 8), and it is an institution within the ASEAN structure, not a region-wide mechanism (Chalermphanupap 2011).

Democracy

The smallest numbers of references over time are to the concept of democracy. While ASEAN documents mention democratic principles from 2003 onwards, as in the Declaration of ASEAN Concord of 2003, they primarily refer to a principle of conduct for international affairs and otherwise leave the scope of application deliberately vague. The ASEAN Political and Security

Community vaguely envisions an ASEAN in which countries in the region “live at peace with one another and with the world at large in a just, democratic and harmonious environment” (article A.1). Similarly, the ASEAN Charter of 2007 mentions the promotion of democracy, but leaves the content of democracy undefined. The Charter refers to “constitutional government” as a legitimate governance institution, without further specification.

Regarding participation as a constitutive part of democracy participation initially refers to the need to make ASEAN, as a regional organization, more effective by increasing societal attitudes toward ASEAN. In the Manila Declaration (1987) members commit themselves to ensure greater inclusion of the “ASEAN people”. Paragraph 8 of the legally non-binding declaration mentions the promotion of “increased awareness of ASEAN, wider involvement and increased participation and cooperation by the peoples of ASEAN, and development of human resources” (Manila Declaration 1987). The ASEAN Vision 2020 again foresees “a socially cohesive and caring ASEAN ... where civil society is empowered” (ASEAN Vision 2020, paragraph 4). The ASEAN Charter of 2008 again mentions the need to ensure the participation of civil society in the decision-making process of ASEAN, but there no right to a democratic government is established, and there are also no provisions concerning representation or elections in ASEAN documents.

Rule of Law

Regarding the concept of “rule of law”, the founding document of ASEAN, the Bangkok Declaration (1967), refers to the promotion of regional peace and stability “through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter” (paragraph 2), and the Declaration of ASEAN Concord (1976) mentions judicial cooperation among members, but only on an ASEAN Extradition Treaty (article A.6). Hence, where members talk about rule-of-law, they initially refer to the rule of international law among states. In the ASEAN Vision 2020, adopted in 1997, members explicitly envision for themselves a “a peaceful and stable Southeast Asia ... where the causes for conflict have been eliminated through abiding respect for justice and the rule of law” (ASEAN Vision 2020, paragraph 1) and where “social justice and the rule of law reign” (ASEAN Vision 2020, paragraph 4). Here, ASEAN members for the first time appear to refer to the domestic conditions of member states. The ASEAN Charter, entered in force since 2008, finally elevates the “rule of law” to a legally binding commitment. The preamble, as well as articles 1.7 and 2.h, refer to the desire to “enhance” the “rule of law”. The commitment is conditional on “the rights and responsibilities of the Member States of ASEAN” (ASEAN Charter 2008). Again, ASEAN assumes only a very limited role in the active promotion of the rule of law. As outlined in the Vientiane Action Programme (2004), and more specifically in the Roadmap for an ASEAN Community (2009), ASEAN acts as a forum facilitating the exchange of information, and an ASEAN Commission is tasked with furthering cooperation among legal agencies in member states. No specific standards defining “rule of law” (such as independence of judiciary) are developed.

Good Governance

ASEAN as a regional organization does not set a binding standard for good governance, but it does mention concepts that can be associated with good governance. Starting in 2003, there are regular and explicit references to the need to promote good governance, but the content is not defined. The roadmap for an ASEAN Community (2009) establishes instruments for capacity building of civil services, in particular in the new ASEAN member states (Cambodia, Myanmar, Laos and Vietnam). Again, ASEAN's role in the promotion of good governance is restricted to the dissemination and sharing of information and to developing benchmarks, as described in greater detail by the Roadmap (2009).

3.2 Measures of Governance Transfer: Adoption and Application

ASEAN as an organization has not developed formalized procedures to monitor and enforce its proclaimed aims for governance transfer. While there are a number of "actions" planned whose implementation is being monitored by ASEAN ministerial bodies and commissions, these do not assume the status of standards against which government's behavior is being judged or on the basis of which governments can be criticized for non-compliance. ASEAN only started to develop specific actions and measures in 2004, with the Vientiane Action Programme accompanying the Bali Concord II (2003). The Roadmap (2009) provides specific strategies and actions in greater detail, but these are actions on the level of specific projects, not institutionalized mechanisms ensuring the implementation of standards. Not only do strong norms of non-interference and sovereignty (ASEAN Way) stand in the way of ASEAN assuming a greater role in this regard; the spirit of ASEAN as a regional organization is that of a network organization in which the organization has little autonomy from member states. Measures for the promotion of governance standards are consequently designed to increase member states' voluntary commitment. With regard to the concepts of human rights, democracy, the rule of law and good governance, ASEAN's role is restricted to that of a forum facilitating the exchange of information, providing information and setting benchmarks and capacity building. Thus,

Given the commitment to consensus, unanimity and the enduring interest in protecting sovereign equality within ASEAN there is very little room for central institutions of ASEAN to express anything other than that which has been approved by member states (Davies 2012: 6).

Despite these limitations, member states have been collectively acting to sanction some instances of violations of human rights and democracy standards.

Protection: diplomatic 'interventions' in the case of HR violations

Member states have in some cases intervened to protect and promote domestic governance standards in a diplomatic fashion, in particular concerning Myanmar. The adoption and appli-

cation of measures here remains a political process, subject to political pressures and opportunities, or what is called “de-centralized enforcement” (Davies 2011; Gehring 1995).

Intervention in the case of Myanmar contrasts with diplomatic non-interventions in cases that constitute human rights violations, but are not on the agenda of ASEAN, such as in the Philippines, Thailand and Indonesia.

Myanmar joined the organization in 1997, an accession that was controversial among ASEAN members, although only the Philippines was democratic at that point in time. The military junta did not acknowledge the results of national elections in 1990, when opposition figure Aung San Suu Kyi and her National Democratic League (NDL) won the elections. They put her under house arrest and installed a military government with strong restrictions on human rights and democratic freedoms. Nevertheless, ASEAN admitted Myanmar to the organization because members believed that they could handle the human rights situation and otherwise profit from an enlarged ASEAN market and the strategic position of Myanmar. Apparently, Malaysia was particularly in favor of admitting the country to the organization, as Malaysia’s then Prime Minister Mohamed Mahatir saw the chance to create a larger market that would make ASEAN more competitive (Katanyuu 2006: 835).

The military junta in Myanmar has been accused of severe repression, through rape, torture, arbitrary arrests, forced labor and the exploitation of natural resources (Hlaing 2009: 152). Up until the introduction of cautious political reforms in March 2011, the military regime had been called one of the most enduring authoritarian regimes in the world (Bunte and Portela 2012: 2). Ever since the stolen elections of 1990, Western countries had condemned the human rights situation in Myanmar. As a result, Myanmar was subjected to comprehensive sanctions by the West. The US and the EU both instituted an arms embargo for Myanmar, and they withdrew trade preferences. The UN appointed a special envoy to Myanmar, a Malaysian national.

By contrast, ASEAN member states did not criticize the regime openly. While external governments demanded the introduction of democratic reforms, the release of opposition leader Aung San Suu Kyi and the holding of free and fair elections, ASEAN member states initially strictly refrained from criticism of Myanmar’s human rights abuses (Katanyuu 2006: 838) and emphasized the need for “national reconciliation” (Hlaing 2009: 153), thereby expressing a preference for making the government “seem the moral equivalent to the opposition and suggesting a compromise solution halfway between their two positions” (Hlaing 2009: 177).

