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Institutional Aspect of Economic Integration in the European Union and ASEAN: A Comparative Glimpse

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ABSTRACT: *The European Union (EU), a leading regional political organisation of today, started with economic integration and was known as European Economic Community (EEC). Later, this (EEC) triggered political unity and formed the very centre of EU. The Association of Southeast Asian Nations (ASEAN) came into being in 1969 with the objective of economic, political and socio-cultural unity. Under Malaysian Chairmanship, the economic community came into being in December, 2015. This study makes a brief overview of the institutional aspect of these two regional organisations to spot their comparative features of legal harmonisation meant for economic integration. It underlines the importance of an ASEAN court for consistent constitutional and legal interpretation. Students and scholars of comparative economic integration would find this work relevant for further research.*

I. Introductory

The European Union (EU) of today is a supranational[1] organisation that has integrated so far 28 States of Europe. Its origin lies in three organisations, namely European Coal and Steel Community (ECSC), European Atomic Energy Community (Euratom) and European Economic Community (EEC). The ECSC was formed in 1951 by a treaty[2] to integrate coal and steel market in Europe bringing together six States including France and Germany, the two bitter enemies in the Second World War[3]. With this, Europe started its journey, as put by Tsoukalis (1982), as 'basically as an economic organisation, although the final objectives were clearly political.'[4] The other two organisations- the Euratom and the EEC- followed in 1957 under two different treaties, namely the European Atomic Energy Community (Euratom) Treaty and the European Economic Community (EEC) Treaty.

Of the said three institutions, the EEC was the leading one. Its main task, as said in Article 2 of the EEC Treaty, was 'to promote throughout the Community a harmonious, *development of economic activities*, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and *closer relations between the States* belonging to it.' As this provision reads, the EEC aimed, among others, at economic development and at the same time at closer relations among the Member States. The former confirms its economic character and the latter political, but the economic development was always its main focus, because, for some theorists, to quote Weatherill (1995), economic integration 'inevitably begets political integration too, even without any explicit initiatives directed at the political sector.' A two-fold means was envisaged to achieve these goals, namely establishment of a common market, and progressive approximation of the economic policies of the Member States. As Weatherill (1995) maintains, the economic success as a goal and common market as a means to reach that goal received prominence in the EEC propaganda and activities even to the extent that the common market and the EEC were the interchangeably used jargons in the United Kingdom for many years.

Kapteyn and Themaat (1998) defines Common Market as 'a market in which every participant within the Community in question is free (from any obstacle) to invest (capital), produce (goods), work, buy and sell, supply or obtain services under conditions of competition which have not been artificially distorted wherever economic conditions are most favourable.' They interpret the words, 'conditions of competition which have not been artificially distorted' as meaning that the conditions of competition have not been made unequal among the participants of the common market. In other words, the common market comprises unfettered four freedoms, namely the free movements of goods, persons, services and capital under equal conditions of competition. The materialisation of these freedoms requires harmonisation of the national laws so that no discrepancies remain

[1] A supranational organisation may be defined as an independent entity composed of a number of States to which powers have been transferred from national level (Weatherill 1995).

[2] Treaty Instituting the European Coal and Steel Community (ECSC Treaty), signed on 18 April 1951 at Paris, No. I:3729, (1957) 261 UNTS 140. It came into force on 23 July 1952 with validity for 50 years (until 23 July 2002), 261 UNTS 140 at p. 143. The signatories to the treaty were Belgium, Netherlands, Luxembourg, Italy, Germany and France.

[3] For a brief account of the destruction and loss caused by the Second World War, see Michael (1975) at pp. 781-799.

[4] Tsoukalis (1982) at 229.

between such laws, which might distort the equal conditions of competition. Thus, Storm (1982) holds the view that harmonisation would facilitate the appropriate functioning of the market.

Later, the common market programme was given further thrust by the adoption of the Single European Act (SEA*)* in 1986, which brought amendment to the EEC Treaty with a view to accomplishing an internal market programme. The competences of the EEC as envisaged by the SEA were further extended to include common foreign and security policy, and home and justice affairs through the formation of the European Union (EU) by the Treaty of European Union (TEU) signed on 7 February 1992 in Maastricht, which came into force on 1 November 1993. Thus, the common market continued by the internal market programme, primarily an economic programme, took a political shape. EU turned into a political organisation. The TEU renamed the EEC Treaty as EC Treaty (Treaty Establishing European Community- TEC) and contained in it. Thus, EC existed within EU framework as its component. Later, the Treaty of Lisbon, effective from 1 December 2009, brought amendment to the TEU and the TEC renaming it as Treaty on the Functioning of the European Union (TFEU).

