

ASEAN GOVERNANCE ON DATA PRIVACY:
CHALLENGES TO REGIONAL PROTECTION OF DATA
PRIVACY AND PERSONAL DATA IN CYBERSPACE

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จุฬาลงกรณ์มหาวิทยาลัย
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การกำกับดูแลของอาเซียนด้านความเป็นส่วนตัวของข้อมูล: ความท้าทายของภูมิภาคต่อการ
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สารนิพนธ์ฉบับนี้มีจุดประสงค์เพื่อศึกษาความท้าทายของอาเซียนในการกำกับดูแลด้านความเป็นส่วนตัวของข้อมูลไหลผ่านไซเบอร์สเปซ โดยเฉพาะอย่างยิ่งการศึกษาทบทวนของสถาบันของอาเซียนหรือที่เรียกกันว่าอาเซียนในการกำกับดูแลด้านดังกล่าว โดยสารนิพนธ์ฉบับนี้ ได้มีการค้นคว้าระบอบที่เกี่ยวกับความเป็นส่วนตัวของข้อมูลในไซเบอร์สเปซที่มีอยู่ในปัจจุบัน ทั้งในระดับระหว่างประเทศ ระดับภูมิภาค และระดับรัฐ อีกทั้งยังได้เปรียบเทียบความเหมือนและความแตกต่างของระบอบดังกล่าวและการกำกับดูแลในแต่ละระดับ นอกจากนี้ สารนิพนธ์ฉบับนี้ยังได้วิเคราะห์ลักษณะการกำกับดูแลการคุ้มครองข้อมูลส่วนบุคคลบนพื้นฐานของโครงสร้างทางปทัสถานของอาเซียน เพื่อที่จะประเมินประสิทธิภาพและข้อท้าทายในการกำกับดูแล รวมทั้งข้อเสนอแนะในการกำกับดูแลต่อไป

ผลการศึกษาได้ค้นพบว่าปทัสถานของอาเซียนมีบทบาทสำคัญต่อการกำหนดทิศทางในการกำกับดูแลความเป็นส่วนตัวของข้อมูล โดยปทัสถานดังกล่าวได้เน้นถึงความสำคัญของหลักการไม่แทรกแซงกิจการภายใน การไม่สร้างผลผูกพันทางกฎหมาย และการใช้วิธีการเจรจาหรือปรึกษาหารือในการแก้ไขข้อขัดแย้ง เป็นสาเหตุสำคัญที่นำมาสู่ความท้าทายในการกำกับดูแลความเป็นส่วนตัวของข้อมูลในอาเซียน โดยทำให้กรอบความร่วมมือที่มีอยู่ไม่มีประสิทธิภาพและไม่สามารถทำงานได้จริง ถึงแม้ว่าในปัจจุบันจะยังไม่มีการคุ้มครองความปลอดภัยและความเป็นส่วนตัวของข้อมูลในระดับสากลเป็นหนึ่งเดียว แต่ประชาคมระหว่างประเทศได้พยายามจัดทำมาตรการคุ้มครองความเป็นส่วนตัวของข้อมูล เพื่อส่งเสริมสภาพแวดล้อมที่น่าเชื่อถือในการทำธุรกิจ เศรษฐกิจดิจิทัล โดยที่อาเซียนก็ได้ยอมรับหลักการพื้นฐานจากกรอบความร่วมมือระหว่างประเทศ อย่างไรก็ดี อาเซียนได้ปรับใช้หลักการดังกล่าวให้เข้ากับปทัสถานของตนเอง (localize)