The reactions by ASEAN member states have been informal. There still is no enforcement of international human rights standards, as is often displayed by other regional organizations, notably the EU. As Mathew Davies puts it:

Instead of courts and commissions sitting in judgment over members, for the past decade ASEAN’s efforts have rested on the use of language and public pronouncements aimed at making Myanmar modify its behaviour (Davies 2012: 2).

Thus, there have been discussion forums and diplomatic interventions, but no sanctions on Myanmar by ASEAN members. The most important change of ASEAN's official position was that it has come from "strictly refraining from criticism of Burma's human rights abuses" to denouncing "the deteriorating situation in Burma" and calling on the military junta to release its most prominent political prisoner, Aung San Suu Kyi (Katanyuu 2006: 838).

Most importantly, the ASEAN Ministerial Meeting demanded, from 2001 onwards, that the military junta take specific steps to seek national reconciliation. As Davies notes, over time the official Communiqués have become more detailed and the tone has hardened. For example, the Communiqué of the 36th ASEAN Ministerial Meeting in Phnom Penh of 17 June 2003 urged the government to "resume its efforts of national reconciliation and dialogue" (as quoted in Davies 2012: 8). The Communiqué also explicitly noted the role of the National League for Democracy, which can be interpreted as official acknowledgement by ASEAN members of the domestic opposition. In 2003, ASEAN held an international forum on Myanmar in Thailand and collectively discussed political developments. The forum was specifically sponsored by Malaysia and Thailand. In 2004, ASEAN endorsed the process of National Convention initiated by the military junta, thereby explicitly commenting on the domestic political situation. Davies calls these measures "very strong for a regional organization wedded to non-interference" (Davies 2012: 8). The 2005 Communiqué called for a release of political prisoners and expressed interest in the military junta pursuing the implementation of the "National Roadmap to Democracy". The reference to the release of political prisoners was actually the first time that members referred to a human rights issue (Davies 2012: 8). During their eleventh Summit ASEAN leaders departed from the traditional taboo on commenting on a domestic situation, urged the leadership in Myanmar to release Suu Kyi (as had the ASEAN Ministerial Meeting earlier that year), and ultimately decided to send a delegation to investigate the situation in Myanmar (Emmerson 2008; Katanyuu 2006: 839). More significantly, members collectively called on the government to forego its chairmanship of the organization in 2006. Under normal circumstances, Myanmar would have routinely assumed the chairman's role under the rotation principle. The UN Special Rapporteur on Human Rights in Myanmar, Sergio Pinero, attributed this decision to pressure from ASEAN (Davies 2012: 9).

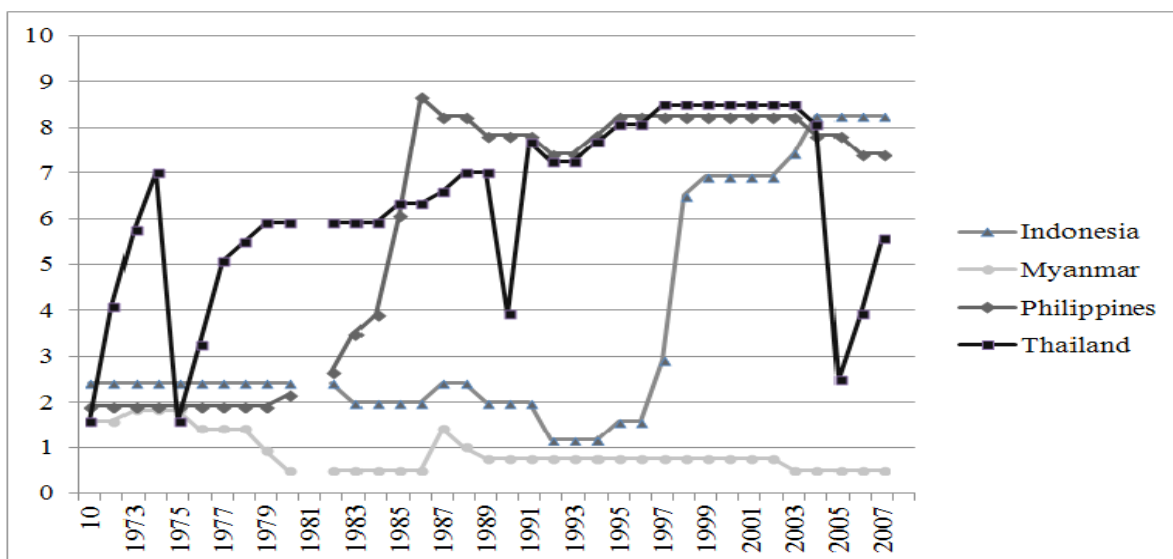
The ASEAN Ministerial Meeting of 2006 went as far as demanding "tangible progress that would lead to peaceful transition to democracy in the near future" (as quoted in: Davies 2012: 9), a position that was reiterated in 2007. Here, it is notable that ASEAN perceptively shifted away from its earlier preference of a negotiated solution and openly expressed the desire for a transition to democracy in Myanmar.

Despite these unprecedented steps, the Association remained initially silent when the military in Myanmar cracked down on the opposition in August 2007 and shot into a crowd of demonstrating Buddhist monks (Hlaing 2009). It again surprised observers, however, when the ASEAN Chair officially condemned Myanmar in a September 27 statement. The statement expressed "appall" over reports "of automatic weapons being used" and demanded that the Myanmar government "immediately desist from the use of violence against demonstrators." ASEAN foreign ministers expressed their "revulsion" to Myanmar Foreign Minister Nyan Win over reports that

the demonstrations in Myanmar were being suppressed by violent force (ASEAN 2007c). The two AMMs of 2009 and 2010 again encouraged the government of Myanmar to “hold free, fair and inclusive elections”.

A systematic policy of applying instruments for governance transfer cannot be observed, however, and ASEAN was for a long time widely criticized for not condemning some of the most egregious human rights violations of its member states. For example, the deteriorating human rights situation in Indonesia in the course of the fall of Suharto (1997-98) and human rights violations in the context of East Timor’s referendum for independence (August 1999) did not provoke a collective ASEAN response. Observers lament that “neither ASEAN nor the ASEAN Regional Forum (ARF) did much to prevent or end this crisis”, and regional states did not support conferences and NGO-organized events in the years preceding the crisis. “The ASEAN states felt compelled to remain quiet because they did not dare to interfere with Indonesia’s internal affairs” (Freistein 2005: 183f.).

Figure 3: Development of Civil and Political Freedoms in Four Asian Countries, Combined Scores¹¹



ASEAN has also not commented on the deteriorating human rights situations in the Philippines and Thailand after 2005. In the Philippines, human rights monitors have identified a pattern of extrajudicial killings and disappearances for which the military is clearly responsible. The United Nations special rapporteur on extrajudicial, summary or arbitrary executions condemned the human rights situations and impunity after a personal visit to the country in February 2007 (Jetschke 2010b). Likewise, the human rights situation in Thailand has not been on ASEAN’s agenda, despite a state of emergency in Thailand’s South since 2005 and violations of human rights in the Thai South. Amnesty International claims that more than 2700

¹¹ Source: Teorell, Jan u.a. (2013): The Quality of Government Basic Dataset made from The Quality of Government Dataset. In, ed. The Quality of Government Institute. Gothenburg.

individuals suspected of trading in drugs have been illegally executed, and 18 human rights monitors have been murdered (Amnesty International n.d.). Here, the variance of issues that are being addressed by ASEAN members in other member states suggest that the level of human rights violations, their persistence and international attention drive ASEAN reactions to non-compliance. Human rights in Myanmar have been high on the agenda of ASEAN, as there is a high level of violations and international attention exists. This is not the case for human rights violations in the Philippines, Thailand and Indonesia, where systematic (but locally confined) human rights violations have occurred but only little international attention exists.