The Association of Southeast Asian Nations (ASEAN) was established on 8 August 1967 in Bangkok, Thailand, with the signing of the ASEAN Declaration (Bangkok Declaration). The founding fathers of ASEAN are Indonesia, Malaysia, Philippines, Singapore and Thailand. Subsequently, the member States of ASEAN increased to include Brunei Darussalam (1984), Viet Nam (1995), Lao PDR and Myanmar (1997), and Cambodia (1999). The ASEAN aims, among others, to develop friendly relations and mutually beneficial dialogue, cooperation and partnerships with countries and sub-regional, regional and international organisations and institutions. ASEAN has made relations with almost all major economies in Asia including Japan, China, Republic of Korea and India through mechanisms under the various dialogue relations, namely Summit, ministerial meetings, senior officials meetings and meetings at experts' level and so on.

With its inception in 1967 merely as a regional association of a number of neighbouring States, today Association of Southeast Asian Nations (ASEAN) is a legal person founded on three fundamental pillars, namely Political-Security Community, Economic Community, and Socio-Cultural Community (ASEAN Charter, Art 3). The combined aim of these three Communities is 'to live in a region of lasting peace, security and stability, sustained economic growth, shared prosperity and social progress, and to promote our vital interests, ideals and aspirations' (ASEAN Charter, Preamble). The purpose of the Economic Community, in particular, is to 'create a single market and production base' consisting five freedoms- free movement of goods, services, investment, capital and skilled labour (ASEAN Charter, Art 1(5)). In other words, the free movement of these FIVE will turn ASEAN into a single market- an integrated economy. This integration will
bring benefits to the Community Members in many ways, such as increase in open competition among business enterprises across the border generating Gross National Production (GDP) and also employment for the people (ASEAN Economic Community Blueprint, Art 6).

While the EU single market is well established by now, ASEAN started that journey only in 2014 under the chairmanship of Malaysia. In this respect, ASEAN may learn from the experience of EU. This accounts for the present undertaking. In the first place, this investigates the theoretical underpinnings of both single markets to determine their unity or divergence at the conceptual roots. Second, it compares the methods by which economic integration is accomplished in these two regions. Third, it also spots the role of various institutions in the process of integration. This concludes with specific remarks/ suggestions, as appropriate.

II. Theoretical Bases And Methods Of Market Integration

As maintained by Fitchew (1991), EU Single market seems to be based on economic integration theory propounded by Scitovsky (1958) who posits that European economic integration can take place through 'the abolition of restrictions on the movement of products and, …on the movement of labour and capital.' This will generate competition among the national economies of the Member States under equal conditions. Such competition may produce 'unfavourable effects' on any particular sector of any national economy. For example, small business firms that a particular Member State had been fostering with subsidy, even to the disadvantage of the big ones, may not survive the competition. In such a situation Scitovsky suggests for adopting measures to remove the 'unfavourable effects' or to convert them into 'favourable ones' and thereby to bolster the integrated market. On the similar line of hypothesis, the European Commission (1985) seeks to completely establish the integrated single market free from 'barriers of all kinds' including legal barriers. In doing so, European Commission (1985), of course, recognises that 'many of the changes …will present considerable difficulties for Member States and time will be needed for the necessary adjustments to be made.' As to why such adjustments should be made, the Commission (1985) maintains that

The benefits of an integrated community economy of the large, expanding and flexible market are so great that they should not denied to its citizens because of difficulties faced by individual Member States. These difficulties must be recognised, to some degree they must be accommodated, but they should not be allowed permanently to frustrate the achievement of the greater progress, the greater prosperity and the higher level of employment that economic integration can bring to the Community.

In order to eliminate the barriers, the Commission adopts a dual method of integration- harmonisation of rules and standards, etc. and mutual recognition of Member States' requirements. The reason behind this approach is that only-harmonisation would not be an effective method of integration because detailing technical specifications would be time-consuming, excessively regulatory, and probably impossible given the diversity of legal, administrative and regulatory systems of the Member States. Resorting to only-mutual recognition would not be sufficient either given the increasing size of the competitive market of Europe.