ประการแรก กรอบความร่วมมือของอาเซียนว่าด้วยการคุ้มครองข้อมูลส่วนบุคคล (ASEAN Framework on Personal Data Protection) เป็นเพียงความตกลงขั้นต่ำสุดเท่าที่ทุกประเทศจะสามารถยอมรับร่วมกันได้ ประเทศสมาชิกยังมีความยืดหยุ่นที่จะผูกพันกับหลักการดังกล่าวหรือไม่ก็ได้ และได้ละเว้นพันธกรณีใดๆ ที่เกี่ยวกับการแทรกแซงอำนาจอธิปไตยหรือความมั่นคงของชาติ ด้วยเหตุนี้จึงทำให้การคุ้มครองความเป็นส่วนตัวของข้อมูลของผู้นในอาเซียนจึงขึ้นอยู่กับการกำกับดูแลในระดับรัฐเป็นสำคัญ นอกจากนี้ ช่องว่างของศักยภาพการพัฒนาด้านเทคโนโลยีและเศรษฐกิจระหว่างประเทศสมาชิกอาเซียนยังส่งผลให้แต่ละประเทศมีแรงจูงใจในการจัดทำมาตรการคุ้มครองข้อมูลส่วนบุคคลที่แตกต่างกัน ความแตกต่างหลากหลายระหว่างประเทศสมาชิกอาเซียนส่งผลให้การสร้างกรอบความร่วมมือให้เป็นหนึ่งเดียวเป็นไปได้ยาก ซึ่งความร่วมมือระหว่างภูมิภาคเป็นปัจจัยสำคัญในการแก้ไขปัญหาข้ามชาติหรือประเด็นปัญหาในรูปแบบใหม่ อีกทั้งเมื่อคำนึงถึงข้อเท็จจริงที่ว่าสิทธิในความเป็นส่วนตัวเป็นเรื่องที่ไม่สามารถแยกออกจากสิทธิมนุษยชนได้ โครงสร้างทางปทัสถานของอาเซียนยังส่งผลให้รัฐสามารถคงไว้ซึ่งอำนาจอธิปไตยและไม่สามารถแก้ไขปัญหาการละเมิดสิทธิมนุษยชนที่กระทำโดยรัฐเองได้ แม้ว่าอาเซียนจะมีแถลงการณ์เกี่ยวกับสิทธิมนุษยชนมากมายเพื่อแสดงให้เห็นว่าคนได้ยอมรับคุณค่าสากลเกี่ยวกับสิทธิมนุษยชนแล้วก็ตาม ทว่าในความเป็นจริงอาเซียนเพียงแต่แสดงว่ายอมรับหลักการเหล่านั้นผ่านแถลงการณ์ต่างๆ และปรับใช้หลักการให้เข้ากับปทัสถานของตนเอง ส่งผลให้เกิดไคด้านสิทธิมนุษยชนของภูมิภาคที่มีอยู่ไม่สามารถนำมาใช้แก้ปัญหาที่มีอยู่ได้จริง รัฐอำนาจนิยมอาเซียนยังมีแนวโน้มที่จะออกมาตรการใหม่ๆ ซึ่งรวมถึงกฎหมายว่าด้วยการคุ้มครองข้อมูลส่วนบุคคล เพื่อสอดคล้องดูแลประชาชน ละเมิดสิทธิความเป็นส่วนตัว และละเมิดสิทธิเสรีภาพในการพูดบนอินเทอร์เน็ตควบคู่ไปกับการละเมิดสิทธิมนุษยชนที่ได้กระทำมาโดยตลอดด้วย นอกเหนือไปจากนี้ ทั้งการกำกับดูแลในระดับภูมิภาคหรือในระดับประเทศ รัฐบาลของประเทศสมาชิกอาเซียนไม่เปิดโอกาสให้ประชาชนและภาคส่วนอื่นๆ เข้ามามีบทบาทในการกำกับดูแล ตรงข้ามกับความพยายามของอาเซียนในการส่งเสริมให้ประชาชนเป็นศูนย์กลางขององค์กร ท้ายที่สุดแล้ว อาเซียนไม่สามารถหลีกเลี่ยงการเปลี่ยนแปลงปทัสถานที่คนยึดถือมาโดยตลอดได้ หากอาเซียนต้องการที่จะสร้างกรอบความร่วมมือที่สามารถจัดการกับปัญหาข้ามพรมแดนอย่างการละเมิดสิทธิความเป็นส่วนตัวของข้อมูลในไซเบอร์สเปซได้ เพื่อที่จะก้าวข้ามข้อท้าทายดังกล่าวได้อย่างแท้จริง

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Supatsara Chaipipat : ASEAN GOVERNANCE ON DATA PRIVACY: CHALLENGES TO REGIONAL PROTECTION OF DATA PRIVACY AND PERSONAL DATA IN CYBERSPACE.

Advisor: Asst. Prof. KASIRA CHEEPPENSOOK, Ph.D.

This independent study explores how the cornerstone norms of the Association of Southeast Asian Nations (ASEAN), mostly referred as the ASEAN way, play significant role in forming the regional governance on data privacy and involves the answer that it poses challenges to the region in protecting their citizen's personal data in cyberspace. This study investigates and compares the existing regimes regarding to data privacy in cyberspace at international, regional and domestic levels. To estimate the efficacy of ASEAN governance on data privacy and personal data protection, the analysis of study is based on the associations' normative structure. Particularly, it searches what are the challenges to regional governance and how to overcome them.

The findings of this study reveal that ASEAN norms, which emphasize on non-interference of internal affairs, non-binding legalism and consultative approaches for dispute settlement, poses challenges toward the efficient and functional governance on data privacy. It is true that international community try to promote privacy safeguard in order to establish good environment of digital economy while there is yet single accepted regime of this issue area in cyberspace. ASEAN also adopted basic principles from the international frameworks but localized in a way that suits with their norms.