3.3 Summary

As becomes clear from the documentary analysis, ASEAN has prescribed regional standards regarding human rights, democracy, the rule of law and good governance. It has done so with varying precision: relatively detailed in the case of human rights, most importantly in the ASEAN Declaration on Human Rights (2012), but vaguely in the case of all other concepts. In the case of human rights, member states moved from a relativist position in the early 1990s to a position where they commit themselves to the promotion of fundamental human rights on a regional level. In terms of policy, it has also become clear that ASEAN as a regional organization does not explicitly demand the modification of governance institutions in member states or third countries. The implementation of these standards is a voluntary process, spurred by consciousness-raising efforts, information sharing and the setting of benchmarks. Member states commit themselves and delegate to ASEAN as a regional body only very limited competences to monitor progress. In fact, institutionalized mechanisms for the continual monitoring of progress are absent. Nevertheless, among the different concepts notable differences emerge. There is more institutionalization in the area of human rights, where the ASEAN Charter and the various human rights declarations provide for an ASEAN Inter-Governmental Commission on Human Rights (AICHR) and other commissions. The measures that ASEAN takes are characterized by concrete projects and actions whose implementation is monitored by the ASEAN Secretariat. These include workshops, conferences, and the building of networks among ASEAN sectoral organizations.

4. Explaining Governance Transfer by ASEAN

The evidence provided so far indicates an increase in the declaratory commitment by ASEAN members to good governance, democracy, the rule of law and human rights. The puzzle deserving explanation here is why ASEAN members have taken the unusual step of issuing the ASEAN Charter, the Association's first legally binding document after the Treaty of Amity and Cooperation of 1976. More specifically, it should be explained 1) why members – in comparison to other regional organizations – committed themselves relatively late in ASEAN's life-time to promote legitimate governance institutions, 2) why they adopted the Charter at this particular point of time and 3) why they made a great leap with a legally binding document instead of a soft law declaration. At the same time, this question can also be asked more generally: under what conditions do ASEAN states – against the backdrop of their own collective understanding of

the principles of the organization – opt for committing themselves to higher governance standards? In other words, the question here is what the drivers and mechanisms of these changes are.

Some authors claim that ASEAN's commitment to human rights has been continually evolving since 1993, when the ASEAN Ministerial Meeting first discussed the organization's position on human rights (Thio 1999). However, such a position neglects political context: ASEAN's initial position on human rights was influenced by the Asian values debate of the early 1990s, and it was an attempt to castigate Western interference in the domestic affairs of member states and human rights conditionality (Ciorcari 2012: 700-01). Hence, it had a different aim than later statements on human rights. Rather, there have been decisive moments (or critical junctures) at which member states have decided to include these principles. As Munro notes, "although the idea of an AHRB (ASEAN Human Rights Body) had been on the outer-periphery of the ASEAN agenda since 1993, it only became a serious possibility in October 2003" (Munro 2009: 4). It needs to be emphasized, however, that for the reasons mentioned already – lack of member state obligations spelled out in the Charter, lack of precision, lack of delegation to ASEAN – it is highly disputed whether or not the ASEAN Charter constitutes a decisive break with *de facto* ASEAN practices (Krome 2011). The following analysis proceeds from the assumption that even the rhetorical change of ASEAN is unprecedented and should therefore be explained.

4.1 Hegemonic Coercion

Several external actors need to be considered. Perhaps the most important one is the US, which has traditionally promoted its strategic interests in Southeast Asia. Although ASEAN has strong proponents of a non-aligned policy (Indonesia), member states have always regarded the US as the security guarantor in the region. While the US has traditionally understood itself as a defender of democracy, its policy toward Southeast Asia has not been characterized by the establishment of human rights institutions in the ASEAN region (Barnds 1995). It regularly supports democratization movements in member states if they emerge and promise to be viable and sanctions human rights violations, but it does not extend this policy to ASEAN as a regional organization. Consistent with the modernization paradigm of the 1950s, the US supported military-led modernization (Simpson 2008) and implicated itself in the rise of the military as the institution best capable of contributing to the growth of a rational-legal state in countries such as Indonesia and the Philippines. However, in the 1990s, the US became a crucial supporter of the democracy movement in Indonesia. The US was the trendsetter in putting pressure on ASEAN to change its policy toward Myanmar. The US adopted its first sanctions against Myanmar in 1990 and has continuously expanded the sanctions regime since then.

The EU has historically been the most important trade partner for almost all ASEAN members, except the former socialist members, and next to the US it is the largest source of Foreign Direct Investment (FDI). The EU silently serves as an example of regional integration and has had an ideational influence on ASEAN, although one that they would never openly admit (Jetschke 2010a). It is likely that the initial idea to draft the ASEAN Charter was inspired by the EU's draft-

ing of its own Constitutional Charter around the same time. Yet it is important to emphasize that the EU has not consistently pursued conditionality in its interaction with ASEAN or individual members. Individual EU members sanctioned the shooting of demonstrators in East Timor in 1991 by dispensing development aid (Schulte-Nordholt 1995), and the EU Parliament issued a resolution condemning the massacre, but these measures apply to individual countries, not to ASEAN. Similar to the US, the EU promotes democracy in individual ASEAN states and has been a crucial supporter of the Indonesian democratization movement. This approach is not adopted toward ASEAN as a regional grouping, however.

Formalized relations between ASEAN and the EU have existed since 1977 and were institutionalized in 1980 (EC-ASEAN Co-operation Agreement), but they did not include a human rights component. In 1994, the EU for the first time formulated an Asia strategy, outlining its policy objectives in Asia. Yet expectations that the EU would promote human rights in Asia were disappointed. Observers noted that during the first ASEAN–EU Ministerial Meeting in Karlsruhe in 1994, the EU decided to focus only on economic and trade relations with ASEAN. ASEAN was able to soften criticism by EU members on the human rights situation in East Timor and Myanmar, whose membership application had been positively evaluated by ASEAN members. This decision was highly controversial within the EU (Manea 2009; Rüländ 2000). The economically dominated dialogues were expanded to include political and security issues in the 1990s, when the Asia-Europe Meeting (ASEM, 1996) was established. The Asia-Europe Meeting (ASEM) is an informal process of dialogue and co-operation, and brings the 28 European Union Member States and the European Commission together with 16 Asian countries and the ASEAN Secretariat and meets every two years. According to the EU’s webpage, “subjects covered have extended from the initial emphasis on economic cooperation to include human rights, rule of law, global health threats, sustainable development, and intercultural and interfaith dialogues.”¹² According to observers, ASEM initially also focused on the promotion of human rights and democracy, and were – particularly during earlier years – used by the EU as a platform to discuss Myanmar’s human rights performance. ASEAN members were able to convince the EU to erase the issue of human rights from the official track of the interregional dialogue.

Given ASEAN’s principled stance in the Asian values debate of the early 1990s, it was hard for the EU to claim moral high ground. The ASEAN Communiqué of the 26th Ministerial Meeting in 1993 did not reject a Western definition of human rights, but it did constitute a criticism of Western states’ conditionality clauses, their emphasis on civil and political human rights and their policy of taking the stability of post-colonial states for granted. At the beginning of the 1990s, ASEAN firmly defended its principles and was able to shape interactions with more powerful external partners like the EU (Rüländ 2000). Consequently, human rights were eliminated from the joint agenda. The EU, like the US, did apply pressure on the organization, however, to promote democratization in Myanmar.

