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Complexity of Legal Harmonisation in Southeast Asia: A Diversity of Legal Systems & Languages

By Robert Brian Smith[*1]

The eleven countries of the Southeast are quite diverse in terms of culture, religion, language and legal system. All members except Thailand were colonies of European powers who introduced their legal systems. Even Thailand, which was never colonised, was influenced by the laws of the European powers. This European influence has resulted in a range of political and legal systems. Although English is the working language of ASEAN, it is the national language of none. Cambodia, Lao PDR, Myanmar, and Thailand use a non-Latin script, and Vietnam uses Latin-based orthography to complicate matters further. The diversity of national and official languages is a crucial element impacting the ability of ASEAN member states to harmonise their laws, so there is a common approach to prosecuting international criminal activity. Such an approach is critical as the ASEAN Economic Community moves to greater integration. The article briefly describes the importance of language in understanding legal concepts. Then, it describes the variety of legal systems in place across Southeast Asia, which, other than the case of Thailand, are vestiges of their colonial past. The article discusses three possible models for harmonisation/ cooperation: a set of model laws, accession to an international treaty, or an agreement to cooperate. In the case of Brunei Darussalam, Malaysia, the Philippines and Singapore, where legal systems use English, all three models could be used. For the other seven countries, because of their language diversity, it is argued that the set of model laws is inappropriate. The preferred option is a treaty or convention that sets out the scope and minimum requirements to be included in the local law and the obligations to cooperate. The Convention on Cybercrime (Budapest Convention) is a possible model.

Keywords: *Southeast Asia, Cybercrime Convention, Law harmonisation, Legal translation, Model laws*

Introduction

The Association of Southeast Asian Nations (ASEAN) is a regional organisation whose working language is English.[2] It is not the national language

[*]Ph.D. (Civil Engineering); M.Phil in law; Ph.D. student in law, University of New England, Armidale NSW, Australia.
E-mails: r.b.smith@unswalumni.com; robert@aecconsultants.asia

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[2]*Charter of the Association of Southeast Asian Nations. (2007).*

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of any of its ten members and one prospective member. It is an official language of three members: Malaysia, the Philippines and Singapore.

This article focuses on the impact of language on the ability of ASEAN member states to harmonise their laws, develop a common approach to prosecution of international criminal activity, and develop a framework for closer cooperation. The issue is broader than translation, per se; it is also an issue of the process undertaken in the initial drafting of the law and placing the translation in context.

Suwannasri and Nomnian investigated the use of English as a lingua franca[3] for the populations of the ASEAN member countries.[4] Member countries were divided into two categories: the Outer Circle, which consists of countries colonised by English-speaking powers and the Expanding Circle, where English has no role in domestic institutions. These countries are Cambodia, Indonesia, Lao PDR, Thailand, and Vietnam. Timor-Leste would also be placed in the Expanding Circle. The Outer Circle countries are Brunei Darussalam, Malaysia, Philippines, Singapore, and Myanmar before 1962.

Assy argues that Anglo-American law uses "common" expressions and gives them meanings in law different from their ordinary ones, for instance, action meaning lawsuit.[5] Also, legal language utilises expressions taken from "formal and archaic English, Latin, and Old French terms" that have a specific meaning in law, such as alibi, amicus curiae, affidavit and estoppel.[6] It also utilises expressions with no additional legal implications, such as prima facie, versus, and aforesaid. Legal language is "underpinned by a body of theories, doctrines, principles, and rules," all required to understand the meaning and scope of legal concepts.[7] After studying the impact of language on the legal system of Timor Leste, Simões argued that law is a kind of language of its own, and legal systems cannot be separated from the underlying technical language.[8] A quantitative regression study of cross-citations between Supreme Courts in Europe found that knowledge of the language cited in court appeared more important than legal traditions, culture or politics**.**[9]

The complexity of the task can be gauged from the fact that the University of Kent provides its undergraduate law students with a ten-page list of Latin terms.[10] This is, in fact, minuscule compared to the 11th edition of the authoritative Black's Legal Dictionary, which has 2,110 pages of legal entries.[11]

What is harmonisation? Clough[12] has provided a cogent discussion in his critique of the Convention on Cybercrime.[13] This author has broadened the focus

[3]Defined as a common or bridging language.
[4]Suwannasri & Nomnian (2017).
[5]Assy (2011).
[6]Ibid at 399.
[7]Ibid.
[8]Simões (2015).
[9]Gelter & Siems (2014) at 267.
[10]Lawlinks. (n.d.).
[11]Garner (2019).
[12]Clough (2014).
[13]*Convention on Cybercrime* (2001).

of the original discussion to cover transnational crime in general. Clough emphasises that "harmonised does not mean identical".[14] What is needed is the ability to enable enforcement mechanisms to work effectively, considering national and regional differences influenced by each party's legal traditions, history, and culture. Key issues include substantive and procedural law and possible legal restrictions or prohibitions on activities such as mutual assistance and extradition. To respond effectively to transnational crime, legislative harmonisation must seek to accommodate and reconcile differences between the parties. One solution could be to allow parties to exercise their right to declare reservations so that implementation can be adapted to the local conditions, thus addressing the difficulties in achieving consensus between all parties. Despite these difficulties, Clough considered that harmonisation is critical in the case of transnational crime, such as cybercrime, as there is a need to ensure that no safe haven is provided to the offenders. There must also be effective cooperation between the various law enforcement agencies.