By legal harmonisation, differing requirements that stand in the way of the said four freedoms are removed by laying down essential requirements instead of detailed ones so that the Member States could incorporate them in the domestic laws or amend necessary legal provisions. Harmonisation is brought about mainly through EU Directives issued by the Council. The member states are supposed to adopt means to comply with the Directives. Johnson and Rockwell hold view that the means adopted by the states may differ, but the ends must be the same. Under Article 95 of then EEC Treaty, derogation from the harmonisation provision may be available to a Member State on certain grounds like health, safety, environmental protection etc. The same provision allows Member States to legislate in such cases with varying standards or regulations, which will be mutually recognised within the EU. This is known as the principle of mutual recognition, which was first established by the European Court of Justice (ECJ) in the famous case of *Cassis de Dijon* (1979). In this case, the plaintiff importing French wine, Cassis de Dijon, with alcohol content of 15%-20%, was barred by the concerned German authority on the ground that it had to contain a minimum alcohol content of 25% as provided for by German law. It was contended that in absence of common rules, German prohibition amounted to a quantitative restriction to free movement of goods within the Community according to art. 30 (later art. 28) of the EC Treaty. The European Court of Justice (ECJ) upheld the contention. It said that it could have been accepted if it were necessary 'to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer' (p. 662). In other words, the Court, for the first time, established that in absence of harmonised Community law, goods produced and marketed legally in a Member State must be recognised in other Member States unless it contravenes mandatory requirements rules (p. 664). The *Cassis de Dijon* formula is an invention by the ECJ with a view to keeping atop the objective of common market as enshrined in the EC Treaty. In line with this principle, for example, for securities offerings throughout EU, the prospectus disclosure rules have harmonised by directives. Once a prospectus is prepared according to those directives in a particular Member State and it has been approved according to the local law, that will be accepted in other countries. No further administrative review is required. Thus harmonisation and mutual recognition are in operation in EU to integrate the markets.

On the other hand, ASEAN seems to have taken a similar theoretical approach. In 2007, it adopted a Declaration on Economic Community Blueprint. The Member States are committed to abide by and implement the Blueprint by 2015.[5] The Blueprint seeks to transform ASEAN into a single market and production base, a highly competitive economic region, a region of equitable economic development, and a region fully integrated into the global economy (http://www.aseansec.org). For example, with regard to its securities market integration, the Blueprint proposed some actions that include

(i) achieving greater harmonisation in capital market standards in the areas of offering rules for debt securities, disclosure requirements and distribution rules;
(ii) mutual recognition arrangement or agreement for the cross recognition of qualification and education and experience of market professionals;
(iii) greater flexibility in language and governing law requirements for securities issuance; and withholding tax structure, where possible, to promote the broadening of investor base in ASEAN debt issuance.

The ASEAN requested the Asian Development Bank (ADB) to provide technical assistance (TA) for the development and integration of regional capital markets.[6] Recognizing the individual circumstances of each

[5] ASEAN Economic Community Blueprint, Jakarta: ASEAN Secretariat, January 2008. The ASEAN feels the need of integration of its capital markets because the number of and openness to cross border listings within ASEAN are low, despite that the share of foreign investors in the national equity markets of each Member State has grown rapidly. The markets generally lag behind in comparison with more developed regions in terms of depth and quality. The markets remain relatively illiquid and have high trading costs because of their subscale trading volumes. All these scenarios coupled with stiffer competition among world stock exchanges, the emergence of alternative trading networks, and rapid growth in trading volumes internationally, have led Southeast Asian countries to agree that regional integration is needed to expand their market capacity and scale so that they can compete globally.