¹² EuropeAid: “Building strong and lasting links with Asia,” in: http://ec.europa.eu/europeaid/where/asia/regional-cooperation/support-regional-integration/asem_en.htm; 04.02.2013.

The EU and ASEAN perceive themselves as sharing a commitment to regional integration as a means of “fostering regional stability, building prosperity, and addressing global challenges”.¹³ Given the economic importance of Asia to the EU and its strategic importance vis-à-vis China, the EU has started to increase dialogue and cooperation with ASEAN, as well as to pursue closer coordination on regional and international issues. The Nuremberg Declaration and the joint EU-ASEAN Plan of Action (March 2007) formulate the goals of the ASEAN-EU relationship. The aim is to enhance the longstanding EU-ASEAN partnership by pursuing closer cooperation on political, security, economic, socio-cultural and development issues, as well as in the fields of energy security and climate. On 22 November 2007 a Plan of Action was issued by the first-ever EU-ASEAN Summit (Joint Declaration). The EU is also actively supporting ASEAN’s integration efforts. Within the framework of the ASEAN-EU Program of Regional Integration Support (APRIS) and a Plan of Action signed in November 2007, the EU has offered financial support to ASEAN, aiming particularly at strengthening the institutional capacity of the ASEAN Secretariat and generally fostering regional cooperation.¹⁴ During the two project phases of APRIS (2003-2006; 2006-November 2009), the EU supported ASEAN in its development of program cooperation and provided technical assistance concerning standard setting and procedures. Much of the input into ASEAN’s Vientiane Program of Action of 2004, which seeks to achieve an ASEAN Economic Community, appears to have come through APRIS. This support is not linked to specific demands for governance transfer by ASEAN.

In the absence of information about the universe of cases of regional organizations engaging in governance transfer, it is unclear how much of ASEAN’s prescription and promotion of standards for domestic governance institutions is due to its interaction with the EU or the US, or to what extent it is the product of concern at “being left behind” regarding an important trend (Johnston 2008). ASEAN members have been vehemently criticized for shielding authoritarian regimes such as Myanmar (Kuhonta 2006). However, it is unlikely that these pressures had a direct impact on ASEAN members’ decision to engage in governance transfer. Had the Asian financial crisis of 1997-98 and the subsequent downturn of urgently needed FDI to Southeast Asia not brought into question ASEAN’s own *raison d’être* at the beginning of the new millennium, it is unlikely that ASEAN would have adopted the ASEAN Charter.

4.2 Liberal Intergovernmentalism (Rationalism)

Liberal intergovernmentalism provides a different approach to normative change in ASEAN. According to this approach, state preferences are the appropriate source of change on a regional level, but state preferences are themselves merely a reflection of the distribution of power among domestic groups (Moravcsik 1995; Solingen 1998). According to this literature, the ASEAN Charter could be an ideal instance of lock-in effects on a regional level. As Moravcsik suggests, it is neither autocratic nor democratic governments that have the greatest incentive

¹³ See the information provided by the EU on its homepage, cf. EU External Action Service: “Association of Southeast Asian Nations”, in: http://eeas.europa.eu/asean/index_en.htm; 04.02.2013.

¹⁴ See the description of the European Commission on ASEAN, in: http://eeas.europa.eu/asean/index_en.htm; 30.04.2013.

to create regional human rights regimes. Rather, it is newly democratizing states that are the strongest promoters – and beneficiaries (Simmons 2009) – of regional human rights norms. Governments of states that have made a transition from authoritarian regimes to democratic ones want to embed or lock-in their state in a regional regime with the power to monitor the country's human rights practice. They are concerned about the sustainability of democracy in their country. Consequently, they are the most likely to promote human rights.

This implies that the distribution of democratizing and democratic states among member states ultimately determines whether or not ASEAN as a regional organization will increase its democratic governance. The more members have recently undergone democratization, the more likely it is that initiatives to promote democratic governance on a regional level will emerge and be implemented. However, given the consensus principle within ASEAN, each ASEAN member, especially the non-democratic ones, have veto power over any changes of the ASEAN Way of non-interference.

There have been demands, especially by democratizing states, to establish governance standards on a regional level. Indonesia underwent a democratization process in 1998 and is today the most democratic member state of the regional organization. In 1997, Thailand and the Philippines were the strongest promoters of the departure from the non-interference principle. Surin Pitsuwan, democratic Thailand's foreign minister, first advanced the concept of "flexible engagement" as an alternative to ASEAN's policy of non-intervention ahead of the 1998 ASEAN Ministerial Meeting (AAM). Thailand offered three official reasons for this promotion of flexible engagement:

„First, flexible engagement was to allow ASEAN to respond to the increasing interdependence faced by the region, as events in one country increasingly affected other countries. Second, flexible engagement was designed to confront new security threats, such as economic disruption and various cross-border security problems. Third, flexible engagement was to enhance the democratization and human rights in ASEAN countries“ (as quoted in Narine 2002:168).

As one observer put it, the Thai front state under Chuan Leekpai became, at least rhetorically, the first ASEAN administration to "embrace the democratic peace proposition" (Möller 1998: 1103). It was Thailand and the Philippines that called for more openness in addressing intra-ASEAN differences during the Manila meeting of foreign ministers in July 1998 (Möller 1998).

It took the democratization of Indonesia to give these preferences more leverage within ASEAN, a development that is described in greater detail by James Munro (Munro 2009). Munro holds that a democratic lock-in has indeed occurred in the case of the ASEAN Charter. He has reconstructed the negotiation process for the ASEAN Charter.

In October 2003, ASEAN's Senior Officials Meeting (SOM) announced that ASEAN would develop a Charter. In early 2004, Indonesia, the chair of ASEAN at the time, suggested the forma-

tion of an ASEAN Charter of Rights and Obligations and an ASEAN Regional Commission on Human Rights “to create a solid community” and “prevent possible intervention by countries outside the organization” (N.N. 2004). The principal process of drafting the ASEAN Charter was taken in two steps: at the ASEAN summit of 2005, members established an Eminent Persons Group (EPG) to consult widely and to eventually recommend “bold and visionary” ideas for the Charter. The EPG consulted with former ASEAN Secretary-Generals, business leaders, scholars and researchers, as well as representatives of civil society. It submitted its report in 2006. Based on that report, a High Level Task Force (HLTF) of ASEAN leaders and diplomats developed the text of the ASEAN Charter. Among others, it received input from the national human rights commissions of Indonesia, Malaysia, the Philippines and Thailand, who urged the HLTF to include human rights and fundamental freedoms in the Charter and to commit ASEAN member states to the establishment of national human rights institutions (National Human Rights Commissions of Indonesia 2007). The Charter was eventually signed in November 2007. Throughout the year 2008, the Indonesian government, supported by the parliament, became the strongest advocate of an effective human rights mechanism. The parliament delayed the ratification of the Charter, making it the last to ratify among ASEAN’s members. It linked its ratification to demands that the human rights commission be independent and vested with the right to monitor human rights violations and to carry out investigations (Lohman 2008).

However, the negotiations on the human rights mechanism over the course of 2006 became the

„most contentious issue in the entire Charter. Singapore’s Ambassador Tommy Koh stated that there was no issue that took up more of the delegates’ time and which divided the ASEAN family so deeply as human rights“ (as quoted in: Munro 2009: 5).