Decision-making in ASEAN is based on the principle of conciliation and consensus[15], so any approach must receive unanimous approval. As can be seen in Table 1, a complicating factor is that, based on the Democracy Index developed by the Economist Intelligence Unit, the economies range from flawed democracies to authoritarian regimes.

Table 1. *Southeast Asian Economies - Democracy Index 2023*

Country	**Regime Type**	**Overall Score**	**Rank**	**Electoral Process and Pluralism**	**Functioning of Government**	**Political Participation**	**Political Culture**	**Civil Liberties**
Brunei Darussalam	4	No data						
Cambodia	4	3.05	121	0.00	3.21	5.00	5.00	2.06
Indonesia	2	6.53	56	7.92	7.86	7.22	4.38	5.29
Lao PDR	4	1.71	159	0.00	2.86	1.67	3.75	2.35
Malaysia	2	7.29	40	9.58	7.50	7.22	6.25	5.88
Myanmar	4	0.85	166	0.00	0.00	1.11	3.13	0.00
Philippines	2	6.66	53	9.17	4.64	7.78	4.38	7.35
Singapore	2	6.18	69	5.33	7.14	4.44	7.50	6.47
Thailand	2	6.35	63	7.00	6.07	5.00	6.25	7.06
Timor-Leste	2	7.06	45	9.58	5.93	5.56	6.88	7.35
Vietnam	4	2.62	136	0.00	3.93	2.78	3.75	2.65

Note: 1 = Full Democracy; 2 = Flawed Democracy; 3 = Hybrid Regime; 4 = Authoritarian
Source: Democracy Index 2023[16]

[14]Clough (2014) at 701.
[15]*Charter of the Association of Southeast Asian Nations*. (2007) art. 20(1).
[16]Economist Intelligence Unit (2024) at Table 2.

This article examines the legal systems and languages of ASEAN and provides selected examples from the literature that show the issues associated with legal translation. Considering language issues, it assesses three potential models for cooperation: a set of model laws, accession to an international treaty, or an agreement to cooperate. To which of these three models should countries aspire? Does it depend on their legal system, national language, and its nuances and understandings?

Methodology

This research is based on the documentary research concept. It analyses Southeast Asia's current governance structures, legal systems and national languages. It then discusses the difficulties of translation in a legal setting. Finally, it investigates the types of models currently in practice to ascertain which model may be the best fit for legal harmonisation in Southeast Asia.

Legal Analysis

Legal Systems and Languages of ASEAN Members

Common Law Countries

The three ASEAN countries with a common law system were former British colonies (Malaysia and Singapore) and a British dependency (Brunei Darussalam).

Brunei Darussalam

Brunei Darussalam is an absolute monarchy with the supreme executive authority of the country vested in the Sultan[17] , who is also the Prime Minister.[18] As a result, although not evaluated by the Economist Economic Unit, it is clearly an authoritarian regime.

In Brunei Darussalam, the Supreme Court is guided by the Constitution, but where no written laws exist, they rely on judicial precedent.[19] The common law of England, the doctrines of equity, and statutes of general application apply subject to local circumstances and customs.[20] Brunei introduced Sharia law in 2014[21] with the Syariah Penal Code Order[22] in 2013, followed by the Syariah Courts Criminal Procedure Code Order in 2018.[23]

[17] *Constitution of Brunei Darussalam (revised edition 2011)* art 4(1).
[18] Ibid at art 4(2).
[19] *Legal System in Brunei Darussalam*.
[20] *Application of Laws Act (rev ed 2009) (Brunei Darussalam).*
[21] Hunt (2014).
[22] *Syariah Penal Code Order, 2013.*
[23] *Syariah Courts Criminal Procedure Code Order, 2018.*

The official language is Malay, although the Constitution states that an official version in the English language must be provided, and both versions must be accepted as "authentic text".[24]

Malaysia

Malaysia has a federal structure[25] with a democratically elected national parliament[26] and a monarch as head of state.[27] As shown in Table 1, the Economics Intelligence Unit considers it a flawed democracy due to its relatively low scores on *Political Culture* and *Civil Liberties*. The Yang di-Pertuan Agong, the head of state, is elected by the Conference of Rulers for a term of five years.[28]

The Malaysian legal system is based on legislation and the common law system.[29] The common law of England and the rules of equity as administered in England up to 7 April 1956 apply in as far as they are applicable to Malaysia.[30]

The national language of Malaysia is Malay, and no person is prevented from using other languages "otherwise than for official purposes." However, authoritative texts such as bills and acts will be in English until Parliament provides otherwise.[31] The use of English still applied on 29 February 2024.