[6] Asian Development Bank (ADB) Regional Technical Assistance Report, Strengthening Southeast Asian Financial Markets (Financed by the Regional Cooperation and Integration Fund under the Regional Cooperation and Integration Financing Partnership Facility) Project Number: 42132 August 2008

member country, the ADB (2008) underscored that the regulators of capital markets, specifically the ASEAN Capital Markets Forum (ACMF), take measured steps toward harmonised capital markets standards, achieving mutual recognition frameworks, and developing exchange alliances. In other words, it proposed for adoption of a mutual recognition framework in conformity with global standards, such as those of the International Organization of Securities Commissions (IOSCO), and harmonisation of national legal and regulatory frameworks. This will eliminate inter-Member States legal and regulatory impediments and thereby will establish a "single passport" regime within the region. As to how the "single passport" system will work, ADB (2008) makes three important suggestions. First, once an issue meets prospectus requirements in one country, the sale of the securities should be allowed across the region. Second, securities market intermediaries should be able to provide their services through the region if they are incorporated and authorised to do so in one Member State; they should not be required to have separate authorization by the other countries in which they conduct their businesses. Last, the investors should be allowed easy access to regional capital markets.

III. Integration Tools Under EU And ASEAN Constitutional Framework

A. European Union

As said above, harmonisation and mutual recognition are the two methods of economic integration in Europe. At this stage, it is expedient to look at how these methods work within the EU constitutional framework and how its application is affected by the centre-periphery relationship existing within the quasi-federation of the EU. The central institutions (e.g., Council, Commission, and Parliament together) constitute the centre and the Member States form the periphery. The centre has exclusive powers in particular matters (e.g., common economic policy) and also shared powers (jointly with the periphery) in other matters. In the matters of shared jurisdiction, the power to legislate primarily vests in the periphery. But when the centre can better achieve the objectives of a particular matter, it can foreclose the matter for legislation. But there is no standard to measure if it is better to be legislated by the Union. It is a matter of political consideration, not legal. Therefore, such a situation sometimes gives rise to political tussle between the centre and the periphery. When the ECJ is invoked for judicial determination, it generates serious questions about the legitimacy of the Court in dealing with a political bickering. Still the Court has a great role to play by way of interpretation of the EU Treaty and other laws and thereby to contribute to its (EU) integration. All these aspects involved in the process of economic integration of Europe in general are relevant to discuss below.

1. Legislatives Tools

Article 288 of TFEU names five kinds of tools: regulations, directives, decisions, recommendations and opinions.[7] A "regulation" is a Community (EU) legislation, which is addressed to all the Member States in general. It becomes a part of the national legislation and thus is directly applicable, in its entirety, in the Member States without any need of enacting national laws. A "directive" is also addressed to all Member States, but it does not automatically become a part of the national legislation. It lays down an objective to be achieved and the Member States are required to take legislative measures for its implementation. A "decision" may be directed towards Members States or, natural or legal persons or group of persons. It is also binding on the addressees. The EU implements treaties or regulations by means of decisions. A "recommendation" or "opinion" is merely a suggestion or view of the EU and does not, therefore, have any binding force.

In this connection, it is worth mentioning that the actual nature of the aforementioned tools depends on their contents and not on their label. Thus, in *Confederation nationale case* [1962], the ECJ held a "decision" as a "regulation" and said that '(t)he determination of the legal nature of a measure emanating from the Council or Commission does not depend only on its official designation, but should first take into account of its object and content.'

In another case, *Roquette Fires* v *Council* [1980], the Court disregarded the official title of a regulation and adjudged it as a decision because it was addressed to particular undertakings.

Of all the integration tools, directive is the most important one because of its double-ended role, namely, as Buxbaum and Hopt (1988) put it, it integrates the market on the one hand and respects the Member States' sovereignty on the other. It is principally used for the Community's (EU) legal harmonisation while regulation as legal unification with respect to important matter, such as customs for imported goods. As evidenced in *Bremarhaven* [1973], the ECJ recognised regulation as the last-resort mechanism of legal harmonisation when no other tools are deemed to be of sufficient effect.

[7] These are the secondary legislation of the EU. While the primary legislation, i.e. treaties, set forth the objectives of the Community activities, the secondary legislation lays down the detail of how those objectives are to be attained.

2. Union Competence to Adopt Directives

As said above, the TFEU confers powers on the Union. Of them, there are areas that fall within its exclusive competence. Besides, there are some supplementary powers. Apart from these, there some powers that are shared by the Union (Centre) and the Member States (periphery). Under Article 3 of TFEU, the Union enjoys exclusive powers and as such can make directives in respect of the following areas:

(1) Customs union;
(2) Competition rules necessary for the functioning of the internal market;
(3) Monetary policy for the Member States currency of which is euro;
(4) the conservation of marine biological resources under the common fishery markets;
(5) the common commercial policy.