Apparently, Indonesia, the Philippines and Thailand were the strongest supporters of a human rights mechanism – evidence that clearly supports the democratic lock-in hypothesis. Indonesia underwent democratization in 1998, and the Philippines was ranked as “partly free” during this period. During the time of negotiations for the ASEAN Charter, Thailand had three consecutive governments: a military-appointed government (2006-2007), a democratically elected government (2007-December 2008) and a parliamentary-appointed government (December 2008-2011). According to Munro, it is plausible to assume that the Thai government would support the creation of a human rights mechanisms “to signal a commitment to human rights”, albeit in a rhetorical way (Munro 2009: 11). While Indonesia, the Philippines, Malaysia, Thailand and Singapore all supported the idea of a human rights mechanism, Myanmar, Cambodia, Lao and Vietnam were firmly against it. Myanmar reportedly opposed “any inclusion of references to human rights and democracy” (Munro 2009: 14). However, when it comes to the form and function of the mechanism, and the question of monitoring and enforcement mechanisms, some of the governments that supported the mechanism in principle moved to the camp of countries that were against the human rights body. Singapore and Malaysia apparently shifted their position, with Singapore declaring that the government did not envisage the mechanism to affect “Singapore’s domestic laws or foreign policy” (as quoted in Munro 2009: 16).

On closer inspection, however, the liberal explanation falls short of explaining both the timing of the ASEAN Charter in 2007 and its legally binding character. Given the consensus principle, it is surprising that ASEAN, for the first time in its lifetime, became an advocate of human rights norms, however small the chance of enforcement (Munro 2009: 5), and it is surprising that ASEAN's autocratic members supported this move, despite its potentially negative repercussions in these countries. More importantly, by the time of the adoption of the Charter in 2007, Thailand and the Philippines had adopted restrictions on civil rights and political liberties and were rated as "not free" (Thailand) and "partially free" (Philippines) by Freedom House. One could perhaps argue that the ASEAN Charter simply comprises "cheap talk" designed both for an international audience and to silence domestic opposition (Hafner-Burton et al. 2008). While this rationale for autocratic member states cannot be completely denied, it does not explain the timing. If the ASEAN Charter is cheap talk, then one would expect that members would have resorted to that strategy earlier, when the organization was under fire from its Western partners, primarily the US and the EU, in the 1990s.

4.3 Constructivism

Constructivist scholarship on normative change identifies two key sources of the change of the rules and norms embedded in ASEAN: normative change can either come from within the region, as demand from civil society organizations, or it can come from outside the region, in the form of a supply of good governance scripts about legitimate state behavior. It can also come from the regional organization itself, if it has the competence and appropriate enforcement mechanisms. ASEAN as a regional organization has not had an effect on the democratization processes of Southeast Asian states like the Philippines in the 1980s, Indonesia in the 1990s and Thailand. The democratization of these three countries was influenced by the mobilization of external actors like the US and the European Union in combination with transnational networks of civil society organizations (for Indonesia and the Philippines, see Jetschke 1999; Jetschke 2010b). In turn, the democratization of these states influenced the formulation of the norms of democratic governance of ASEAN, even if this does not fully explain the adoption of the Charter.

In the first instance, norm entrepreneurs challenge the norms and values embedded in ASEAN as a regional organization. These norm entrepreneurs are most likely to be civil society organizations in individual ASEAN states that transnationalize their issues. Keck and Sikkink (1998) and Risse et al. (1999, 2002) have argued that transnational advocacy networks can be successful in changing collective understandings about what is good and appropriate. Through international campaigns they engage in public persuasion efforts seeking to convince other actors that a given practice constitutes a morally objectionable practice. They do so by exposing seemingly "natural" or "traditional" practices as socially constructed practices that benefit the power interests of particular groups. They thereby open the way to social reconstruction and the public shaming of the group whose interests are served. Through the joint mechanisms of persuasion and mobilization they thereby manage to induce changes among the political power of

contending groups and to create new norms (Carpenter 2007; Keck and Sikkink 1998; Risse et al. 2002; Risse et al. 1999). From this perspective, the normative change indicated by the ASEAN Charter is an outcome of public campaigns on ASEAN.

Little empirical evidence supports a constructivist explanation for the adoption of the ASEAN Charter, which is owed more to the lack of scholarly attention to this subject than to the lack of explanatory power of the theory (for exceptions, see: Katsumata 2009; Katsumata 2010; Manea 2009; Wiessala 2006). There is abundant evidence that campaigns within individual ASEAN states have led to the domestic adoption of legally binding human rights norms (Jetschke 2010b). Transnational advocacy networks have focused on ASEAN for some time. Manea (Manea 2009) traces several transnational networks, consisting of inter-governmental networks (track I), think thank networks (track II) and civil society networks (track III). Since 1994, an informal ASEAN–ISIS Colloquium on Human Rights (AICOHR), a biannual Asia–Europe People’s Forum (February 1996) and a yearly ASEM Informal Seminar on Human Rights (first organized in December 1997) have existed. In 1996, the informal Working Group for Regional Human Rights Mechanisms was founded under the umbrella of the Philippine Ateneo University’s Human Rights Center. The Working Group claims an impact on the ASEAN Charter given its proposal to ASEAN in 2000 of a working document entitled Draft Agreement for the Establishment of the ASEAN Human Rights Commission for its consideration.¹⁵

The civil society network that arguably provided the greatest input to the draft of the ASEAN Charter, the report by the Eminent Persons Group of 2006, was the ASEAN People’s Assembly (APA), an initiative by the ASEAN Institutes of Strategic and International Studies (ASEAN-ISIS). ISIS is the most important ASEAN think tank network. APA brings together academe from ASEAN member states and civil society organizations to promote people-centered development in the process of ASEAN community building. APA was founded in 2000. APA is headed by two Philippine representatives: Secretary-General Carlos Medina, a long-time human rights lawyer involved in election monitoring and founder of the Working Group for Regional Human Rights Mechanisms, and co-chair Carolina Hernandez, the Director of the Institute for Strategic and International Studies of the Philippines.

A second group is SAPA, the “Solidarity for Asian People’s Advocacy”. SAPA was established in February 2006. In 2006, this group consisted of more than 80 (July 2014) civil society organizations from the “Asian region”. According to SAPA’s web page, the network was born out of common concerns about how to enhance the effectiveness and impact of civil society advocacy by improving communication, cooperation and coordination among non-governmental organizations (NGOs) operating regionally, in the face of rapidly increasing and multiplying inter-governmental processes and meetings in Asia.

¹⁵ Ateneo Human Rights Center: “Working Group”, URL: <http://ahrc.org.ph/desks/working-group/>; 30.04.2013.

It includes people's organizations and trade unions engaged in action, advocacy and lobbying at the level of inter-governmental processes and organizations.¹⁶ The concrete influence of these networks on ASEAN as a regional organization is notoriously difficult to trace, however. The establishment of SAPA is definitely too late to have influenced decision-making. Process tracing narratives detailing the influence of each of these organizations on the drafting of the ASEAN Charter are extremely rare, and systematic analyses surveying human rights activities in the region are non-existent.

However, Corinna Krome has developed a qualitative measure for the potential impact of civil society organizations on the formulation of the ASEAN Charter. She surveyed the accreditation of CSOs, the ASEAN-CSO dialogue and the civil societies' influence on ASEAN's codification as an approximate value for overall influence and traced the influence through newspaper articles, minutes of CSO-ASEAN meetings and press releases (Krome 2011). Her analysis shows that, in general, CSO activities in ASEAN countries correlate with the respective state of democracy. Those countries that have higher degrees of democracy also reveal a greater degree of CSO participation (Krome 2011). Although ASEAN allows the accreditation of CSOs, the process of accreditation is such that it clearly de-limits the activities of CSOs so that they do not harm member states (Krome 2011). When it comes to the influence of CSOs on the drafting of the ASEAN Charter, she shows that the CSO recommendations concerning human rights and democracy were rejected by the High Level Task Force drafting the Charter.