Singapore

Singapore is a sovereign republic.[32] It is a parliamentary democracy[33] with an elected President as head of state.[34] As shown in Table 1, the Economics Intelligence Unit considers it a flawed democracy due to its low scores on *Electoral Process and Pluralism* and *Political Participation*.

Local jurisprudence is now a significant part of the common law in Singapore.[35] The common law of England, as far as it was part of Singapore law immediately before 12 November 1993, continues to be part of the law of Singapore.[36]

The official languages are Malay, Mandarin, Tamil and English whilst the national language is Malay in the Roman script.[37] Laws are mandated to be published in plain English.[38]

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[24]*Constitution of Brunei Darussalam (revised edition 2011)* art 82.
[25]*Federal Constitution (1 November 2010 reprint) (Malaysia)* art 1.
[26]Ibid at pt IV ch 4.
[27] Ibid at art. 32.
[28] Ibid at art. 32(3).
[29] Ahmad (2014).
[30]*Civil Law Act 1956 (incorporating all amendments up to 1 January 2006*).
[31]*Federal Constitution (1 November 2010 reprint) (Malaysia)* art 152(2).
[32]*Constitution of the Republic of Singapore (1963) (version as at 14 March 2019)* art. 3.
[33]Ibid at pt VI.
[34]Ibid at ch 1.
[35]Tan & Chan (2019) s 1.3.3 to 1.3.6.
[36]*Application of English Law Act (1994, rev ed) (Singapore)*.
[37]Constitution of the Republic of Singapore (1963) (current version as at 14 March 2019) art 153A.

Civil Law Countries

Indonesia

Indonesia is "a unitary state with the form of a Republic",[39] with the power of government held by the President.[40] Ministers are appointed and dismissed by the President.[41] As shown in Table 1, the Economics Intelligence Unit considers it a flawed democracy due to its low scores on *Political Culture* and *Civil Liberties*.

Laiman et al. have described the complexity of Indonesia's legal system, although it is a country based on civil law on the Dutch model.[42] The Netherlands East Indies, as Indonesia was called, was a Dutch colony. The Codes are "heavily, if not translated, influenced, or derived from the French codified laws" due to France occupying the Netherlands during the Napoleonic Wars.[43] There are also elements of customary and Adat Law.[44] Adat Law is a set of local and traditional laws and dispute resolution systems operating in many parts of Indonesia, and it tends to be based on region and ethnicity.[45] Adat law is important in areas such as family law, inheritance, and agrarian law.[46] Syariah Law principles are not part of Indonesian law, although the Court of Religion originally applied Syariah law to matters of marriage and inheritance for Muslims.[47] With regional autonomy, Aceh introduced Syariah courts, which cover matters such as family law, civil law, criminal law, courts, and education.

The language of the state is Bahasa Indonesia[48], which uses the Latin script.

Lao Peoples Democratic Republic (Lao PDR)

Lao PDR is a people's democratic state. "All powers belong to the people, [and are exercised] by the people and for the interests of the multi-ethnic people of all social strata with the workers, farmers and intelligentsia as key components".[49]

> The Lao Front for National Construction, the Lao Veterans Federation, the Lao Federation of Trade Unions, the Lao People's Revolutionary Youth Union, the Lao Women's Union and other social organisations are the organisations to unite and mobilise all strata of the multi-ethnic people to take part in the tasks of protection and

[38]Ying (2000).
[39]The Constitution of the Republic of Indonesia (1945, consolidated) (tr Ministry of Foreign Affairs of the Republic of Indonesia 1 July 2003) art 1(1).
[40]Ibid at art 4(1).
[41]Ibid at art 17.
[42]Laiman, Reni, Lengkong, Ardianto, Reni & Renaldi (2019).
[43]Ibid s 1.1.
[44]Ibid s 6.2
[45]Ibid.
[46]Ibid.
[47]Ibid.
[48]*The Constitution of the Republic of Indonesia (1945, consolidated) (tr Ministry of Foreign Affairs of the Republic of Indonesia 1 July 2003)* art 36.
[49]*Constitution of the Lao PDR (amended) (tr Khamphaeng Phochanthilath)* art 2.

> construction of the country, to develop the right of self-determination of the people, and to protect the legitimate rights and interests of members of their respective organisations. *They have the right and duty to monitor the activities of the National Assembly, Local People's Assemblies and other members of such assemblies.*[50] (emphasis added)

As shown in Table 1, the Economics Intelligence Unit considers it an authoritarian regime due to its low scores on all variables, which is unsurprising for a communist state.