Thus, in *The Queen, ex parte Centro-Com Srl.* v *H.M. Treasury and Bank of England [1997],* where the United Kingdom refused to release funds from a British bank to a non-Member State as payment for goods exported from Italy instead of itself, the ECJ held that the British action was a violation of the common commercial policy, even though the alleged measure was taken by virtue of national competence in matters of foreign and security policy. In addition, the Union can also exercise exclusive competence for the conclusion of international agreements when (a) its conclusion allowed by a legislative act of the Union; (b) it is necessary to enable the Union to apply it exclusive powers; and (c) its conclusion has the effect on common rules.

The Union shares powers with the Member States in respect of the following matters: (a) internal market; (b) social policy; (c) economic, social and territorial cohesion; (d) agriculture and fisheries; (e) environment; (f) consumer protection; (g) transport; (h) tran European networks; (i) energy (j) freedom, security and justice, and (k) public health.

3. Making Legislation Within The Shared Competence Areas: The Principle of Subsidiarity

1) The Principle of Subsidiarity[8] in Brief

Article 5(3) of the TEU provides for the exercise of the Union's legislative competences as follows:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Put simply, this sub-Article prescribes that the Community is entitled to exercise its non-exclusive powers with regard to a particular matter when its objective cannot be sufficiently achieved by the Member States, and given its scale or effects that objective can better be achieved by the Community. In this respect, Article 5(4) requires the Union to act in proportionate to the need of achieving the Treaty objective. It is thus a principle of "reasonableness." Any action beyond necessity is unreasonable and, therefore, invalid.

2) Subsidiarity as a Bone of Contention between the Centre and Periphery

The principle of subsidiarity is a political concept as it involves the assessment of comparative efficiency of a proposed action. While the Union deems the objectives of the proposed action can be better achieved by its legislation, the Member State(s) may differ. Likewise, the efficiency test may give different results at different times. For example, the centre's competence of lawmaking on environment or terrorism can hardly be questioned today, even though they were the Members' concern in the beginning. Thus, subsidiarity is a debatable and tug-of-war issue. European Cheese Directive (1992) may be cited an example. Because they produced cheeses from raw milk, French cheeses contained high level of bacteria, which created a problem concerning the hygiene regulations of particular countries. On the other hand, Northern European cheeses made from pasteurised milk and as such contained less or no bacteria had almost the same appearance and taste as the raw milk cheeses, and also complied with the said regulations. As such, there was a risk for the French cheeses to be replaced by Northern European ones but the consumers liked the former. Given this circumstance, the French cheese producers invoked the centre's interference, which responded with the above Directive laying down rules for the production and marketing of raw milk, pasteurised milk and milk related products. In proposing the Directive, as mentioned the concerned document, COM(89) 667 final and COM (91) 420 final, the Commission had in mind the purpose of protecting the public health and ensuring the free movement of milk products throughout the (then) Community. The Directive is criticised as a misuse of the subsidiarity by the

[8] The principle of subsidiarity was not in the original EC Treaty in an explicit form. Article 5 of the Treaty establishing the Coal and Steel Community impliedly provided for the application of the principle when it said, 'the Community shall exert direct influence upon production or upon the market only when circumstances so require'. For a conceptual and historical aspect of the principle, see Schoutheete (2000).

centre, though it is defended that the centre did so to maintain and protect diversities of cheeses, particularly French cheeses.

Incorporation of the principle of subsidiarity into the TEFU imposes constraints both on the Union and Member States. Normally, the centre is not supposed to interfere in the area of non-exclusive competence. It may, however, intervene in such area when it is called for by the objective of a particular act. As Schoutheete (2000) rightly says, it is a matter of political consideration, which must be there in the quasi-federal structure of the Union and should be applied wisely.