A second source of normative change, according to constructivist theories and diffusion approaches, lies outside the region, in the form of global scripts on good governance mandating the establishment and institutional design of legitimate states (Finnemore 1996; McNeely 1995; Meyer et al. 1997). According to this literature, the very concept of nation-state does not exist outside a constructed social reality about what a nation-state is comprised of. This presupposes the existence of collective norms on the level of the international system or world society that define and constitute a state. International norms tell us what kind of institutions a legitimate state should have, such as a science bureaucracy (Finnemore 1993). International institutions tell us what states are: territorially defined governance mechanisms that draw on a legal-rational bureaucracy and a monopoly of force. International institutions tell us what counts as legitimate state behavior, peaceful conflict resolution or humanitarian intervention in states that face a humanitarian crisis or systematically violate human rights.

According to this literature, the world has witnessed a "good governance" revolution. Declarations and conventions prescribing standards of appropriate behavior in the realms of democratic governance and human rights have increased, and their precision has become greater (Simmons 2009). A good example is the concept of "good governance" that has been promoted, most importantly, by the World Bank and other international organizations like the United Nations Development Program (UNDP), the Organization for Economic Cooperation and De-

¹⁶ Alternative Regionalisms: "Networks in Southeast Asia", in: http://www.alternative-regionalisms.org/?page_id=57; 01.08.2011.

velopment (OECD) and the Asian Development Bank. All of these organizations have developed their own indices to measure “good governance” practices among the countries that receive assistance; as such one might speak of a global script of ‘good governance’ (Aguilera/ Cuervo-Cazurra 2004). Good governance refers to effective state institutions guaranteeing the efficient implementation of development programs and structural adjustments prescribed by these organizations, like administrative transparency, efficiency, participation, responsibility, market economies, the rule of law and justice. Where institutions are effective, these organizations speak of good governance institutions (Aguilera/Cuervo-Cazurra 2004; Weiss 2000).

To what extent has the ASEAN Charter been affected by the emergence of these norms? Can the Charter be considered a response to the rise of a global discourse? Concerning ‘good governance’, there is some influence of the concept on ASEAN leaders. For example, in November 2005, ASEAN’s then Secretary-General Ong Keng Yong, in his address to the ASEAN-EC Regional Symposium, devoted his whole speech to the topic of “good governance”. He argued that ASEAN already “intuitively” practiced good governance, even if ASEAN documents did not explicitly refer to the term. ASEAN integrated private organizations, most importantly the business community, but also civil society organizations like APA and the Working Group on Regional Human Rights Mechanisms. Its consensual decision-making promoted peace and security in the region¹⁷. Ong Keng Yong’s speech demonstrates vividly how the concept of “good governance” could be made to fit the ASEAN Way. According to Ong Keng Yong there is no discrepancy between ASEAN’s practice and the norms of good governance. While Ong mentions the limited influence of ASEAN as a weakness potentially affecting compliance, he turns this into an asset when he argues that “ASEAN has a built-in advantage in the sense that it is driven by the collective leadership of our heads of state and government” (ASEAN 2013c, paragraph 26).

Since the concept was promoted at the end of the 1980s, it is unlikely that the ASEAN Charter is an adaption to external normative pressures. In fact, ASEAN’s first reaction to the appearance of what was then only an emerging or developing governance script was offense (see the Joint Communiqué of ASEAN Foreign Ministers in 1993). In fact, there is strong evidence that these key institutions even considered Asian countries, including Southeast Asian ones, as instances of good governance practices. In 1993, the World Bank published an influential study entitled “The East Asian Miracle”, wherein it propounded the development strategy of the Asian Tigers as a successful development model that should be emulated by other states outside of Asia (World Bank 1993). Even when the Asian financial crisis of 1997-98 appeared to shatter the myth of the “miracle” economies and the IMF was criticizing crony capitalism and corruption among Southeast Asian governments, the World Bank did not fully depart from its evaluation. The World Bank’s chief economist, Joseph Stiglitz, published a dissenting view regarding the

¹⁷ ASEAN.Org: “The Role of Good Governance in ASEAN”. Keynote Address by H.E. Ong Keng Yong, Secretary-General of the Association of Southeast Asian Nations at the ASEAN-EC Regional Symposium, Bandar Seri Begawan, 28 November 2005, in: <http://www.asean.org/resources/2012-02-10-08-47-56/speeches-statements-of-the-former-secretaries-general-of-asean/item/the-role-of-good-governance-in-asean-keynote-address-by-he-ong-keng-yong>; 30.04.2013.

causes of the Asian crisis in which he pointed his finger at imprudent speculative investment and capital flight as the factors ultimately responsible for the financial crisis.

In the case of human rights, there is some anecdotal evidence that ASEAN members, individually and collectively, are part of a global movement of human rights institutions. For example, Indonesia (1999), Malaysia (1999), the Philippines (1987) and Thailand (2001) all have national human rights institutions established mostly in the context of the Vienna Declaration of Human Rights and its Programme of Action (1993)¹⁸. Additionally, Southeast Asian governments have become part of a network of domestic human rights institutions. This network is driven by Commonwealth countries, which have held regular meetings from 1996 onwards. This network is comprised of delegations from India, Indonesia and New Zealand: These have established an informal Asia-Pacific Forum of National Human Rights Institutions, funded by the Australian government for three years (Thio 1999: 60-61).

There is also some evidence that at least some ASEAN representatives have feared being left behind in a global human rights movement. Indonesia's foreign minister, Marty Natalegawa, said in 2009 that, "we look around us to other developing regions and see that we cannot be left behind if we want to be at the center of things. Look at Africa – they are being quite strategic and farsighted in developing their human rights mechanism" (Marty Natalegawa, as quoted in: Ciorcari 2012: 710). His predecessor in office, Ali Alatas, asked in 2006, "how can we avoid having a human rights body when all other regional organizations have one already?" (as quoted in: Ciorcari 2012: 710). While concerns with "not being left behind" obviously played into the calculations of some members, this does not appear to be an overall phenomenon.

4.4 "Negative Externalities", ASEAN's Reputation and the ASEAN Charter

A convincing explanation for the ASEAN Charter that is consistent with the presented evidence about key variables on ASEAN members and ASEAN as a regional organization focuses on the perception of negative externalities, in combination with concerns for ASEAN's reputation. In economics, "a negative externality occurs when an individual or firm making a decision does not have to pay the full cost of the decision. If a good has a negative externality, then the cost to society is greater than the cost the consumer is paying for it".¹⁹ Negative externalities are essentially "social costs" that are carried by the society (Coase 1960; Papandreou 1994). They are defined by two conditions: first, they affect the environments that other actors are facing, and second, they are not fully compensated for or penalized (Wong 2000: 1). In regional integration, the concept of negative externalities explains accession decisions by states that were previously not part of a regional organization (Mattli 1999). I use the concept here to show why – regardless of their democratic status – it is rational even for states socialized into norms of non-interference and sovereignty to adopt standards for legitimate governance institutions. I also show, however,

¹⁸ See: UNDP-OHCHR Toolkit for collaboration with National Human Rights Institutions, URL: <http://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf>, 30.04.2013.

¹⁹ Definition according to the entry on "Negative Externality", in: <http://economics.fundamentalfinance.com/negative-externality.php>; 04.02.2013.

that the concept of negative externalities accounts for only half the story of the adoption of the ASEAN Charter. It essentially accounts for the emergence of standards for domestic governance institutions. It does not explain the particular timing and the legally binding character of the Charter. These features are explained by other factors, including the existence of a global governance script and the state of democracy in some member states.