The President of the State is elected by a vote of the National Assembly.[51] "The government consists of the Prime Minister, Deputy Prime Minister[s], ministers and chairmen of the ministry-equivalent organisations".[52]

Legislation is the primary source of law, and there are two types of legislation: legislation of general application and legislation of specific application, such as presidential decrees or decisions and notifications.[53] Jurisprudence is not part of the legal system.[54] There are no codes in print, and there are no legal journals, but various laws are included on government websites.[55]

The Lao language and its script are the official language and script.[56]

Thailand

Thailand is a parliamentary democracy with a king as head of state.[57] As shown in Table 1, the Economics Intelligence Unit considers it a flawed democracy as it has relatively low scores on *Functioning of Government, Political Participation* and *Political Culture*.

The fundamental laws of the legal system of Thailand are the *Constitution*[58] *Civil and Commercial Code*,[59] *Civil Procedure Code*,[60] *Criminal Code*[61] and *Criminal Procedure Code*.[62] In addition, there are a large number of organic laws. Under the Constitution, there are four types of courts: the Constitutional Court of

[50]Ibid at art 7.
[51]Ibid at art 66 & art 67.
[52]Ibid art 71.
[53]David, De Leon-David & Kitcharoen (2019) s 3.
[54]Ibid.
[55]Ibid s 4.
[56]*Constitution of the Lao PDR (amended) (tr Khamphaeng Phochanthilath), (2016)* art 110.
[57]*Constitution of the Kingdom of Thailand, B.E. 2560 (2017)* s 2.
[58]Ibid.
[59]"English translations of the original Thai law texts are prepared for reference purposes only. Only the Thai script versions, as published in the royal Thai government gazette (**ราชกิจจานุเบกษา**), shall have legal force in Thailand". The English translation can be found at: *Civil and Commercial Code, B.E. 2468 (1925)* an online version at: *Civil and Commercial Code, B.E. 2468 (1925)* (online version). s
[60]*Act Promulgating the Civil Procedure Code, B.E 2477 (1934) (with amendments up to and including Civil Code Amendment Act (No. 30), B.E. 2560 (2017)).*
[61]*The Criminal Code (Thailand) (updated to 2009).*
[62]*The Criminal Procedure Code (Thailand) (updated to 2009).*

the Kingdom of Thailand, the Courts of Justice, the Administrative Courts, and the Military Courts.[63]

> Thailand is not a common law jurisdiction and judicial precedent is not binding on lower courts. The Supreme Court of Justice is not bound to follow its own decisions, and lower courts are not bound to follow precedents set by higher courts. In practice, however, the decisions of the Supreme Court of Justice do have a significant influence on the Supreme Court of Justice itself and lower courts. Supreme Court decisions are printed on a regular basis and distributed to law libraries and private subscribers.[64]

Unlike the other ASEAN jurisdictions, the Thai Constitution remains silent on Thailand's national or official language. Most language decisions are based on unwritten assumptions about the status of the Thai language.

Since Thailand became a constitutional monarchy in 1932, there have been a series of successful military coups d'état, most recently in 1976, 1991, 2006, and 2014.[65] The military-backed 2017 constitution was approved by the new King, Vijiralongkorn, King Rama X, after he made his own amendments. At the time of writing, Thailand had a democratically elected lower house. Through the amendments and administrative arrangements, it is clear that the intent of the King "was to protect and enhance his influence as monarch".[66] The supremacy of the King is enshrined in Chapter II of the Constitution[67], namely:

> Section 6. The King shall be enthroned in a position of revered worship and shall not be violated. No person shall expose the King to any sort of accusation or action.
> Section 7. The King is a Buddhist and Upholder of religions.
> Section 8. The King holds the position of Head of the Thai Armed Forces.
> Section 9. The King has the Royal Prerogative to create and remove titles and confer and revoke decorations.

The above concepts are reinforced by stringent lèse-majesté[68] and criminal defamation[69] offences included in the Criminal Code.[70]

Wise argues that the Thai legal system should be understood in terms of Thai history.[71] He argues that traditional and modern political legitimacies should be seen as "co-existing rather than competing".

> [As the country] was not directly colonised, hierarchy and monarchy are still tightly woven into the fabric of Thailand. Many Thais, including the [current] King himself, still believe that at times the King should play a direct political role […]. They

[63]Leeds & Leeds (2020) s 2.3.
[64]Ibid, at s 4.5.
[65]Wise (2019) at 205-219.
[66]Ibid, at 264.
[67]*Constitution of the Kingdom of Thailand, B.E. 2560 (2017)* ch II.
[68]*The Criminal Code (Thailand) (updated to 2009)* s 112.
[69]Ibid, at s 326.
[70]See, for instance: Smith & Perry (2020).
[71]Wise (2019) at 234.

> believe in a moral hierarchy based on [Buddhist concept of] karma. […]. Within this moral hierarchy, power relations are determined between patrons and clients on a personal basis, not through elections. When disputes arise, they are best mediated and arbitrated by the King, his representatives, […] or the military, not in courts of law or legislatures or through elections.[72]

Timor-Leste

Timor-Leste is a unitary democratic Republic with a President as Head of State and a parliamentary system of government. As shown in Table 1, the Economics Intelligence Unit considers it a flawed democracy due to its relatively low scores on *Functioning of Government* and *Political Participation*.

