

The Authors Do Not Speak: A People's Reading of the ASEAN Charter

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Abstract

While the Association of Southeast Asian Nations (ASEAN) Charter has been read by commentators as a constitutional document, its use of the peoples of Southeast Asia as fictional authors of the text has not been fully explored. A people's reading of the ASEAN Charter provides a critical perspective that uncovers the elitist and statist nature of this document. A close textual analysis of the preamble reveals that these purported authors are displaced by the Heads of State as the speaking subject and creators of the new legal entity. This textual displacement transforms the constituent treaty into a state monologue as it imposes a utopian vision of capitalism on the geopolitical body of the region. Contrary to its democratic claims, the Charter has only constitutionalised reification, class structures, and the exclusion of the peoples from power. The ASEAN constitution silences its own authors.

Keywords: Constitutionalisation, ASEAN Charter, Textual analysis, People, Displacement

“One never has the right to speak if one belongs to the people.”
Polydamas to Hector¹

“Golf has been critical to ASEAN's success from the beginning.”
Kishore Mahbubani and Jeffrey Sng²

1. INTRODUCTION

This paper reads the Charter of the Association of Southeast Asian Nations (ASEAN) as a constitutional text from the point of view of its fictional author—the “peoples” of Southeast Asia. The ASEAN Charter, which begins with the words “WE, THE PEOPLES,” is purportedly authored by the peoples of the Member States,³ represented by the heads of the ten states forming the ASEAN organization. With this fiction of the people as author, one

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1. Rancière (2014), p. 560.

2. Mahbubani & Sng (2017), p. 179.

3. Asean.org (2007), Preamble. In this paper, the words “people” and “peoples” mean the same thing. Reasons of style require the author to sometimes use “people” instead of “peoples.”

therefore expects to hear the peoples' polyphonic voices in the Charter, however mediated by their representatives. One expects the peoples' interests to be expressly written therein. Yet, contrary to these expectations, the Charter takes the form of a state monologue. One notices that the purported authors do not actually speak. After the people's displacement from the preamble, only the States speak further. The peoples are silenced, displaced, and marginalized. Thus, the constitutionalisation of ASEAN ten years ago created a suppression and displacement of the people, making the ASEAN Charter a mono-logical, statist, and elitist document that is alien to most of the peoples living in the mainland and the archipelagos of Southeast Asia.

In pursuing this thesis, I use the method of literary criticism, which I find helpful in dealing with the problematics of production of legal texts. I use a narratological approach in explicating the textual suppression of the people. This interdisciplinary approach bolsters the outsider's point of view of the "peoples of Southeast Asia" which I try to construct, develop, and use in reading the text of the Charter. This mode of reading, it goes without saying, runs against the grain of the normative and often celebratory styles of interpretation one often encounters in the rather incestuous diplomatic and academic circuits in the field of ASEAN Studies.

A quick review of the sections of this paper follows. After this introduction, I present in the second section a review of the commentaries on the Charter and explain why there is a need for a people's reading of the said text. The third section discusses the concepts and theoretical framework through which I read the presences and absences in the text. The fourth section analyses the Charter from the viewpoint of its elitist textual production. The fifth section critiques the displacement of the peoples of ASEAN in the preamble of the Charter contrary to the democratic claims embedded in the text. This is followed by the sixth section which examines the subordination of the peoples to the logic of state and capital through the reification of labour and the constitutionalisation of class distinctions. This section ends with an analysis of Article 1 (5) which contains a utopian vision of a future ASEAN economic order. Finally, the conclusion gives a summary of this paper's analyses.

2. (RE)VIEWING THE LITERATURE

The ASEAN Charter has been the object of several studies since it came into force. The reception ranges from the outright congratulatory to the critical and from the journalistic to the scholarly. Walter Woon has written the first book-length commentary on the subject.⁴ It is rich in details from official sources and features some critical notes on the Charter. The book is a product of his long engagement with ASEAN and many parts of it have been retrieved from his earlier works.⁵ The transition to rules-based community narrative is the main theme of Walter Woon's work and this same theme is further explored in writings by other scholars.⁶ Another theme pursued in recent scholarship is the legal personality conferred on ASEAN. Lawyers and non-lawyers have so far analysed this aspect of the Charter.⁷

4. Woon (2016), p. ix.

5. *Ibid.*, p. ix.

6. Piris & Woon (2015).

7. Caballero-Anthony (2008); Lin (2010).

Many have characterized this international legal personality as the most important feature of the Charter, though it may have, in fact, preceded the latter.⁸

Meanwhile, some scholars have viewed the ASEAN Charter as part of a global trend of constitutionalisation. A constitution is “a document” from which “all other authority is derived.”⁹ It serves as an ur-text of a legal system. From the view point of international constitutionalism, the ASEAN Charter may be considered as the ur-text of a new regional entity in Southeast Asia. It is an “enabling” document that gives power to a new legal person called, “ASEAN,” including the various bodies created in the Charter.¹⁰ The Charter certainly aspires to be the governing law for intergovernmental actions and policies among Member States in the ASEAN region. For all practical purposes, the ASEAN Charter serves as the constitution of the ASEAN.¹¹

One of the scholars whose work focuses on ASEAN constitutionalisation is Diane Desierto. She has described the creation of the Charter as a “paradigm shift towards a deliberate constitutionalisation of a distinct regional identity.”¹² She reads the Charter in the context of the global intertexts of constitutional separation of powers and underscores the ASEAN Charter’s shortcomings as a form of basic law. Closer to the reading of this paper is Katja Freistein’s article, “A Living Constitution: Promises of the ASEAN Charter.” Using Jacques Derrida’s style of deconstructive reading, she reads the preamble as a performative act and construes the whole Charter as an “institutional text” where the discourse of democracy has been included and now serves as a guiding discourse for the domestic behaviour of states.¹³ Her deconstructive reading leads her to celebrate the openness of the text through the Member States’ reluctance to fix “narrow predefinitions” thereby allowing interpreters much leeway in applying it to future cases.¹⁴