First of all, ASEAN Framework on Personal Data Protection is the least common condition that everyone agrees with. In other word, the framework provides flexibility for states to adopt or not to adopt and it carves out any obligation related to sovereignty and national security. At a result, the privacy safeguards rely on domestic governance of each ASEAN member. Furthermore, there is a huge gap in technological and economic capacities among ASEAN members so that they have different motives to produce privacy safeguard. Their heterogeneity impacts the harmonization of the association's privacy safeguard which is transnational and non-traditional issue that requires more integrated response. With respect to the fact that privacy rights are inseparable from the value of human rights, ASEAN normative structure reserves state's sovereignty and prevents the stemming of human rights violations conducted by states themselves. Despite the official documents portraying the acceptance of universal values of human rights, ASEAN simply localizes those concepts in accordance with their norms. At a result, the existing mechanisms are impractical and non-functional. In line with the infringement of human rights, authoritarian states in ASEAN likely adopt new regulations including Personal Data Protect Acts for state surveillance, abuse of people's privacy and deprivation of freedom of speech on the Internet. Also, both regional and domestic governance barely allows the participation of non-state actors, contrary to its promotion as a people-centric community. To overcome the challenges, the reformation of ASEAN norms is inevitable if the association would like to create functional cooperation to deal with transnational issue such as infringement of privacy rights in cyberspace.

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TABLE OF CONTENTS

| | Page |
|---|-------------|
| | iii |
| ABSTRACT (THAI) | iii |
| | iv |
| ABSTRACT (ENGLISH)..... | iv |
| ACKNOWLEDGEMENTS..... | v |
| TABLE OF CONTENTS..... | vi |
| 1. Introduction..... | 2 |
| 1.1 Background and problem statement | 2 |
| 1.2 Literature review | 5 |
| 1.3 Research question | 17 |
| 1.4 Objectives | 17 |
| 1.5 Theoretical framework..... | 17 |
| 1.6 Hypothesis | 20 |
| 1.7 Scope..... | 20 |
| 1.8 Methodology..... | 21 |
| 1.9 Structure..... | 21 |
| 2. Background of ASEAN Cooperation and Governance of Data Privacy and Regime Complex of Privacy in Cyberspace..... | 23 |
| 2.1 Development of ASEAN cooperation in protecting security and privacy of personal data on the Internet..... | 23 |
| 2.2 Personal data protection: policy, regulation and practice in ASEAN member states | 27 |
| 2.3 ASEAN governance and international regimes | 33 |
| 3. Analysis of ASEAN Norms and ASEAN Governance on Data Privacy..... | 44 |
| 3.1 ASEAN Way, economic cooperation and ASEAN Framework on Personal Data Protection..... | 44 |

| | |
|--|----|
| 3.2 ASEAN human rights regime and data privacy..... | 52 |
| 4. Challenges of ASEAN Governance on Data Privacy | 62 |
| 4.1 ASEAN ineffective governance on data privacy and the institutional norms. .. | 62 |
| 4.2 Self-management governance of data privacy in ASEAN member states | 67 |
| 4.3 The people-centric approach for ASEAN governance on data privacy..... | 75 |
| 5. Conclusion and Recommendations..... | 82 |
| 5.1 ASEAN norms and regional governance on data privacy | 82 |
| 5.2 Recommendations and limitations of this study | 84 |
| REFERENCES | 87 |
| VITA..... | 99 |



LIST OF TABLES

| | |
|--|----|
| Table 1 Data privacy measures of ASEAN countries..... | 29 |
| Table 2 Comparative table of data localization requirements in ASEAN member states | 51 |
| Table 3 Comparison of principles in the OECD Privacy Framework (2013) and ASEAN Framework on Personal Data Protection (2016) | 63 |
| Table 4 UNCTAD B2C E-commerce index, 2019 | 68 |
| Table 5 ASEAN Information Security Maturity | 68 |
| Table 6 Status of ratification of 18 International Human Rights Treaties | 71 |
| Table 7 Internet Freedom Scores | 72 |
| Table 8 Example cases and measures that violate human rights, specifically the abuse of freedom of speech in cyberspace..... | 73 |

1. Introduction

1.1 Background and problem statement

The right of privacy is a gateway to freedom of expression which is considered as one of the basic human rights. The concern over privacy and security of personal data is not new issue.¹ The nature of data collection has been changed in the past 3 decades due to the worldwide emergence of information communication technology and general public use of the Internet. A big amount of collected raw data identifying data owner may lead to the negative effects regarding to the rights of privacy and personal security if there is no appropriate safeguard.² Moreover, the technology of data gathering and processing on the Internet is transnational. Therefore, the participation of international, regional and local institutions for the effective governance on data privacy is necessary.