3) Role of European Court of Justice (ECJ) in the Matter of Subsidiarity

As seen above, subsidiarity is prone to give rise to conflict between the centre and the periphery. There may be a contention over the "proportionality" of the exercise of the power by the centre. In other words, the key issue involved in a subsidiarity case is whether the objective of the Union act or national legislation can be *better or sufficiently* achieved at the Union or national level. As Toth (1994a) says, this is a political issue and cannot, therefore, be determined by the Court. Such a matter falls within the discretionary powers of the Council and Commission. The Court can only determine whether the Council or Commission has committed a manifest error or misuse of powers or has clearly exceeded the limits of its discretion. If these limits are exceeded and the Court goes to look into whether the objective of an impugned action/measure taken by the Council and Commission could be better or sufficiently achieved at the Member State level, that, to quote Toth (1994b)[9] 'would interfere with the legislative process by replacing the institutes' discretion by its own view'. The ECJ can, of course, take into account the statement of reasons contained in the preamble[10] of an act and also the legal basis of the same. Toth (1994a)[11] maintain that '(t)his is the main means whereby the Court can control the institutions' discretionary powers.'

A few cases decided by the ECJ may be cited here. The Court has just touched upon the principle of subsidiarity. Its scope has not been fully explored. In *United Kingdom* v *Council (1996),* the United Kingdom sought judicial review of the Working Time Directive (1993), which provided, among others, for a maximum working time. It submitted, *inter alia,* that the concerned provision (Article 118a) should have been interpreted in the light of the subsidiarity principle because 'the extent and nature of legislative regulation of working time vary very widely between Member States'.[12] It also argued that the legislature had not fully considered or sufficiently exhibited that the result intended to be obtained by the Directive (protection of health and safety of workers) was such as could not be attained by measures by Member States. The Court pointed to that once the Council had deemed it necessary to take measures for the protection of health and safety of the workers by harmonising the working time, that would suffice to meet the subsidiairity test. Thus, it did not apply the comparative efficiency test, rather relied on whether the legal conditions had been fulfilled. This is further clear from the following words: '(I)t is not the function of the Court to review the expediency of measures adopted by the legislature. The review exercises under then Article 173 must be limited to the legality of the disputed measure.'[13] Second, in *Bosman[14]* a sporting associations made rules effecting transfer fees for players moving from one club to another. The ECJ held the rules incompatible with then Article 48 of the EEC Treaty which provided for free movement of workers. German Government pleaded that sport was, in effect, similar to culture diversity of which must be respected by the (then) Community under Article 128(1) of the EEC Treaty. It also argued that since sporting associations enjoyed freedom and autonomy under national law, the (then) Community (which includes the Court) intervention should, with regard to the subsiadiarity principle, be limited to what was strictly necessary. The Court refuted the sport-culture similarity argument on the ground that football player's engagement in the given case involved remuneration and hence it was an economic activity coming within the purview of then Article 48 of the EEC Treaty. It dismissed the next argument in that private organisation's freedom to adopt rules should not go so far so that it hampers the rights (of free movement) conferred by the Treaty. In other words, the Court seemed to interpret that the transfer fees had impeded free movement of workers and, therefore, were subject to abolition. In this case, the Court avoided expediency test

[9] Toth (1994b), at 48.

[10] The preamble of a treaty is like a general principle of law acts as the guideline for the judiciary in the interpretation of its provisions. Unlike the provisions themselves it does not have any binding force. While talking about where the subsidiarity should be placed in the *Maastricht Treaty,* in the preamble or body, Lord Mackenzie-Stuart (1991) writes, 'The Preamble and the General Principles are of some use to the Court of Justice when they are weighing up in trying to interpret other provisions of the Treaty- it gives them a line,' at p. 40.

[11] Toth (1994a), at 284

[12] Case C-84/94 (1996), at p. 5808.

[13] Case C-84/94 (1996), at p. 5802 .

[14] Case 415/93, [1995] ECR I-4921.

and held on to determining the legality of the sporting federation's rules. Thus, from the reading of the above cases, it can be gathered that, invoked to employ the subsidiarity principle, the ECJ has so far applied the legality test instead of expediency test. Of course, at the same time it made law by way of interpretation keeping constant view on the teleology of integration.