The present study deviates, sometimes radically, from these existing literatures on the ASEAN Charter. While some of the criticisms made by Woon and Desierto are relevant, their critiques are not formulated from the viewpoint of the “people.” Woon, for instance, admits that “ASEAN has been somewhat distant and aloof for most people of the member states.”¹⁵ But he fails to pursue this thought in his reading of the Charter. His work does not pretend to be a people’s commentary. Desierto, on the other hand, underscores the over-centralization of powers in the ASEAN Summit as it seemingly monopolizes the executive, legislative, and quasi-judicial powers in the Charter.¹⁶ Nonetheless, Desierto fails to point out the relevance of the centralization to the lives of the “people.” The “people” as a speaking subject and as constitutional author do not concern her analysis. Institutions, not people, are her main concern. Finally, while Freistein applies an innovative approach to the Charter, which emphasizes its textuality and performativity, and touches on the concept of “the people” as

8. Chan Wah Teck (2010), p. 1; Chesterman (2010), p. 18.

9. Paulus (2007), p. 74.

10. Dunoff & Trachtman (2007), p. 10.

11. “Constitutions establish legal authority for all legal enactments and actions.” (Graber (2013), p. 24).

12. Desierto (2010), p. 274.

13. Freistein (2013), pp. 412–3.

14. *Ibid.*, pp. 422–3.

15. Woon, *supra* note 4, p. 56.

16. Desierto, *supra* note 12, p. 297.

author, she fails to notice the suppression of the “people” within the text. Moreover, her own deconstructive style of reading prevented her from further delving into the concept of the people and their relation to the Charter. Thus, her article fails to provide a critique of the limitations of the Charter. Her analysis certainly ends in a positive note and is, perhaps, more optimistic than the view of some Southeast Asians.

Given the limits of the perspectives of the scholars mentioned above and the lacuna in the scholarly literature that they produced, a “people’s reading” of the ASEAN Charter is timely and appropriate. An outsider’s reading of this politico-legal text would serve as a counterweight to much normative and mainstream academic interpretations. Unlike most of the literature cited above, this study seeks to reveal the statist and elitist logic of the Charter which might explain why ASEAN has so far remained alien to most of the population of the region. Through a symptomatic reading of the presences and absences in the Charter of the international organization, this paper aims to explain the contradictions and indeterminacies of the new ASEAN.

3. MODES OF READING

This section shall discuss the analytical tools relevant to a people’s reading of the ASEAN Charter. At the outset, it must be stated that this study primarily attempts a textual analysis of the ASEAN constitution. In one sense, it is a close reading¹⁷ of the preamble and the other provisions of the Charter. For this reason, its focus is on the text of the Charter. If there is any reference to other texts, it is not intended for a comparative study or survey of international organizations’ charters. It is only done for the purposes of emphasis and distinction. The intent is to do an “*explication de texte*.”

Due to the textual nature of this study, the tools to be used in the analysis come mainly from the fields of literature and philosophy.

The reconstruction of “the peoples” in the text is critical to the overall strategy of this paper’s analytical project. To achieve this goal, I use some of the tools developed in narratology, particularly “focalisation” and “narrator.” In literary theory, a narrator is the “agent that utters the linguistic sign that constitutes the text.”¹⁸ This means that one would know the diegetic world of fiction through the narrator whose word constitutes that world. Through the eyes of the narrator, one enters the fictional world and experiences its mode of being. “Focalisation” refers to “the relationship between the vision” of an agent and that which is seen. It is the point of view of a specific “focalisor.” These tools are useful in analysing a text that purports to be written by a particular author. They can help trace the shifts and erasures in the text which ordinary doctrinal analysis fails to account for.

With the use of these narratological concepts, this paper will attempt a “symptomatic” reading of the Charter. According to Louis Althusser, symptomatic reading is an interpretative strategy that “divulges the undivulged event in the text it reads, and in the same movement relates it to a different text, present as a necessary absence in the first.”¹⁹ It is a

17. Wellek & Warren (1949). The old “New Critical” notion of close reading limited the analysis to the four corners of the text. It viewed the text as a self-sufficient object independent of the “actual” intent of the author. Thus, the literary critic need not analyze what is outside the text.

18. Bal (1997), p. 18.

19. Althusser & Balibar (2009), p. 29.

reading strategy that allows one to read the absences in the text against the problematic but visible provision(al) presences one reads in the text.

Althusser's student Pierre Macherey has applied this critical strategy to the reading of literature. According to Macherey, the meaning of a literary text is most often revealed in what it does not say. It is "in the silences of the text, in its gaps and absences" that ideology emerges.²⁰ It is these "silences which a critic must make speak."²¹ In other words, if one wants to understand the ASEAN Charter, one's analysis must confront this text's silences.²²

It is argued that a symptomatic reading can be a useful and fruitful approach to the ASEAN Charter which purports to be a constitutional text. Like literature, constitutional texts are also full of indeterminacies which create the need for interpretation. They are often characterized by openness, if not vagueness and silences. Surely, constitutional texts are no ordinary law that attempts to enumerate all possible situations that the law may apply to. On the contrary, constitutions are, by nature, drafted in broad outlines and are not intended to suffer the "prolixity of a legal code."²³ It is for this reason that the constitutional text may be read as a literary text, a text the meaning of which is a matter of interpretation.

In reading the absences in the ASEAN Charter, one must therefore take note of the presences and absences of what the Charter itself calls "the peoples." But who are "the peoples?"

Certainly, it is a familiar term: one reads books like *A People's History of the United States of America*, *A People's History of the Supreme Court*, and even *A People's History of the World*. The "people," indeed, is a popular term. For this paper's purpose, I use the definition of Jacques Rancière. I believe that Rancière's definition provides a more appropriate approach to the subject. The people or *demos*, for Rancière, is "a part of the community" composed of "the poor." But the poor here is not an economic category. It "designates the categories of peoples who do not count, those who have no qualifications to part-take in arche, no qualification for being taken into account."²⁴ The "people" refers to the "one who speaks when s/he is not to speak, the one who part-takes in what s/he has no part in—that person belongs to the *demos*."²⁵

Rancière's definition of the *demos* as the "subject of democracy" and therefore of politics is relevant in unmasking the pretensions of the ASEAN Charter to be democratic and pro-people. Applying Rancière's concept of those "who do not part-take" to the historical context of Southeast Asia, one begins to understand why ASEAN is said to be aloof. ASEAN has been, for the most part, a diplomatic affair where the "people"—those who do not part-take—have no voice and cannot speak. The distance between ASEAN as an organization and the peoples of Southeast Asia is reflected in the text of the Charter as it will be shown below.