Recognizing the importance of the safeguard of personal data flowing on the Internet, international communities have held conferences and fora discussing issues of Internet governance which includes the protection of data privacy and security since the late 1990s. The first remarkable international conference discussing about online data protection was the World Summit on the Information Society (WSIS) in 2003, Geneva. In the WSIS Declaration of Principles “Building the Information Society: a global challenge in the new Millennium”, it states that international cooperation to “enhance security and to ensure the protection of data and privacy” is necessary. In parallel with the protection, states should also augment the Internet access and trade within the global culture of cyber-security. Moreover, the WSIS established the Working Group on Internet Governance (WGIG) functioning as a secretariat agency³ and launched the Tunis Commitment emphasizing the implementation of Universal

¹ Orlando Mardner, “A New Approach in Human Security: The Implications of Human Rights on Personal Data, Privacy and Surveillance,” (Dissertation, Professional Security Academy UK., 2018), p. 1, accessed March 20, 2020,

https://www.researchgate.net/publication/327692945_A_New_Approach_in_Human_Security_The_Implications_of_Human_Rights_on_Personal_Data_Privacy_and_Surveillance_Author_Name_Orlando_Mardner_CSM_Dpi_I_LA_IOA_EQA_SSO_PFSO_PPO_CPO_MIPSA_PSD.

² Mark Latonero and Zachary Gold, "Data, Human Rights & Human Security," *Data & Society*, June 22, 2015, p. 2, accessed March 20, 2020, <https://datasociety.net/pubs/dhr/Data-HumanRights-primer2015.pdf>.

³ Jovan Kurbalija, *An Introduction to Internet Governance*, (Geneva: Diplo Foundation, 2016), p. 9.

Declaration of Human Rights in accessing, creating, using and sharing information online.

However, the issues discussed in the early stage are mainly about the development of Internet, critical internet resources and other technical topics. Therefore, since the early Internet era, privacy and security of personal data have been considered as the gateway of freedom of expression. However, they were less emphasized than the development of ICT infrastructure and other technical issues. Some people also criticize that IGF is simply a ‘talk show’ without tangible solution for appropriate Internet governance.⁴ In the beginning of 2010s, many countries became more aware of Internet governance especially the issues about online data and content. The conflict between American Big Tech corporates and the People’s Republic of China brought up concern of the freedom of expression on the Internet. Most authoritarian states are likely to discuss about technical issues in the international fora in order to reserve their domestic governance and policy on content control. Meanwhile, Organization for Economic Co-operation and Development (OECD), Council of Europe (CoE) and International Telecommunications Union (ITU) tend to focus more on the board policy aspects of Internet governance. International bodies also promote the establishment of single international binding framework, but no consensus exists at a global level.⁵

Practically, states still have the right to regulate and govern cyberspace and issues regarding to data on the Internet. Nevertheless, western countries who frame their data governance by inclusive model are trying to promote the protection of personal data and privacy in parallel with the free flow of data as a binding framework in the multilateral and bilateral economic agreements. At a regional level, the European Union enforced the General Data Protection Regulation (GDPR) in 2016, amended from the Data Protection Directive, and members have all complied since 2018.⁶ The EU’s GDPR is a high-standard rule requiring controllers and processors of personal data to put in place appropriate technical and organizational measures to implement the data protection principles. The rule applies for any data processors that collect EU citizens

⁴ Ibid.

⁵ Ibid, p. 11-13.

⁶ The European Union General Data Protection Regulation 2016, article 51.

data's even though their computing facilities and entities are located outside the EU territory. The GDPR, if not yet the global framework for data privacy and security, now becomes the prototype of data governance for many countries and regional organizations. Among them are ASEAN member states.

ASEAN launched the Joint Statement at The World Summit of Information Society in Geneva 2003 to adopt the WSIS guideline in promoting ICT development. ASEAN has been engaged their cooperation agenda in digital development including the data regime through ASEAN Telecommunications and Information Technology Ministers Meeting (TELMIN), ASEAN Telecommunications and Information Technology Senior Officials (TELSOM) and ASEAN Telecommunications Regulators' Council (ATRC). For example, ASEAN launched the first ASEAN Information Communication Technology Masterplan (AIM), adopted Framework on Personal Data Protection and also adopted Framework on Digital Data Governance. Those mentioned frameworks and meetings mainly discuss how to govern data for driving digital economy.⁷ Similar to other ASEAN agreements, ASEAN cooperation approach is a quasi-legal instrument. Unlike the European Union, the regionalization of ASEAN member states is based on the long-standing norm of non-interference of domestic affairs. The core value of ASEAN's regionalization is widely criticized as an obstruction to strengthen functional cooperation particularly for the regional solution against transnational issues. As a result, ASEAN member states have different domestic legislations of data governance in practice. It is difficult to imply that ASEAN member states' domestic governance corresponding with the regional frameworks which include broad criteria of soft-law instrument and leave a wide room for domestic flexibility.