I argue in the following that in the case of ASEAN, the negative externalities produced by the human rights practices of some member states on the domestic conditions of other member states provided an intrinsic motivation for member states as a collective to partially revise ASEAN's policy. While Myanmar has been a focus of attention, Indonesia's democratization has produced negative externalities for certain ASEAN members. But these costs were not carried by member states alone. ASEAN as a regional organization carried these costs in terms of reputation. It was widely criticized for not being able to manage the crisis.

In this context, the viability of the ASEAN Way was always dependent on the condition that what was happening in a member state did not affect other countries. Each member state takes care of itself, and no one member state is obliged to help the other. However, at the end of the 1990s, this condition was absent. The policy of the Myanmar military junta and Indonesia's democratization not only affected Thailand, Malaysia and the Philippines directly – a major factor compelling the Thai government to question the policy of “flexible engagement” at the end of the 1990s – it also negatively impacted the reputation of ASEAN and therefore all member states. The issuing of the ASEAN Charter, against this backdrop, needs to be seen in light of Myanmar's impact on ASEAN as a regional organization, and on member states, during a period when ASEAN's international reputation was at one of its lowest points.

Perhaps the most striking factor to account for ASEAN's adoption of the ASEAN Charter is the drop in ASEAN's perception as a “model” of regional cooperation in its own right at the end of the 1990s. Until 1997, Asia's “factory” model of regional integration with little institutionalization and its emphasis on sovereignty and non-interference thrived through East and Southeast Asian countries' effectiveness in generating sustained economic growth. It was an output oriented legitimation strategy in which the spectacular growth rates of Asia's tiger states allowed many commentators to gloss over the authoritarian political systems of many of these states. As mentioned earlier, by the mid-1990s, the very success of East and Southeast Asian economies had made East Asia itself a model to be promoted by international financial institutions (World Bank 1993; Stieglitz 1996).²⁰

Yet this East Asian growth model was deeply challenged by policy crises at the end of the 1990s. The financial crisis of 1997-1998 illustrated the problems with ASEAN's hitherto successful model of cooperation. The crisis exposed the institutional weakness of Southeast and East Asian regionalization (Martin Jones 2008). The lack of coordinated efforts by governments appeared

²⁰ See, for example, the Asian Development Bank Working Paper Series on Regional Economic Integration.

to deepen the financial crisis (Higgott 1998; Soesatro 1999; Harris 2000; Rüländ 2000)– with serious repercussions for political stability. It was widely feared that the withering of Asian states' main basis of success would “fuel nationalism, undermine regional co-operation, and foster confrontation over long-standing territorial and other disputes” (Hill 1999: 1). ASEAN proved unable to unify members behind a collective approach to the crisis. Leadership was lacking – and so was a coherent institutional response (Dent 2008: 150ff).

However, the financial crisis was only one factor driving the long awaited institutionalization of ASEAN's decision-making process. The Asian financial crisis did not determine the adoption of legitimate governance institutions. More important here was the political crisis in East Timor (1999) and the challenges posed by Myanmar, which had joined the organization in 1997. The military junta's action against Myanmar's most prominent political prisoner, Aung San Suu Kyi, invited constant external criticism by the United Nations, the US and the EU. But as we have seen earlier, this had been a constant feature since Myanmar's application for membership, a feature that ASEAN was able to ignore as long as they were economically successful. What tilted all member states' preferences in the direction of human rights and democracy were the negative externalities that the military junta's decisions were producing for other members and for ASEAN as a regional organization.

The decision of the military junta in Rangoon to suppress the political opposition could not be treated as if it no longer affected other member states. First of all, some members were directly affected: in particular, Thailand increasingly felt the effects of the Burmese military's operations against its ethnic minorities along the Thai border. In May 1999, 300 Karen rebels fled to Thailand after a clash with the Burmese junta. Army intelligence sources then predicted more violence, as Myanmar wanted to suppress the minority rebels ahead of the planned ASEAN meeting in Rangoon. An estimated 100,000 individuals of ethnic minorities had already fled Myanmar in the years before the crackdown and sought refuge in neighboring Thailand, challenging the latter's ability to provide humanitarian assistance. In October 1999, Burmese pro-democracy activists occupied the Burmese Embassy in Bangkok and took the Burmese ambassador hostage, leading to a militarized dispute between Thailand and Myanmar. Thailand, which set the pro-democracy activists free and refrained from leveling criminal charges, was accused by Myanmar of meddling in the domestic affairs of Myanmar. It closed all checkpoints along the land and sea border with Thailand and linked their re-opening to the arrest and prosecution of the dissident students who had occupied the embassy. Although the checkpoints were later re-opened, the bilateral relationship between Thailand and Myanmar remained strained, and the border conflict intensified. In Thailand, the closing of the borders marked a turn in the public perception of the Thai-Burmese border disputes. It triggered a nationalist reaction amongst the Thai public, again with negative consequences for Thai domestic politics. The Thai press openly began to put public pressure on the Thai government to end ASEAN's policy of “constructive engagement”, a policy designed to keep communication lines open with Myanmar and engage it in order to change it (Jetschke 2003; Katanyuu 2006).

Similar to Myanmar, Indonesia's Aceh conflict during the country's democratization negatively affected neighboring countries, especially Malaysia and the Philippines. The Free Aceh Move-

ment (Gerakan Aceh Merdeka) has been active in Indonesia since the late 1980s. Under the military dominated regime of President Suharto (1966-1998), these independence struggles were largely contained through military measures. When the Indonesian government under President Habibie announced in January 1999 that East Timor would have the chance to hold a referendum on its independence, and when the referendum was finally conducted in August 1999, the independence struggle in Aceh gained a major boost. President Habibie's successor, Abdurrahman Wahid, gave in to pressure by the military and deployed special forces to the province. Human rights monitors subsequently reported extra-judicial killings and torture and an increase in civilian victims from the military operations. Several thousand Acehnese fled to Malaysia to seek asylum. While ASEAN members publicly declared that they fully respected Indonesia's territorial integrity, the negative externalities of the Indonesian government's decision were hard to bear. In the Philippines, the self-determination movement in Muslim Mindanao took Aceh as a model for seeking independence from the Philippines, in the process threatening its territorial integrity (Jetschke 2010b: 235-238).

Thus, while none of the ASEAN members formally wished to depart from ASEAN's official position of non-interference or desired that they themselves be subjected to internal interference, the negative externalities produced by events in Myanmar and Indonesia provided incentives to depart from the ASEAN Way. The Philippines' and Thailand's justification for departing from the ASEAN Way is significant in this regard. Both made the point that such domestic policies risked affecting neighbors or the association's standing (Möller 1998). Evidence for these common interests also comes from the establishment of the ASEAN "Troika" in 1999 as external representation (on an ad-hoc basis) by ASEAN member states. The ASEAN "Troika" was set up during the Third ASEAN Informal Summit in Manila on November 28, 1999. Thailand, which suggested its establishment, argued that ASEAN needed an instrument that would allow it to address issues of regional peace and stability more effectively. It is widely considered a major attempt to address issues that were previously regarded as domestic, although the activation of the Troika depended on the agreement of all ten member states and therefore seemed to be of little value for conflict resolution (Narine 2002). When the heads of state were asked to explain why they had decided to set up a Troika that would eventually interfere in the domestic affairs of member states, Philippine President Joseph Estrada explained that it was due to developments in Indonesia, whose probable disintegration due to separatist conflicts in Aceh and Papua would encourage similar separatist rebellions, from the Philippines to China (Quiambao 1999).