20. Eagleton (1989), p. 32.

21. *Ibid.*, p. 32.

22. Macherey (2006), pp. 95–7.

23. *McCulloch v. Maryland* 17 U.S. 316, 407 (1819).

24. Rancière, *supra* note 1, p. 560.

25. *Ibid.*, p. 560.

4. THE CONVENTION(AL) ELITE

ASEAN is an alien in Southeast Asia. Aside from the diplomats, there are few people who are aware of it. As one Singaporean journalist writes:

I have plenty of anecdotes to weave an encyclopedia of what an ordinary Southeast Asian thought ASEAN to be. A few hawkler-center stall owners thought (ASEAN) to be a British football club, mistaking it for Arsenal, while others thought it to be arsenic...²⁶

The same journalist recounts how in Myanmar people would tell him the time on their watch every time he asked about ASEAN. It turns out the word “ASEAN” sounded like “Ah-chien” which means “time” in Burmese. But in Thailand, according to the journalist, ASEAN suggested something like “arse.”²⁷ One may, of course, forgive the writer’s humour. But the anecdotes prove that there is a great distance separating ASEAN and the ordinary Southeast Asian, a distance that is symbolic of their different interests.

If the elite in ASEAN does not understand why there is a distance to bridge, they need not look far. They must only look at the production process of the Charter. In 2005, the ASEAN Summit issued a declaration on the establishment of the ASEAN Charter. For this purpose, it mandated the creation of an “Eminent Persons Group” tasked to submit “bold and visionary recommendations.” The EPG was indeed eminent in the sense that it was a group of former heads of states, foreign ministers, ministers, etc.²⁸ Some of the members knew each other because they were “long-time golf buddies.”²⁹ These golf-buddies of the EPG, then, conducted consultations with ASEAN Inter-Parliamentary Organization (AIPO), the Working Group for an ASEAN Human Rights Mechanism, ASEAN Institutes of Strategic and International Studies (ASEAN-ISIS), ASEAN Chambers of Commerce and Industry (ASEAN-CCI), the private sector, and civil society organizations. It may be observed that most of these stakeholders are also elite institutions in ASEAN politics, academe, and business. Only the civil society organizations may lend a semblance of a democratic consultation in the EPG actions. The EPG later wrote a report and submitted it, particularly recommending the creation of an organization that has a legal personality. The Cebu Declaration on the Blueprint for the ASEAN Charter adopted the report and created a “High Level Task Force” for Drafting of the ASEAN Charter. Again, this was a group composed of “senior diplomats and ministers” from the Member States. It was this group that eventually drafted the ASEAN Charter that was presented in Singapore on 20 November 2007.³⁰

From the point of view of constitution-making, the EPG and the HLTF, whose members all came from elite government ministries of ASEAN, served as the constitutional convention that finally wrote the text. The people, who were outside the diplomatic circles, were barely invited. Their participation in this constitutionalisation of ASEAN was next to nothing. Most of them were not even aware of it. The “peoples/authors” were merely informed to watch and applaud the successful signing of the Charter.

26. Sourav Roy, “ASEAN: What’s That and Who cares? Certainly Not the Common Man in Asia,” cited in Mahbubani & Sng, *supra* note 2, p. 189.

27. Huffingtonpost.com (2013).

28. Woon, *supra* note 4, p. 18.

29. S. Kayakumar of Singapore wrote: “It helped that Ramos, Ali Alatas, Musa, Jock Seng and I had also been long-time golf buddies.”—cited in Mahbubani & Sng, *supra* note 2, p. 179.

30. Woon, *supra* note 4, pp. 19–27.

Indeed, there was nothing democratic about the whole process. There was a very thin link, if ever there was, between the peoples of ASEAN and the members of the EPG or HLTF. Unlike in national conventions, where elected or appointed representatives may come from marginalized sectors,³¹ the ASEAN constitution-making process was dominated by an elite coming from only one bureaucratic class, if not one social class. The ASEAN “convention” members were all “Eminent” and “High.” For this reason, the “convention” looked like a soiree of ex-presidents, ex-ministers, foreign ministers, ministers, and other state officials. It could not be democratic in Rancière’s sense. Its limited class basis could not be representative. It could not represent the ASEAN multitude—the demos, the outsiders, the uninvited.

Simply put, the peoples did not have a hand in the textual production of the Charter which is supposed to be authored by them. They had no part in the soiree of the eminent. They could not “part-take.”

5. PEOPLES AND PREAMBLES

Like any other constitutional document, the ASEAN Charter constitutes a world. It is a word that founds a political world.³² This word is an utterance of an agent within the textual space of the Charter. This agent, in turn, is a construct, a fiction of the text—a necessary fiction for legitimating a new order.

For the purposes of this study, the identification of the narrative agent is critical. Thus, the preliminary question is this: Who is the agent?

The preamble provides the answer.

WE, THE PEOPLES of the Member States of the Association of Southeast Asian Nations (ASEAN)... HEREBY DECIDE to establish, through this Charter, the legal and the institutional framework for ASEAN.

The words of the preamble are quite clear. The ASEAN Charter has adopted the fiction of law that it is “the peoples” who authored the text. As authors, they authorize the constitution of this new legal entity, this new world.³³ Their word begins the act of creation and gives flesh to a new order. To emphasize this legal fiction, the text underscores the point in bold caps: WE, THE PEOPLES.... HEREBY DECIDE.

These words are significant not only to emphasize the source of the sovereign powers that created ASEAN, but also to justify this critical reading of the Charter. These words underscore the possibility of a people’s reading of the Charter. “The people” is not just a construct of this critic’s imagination. It is not an imposition *de hors-texte*. It is, in fact, a construct of the Charter itself. “In its Preamble,” writes William Harris on the US constitution, the text

31. The framers of the 1987 Philippine Constitution, for instance, included peasant leaders, priests, constitutionalists, a movie director, political activists, former justices, and lawyers who were all appointed by the President “in consultation with various sectors of society,” see Bernas (2003).

32. Harris (1993), p. 1. Harris states that constitutionalism is based on a “presumption that a political world can be constructed and controlled with words.”