Moreover, there are concerns that ASEAN safeguard measures might lead to other new issues instead. Above all, it is widely criticized that the existing safeguards might not be able to protect the data owners' privacy. The requirement of data protection in form of data localization - establishing the computing facilities or data processing system in order to do business and collect their citizens' data within the

⁷ "Overview: ASEAN Telecommunications and IT Ministers Meeting (TELMIN)," ASEAN, accessed March 15, 2020, <https://asean.org/asean-economic-community/asean-telecommunications-and-it-ministers-meeting-telmin/overview/>.

territory - is a controversial issue, in both economic and political aspects. Many business entities consider the restriction might become the non-tariff barrier and obstruction of data flow for foreign service providers, rather than promoting integrated digital economy of AEC community.⁸ Secondly, the risk of securitization of personal data in cyberspace might lead to a new form of government surveillance. In some countries, the government agencies gather citizens' personal data and abuse them for "national security". There is a fine line between accessing personal data for national security and criminal investigation and spying people's data for maintaining power. Moreover, the different approaches, perspectives and capacities among ASEAN members result to the heterogeneous perceptions in designing cooperation framework. For the most part, the association's structure that is attached to the long-standing norm of non-interference plays an important role in regional governance on data privacy. It also poses a great challenge in enhancing functional mechanism responding to the transnational threat of privacy violation in cyberspace.

Since the problems regarding data privacy in cyberspace become more complex, international community, regional organization as well as national regulators actively cooperate in creating mechanism to deal with them. This study explores the existing status of how ASEAN has cooperated so far to deal with the issue. The regional governance that is influenced by the underlying norms of the association will be the analytical instrument to estimate the efficacy and address challenges the region faces toward the misuse of personal data.

1.2 Literature review

Before exploring the challenges ASEAN faces in creating regional cooperation to protect their citizens' personal data in cyberspace, it is important to review how the association has evolved themselves so far. This study focuses on how the regional norms play role in constructing the association and divides the literature reviews into 2 main parts: 1) the development of ASEAN norms in chronological order and 2) ASEAN norms and regional governance.

⁸ Benjamin Wong, "Data Localization and ASEAN Economic Community," *Asian Journal of International Law*, 10, 2020, p. 159.

1) Development of ASEAN Norms

ASEAN has been considered as the second most successful regional organization after the European Union⁹ and even regarded as an institution-builder par excellence.¹⁰ Particularly, ASEAN has accomplished in maintaining peace which frequently referred as “ASEAN Miracle” from preventing conflicts among ASEAN member states and conflict caused by the interference from great powers. The norms of ASEAN account for the regional integration despite the diverse characteristics of its members.¹¹ The ASEAN's norms and principles can be divided into 1) non-use of force and the pacific settlement of disputes 2) regional autonomy and collective self-reliance 3) the doctrine of non-interference in the internal affairs of states and 4) the rejection of an military pact.¹² Among those norms, the single most important principle of ASEAN regionalism is non-interference of domestic affairs.¹³ Those norms are indeed the general principles accepted by the international community. However, they would later be developed as the “ASEAN Way” to serve the significant function of conflict mediation and insecurity among ASEAN leaders and limit the interference of external powers outside ASEAN.¹⁴

However, it does not mean that there is no interference of non-ASEAN members or intra-state disputes in the region at all. In fact, there are wide debates of “non-interference” discourse and ASEAN’s norms have transformed according to the challenges they face in each period.¹⁵ First of all, ASEAN member countries mutually agree that non-interference is central to the regional politics regardless of their differences.¹⁶ The principle was first mentioned in ASEAN’s foundational normative

⁹ Taku Yukawa, "ASEAN Norms—Argument Yielding to Change," *Japan and the World*, Japan Digital Library, March 2017, p. 1, accessed May 4, 2020, http://www2.jiia.or.jp/en/digital_library/world.php.

¹⁰ Jurgen Ruland, “Southeast Asian Regionalism and Global Governance: ‘Multilateral Utility’ or ‘Hedging Utility’?” *Contemporary Southeast Asia*, vol. 33, no. 1, April 2011, p. 98.

¹¹ Taku Yukawa, "ASEAN Norms—Argument Yielding to Change," p. 2.