Timor-Leste was a former Portuguese colony that proclaimed its independence on 28 November 1975 and was invaded by neighbouring Indonesia on 7 December 1975.[73] Its Independence was finally recognised internationally on 20 May 2002.[74] Its territory includes the enclave of Oecussi in Indonesian West Timor.[75]

The Head of State is the President, who is also the Supreme Commander of the Defence Force.[76] The National Parliament "is vested with legislative, supervisory and political decision-making powers".[77] The Government comprises the Prime Minister, the Ministers, and the Secretaries of State.[78]

"As a civil law country, court decisions are not binding as law; however, they may be looked to for guidance".[79] Timor-Leste utilises "the Portuguese 'Fixativa Resultada' in which the highest court may pronounce a decision binding in some cases on lower courts".[80] The Supreme Court of Justice (is empowered to provide judicial review of legislation.[81]

Previous "laws and regulations in force in East Timor shall continue to be applicable to all matters except to the extent that they are inconsistent with the Constitution, or the principles contained therein".[82]

> Timor-Leste has a significant tradition of informal law administered by local leaders and family heads. Due, in part, to the fact that the formal system is still too underdeveloped to reach the widely dispersed populations of the country, these traditional systems remain active and influential. […] Traditional "trials" under the informal system are headed by the cultural, family or other local leaders in the community, . . . Often, the goal is not retribution but, rather, reconciliation and community harmony. Currently, there is no legislation which regulates the

[72]Ibid.
[73]*Constitution of the Democratic Republic of Timor-Leste*, preamble.
[74]Ibid.
[75]Ibid at s 4(1).
[76]Ibid at s 74.
[77]Ibid at s 92.
[78]Ibid, at s 104.
[79]Greising, Vital & Gil Lobit (2019) s 2.2.
[80]Ibid.
[81]Ibid, at s 4.2.
[82]*Constitution of the Democratic Republic of Timor-Leste* s 165.

> intersection of informal and formal law— and the Constitution explicitly recognises respect for cultural history and traditions— opening another level of complexity to the legal system and creating issues of double jeopardy and conflicts of law.[83]

The official languages are the local Tetum language and Portuguese.[84] "Indonesian and English shall be working languages within civil service side by side with official languages as long as deemed necessary".[85] Due to its basic nature, few laws have been translated into Tetum.[86] The only official versions of laws are those in Tetum and Portuguese. Translations are often of poor quality, and the Portuguese version is controlling if there is a conflict.[87]

Vietnam

Vietnam is "a socialist rule of law State of the people, by the people and for the people whose base is the alliance between the working class, the peasantry, and the intelligentsia".[88] As shown in Table 1, the Economics Intelligence Unit considers it an authoritarian regime due to its low scores on all variables, which is unsurprising as, like the Lao PDR, it is a communist state.

The legal system of Vietnam, like that of the former Soviet Union, is based on the civil law system modified in accordance with Marxist-Leninist ideology.[89] Since 1995, customs have been officially recognised "as a kind of law source".[90] With the reorganisation of the People's Courts in 2014, case law has become more significant, with the Judicial Council of the Supreme People's Court tasked with issuing guidance to courts in uniformly applying law.[91] The process is facilitated by the practice of the Supreme People's Court producing an annual collection of typical cases with comments and instructions.[92]

"The national language is Vietnamese. Every nationality has the right to use its own language and system of writing, to preserve its national identity, and to promote its fine customs, habits, traditions, and culture".[93]

Hybrid Civil and Common Law Countries

For historical reasons, Cambodia and the Philippines have hybrid systems.

[83]Greising, Vital & Gil Lobit (2019) s l.
[84]*Constitution of the Democratic Republic of Timor-Leste* s 13(1).
[85]Ibid at s 159.
[86]Greising, Vital & Gil Lobit (2019) s 4.2.
[87]Ibid.
[88]*Constitution of the Socialist Republic of Vietnam (tr International IDEA)* art 2,
[89]Huong (2019) s 1.1.
[90]Legal System in Vietnam pt II s 3.
[91]*Law on Organization of People's Courts (2014),*
[92]Hanh (2022) at s 6.
[93]*Constitution of the Socialist Republic of Vietnam (tr International IDEA)* art 5(3).

Cambodia

Cambodia is a 'multi-party democracy'[94] with a king as head of state.[95] As shown in Table 1, the Economics Intelligence Unit considers it an authoritarian state with low scores on all parameters.

The current legal system of Cambodia is a hybrid system which is an amalgam of Cambodian customs, the French legal system and common law.[96] The latter is due to the influence of foreign aid assistance to legal and judicial reform in Cambodia. As well as the primary sources, there are secondary sources, including "customs, traditions, conscience, equity, judicial decisions, arbitral awards and doctrine".[97] Secondary sources are used in civil cases where the law is not explicit, or there are gaps.[98]

The official language and script are Khmer.[99]

Philippines

The Philippines is a democratic republic[100] with executive power resting in the President.[101] As shown in Table 1, the Economics Intelligence Unit considers it a flawed democracy due to its low scores on *Functioning of Government* and *Political Culture*.