33. “(T)he Constitution styles itself as the ‘word of the people’....,” see Brown (1995), p. 590. Legally speaking, the Charter only creates an international organization. Nonetheless, the Charter also creates and envisions ASEAN “communities.” There are three pillars of the ASEAN community and the Charter creates an organ for each of these communities. They are the ASEAN Political-Security Community Council, ASEAN Economic Community Council, and ASEAN Socio-Cultural Community Council. ASEAN Charter, Chapter IV, Article 9.

“literally creates, and refers to (as if already in existence) its author.”³⁴ Thus, when the Charter states the words “WE, THE PEOPLES,” it refers to the fictional author of the text and the source of the sovereign power. The words of the author create a Charter and constitutes the new world. But it is the Charter—the word of the peoples—, in turn, that constructs the peoples within the text. Indeed, one need not go outside the text. The peoples are in the text. As Jacques Derrida puts it, “*il n’y a pas de hors-texte*” (there is nothing outside the text).³⁵

The same fiction is used in the United Nations Charter which states the following words: WE, THE PEOPLES OF THE UNITED NATIONS.³⁶ These words announce that the peoples are the creators of the UN. They determine and establish. The peoples as authors means two things: they authored and authorized a new political world. Their “words narrate the polity into existence.”³⁷

While these fictions of authorship can be considered just a rhetorical move, one must not lose sight of the substantive importance of the identification of the source of sovereign powers, which, in the final analysis, serves as a legitimating act. In other words, the fiction of the people as author plays a legitimating role in the whole act of constitutionalisation in the sense that the new political order that arises is justified as willed by the people themselves. The presence of the fiction of the people as author casts away all doubts surrounding consent. It is for this reason that one must be conscious of the nuances of the use of this legal fiction in preambles.

Historically, this legal fiction has been invented by the state to “produce the effect of unity.”³⁸ The United States Constitution, an early document to appeal to such rhetoric, uses this fiction to establish a new polity based on the theory that the people is the origin of political power. This fiction also “operates as a major premise in an argument for the

34. Harris, *supra* note 32, p. 201.

35. Derrida (2001), p. 1825.

36. U.N. Charter, preamble. As stated in part 3, this paper does not intend to do a survey of IO charters. It is primarily a close reading of the ASEAN constitutional text. In literary studies, close reading means an analysis of the words within the text. One does not move beyond the text. Nonetheless, Althusser and Macherey’s theory of absences is not too formalistic to confine me within one text. Thus, I try to compare the UN Charter and the ASEAN Charter since they both use the same rhetoric. I also find the UN Charter to be an interesting foil to the pretenses of the ASEAN constitutional writers. Moreover, it may also be productive to compare the ASEAN Charter and the treaties creating the European Union (EU). While the EU may be said to be in a higher stage of integration, ASEAN and the EU are both international organizations that share the vision of a community. The European Union, however, does not use the fiction of the people as author. It is more realistic, or to be more precise, *legalistic*, in describing the states—represented by their Kings, Queens, and Presidents—as the authors. Indeed, from the viewpoint of public international law, an international organization is generally created by a treaty contracted by states, not peoples. The Rome Treaty (1957), the Maastricht Treaty (1992), and the Treaty on the Functioning of the European Union (2008) all follow the same style. In one sense, this style emphasizes, without any semblance of fiction, that the real actors are the states and not the peoples of Europe. On the other hand, ASEAN wants to present itself as authored by the people when in fact its Member States are more protective of their sovereign powers and do not clearly transfer any competency to the international organisations. For instance, Articles 2(1) and 3 (1) of the TFEU explicitly empower the EU to bind the Member States through treaties. It provides the EU with powers of exclusivity and pre-emption (see Weatherill (2012), p. 76). The division of powers between the EU and the Member States have been explained much further in the Court of Justice of the European Union’s opinion on the Free Trade Agreement between the EU and the Republic of Singapore (2017). In contrast to the EU treaties, the ASEAN Charter does not explicitly transfer any state competency to the international organization in Article 41(7). This silence has invited a debate on whether ASEAN can bind its Member States under the Charter. See Chen (2014) and Seah (2015). ASEAN Member States retain their competencies and try to control the international organization. This statist bias emerges in the textual body of the ASEAN constitution and, as it will be shown in this paper, betrays the legal fiction enunciated in the preamble.

37. Harris, *supra* note 32, p. 34.

38. Etienne Balibar as cited in Hau (2004), p. 111.

Constitution as paramount rule.”³⁹ Constitutionalism may indeed be said to be standing on the foundation of this fiction of the people as author. Nonetheless, it must be pointed out that this fiction is double-edged. Citing Balibar, the Kyoto-based Filipino scholar Carol Hau argues that “[w]hile states invoke the people often to serve their own interests, ‘the people’ remains a powerful source and reference point of legitimacy and decision.”⁴⁰ The “people” can both legitimize and destabilize the state. In other words, the state helps create “the people” as a people,⁴¹ but the power of the people, who by fiction become the source of sovereign power, can be “harnessed both for and against the state.”⁴² It is from this understanding of “the people” that one may understand the tension between the Member States and “the peoples” of ASEAN.

To return now to the preambles in the charters of ASEAN and the UN, one notices that the two preambles differ in a significant way. This difference is substantive and not just a matter of drafting. The preamble of the United Nations does not undercut the position of the peoples in the text. It begins with the words “We, the peoples of the United Nations” and ends with the following words: “*Accordingly, our respective Governments, through representatives assembled in the city of San Francisco...have agreed to the present charter and do hereby establish an international organization to be known as the United Nations.*” Hence, throughout the preamble, it is the peoples who speak, who act, who constitute. They are the ones that inform readers that they have sent representatives to the city of San Francisco. They are principals who are in control of their agents. Critical to this democratic control are the words “our respective Governments, through representatives.” By maintaining the same point of view from “We” to “Our,” the fiction of the people as author is also sustained.

How about the ASEAN Charter? The Charter’s preamble says:

WE, THE PEOPLES of the Member States of the Association of Southeast Asian Nations (ASEAN), as represented by the Heads of State or Government of...AND TO THIS END, *the Heads of State or Government* of the Member States of ASEAN, assembled in Singapore on the historic occasion of the 40th anniversary of the founding of ASEAN, *have agreed* to this Charter. (Emphasis added)

The wording of the preamble is very significant and affects the “worlding” of ASEAN.⁴³ Thus, the words must be studied carefully.