4. Legal Interpretation by the European Court of Justice (ECJ)

It should not be disputed that interpretation is one of the fundamental functions of the ECJ as a judicial institution. As seen above, as the Union's constitutional court, the ECJ interprets the EU Treaties with a teleological approach, which is, of course, inalienably essential for carrying out the integration programme. Erecting atop the Treaty objective, it has laid a number of decisions that form milestones in the history and thereby has contributed to building up the Union legal order. For instance, in order to fortify the Union foundation as a supranational entity it was a must to ascribe its law with supremacy over the national laws.[15] Additionally, in the past the Court proffered directions to the Community when it was in need.[16] Most importantly, for instance, when during the seventies the then EEC integration by total harmonisation was faltering and the people were losing confidence in the Community solution, the Court came forward with the *Cassis de Dijon* decision, which invented mutual recognition as a method of integration side by side harmonisation. This decision provoked[17] the Commission to adopt a policy proposal[18] to the Council as a supplementation to the 1969 General Programme on the Removal of Technical Barriers to Trade[19]. Before this, it wrote to the governments and Community Parliament on the impact of the said judgement.[20] Ultimately, mutual recognition as a method of integration came into being in the EEC and later Union integration process. This is how the Court stirs the 'political waters'[21] and indirectly contributes to the Community legislation.[22] But this does not mean that the Court legislates. Rather it has declined to interpret the Treaty to make such a rule as could only be done by the legislative amendment. It has also refrained from assessing comparative expediency involved in the application of the principle of subsidiarity, because it is a matter for the political forum to do. So the Court should not be flatly attacked as having trespassed the arena of legislation or legislative politics. Of course it is true that the Court exploits its power of interpretation to the fullest possible extent, when necessary, to promote the common market objective. This may have the effect of political provocation, but that is not unbecoming of it, because being the interpreter of the Community constitution and being composed of sensible human beings the Court should not be unmoved by the need of the Union especially when the legislature fails to

[15] 'Without that basic hierarchy, disintegration would follow. Even one breach in the dam would be too many, for one fissure would inevitably breed others.' Weatherill, *Law and integration in the European Union, supra* note 69, at p. 104.

[16] At national level judicial law-making in need is ever present. For example, in Britain judges, as a part of their function, make new laws because

> parliament cannot legislate for every possible combination of human affairs, and it can be difficult to discover the will of parliament when absence of legislation shows that parliament, as such, has given no thought to the point at issue. If there is a statute on the subject, the best that can be done is to interpret it in a way that seems to make sense of its declared intention. If there is not, then the courts must look for some old legal principle on which to base a new legal point. Joshua Rozenberg, *The Search for Justice* (London, Sydney and Auckland: Hodder & Stoughton, 1994) at p. 56.

[17] The Commission was moved by the judgement in that the guidelines laid down in it 'can only strengthen the Commission's efforts to safeguard the Community's achievements and to promote the growth of the internal market.' (1980) OJ C105/7.

[18] OJ C253.

[19] (1969) OJ C76.

[20] Bull. EC 7/8-1980 at p. 13.

[21] Karen J. Alter, Sophie Meunier-Aitsahalia, 'Judicial politics in the European Community- European integration and the pathbreaking *Cassis de Dijon*', (Jan. 1994) 26 CPS 535 at 557. In this connection for the judicial politics in Europe in general, see Martin Shapiro and Alec Stone, 'The new constitutional politics of Europe', (Jan. 1994) 26 CPS 397

[22] Thus are the Court and the Commission engaged 'in a double act- the Court able to push out the boat of integration and steps on toes in the process in ways the Commission could never dare to do.' Richard Kuper, *The Politics of the European Court of Justice* (London: Kogan Page, 1998), at p. 60.

act. In this form 'judicial politics in the EC (now Union) is here to stay, a fact that European politicians have recognized.'[23]

B. ASEAN

Unlike the EU, ASEAN is not a supra-national organisation. It is an association of a number of States with legal personality.[24] As such, there is no division of lawmaking power between the centre and the periphery. It has three Community Councils[25] and the Secretariat.[26] However, it is a rule-based organisation.[27] The ASEAN Charter emphasises this that ASEAN and its Members shall act upon "adherence to the *rule of law,* good governance, the principles of democracy and constitutional government.[28] The Charter again makes a similar call with respect to the attainment of economic goal- "adherence to multilateral trade rules and ASEAN's rules-based regimes for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration, in a market-driven economy."[29] Thus, it may be concluded that "ASEAN's Economic Community Blueprint and the economic integration within ASEAN is to be carried out *through law, and in continuous conformity with law.*"[30] The reason behind legal harmonisation may be highlighted in the following words:

The role of the law in ASEAN thus cannot be overstated. Within our individual countries, laws give our people a sense of security, and form the backbone of economic prosperity which investors, businesses, employers and employees rely on. For businessmen and traders both within and outside our region, familiarity with our laws and legal systems, as well as the certainty of legal outcomes, provide increased business certainty and lower transactional risks in the
course of trade.[31]

As said above, there is no standing lawmaking body in ASEAN. The ASEAN Senior Law Officers Meetings (ASLOM) is entrusted with the task of harmonising the legal rules within ASEAN. For example, *The Proposal for the ASLOM Working Group on Examining the Modalities for the Harmonization of the Trade Laws of ASEAN* underlines the importance of harmonisation of trade laws in the following words,

One way for ASEAN countries to help its businessmen cope with the uncertainty and cost of having to deal with different legal regimes in business transactions between ASEAN countries would be for the states to harmonise their international trade laws. If this is achieved, then businessmen who conduct business across ASEAN would have to consider only one set of rules applicable to their transaction, rather than many different sets of rules. This would remove uncertainty, reduce cost, generate greater business confidence and, as the final outcome, promote greater intra-ASEAN trade.[32]

IV. Conclusion

The EU is a quasi-federation. It enjoys sovereignty transferred by the Member States. This theoretically enables the centre to compel the latter to comply with its law. The Member States concede to this supranational primacy of the centre in consideration of the balance of the politico-economic benefits they reap from being integrated. In order that the centre can maintain its supranational status its architects have equipped it with exclusive powers in which domain the periphery does not have any share. At the same time, the periphery has been given autonomy conditioned by an upper-hand check by introducing subsidiarity principle. The centre can press the brake on the speed of the peripheral action when it deems it necessary for the sake of the Union as a whole. This, being a subjective decision on the part of the centre, is prone to give rise to conflict between the centre and periphery when the latter feels unhappy with the former's interference because its "balance of interests" is in danger. This political tug of war is an ever-present scenario within the Union constitutional latticework in general right from the start of directives making up to their implementation. Of course, the ECJ has a limited role to play. It cannot and should not engage in deciding the balance of expediency with regard to any matter of

[23] Karen J. Alter, Sophie Meunier-Aitsahalia, 'Judicial politics in the European Community- European integration and the pathbreaking *Cassis de Dijon*', (Jan. 1994) 26 CPS 535. 558
[24] ASEAN Charter, Article 3.
[25] *Ibid.,* Art. 9.
[26] *Ibid.,* Art. 11.
[27] Pornchai Danvivathana (2010). Role of ALA in the Current Legal Issues under the ASEAN Charter, *Thailand Law Journal* 2010 Spring Issue 1 Volume 13;
[28] ASEAN Charter, Art 2(h).
[29] *Ibid,* Art 2(n).
[30] Chong, (Arbitration And International Sale Of Goods), 4th Asean Government Legal Officers Programme (Aglop), (Singapore: Attorney General's Chamber, 2013), p. 5.
[31] *Ibid.*
[32] Cited in Chong, *ibid.,* at p. 6.

legislation. In spite of this it indirectly can influence the legislative actions as it did with respect to devising mutual recognition as a means of integration.

ASEAN is a legal person separate from its Members, but not superior to them. Members have not conceded any sovereign power to it. And there is no centre-periphery tug of war in this organisation. As such, institutionally ASEAN is different from EU. However, they have a similar goal of integration based on identical economic theory. The methods of integration are also same, namely harmonsation and mutual recognition. The tools of harmonisation are not same, however. The EU use mainly directives to harmonise the legal rules both in exclusive and shared competence areas. However, the process of directive making is not easy, especially in the shared areas. There may be a tussle between the Union and the Member States, in which case the ECJ may have to be involved. Though it avoids matters of purely political determination, it plays a crucial role as the Union's court. It may determine the justiciability of an act in view of the Union Treaty objective. In that capacity, it has made a great contribution, particularly in the development of mutual recognition as a method of integration. Second, it contributes by interpretation of the Treaty and the laws. It also serves the Union by guiding the national courts of the Member States by giving preliminary opinions. This is a great feature of the Union, which is lacking in the ASEAN. There will, sooner or later, be a need of an ASEAN court for uniform interpretation of its constitutional documents as well the harmonised laws. If the harmonised laws are interpreted by national law courts, there may be a crisis of uniformity and the purpose harmonisation may become meaningless in that case.

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