The legal system is a blend of civil, common, Islamic, and indigenous law.[102] The primary sources are statutory law and case law.[103] The civil law tradition comes from the Spanish colonial period, while the common law tradition comes from the American colonial period that followed.

The national language of the Philippines is Filipino and should be the medium of official communication and instruction in the education system.[104] Until otherwise provided by law, English remains an official language for communication and instruction, together with Filipino.[105] Regional languages are the auxiliary official languages in the regions whilst Spanish and Arabic can be promoted on a voluntary and optional basis.[106]

[94]*The Constitution of the Kingdom of Cambodia (tr Constitutional Council, October 2015)* art 51(new).
[95]Ibid at ch II.
[96]Kong (2012) at 8.
[97]Ibid.
[98]Ibid at 9.
[99]*Constitution of the Kingdom of Cambodia (tr Constitutional Council, October 2015)* art. 5.
[100]*Constitution of the Republic of the Philippines (1987)* art II s1.
[101]Ibid at art VII s 1 .
[102]Santos-Ong (2020) s 5.1.
[103]Ibid s 5.2.
[104]*Constitution of the Republic of the Philippines, (1987)* art XIV s 1.
[105]Ibid at art XIV s 7.
[106]Ibid.

Pariah States

Myanmar

Any country where the military undertakes a coup d'état as happened in Myanmar on 1 February 2021, and then institutes a civil war on its citizens is clearly a pariah state.[107]

Sources of law in Myanmar up to the coup d'état were the Constitution, legislation, customary law, and English common law developed and adopted in Myanmar case law during the British occupation.[108] Common law was used when no local legislation governs a matter before the court. In addition, judges are granted discretionary power to decide a matter in the absence of any applicable law. Even a cursory reading of the current Constitution, which was developed under military oversight and approved in 2008, shows the lengths to which the military went to ensure they had a role in continuing to influence/hinder, as they considered necessary, the operations of a parliament by reserving 25% of the seats in both houses of the legislature to defence services personnel[109] and requiring a vote of approval greater than 75% of the Pyidaungsu Hluttaw (i.e. the Lower House) to put to the people an amendment to alter key sections of the Constitution.[110]

Myanmar language is the official language.[111]

The Translation Conundrum

One of the more interesting stories surrounding the translation conundrum is related by researcher Tamara Loos who visited southern Thailand in 2003.[112] The local Islamic judges were referring to an English language version of the *Minhaj et Talibin*[113] when settling family law disputes in the local Islamic courts.[114] The original Arabic text was compiled sometime before the 16th Century and is one of the key texts of the Shafi'i school of Islamic law, one of the four schools of law of Sunni Islam, which most Southeast Asian Muslims practice. A Dutchman then translated it into French and, in 1882, published it in Batavia, the capital of the Netherlands East Indies. The translation itself was paraphrased from several Principal Islamic commentaries rather than from the original Arabic text. In 1914, it was translated from the French into English in Singapore. The reason for both translations was to enable European colonial officials and magistrates to access the legal literature of the Shafi'i school.[115]

[107]See, for instance: EAF Editors (2024) and Farrelly (2024).
[108]Su Wai Mon & Karim (2021) s 6.
[109]*Constitution of the Republic of the Union of Myanmar, (2008)* s 74 and s 109.
[110]Ibid at s 436.
[111]Ibid at s 450.
[112]Loos (2006) at 29-30.
[113]Mahiudin Abu Zakaria Yahya ibn Sharif en Nawawi (1914).
[114]Loos (2006) at 29.
[115]Ibid.

> This version found its way in 2003 into the hands of some of Thailand's Islamic judges, who also use Arabic, Malay, and Thai language texts in the course of their duties. It is profoundly ironic that *dato yutitham* in Thailand today might utilise Islamic law through the English translation of a French translation of an amalgamation of sixteenth-century Arabic commentaries on an Islamic law text compiled by a Dutchman for application in nineteenth-century Netherlands East Indies (Indonesia). […] [a] Thai language translation of Shafi'i law on marriage, inheritance, and related issues, compiled from dozens of Arabic and Malay language kitab (commentaries on the Quran and hadith) was not completed until 1941, nearly half a century after the establishment of Islamic family courts in the south.[116]

Thailand modernised its legal system under King Chulalongkorn in the late 19th Century and early 20th Century.[117] A team of international jurists was engaged to undertake the task. For political reasons, both English and French legal teams were used. The Thai Penal Code was drafted in English and French by a joint Thai/foreign team, and the English version was translated into Thai.[118] Of particular interest is the translation of the English term liberty. The Thai term "issaraphap" is translated in modern times as liberty, independence, freedom, or autonomy.[119] Historically, at the turn of the 20th Century, however, it applied to the Thai tradition where the superiors had sovereignty or authority over themselves and their subordinates.[120]

The Thai Civil Code was drafted in English by a joint French/Siamese team without bilingual Thai input because of the great demand within the bureaucracy for fluent bilingual Thai officials.[121] The King even sent members of the French team to England to improve their English.