There are two critical shifts that can be gleaned from the preamble. First, the word “We” disappears mid-sentence and the rest of the story is now told in the objective third-person view point. Second, there is a clear shift in focalization and narrative agent from the “peoples” to the “Heads of State.” These shifts in the preamble are critical and may be best illuminated through a literary reading.

39. Harris, *supra* note 32, p. 73.

40. Hau, *supra* note 38, p. 113.

41. But see Schmitt (2008), p. 127. Carl Schmitt theorizes that “the people” precedes the constitution. Political unity exists prior to the constitution. Hence, the constitution does not create the state and the people. When “the people gives itself a constitution,” it only means a people’s “conscious decision for a particular type and form of its existence.” In contrast, Harris believes that the “people” in the constitutional text “come into existence simultaneously with the constitutional authority of the document,” see Harris, *supra* note 32, p. 201.

42. Hau, *supra* note 38, p. 113.

43. I borrow the word “worlding” from post-colonial theory, see Spivak (1985), p. 243.

According to literary theory, the narrator is “the most central concept in the analysis of narrative texts.”⁴⁴ Its centrality is based on the fact that the “identity of the narrator” “lends the text its special character.”⁴⁵ Indeed, the narrator, the “agent that utters the linguistic sign that constitutes the text,” shapes the world that arises from the text.⁴⁶

Although a legal document is not necessarily a narrative text, the preamble of the ASEAN Charter may be read as a narrative because it goes back to the past when it says “RECALLING the decisions...” Moreover, it also refers to the assembly in Singapore as a “historic occasion of the 40th anniversary of the founding of ASEAN.” The reference to an anniversary involves history and of a repetition of the same event for forty years. These details prove that the preamble is trying to tell “a (hi)story,” a narrative.⁴⁷ For this reason, it is only proper to read the preamble using the tools of narratology.

From the excerpt above, one may observe that as soon as the peoples of ASEAN have spoken, they are undercut by the “Heads of State.” The peoples are swept aside. The words “as represented” are suddenly thrust into the sentence in order to shift the focalization from “WE, THE PEOPLES” to “the Heads of State.” This is followed by a parallel shift from a plural “We” to an objective third-person narration. Thus, the Charter changes voice in the middle of the first sentence and one never hears the people speak again. Representation becomes a mode of silencing the peoples.

Unlike the UN Charter, where the peoples of the United Nations affirm themselves by referring to “our respective Governments,” the ASEAN Charter does not have the possessive word “our.” The subjective position of the peoples is suddenly dropped. There is a total shift from the plural “We” to a seemingly “objective” third person point of view right after the words “as represented by the Heads of State.” This objective point of view, which now suggests the fictions of state objectivity more than the peoples’ sovereignty, is maintained until it culminates in the last sentence of the preamble whose words clearly state that “the Heads of State” “have agreed to this Charter.”

Like a political usurper, the “Heads of State”—the self-proclaimed representatives—claim to create the world of ASEAN by pushing aside the people. In contrast to the UN Charter which says, “Our respective governments...have agreed to this charter and do hereby establish...,” the ASEAN Charter speaks only of the “Heads of State,” perhaps agreeing among themselves to establish a new legal order. The absence of the word “our” and the shift to the third person “Heads of State have agreed” speak a thousand words about the exclusion of the peoples. The wording of the preamble of the ASEAN Charter underscores the power of the “Heads of State” who now appear to be the creators of a new world. Thus, when the last sentence of the preamble states “the Heads of State have agreed,” it signalled not so much their consent but their power to give consent to the creation of a world.

But this act of creation is not the act of the people. It is the act of the Heads of State. Indeed, in the process of constituting the world, “the peoples” were totally displaced and erased from the text.

44. Bal, *supra* note 18, p. 19.

45. *Ibid.*, p. 19.

46. *Ibid.*, p. 18.

47. Narration in preambles is not limited to the ASEAN Charter. The Preamble of the Constitution of the People’s Republic of China basically tells the history of China from the view point of the Chinese Communist Party. “As if following a well-trodden path, many contemporary constitutions refer to past events in their opening sections,” see Uitz (2005), p. 111.

Towards the end of the preamble, the peoples speak no more and their silence no longer constitutive of a world. Someone else has usurped the peoples' role and is doing the constitutional act. The shift in focalization in the first sentence signals the displacement of the narrator/ author/ peoples and this displacement is completed by the new external and seemingly objective focaliser which predominates from the preamble and for the rest of the text. It is no wonder that on that momentous day of creation, the "Heads of State," representing perhaps the States more than "the peoples," took centre-stage, thereby relegating the peoples to the margins and silences of the text. The peoples, as usual, were reduced to the position of audience celebrating the gods' creative powers.

This marginalization of "the peoples" in the text is no longer surprising given the history of the Charter's production process, a process dominated by "eminent" and "high level" persons, not to mention "the Heads of State." It may be seen as the logical conclusion of the elitist production of the text.

In practice, this marginalization, of course, would be capped with the exclusion of the peoples from the process of interpretation. Traditionally, interpretation of treaties is the job of the states as a part of their sovereignty.⁴⁸ Sovereignty, according to Serge Sur, "implies the freedom to interpret its own commitments, to assert the meaning it gives them."⁴⁹ This is what Robert Kolb calls "self-interpretation."⁵⁰ States, as the subjects in international law, are primarily the subject who formulates and interprets treaties. Self-interpretation implies that it is frequently the "starting point" and "end point" of interpretation.⁵¹

Thus, from the production of the text to the interpretation of the ASEAN Charter, the peoples are displaced, erased, and silenced. They have no part and cannot partake.

6. STATES AND UTOPIA

The displacement of the peoples in the preamble uncovers the statist underpinnings of the Charter. This statist ideology also manifests in the contradictions that involve the peoples in the body of the text. This section extends the textual analyses to the other parts of the Charter and discusses three contradictions in the Charter. The first one is a contradiction between principles and purposes in Chapter 1 of the Charter, particularly between statist principles and the advocacy of human rights. The second is the contradiction between capital and labour in the context of achieving the "single market." In both cases, the interests of the peoples are subordinated to the more powerful element in these binaries: States and Capital. Finally, the section analyses the ASEAN economic utopia—within which the contradiction of capital and labour is embodied—and delves into the contradiction between the constitutionalised ideal economic order and the means of achieving such utopia.