¹² Amitav Acharya, *Constructing a Security Community in Southeast Asia*, (Oxon: Routledge, 2009), p. 55.

¹³ *Ibid*, p. 70.

¹⁴ Jurgen Haacke, “ASEAN’s Diplomatic and Security Culture: a Constructivist Assessment,” *International Relations of the Asia-Pacific*, vol. 3, 2003, p. 57.

¹⁵ Anja Jetschke and Jurgen Ruland, “Decoupling Rhetoric and Practice: The Cultural Limits of ASEAN Cooperation,” *The Pacific Review*, vol. 22, no. 2, 2009, p. 194.

¹⁶ Lee Jones, "ASEAN's Unchanged Melody? the Theory and Practice of 'Non-interference' in Southeast Asia," *The Pacific Review*, vol. 23, no. 4, 2010, p. 480.

documents such as Bangkok Declaration 1967 and Treaty of Amity and Cooperation (TAC) 1976. This strict principle was not initially invented by the ASEAN founding members. The principle of non-interference of domestic affairs was adopted in the international agenda and accepted worldwide, for example, in the United Nations Charter. The emphasis on non-violation of national sovereignty among like-minded countries enhanced their efforts to maintain status quo¹⁷, particularly the threats from separatist movements and communist parties supported by external subversion of China or Indochinese states.¹⁸ In other word, the principle of non-interference became the security regime for ASEAN. Realist scholars view the establishment of ASEAN as the regional organization which aimed to promote their national interests, rather than created the regional cooperation and economic integration like the European Economic Community (EEC). The start of ASEAN was “unpromising”, reflected in the autobiography of Singapore’s then Prime Minister that:

“I did not set great store by the lofty aims of the group: to accelerate economic growth, social progress, and cultural development; to promote peace and stability; to collaborate in agriculture and industry and expand trade. The unspoken objective was to gain strength through solidarity ahead of the power vacuum that would come with an impending British, and later a possible U.S., withdrawal.”¹⁹

Nevertheless, it is argued that ASEAN has interfered domestic affairs and the principle of “non-interference” is not absolute in the first place. ASEAN has localized the universal principle of non-interference. Whether ASEAN countries held or broke their cornerstone principle, it is based on their national interests and sovereignty and regional interest to maintain stability.²⁰ For example, the Indonesian ambassador was expelled from Manila due to the “interference” of Indonesia over the Sabah dispute between Philippines and Malaysia in 1982.²¹ ASEAN members also intervened with

¹⁷ Ibid, p. 485.

¹⁸ Ibid, p. 486.

¹⁹ Lee Kuan Yew, *From Third World to First*, (New York: Harper Collins, 2000) p. 329.

²⁰ Lee Jones, "ASEAN's Unchanged Melody? the Theory and Practice of 'Non-interference' in Southeast Asia," p. 480.

²¹ Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia*, (London: Palgrave Macmillan, 2012), p. 4.

the Cambodia Crisis and participated in East Timor.²² Even though ASEAN countries wish to remain stability and status quo, the practice itself is far from neutral because there are groups that clearly benefit with the existing situations.²³ On the contrary, ASEAN will conform with the principle of “non-interference” when they would like to protect the illiberal dominance in their domestic regime. For example, during the Cold War, ASEAN emphasized the principle of non-interference to condemn Vietnam’s interference in Indochina in a way that Vietnam violated the general principle of community. ASEAN referred to the international agenda in order to lobby international organizations specifically the United Nations to oppose Vietnam’s invasion.²⁴ At that time, it is noted that ASEAN referred to the principle of “non-interference” as the general international principle rather than its own norm.²⁵ To intervene or not, the choice itself is strategic and depends on external and internal context.

ASEAN norm of “non-interference” has been violated repeatedly. It is interesting that the principle was later developed to be their identity, the ASEAN way. Some argue that ASEAN’s incorporation is a socialization process to redefine the political and security environment that involved contestations and adaptation. ASEAN localized universal norms through interaction, compromise and renegotiation.²⁶ Although ASEAN leaders did not expect much of the outcomes of regional integration in the beginning, the idea of building regional identity in Southeast Asia is reflected in the creation of ASEAN itself. Particularly, ASEAN is the regional grouping that “preserves their national identities”.²⁷ It is true that economic, social and cultural cooperation was not accomplished in accordance with the aims set in Bangkok Declaration in the early stage. However, ASEAN’s success was found in the international politics as they finally had common standing toward the Cambodia crisis.²⁸ ASEAN true objectives were to maintain peace, prevent the escalation of

²² Lee Jones, "ASEAN's Unchanged Melody? the Theory and Practice of 'Non-interference' in Southeast Asia," p. 484.