The recent Thai Law Dictionary English-Thai is written for Thai students who have to deal with legal English.[122] It includes the translation of over 5,000 English words or expressions into Thai. An impressive task by the compiler/ translator let down by its Preface in English, which is quoted verbatim in part: "Thai Law Dictionary are published in many styles, but that only general dictionary that cannot be used and referred to the universal system of countries. […] I […] feel very impressive with this project Thai Law Dictionary that I have seen some books which appear in the world of books." Fortunately, the version on their website is in correct English; too late for the published version, however.

In his notes on his English translation of the *Cambodian Criminal Code*,[123] Cheung sought to make a text that could be understood by itself by harmonising the translation with the underlying Khmer texts.[124] The Code states that in

[116]Ibid at 29-30.
[117]Loos (1998) at 38.
[118]Ibid at 38-39.
[119]Ibid at 36.
[120]Ibid at 41.
[121]Loos (2006) at 62.
[122]*Thai Law Dictionary: English-Thai*. (2017). Sout Paisal Law.
[123]*Criminal Code, 2009 (Cambodia) (tr Buneng Cheung, May 2011).*
[124]Ibid at p. II

criminal matters, the law should be strictly construed,[125] but Cheung exposes a difficulty.[126] He has identified a number of undefined terms such as "torture" and "acts of cruelty"[127] or offences related to "violence"[128].[129] He considers that the meaning of the terms "specific", "other", and "special' have their ordinary meaning in Khmer, but the meanings shift in the English text with national judges unable to come to a common consensus on their usage.[130] The literal meaning of the offences in Article 79 and Article 80 are "breaking in" and "climbing in", which have been translated to mean "forced entry" and "illegal entry", respectively.[131]

In the note on the translation of the Code of Criminal Procedure of the Kingdom of Cambodia,[132] the translators again point out the difficulties of translating from original statutes into English.[133] This is especially so in this case, as the original draft language was French, which was then translated into Khmer and then finally translated into English. The English version was then harmonised with the underlying Khmer and French texts with the version adopted by the National Assembly (i.e. the Khmer version) providing the ultimate guidance. They point out that French legal terminology refers to "Magistrats", a common term for judges and prosecutors.[134] In the English translation, they looked at the context to determine whether the translation of "Magistrat"' should refer to a judge or a prosecutor.[135] In Khmer law, "confrontation" is an investigative procedure where all parties are brought together before the judge so he/she can directly clarify contradictions in respective statements.[136] In the Khmer original, there is no difference between the terms "accused" and "convicted" persons.[137] They also point out other inconsistencies which they assume jurisprudence will no doubt correct.[138]

As a further example, the Cambodian Road Law (2015)[139] was suspected by this author as being a Khmer translation of an English original, with the Khmer translation subsequently being translated into English. This was subsequently confirmed in a meeting. The Khmer translation is apparently imperfect, as is the English retranslation.

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[125]Ibid a art 5.
[126]Ibid Note on the Translation at II-III..
[127]Ibid at art 210.
[128]Ibid at art 217, art 451 and art 456.
[129]Ibid Note on the Translation at III.
[130]Ibid.
[131]Ibid Note on the Translation at IV.
[132]Code of Criminal Procedure of the Kingdom of Cambodia 2007 (tr Buneng Cheung and Jürgen Assmann, 2008).
[133]Ibid Note on the Translation at vii to viii.
[134]Ibid Note on the Translation at vii.
[135]Ibid.
[136]Ibid.
[137]Ibid at viii.
[138]Ibid at vii.
[139]*Law on Roa,d 2014*.

Finally, without a good grounding in Islamic Law and the meaning of the offences which have been transliterated from Arabic to English, the Syariah Penal Code Order[140] and the Syariah Courts Criminal Procedure Code Order,[141] 2018 of Brunei Darussalam are extremely difficult to understand.

How might laws be harmonised across ASEAN when confronted with such linguistic difficulties?

Discussion

Even though there are disparate legal systems, each jurisdiction has an overarching Constitution and a legislative body able to enact laws. Therefore, it can be argued that it is not the legal systems of the ASEAN members, per se, that provide the stumbling block in adopting a set of model laws within ASEAN. Rather, it is the intricacies of translating/harmonising from one language to another. In this case, from English to the language used in drafting laws in the particular jurisdiction. The following section provides some examples of the problem.

Increasingly, criminal activity does not respect borders; therefore, it is essential that cross-border cooperation is established. This is especially so whilst the international community is grappling with the threat of international terrorism. Several models are currently in operation to facilitate such cooperation. This discussion focuses on just three.