In the previous analysis of the preamble, it was argued that the peoples/we/authors have been displaced by the objective/third person view/heads of state. This displacement is symptomatic of the latent statist ideology of the Charter. I say "latent" because the Charter is peppered with a number of odes and paeans to "democracy," "rule of law," "good governance," "constitutionalism," and "human rights." One finds this theme in the preamble, in Chapter 1,

48. Fernandez (2007), pp. 3–4.

49. Sur (2010), p. 179.

50. Kolb (2016), p. 129.

51. *Ibid.*, p. 129.

Article 1(7), and in Chapter 1, Article 2(2h) and (2i). The repetition of these “themes” serve only to hide the Charter’s legalization of ASEAN practices that strengthen states’ power.⁵²

However, as the voice of the people gets muted, only the “mono-logic” discourse of the States becomes audible. This textual discourse is “mono-logic(al)” in the sense that it is a monologue characterized by the logic of state, or what others would call “the reason of state.”⁵³ In this discourse, only the voice of the states is heard supported by the reasons that justify state action. A single voice pre-dominates and one mode of reasoning holds sway. Thus, the appropriate description is “mono-logical.”

This mono-logical discourse is not difficult to flesh out from the text. It is worth noting that the Charter sings of state sovereignty all the time, notwithstanding the intent to “promote a people-oriented ASEAN.”⁵⁴ Most of the provisions in the principles section, for instance, are addressed to the Member States to preserve the sovereignty of fellow states. Many of the main principles harp on “non-interference”: 1) Chapter 1, Article 2 (2)(a) “Respect for the independence, sovereignty, equality, territorial integrity...of all ASEAN member states;”⁵⁵ (e) “non-interference in the internal affairs of ASEAN Member States;”⁵⁶ (f) “respect for the right of every Member State to lead its existence free from external interference...;” (k) “abstention from participation in any policy or activity...which threatens the sovereignty, territorial integrity...of ASEAN Member States.”⁵⁷

The repetition of the same principles of state sovereignty and non-interference sounds like a mantra of the Member States. This mantra echoes throughout the text and is a domineering presence therein. One might say that this mantra on the principles of state sovereignty and non-interference is the ultimate spirit of the Charter. It is the spirit that gives the Charter its life. Given this obsession with traditional state prerogatives, one begins to wonder why the Member States still needed to form an “intergovernmental organization” and justify it in the name of the peoples of ASEAN.

This statism continues in the next few chapters of the Charter. Chapters II-IV confer legal personality on ASEAN and enumerate its membership as well as the organs of the new intergovernmental organization.⁵⁸ In these chapters, one witnesses the consolidation of all powers in the ASEAN Summit, comprising the Heads of State, as the “supreme policy-making body” of ASEAN.⁵⁹ It is also conferred the powers to “decide how a specific decision can be made”⁶⁰ and to rule in cases of “unresolved dispute.”⁶¹

52. Woon, *supra* note 4, p. 37.

53. Sovereign equality of states and immunity are part of this logic. Mainstream international law, for instance, justifies state immunity as it “facilitates the performance of public functions by the state.” Crawford (2008), p. 487. In Philippine domestic jurisdiction, state immunity is traditionally justified based on the logic that one cannot sue the entity that has provided the right to sue. Bernas, *supra* note 31, p. 1268. Moreover, *Metran v. Paredes* 79 Phil 819, 827 (1948) propounded the idea that when people sue the state, they are suing themselves. The decision partly states, “...they are in effect attempting to sue themselves along with the rest of the people represented by their common government—an anomalous and absurd situation indeed.”

54. Asean.org (2007), Chapter I, Art. 1, Para. 13.

55. *Ibid.*, Chapter I, Art. 2, Para. 2 (b).

56. *Ibid.*, Chapter I, Art. 2, Para. 2 (e).

57. *Ibid.*, Chapter I, Art. 2, Para. 2 (f).

58. Chapter VI of the Charter also confers immunity and the 2009 Agreement on the Privileges and Immunities of ASEAN (API) was adopted. Woon, *supra* note 4, p. 150.

59. Asean.org (2007), Chapter I, Art 7, Para. 2.

60. *Ibid.*, Chapter VII, Art. 20, Para. 2.

61. *Ibid.*, Chapter VIII, Art 26.

With all these powers consolidated in the ASEAN Summit, one cannot but wonder how ASEAN will act as an organization for the interests of the peoples of Southeast Asia. For instance, if there is a Summit decision which the peoples of ASEAN oppose, where will they go? There seems to be no available remedy for the fictional authors of the Charter.

The absence of remedy arises from the contradiction between the Charter's statist principles and its so-called pro-people objectives. This contradiction emerges clearly in ASEAN's human rights policy and practice as embodied in the Charter and its intertext, the "Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights."

Unlike the United Nations or the European Union, the ASEAN Charter provides no direct and effective remedy available to the peoples of ASEAN, which they may use against any of the Member States. It provides no court where one can file a proper suit. Worse, the Charter could not even properly name the human rights body that it wanted to create and left it to the determination of ASEAN Foreign Ministers Meeting.⁶² After the release of the Terms of Reference, the ASEAN human rights body turns out to be a states-controlled ASEAN Intergovernmental Commission on Human Rights (AICHR). The members of the AICHR are the states themselves, each state appointing a representative who works for the appointing authority.⁶³ The Terms of Reference of the AICHR states that it aims to "promote and protect human rights and fundamental freedoms of the peoples of ASEAN."⁶⁴ Yet, the primary principles of the body refer to the first three statist principles of state sovereignty, non-interference, and freedom from external interference.⁶⁵ To begin a terms of reference of a human rights body with the enumeration of statist principles is simply ironic. International human rights grew as a body of rules that serves to limit the freedom of states in their treatment of their own peoples. It means that "[s]tates' sovereignty has been limited, as the treatment of an individual by a State is a matter of international concern and not a matter purely for national jurisdiction."⁶⁶ Thus, the Charter's and TOR's tenacious affirmation of traditional state sovereignty suggests that all these talks about people's human rights are really subordinate to the logic of state. Human rights must be affirmed to showcase progressive pretensions, but then they must be readily dropped when inconvenient or in contradiction with the reasons of state.