²³ Ibid, p. 483.

²⁴ Taku Yukawa, “The ASEAN Way as a Symbol: An Analysis of Discourses on the ASEAN Norms,” *The Pacific Review*, vol. 31, no. 3, 2018, p. 8.

²⁵ Ibid, p. 7.

²⁶ Amitav Acharya, *Constructing a Security Community in Southeast Asia*, p. 55.

²⁷ Ibid, p. 86.

²⁸ Ludo Cuyvers, Lurong Chen and Philippe De Lombaerde, "50 Years of Regional Integration in ASEAN," *Asia Pacific Business Review*, Aug 27, 2019, p. 2, accessed March 20, 2020, DOI: 10.1080/13602381.2019.1652975.

conflicts and follow their national interests. At that time, regional norms and identities had not yet been portrayed as the culture of ASEAN and were not the driven factors in ASEAN's international relations.²⁹

Non-interference in internal affairs has continued to be the most important principle in ASEAN after the Cold War.³⁰ Nevertheless, ASEAN norms have changed and developed in 1990s due to the transformation in the international context of globalization, economic liberalism and the urge democracy in the international community. First of all, the principle of non-interference was explicitly emphasized as the norm of ASEAN, rather than the general international principle. Singapore's then Prime Minister said in 1992 that: "We don't set out to change the world and our neighbors. The culture of ASEAN is that we do not interfere."³¹ The frequent use of the ASEAN way, the principle of non-interference and consensus in the ASEAN Foreign Ministers' Meeting (AMM) statements have increased exponentially.³² The ASEAN way which represents the behavioral norms of ASEAN refers to a mode of interaction, marked by informality, consensus, non-adversarial bargaining, and a preference for non-legalistic and non-binding approaches to problem solving.³³ The five distinctive characteristics of ASEAN are, for example: 1) focus on economic development 2) non-interference in the internal affairs of other states 3) restrained use of coercion or force in security conflicts within ASEAN 4) preference for non-alignment with external powers 5) decision-making based on multilateral consensus.³⁴

Moreover, there are 2 significant driven factors that account for the emergence of ASEAN Way in this decade. Firstly, ASEAN Way was used to present the acceptance of human rights and democracy but in its unique value compared to the Western human rights ideology.³⁵ As they aim to expand their organization and

²⁹ Taku Yukawa, "The ASEAN Way as a Symbol: An Analysis of Discourses on the ASEAN Norms," p. 3.

³⁰ Robin Ramcharan, "ASEAN and Non-interference: A Principle Maintained," *Contemporary Southeast Asia*, vol. 22, no. 1, April 2000, p. 60.

³¹ Lee Jones, "ASEAN's Unchanged Melody? the Theory and Practice of 'Non-interference' in Southeast Asia," p. 481.

³² Taku Yukawa, "The ASEAN Way as a Symbol: An Analysis of Discourses on the ASEAN Norms," p. 6.

³³ Amitav Acharya, "The Evolution and Limitations of ASEAN Identity," in *Building ASEAN Community: Political-Security and Socio-cultural Reflections*, ed. Aileen Baviera and Larry Maramis, (Jakarta: Economic Research Institute for ASEAN and East Asia, 2017), p. 29.

³⁴ Felix K. Chang, "Economic and Security Interests in Southeast Asia," in *The Great Divergence? Economic Integration and Political Conflict in Asia*, (Washington, D.C.: Foreign Policy Research Institute, October 2013) p. 383.

³⁵ Taku Yukawa, "The ASEAN Way as a Symbol: An Analysis of Discourses on the ASEAN Norms," p. 8.

welcome new members, it is inevitable to deal with the criticism of Myanmar's military regime and the infringement of human rights. ASEAN preferred to maintain a temperate dialogue and justified their expansion of new authoritarian member states through "constructive engagement". So, they used the term ASEAN way to represent their unique norms and identity of the organization. ASEAN leaders claimed that the outsiders can encourage the democratic change in Myanmar only by this mean³⁶ and affirmed that "ASEAN is trying to democratize Myanmar."³⁷ On the other hand, ASEAN members "prefer to do things quietly, so as to give face to the other side"³⁸ and did not force Myanmar to democratize itself as a condition to join the association. The ASEAN way also guarantees new members' autonomy over their domestic issues and did not hesitate to participate in the organization. Nevertheless, it is later obvious that the situation of human rights in Myanmar is barely improved and ASEAN has been criticized that they embrace and prolong the military regime in Myanmar rather than stopping it.³⁹