One option is to prepare a set of mutually agreed model laws that the parties could adopt. As discussed earlier, this approach has significant drawbacks, as seven potential parties legislate in a language other than English. Conceivably, Brunei Darussalam, Malaysia, the Philippines, and Singapore could adopt such an approach if they so wished. For the other nations, the lack of a common language would lead to significant issues in understanding the nuances of the language in which the model documents were prepared; in this case, it would, by necessity, be English. Translation and its adoption into the different legal traditions of its members become fraught with difficulties. Clearly, this option should not be pursued further.

Regional groupings such as ASEAN have approached the issue by regional cooperation and capacity building.[142] The Philippines has, for instance, taken a leading role in Cybercrime Prevention through its Office of Cybercrime.[143] The Cybercrime Prevention Act mandates full international cooperation, which is no doubt why it was able to take the leading role.[144]

As discussed by Clough, the regional cooperation model does not have the force of law as a treaty, and it does little to ensure that the laws are compatible

[140]*Syariah Penal Code Order, 2013*.
[141]*Syariah Courts Criminal Procedure Code Order, 2018.*
[142]For Example: *ASEAN Declaration to Prevent and Combat Cybercrime*.
[143]Department of Justice (2017, 2018).
[144]*Cybercrime Prevention Act of 2012 (Philippines).*

between the parties.[145] The primary deficiency of the "cooperative" approach is that it necessitates the parties to enter into individual treaties with the parties with which it seeks to cooperate rather than the concept of the Budapest Convention, also called the Convention on Cybercrime, where the parties are automatically required to mutually cooperate.[146]

Nevertheless, cooperation is an essential first step and could be the starting point for exploring the harmonisation of laws. Unfortunately, an assessment of the documents on the Philippines Office of Cybercrime website shows that some ASEAN members are far more active than others. In developing economies, this is often a capacity issue with limited suitably trained staff.

As noted above, the Budapest Convention mandates cooperation between the parties. It has not, however, mandated harmonisation. Instead, it requires that the parties commit to ensuring that their cybercrime laws meet the minimum standards specified in the treaty.[147] Some country groupings have taken a step further and directed their members to harmonise their laws. The Economic Community of West African States has taken such action.[148]

The adoption of the regional cooperation model has the advantage for each ASEAN member to draft its own laws in accordance with its legal system, customs and legal drafting practices as long as the outcome is a law or set of laws that meet the minimum standards set out in the treaty. Clough considers that, to be effective, harmonisation must seek to accommodate and reconcile differences between the parties.[149] He suggested that parties should be allowed to exercise their right to declare reservations to parts of the treaties so that implementation can be adapted to the local conditions, thus addressing the difficulties in achieving consensus between all parties. Interestingly, as of 29 February 2024, the Philippines has acceded to the *Convention on Cybercrime* after enacting the enabling legislation. Brunei Darussalam has enacted a set of cybercrime legislation[150] that would be essentially compliant with the Convention but has taken no action to be a party to it. None of the other members of ASEAN has sought to accede to the Convention either.

An example of the need for the ability to declare reservations is shown concerning "spam", which is defined as sending unsolicited messages by email, text, or instant messaging systems without consent from the recipient.[151] Spam is a worldwide concern, and the Philippines and Singapore, amongst others, enacted legislation outlawing the sending of spam. Singapore enacted a specific act – the *Spam Control Act*[152] whilst the Philippines included the outlawing of sending spam in their existing *Cybercrime Prevention Act.*[153] Whilst both acts had the

[145]Clough (2014).
[146]*Convention on Cybercrime*. (2001) ch III.
[147]Ibid at s 2.
[148]*Directive C/DIR. 1/08/11 on Fighting Cyber Crime within ECOWAS*, (2011).
[149]Clough (2014) at 701.
[150]*Computer Misuse Act 2017, cap 194.*
[151]Australian Cybercrime Online Reporting Network (2019).
[152]*Spam Control Act (Singapore, cap 311A, rev ed 2008).*
[153]*Cybercrime Prevention Act of 2012 (Philippines).*

same intent, the Supreme Court of the Philippines ruled that banning spam contravened the Constitutional right to free speech.[154] If the requirement for spam legislation became a requirement under an ASEAN 'treaty' or 'convention', without the ability to declare a reservation, the Philippines would be unable to be a party.

Conclusion

The nuances of language are a crucial component of the understanding of a nation's laws. Direct translation is fraught with difficulties and can result in a poorly drafted translation. This means that drafting a set of model laws in English, say, is not a suitable approach for the multi-lingual nations of Southeast Asia. While ASEAN works on the principles of cooperation and consensus, the cooperation approach is considered to be inadequate in the fight against transnational crime in this internet-connected world. An appropriate response would be to develop a treaty modelled on that of the *Convention on Cybercrime*, which sets the minimum legal standards that must be achieved. It must also allow a party to register a reservation against specific provisions to allow for country-specific conditions. Such an approach is independent of the language used in drafting the laws of the party as long as the intent of the treaty is met.

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[154] *Jose Jesus M. Disni et al*. v *The Secretary of Justice et al*. (2014). In (Vol. GR 203335). Supreme Court, Republic of Philippines: en Banc.

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