Finally, the AICHR, as a body of state representatives, only decides by consensus and thus each state has an effective veto.⁶⁷ This body is supposed to be "constructive and non-confrontational" in promoting human rights.⁶⁸ In the final analysis, one should not really expect a lot for it is simply a "consultative body."⁶⁹

For all these weaknesses of AICHR, it is hardly surprising that for the past one or two years, ASEAN member states have been the site of many gross violation of human rights. One only needs to take note of Philippine President Rodrigo Duterte's Drug War that has so far killed more than seven thousand people mostly from poor neighbourhoods.⁷⁰ Cambodia's

62. *Ibid.*, Chapter IV, Art 14, Para. 1 merely states that "ASEAN shall establish an ASEAN human rights body."

63. Woon, *supra* note 4, p. 140.

64. Asean.org (2009), 1.1.

65. *Ibid.*, 2.1(a, b, c), Id.

66. Dixon, McCorquodale & Williams (2003), p. 175.

67. Woon, *supra* note 4, p. 141.

68. Asean.org (2009), 2.4.

69. *Ibid.*, p. 4.

70. Hrw.org (2017).

anti-insurgency drive against the Rohingya insurgents has also uprooted hundreds of thousands in Rakhine state.⁷¹ So much for “promotion and protection of human rights”⁷² and “adherence to the rule of law, good governance, the principles of democracy, and constitutional government.”⁷³

It is simply ironic that the current upsurge in human rights violations in ASEAN came after the adoption of the ASEAN Human Rights Declaration in 2012. These recent events only mean two things. The states are either only paying lip service to human rights or the documents are just words, words, and more words.

Indeed, while some have applauded the declaration as an achievement in itself,⁷⁴ the lack of a “supervisory mechanism” and effective remedy against a state’s violation of its obligation under the Charter or under the declaration of principles reduces the AHRD to just another piece of paper embodying grand declarations and nothing more. As a result, all these recent human rights violations and the deafening silence from most of the ASEAN member states practically mock the latter’s claims to “adhere to the rule of law, good governance, the principles of democracy, and constitutional government” and to “promote a people-oriented ASEAN.”

Another contradiction that is inherent in the Charter is that between capital and labour. The ASEAN Charter suffers from a sort of reification as it prioritizes commodities over people.⁷⁵ On the one hand, it aims for the “freer flow of capital” and “free flow” of goods.⁷⁶ On the other hand, ASEAN aims only for “facilitated movement of business persons, professionals, talents and labour.”

This contrast is very revealing. This means that there will be two different standards of treatment between people and things. “Free flow” for things in the form of capital and goods, while “facilitated movement” for people.

From the vantage point of the states, this is just logical. The concern for control of borders, of population, and of immigration are all justifications for “facilitated movement” of persons. Indeed, there is really nothing new in the concept of “facilitated movement” of people. Sovereign states have been doing that in the past decades or even for centuries. The Charter need not state it because that is already standard operating procedure for all ASEAN countries, especially Singapore and Malaysia, where many professionals, skilled workers, and domestic helpers from the Philippines and Indonesia are currently employed.

The problem becomes clear when this same logic is seen from the point of view of the peoples of ASEAN. Viewed from the peoples’ eyes, it readily appears that the words of the Charter mean that things would be treated better than persons. Things will have “free” or

71. Economist.com (2017).

72. Asean.org (2007), Chapter I, Art. 2, Para. i.

73. *Ibid.*, Chapter I, Art 2, Para. h.

74. Woon, *supra* note 4, p. 143.

75. The concept of reification derives from Marx’s conceptualization of commodity fetishism, which is the process by which human relation appears as a relation between things. Marx (1976). Georg Lukacs’s conceptualization of reification refers to the process whereby people also become objectified as they are treated like things or commodities in themselves, see Kolakowski (2008), pp. 1006–07.

76. Asean.org (2007), Chapter 1, Art. 1, Para. 5. The Charter seems to have two approaches to trade (free flow of goods) and finance (freer flow of capital). While the nuances of goods and capital are noted, both only differ in form. In essence, they are “things.” Their formal separation signifies the extent of capital accumulation in the history of capitalism.

“freer flow” within ASEAN in contrast to the “facilitated” movement of some people demanded by the market. Man-made things will have more freedom than their own makers—the peoples. The things in the form of commodities are reified as if they are more powerful than the hands and limbs that made them. The Charter therefore enacts a form of “legal reification of commodities” and even constitutionalises it as part of the purposes of ASEAN.

The exclusions in the enumeration of people, whose movement within ASEAN would be facilitated, are also quite clear. Only “business persons, professionals, talents and labour” will be afforded priority. Ignoring for the moment those who are uninvited, these enumerated persons, whose movement will be facilitated, are all subordinated to the exchange of things. They become subsidiary to the exchange of commodities and flow of capital in the ASEAN market, if they are not yet the things in themselves.

Moreover, it is also worth noting that the Charter’s language suggests a gradual, diminishing humanity, or perhaps, social class, that is inherent in the movement from “business persons, professionals, talents and labour.” Does the Charter suggest the pre-eminence of “business persons”? The text would suggest this reading. This seems to be the unstated idea of the enumeration. The person who embodies capital seems to precede all just as life comes first before liberty and property. Next are the petty bourgeois professionals and talents. They are positioned in the middle and in between the upper and the lowly. Finally, labour comes last. Indeed, the lowly comes last literally.

This class structuring means only that for the new ASEAN capital is primary and labour last. While class structures are often unstated, its inclusion in the Charter is quite surprising. The inclusion of the phrase seems to mean that ASEAN unwittingly constitutionalised social class distinctions and determined who would directly benefit from the new economic market. Thus, exclusion and class distinctions would be the normative policy of ASEAN as it aims to increase the movement of capital and commodities.