In sum, by 2001 it had become clear that the ASEAN Way of neglecting human rights violations was no longer viable. We can observe the institutionalization of standards for legitimate governance institutions in member states at the regional level. Negative externalities explain the emergence of regional standards, but not the timing or their legally binding character. For this, we need to take into account ASEAN's continued lack of reputation.

It has been argued elsewhere that ASEAN members also adopted the Charter because they realized that, without a distinguishing feature differentiating them from other economic regions,

they would lose out competitively (Jetschke and Murray 2012). ASEAN wanted to present itself to the world community as a meaningful and effective organization. According to Ong Keng Yong, ASEAN's Secretary-General (2003-2007), ASEAN members themselves felt that "we need to come out with some new creative ideas, to maintain Southeast Asia attractiveness vis-à-vis China and vis-à-vis the emerging giant called India" (Interview 05-2010 2010). Arguably, other regions are more advanced in regard to the adoption of principles of good governance and human rights. However, these are not ASEAN's economic competitors. ASEAN's economic competitors are China and India, and it was especially important to outbid China on the perception of the rule of law. Singapore's Prime Minister Lee Hsien Long remarked in 2005 that ASEAN could "fall off the radar screen of international companies and investors" (as quoted by Katanyuu 2006: 838) if it did not comment on ongoing human rights abuses in the region.

Moreover, numerous statements indicate that ASEAN was collectively concerned about its international reputation. Malaysia stated that ASEAN must "convince the world" of its stance toward Myanmar in order to enhance ASEAN's credibility (as quoted by Katanyuu 2006: 840). This became especially apparent in relation to the group's standing toward Myanmar in 2007, after the military junta had fired on demonstrating Buddhist monks. This event, in the midst of celebrations for ASEAN's 40th birthday, appalled many, although the initial reaction of ASEAN members was notable because the "association's initial silence was deafening" (Emmerson 2008: 72). For example, during ASEAN's Ministerial meeting in preparation of the UN General Assembly meeting in New York in September 2007, Singapore's Foreign Minister George Yeo stated that "we had to take issue with a member who behaved badly and brought down the reputation of everyone" (as quoted in: Emmerson 2008: 72). ASEAN's General Secretary Ong Keng Yong remarked in 2006 that "ASEAN is concerned about the impact of this issue ... on our credibility and standing," a statement that is also supported by the Malaysian foreign minister, who said that "the situation in Myanmar is impacting on the image and credibility of ASEAN" (as quoted in Ciorcari 2012: 710).

In sum, a strong driver of ASEAN's adoption of the ASEAN Charter as a legally binding document was the Association's need to send out a costly signal to the international community demonstrating that it was committed to human rights and the rule of law. Myanmar's policy was perceived to have badly damaged the reputation of the organization at a time during which the organization was deeply concerned about its continued relevance. It wanted to express its commitment to the principles of human rights and the rule of law.

5. Conclusion

In this case study on the prescription, policies and instruments of governance transfer by ASEAN, I have argued that an increase in the prescription of standards for legitimate governance institutions in ASEAN documents can be observed starting in 2003. ASEAN members have moved from a position in which their primary concern was national economic development (national resilience) as a precondition for regional stability (regional resilience) to a position where the promotion and protection of human rights has become a legitimate goal of ASEAN

members. The most significant development in this regard is the adoption of the ASEAN Charter of 2007. While these standards vary in precision (relatively precise for human rights, but no content defined for democracy, rule of law or good governance), ASEAN has systematically developed a set of instruments to ensure and promote these governance institutions among members. However, as these prescriptions constitute voluntary commitments by member states, these instruments aim at voluntary changes of domestic structures, through information sharing and dissemination, the building of networks and the conduct of conferences and workshops. They comprise predominantly collective efforts by ASEAN member states to develop common standards, rather than autonomous actions by ASEAN as a regional organization. The competences of AICHR and other commissions for the promotion and protection of human rights (also of women, children and migrant workers) share these characteristics. As a result, it can be stated that ASEAN as a regional organization engages in setting norms for legitimate governance institutions, and that it also engages in activities for the implementation of these standards; however, this occurs in an unobtrusive way and excludes sanctions for non-compliance (as there are currently – with the exception of human rights – no collective “standards” defined, against which member states behavior could or should be judged).

Yet this is not to dismiss the substantial change that has occurred in the self-understanding of member states concerning human rights. As is revealed throughout ASEAN’s documents and official statements, ASEAN members have for a long time shared a particular understanding of state security. One important thread running through ASEAN statements and informing ASEAN as a regional organization has been members’ preference for building up nation-states and strengthening state capacity. They have coined the concepts of “national resilience” and “regional resilience” (Hoadley 2006). National resilience means a focus on domestic self-strengthening. It has been described as an inward-looking concept, based on the proposition that national security lies not in military alliances but in self-reliance derived from domestic factors such as economic and social development, political stability and a sense of nationalism (Hoadley 2006). As internal threats to domestic security were declining, the countries adopted a more outward looking approach to security coined “regional resilience”. Regional resilience rested on the assumption that, to achieve truly national independence, Southeast Asian governments had to guarantee themselves a considerable measure of autonomy and abstain from intervention. This included a commitment that they would not interfere in each other’s affairs and that they would likewise not give great powers such as China, the United States and the Soviet Union an opportunity to interfere in the region (Jetschke 2006).

This meant that it was not the individual who is the bearer of rights, but the state. The territorially defined nation-state was the target of governance transfer, as there could not be stability and economic welfare without a stable state. As post-colonial states, Southeast Asian governments sought primarily and foremost state security from internal threats to governmental authority and territorial disintegration (Jetschke 2010b); they perceived themselves as “insecure states” (Drexler 2009). This understanding has changed to the effect that ASEAN member states define as their responsibility the upholding and promotion of human rights.

As such, the main factor driving ASEAN's governance transfer in the future is likely to be the state of democracy in its member states. However, as the case study has shown, ASEAN as a regional organization, and particularly its reputation, also have to be taken into account. Because ASEAN had successfully established itself as an actor, there were clearly expectations, both by external governments and international organizations, that ASEAN members would also sanction the behavior of a member state that deviates remarkably from international standards. The link here is the negative externalities that impact both individual countries directly, as well as ASEAN as a regional organization, whose credibility is important for ASEAN members. While it is unlikely that member states will grant ASEAN more autonomy, there is some chance that AICHR will develop into a proactive body promoting human rights and democracy in member states. This is likely to occur under the same conditions that fostered the establishment of the Charter: continuing human rights violations with consequences for other ASEAN member states (negative externalities) and concerns regarding ASEAN's relevance.

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The Author



Anja Jetschke is professor of International Relations at Georg-August-University of Göttingen and head of research programme at the GIGA “German Institute of Global and Area Studies”. Her research focuses on comparative regionalism, ASEAN and international criminal tribunals. From 2011 to 2012, she was Academic Director of the Hamburg International Graduate School for the Study of Regional Powers. Before, she worked as a research assistant at the Albert-Ludwigs-University of Freiburg. From 2009 to 2010 she was a postdoctoral fellow at the Research College “The Transformative Power of Europe”.

Research Framework

Governance has become a central theme in social science research. The Collaborative Research Center (SFB) 700 *Governance in Areas of Limited Statehood* investigates governance in areas of limited statehood, i.e. developing countries, failing and failed states, as well as, in historical perspective, different types of colonies. How and under what conditions can governance deliver legitimate authority, security, and welfare, and what problems are likely to emerge? Operating since 2006 and financed by the German Research Foundation (DFG), the Research Center involves the Freie Universität Berlin, the University of Potsdam, the European University Institute, the German Institute for Global and Area Studies (GIGA), the German Institute for International and Security Affairs (SWP), and the Social Science Research Center Berlin (WZB).

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