But the more disconcerting part in the constitutionalisation of class structures in the Charter is the fact that this is found in Article 1 (5). This provision is not an ordinary article of the ASEAN constitution. It is actually a (pro)vision. In other words, it contains the vision of ASEAN’s future. Thus, it follows that the kind of class structuring described above will be part of ASEAN’s future as the “Heads of State” have agreed among themselves. Chapter 1, Article 1(5) states:

To create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods; facilitated movement of business persons, professionals, talents and labour; freer flow of capital.

The provision succinctly states the kind of economic order imagined by the Heads of State for the region. Its presence in the text, however, does not narrate the order into its immediate existence. Unlike the presence of the ASEAN Summit and the other organs in the Charter, the textual presence of this economic vision signifies a referential absence. It signals that the “single market” is something yet to come.

From a certain viewpoint, the (pro)vision constitutionalises the utopia⁷⁷ of the ASEAN Economic Community: the single market. This utopia is the heart of the Charter. While there

77. The utopian character of this concept cannot be overemphasized. At the moment of constitutionalising the “single market” in 2007, ASEAN countries had large disparities in income and productivity. Singapore and (*F’note continued*)

is indeed not a lack of scepticism about the notion of a “single market” even among private entrepreneurs,⁷⁸ it does not really matter if it is unachievable. The idea of a “single market” is “more of an aspiration, not a legal or regulatory concept.”⁷⁹ If communism is the higher stage of socialism, a “single market” is free trade capitalism’s version of utopia. ASEAN’s single market is the communism of capital. It is the ultimate ideal of “elimination of all barriers to regional economic integration, in a market driven economy.”⁸⁰

This constitutionalised utopia, however, is not free from its own contradiction and neither can it hide such contradiction. The ideal as stated in the provision expresses not only a contradiction between labour and capital which has been discussed above, but also between the ideal and the means by which this utopia can be achieved. For one, there is a glaring contradiction between a “free flow of goods” and “freer flow of capital” on the one hand and the ideal of “a single market and production base” on the other hand. Pelksman sees the contradictoriness in a “freer flow of capital” and a “single market.” The ideal is certainly a higher stage of a market driven economy. This suggests “a deep and far-reaching cross-border liberalisation.”⁸¹ It is an ideal that even rises above the concept of Europe’s “old common market.”⁸² Thus, “freer flow” may not fit into this higher stage of market integration. Moreover, the concept of “facilitated movement” is also contrary to the ideal. A single market suggests a free flow, not just a freer flow. It cannot just be facilitation, but a free movement. Indeed, if these “freer” and “facilitated” principles are practiced, the concept of a “single market” cannot be “genuine.”⁸³

This contradiction is symptomatic of the statist leanings that one sees represented by the statist monologue in the preamble. As Article 5(1) of the ASEAN Charter reveals, ASEAN still cannot visualize the ideal outside the lens of the doctrine of sovereignty despite its attempt to imagine a market utopia. Thus, the words “facilitate” and “freer flow” are reflected in an article that embodies a single market, a free-market utopia. The Member States simply do not intend to step aside. They must facilitate. They must mould the market according to their will. This statist logic certainly runs counter to the ideal free trade where there is free flow of goods and people. In this ideal world, the state cannot be omnipresent and direct things according to its own logic. Article 1 (5), therefore, simply fails to reconcile these contradictory elements.

Like dreamwork, the production of a text cannot be so perfectly smooth as to erase all traces of its raw materials and their inherent contradictory elements. The ASEAN constitution is certainly not an exception. The analysis of the textual provisions of the Charter in this section has revealed these contradictions into the open. The statist provisions run into conflict

(*F*note continued)

Brunei have more than USD 50,000 and USD 30,000 respectively. Malaysia has more than USD 9,000, followed by Thailand with more than USD 5,000, Indonesia with more than USD 3,000. Both the Philippines and Vietnam have more than USD 2,000. Cambodia, Lao, and Myanmar have not even breached USD 2,000 level. See ASEAN Economic Chartbook (2016), p. 8.

78. Woon, *supra* note 4, p. 43. Woon states that even “private sector businessmen have expressed skepticism about the realization of this grand design.”

79. Pelksman (2015), p. 36.

80. Asean.org (2007), Chapter I, Art. 2, Para. 2 (n).

81. Pelksman, *supra* note 79, pp. 91–2.

82. *Ibid.*, p. 86.

83. *Ibid.*, p. 93.

with the so-called “pro-people” provisions. The language of the Charter, as evidenced by Chapter 1, Article 1 (5), also constitutionalised both the subordination of human beings to the market and capital and the class structuring of business persons, professionals, talents, and labour. Finally, whatever market ideal is stated in the article, the statist monologue contradicts it and the text affirms the role of the state in this utopia. Nonetheless, the states and capital remain the sure winners in this new world. In this utopian world of ASEAN, there seems to be no place for those who are not subject to the logic of the market. They are simply uninvited for they have no role to play in the capitalist drama of effective demand and ready supply.

7. CONCLUSION

The ASEAN Charter as a constitutional text contains traces of displacement and erasures of the peoples’ voice. What begins as a text of the peoples of Southeast Asia ends up as the mono-logical discourse of the Heads of State of ASEAN. In this monologue, one hears about the affirmation of traditional state sovereignty, the consolidation of power in the ASEAN Summit, and the undiminished states’ control over organs—like the human rights body—intended to protect the displaced “peoples/authors.” One hears about the subordination of “the peoples,” as “professionals, talents, labour,” to the “freer flow” of commodities into the market. Lastly, it imposes a utopian economic order that attempts to reconcile statist means and free trade ideal. Thus, the people’s displacement and disappearance in the constitutional text lays bare the main contradiction between the Member States’ utopian visions and statist realism, a contradiction that tears apart ASEAN. Like Goethe’s Faust, the new ASEAN legal entity has “two souls” ripping its breast apart. These contradictory forces of idealistic aspirations and statist realism make the Charter speak of democracy, human rights, and constitutionalism, while leaving no legal space for ordinary people to question Member States’ exercise of powers. This contradiction, of course, is a logical result of the production and textualization history of the ASEAN Charter, a history dominated by the “Eminent,” the “High Level,” and the “Heads of State.” This history of displacement and of silencing is etched on the text of the Charter. Nonetheless, it may not be too late to “promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration.” ASEAN only needs to take the first step: teach “the peoples” of Southeast Asia how to play golf.

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