Besides, the creation of the ASEAN way was "an appeal to the outside world". ASEAN did not want to only expand their norms to their new members, but also the countries outside the region. The establishment of ASEAN Regional Forum (ARF) represents the great attempt to insert ASEAN as "international hub" of regional process and institutional design in the Asia-Pacific region which is called ASEAN Centrality.⁴⁰ The purposes behind the ASEAN Centrality is to expand ASEAN norms and identity and strategically ensure their place in the Post-Cold War World.⁴¹ Based on the ASEAN way, ASEAN could make external powers feel more comfortable in discussing security issue through the inclusive, open and non-constraining brands of regionalism. Nevertheless, it is skeptic whether ASEAN successfully expanded their norms and ASEAN Centrality is really the outcome of their own effort.⁴² Even though ASEAN has never been able to eliminate the external threats, they hoped that such informal

³⁶ Hien Bui, "The ASEAN Human Rights System: A Critical Analysis," *Asian Journal of Comparative Law*, vol. 11, no. 1, June 2016, p. 5.

³⁷ Ibid, p. 6.

³⁸ Taku Yukawa, "The ASEAN Way as a Symbol: An Analysis of Discourses on the ASEAN Norms," p. 8.

³⁹ Hien Bui, "The ASEAN Human Rights System: A Critical Analysis," p. 6.

⁴⁰ Amitav Acharya, "The Myth of ASEAN Centrality?" *Contemporary Southeast Asia: A Journal of International and Strategic Affairs*, vol. 39, no. 2, August 2017, p. 273-274.

⁴¹ Ibid, p. 275.

⁴² Ibid, p. 273.

dialogue could reduce the level of international conflicts and provide solutions to regional problems.⁴³

The last important change of ASEAN in the 1990s was their attempt to undermine the benefits of that norms in order to strengthen functional cooperation. It is true that the ASEAN way have been enthusiastically promoted since the 1990s. Nevertheless, functional cooperation is impossible to achieve if the norms remain. There are 2 important issues that need functional cooperation for the solution: economic integration⁴⁴ and problems related to the human rights and democratization.⁴⁵ As for economic cooperation in the Fourth ASEAN Summit in 1992, ASEAN decided to create the ASEAN Free Trade Area (AFTA) with the aim to liberalize the intra-ASEAN trade and stimulate investment.⁴⁶ However, there are limits of the ASEAN way in promoting regional cooperation and solving regional problems. As for the intra-ASEAN cooperation, ASEAN possesses dual characteristics that contradict themselves. While ASEAN declared to enhance economic cooperation and development, the norms did not produce mechanisms to facilitate regional cooperation.⁴⁷ Some scholars argue that ASEAN engages in cooperation rhetoric and decouples its institutional structure from organizational activities. Their norms which emerged from social structure and political culture do not produce necessary mechanism for regional cooperation such as “a legacy of legalism facilitating the setup of contractual relationship and mechanisms of monitoring or a marked orientation towards a common interest.”⁴⁸

While the effectiveness of international institutions is inseparable with organization’s structure and activities, there is a gap between ASEAN rhetoric cooperation and practice.⁴⁹ The lack of efficacy could be reflected in the failure in promoting human rights and ineffective mechanism to deal with the Financial Crisis in 1997. It is true that ASEAN was pressured to strengthen their economic cooperation after the economic crisis. Nevertheless, the attempt to alter the ASEAN norms met with

⁴³ Felix K. Chang, "Economic and Security Interests in Southeast Asia," p. 383.

⁴⁴ Taku Yukawa, *The ASEAN Way as a Symbol: An Analysis of Discourses on the ASEAN Norms*, p. 5.

⁴⁵ *Ibid*, p. 10.

⁴⁶ Ludo Cuyvers, Lurong Chen and Philippe De Lombaerde, "50 Years of Regional Integration in ASEAN," p. 3.

⁴⁷ Anja Jetschke and Jurgen Ruland, "Decoupling Rhetoric and Practice: The Cultural Limits of ASEAN Cooperation," p. 179.

⁴⁸ *Ibid*, p. 181.

⁴⁹ *Ibid*, p. 183.

silence. In 1998, Thailand and Philippines urged that ASEAN should be able to interfere in members' domestic affairs when it is necessary and advocated the concept of "flexible engagement." However, the new principle was opposed by other members and Thailand's proposal was simply replaced by "enhanced cooperation" among members.⁵⁰ The reluctance of ASEAN toward the regional engagement in a more resultant and decisive approach reflects the prevalence of sovereignty among member states. It is true that the ASEAN introduced more flexible mechanisms such as ASEAN-minus-X formula⁵¹ and ASEAN Troika to respond with the urgent political and security issues.⁵² Such non-consensus solution has never been called into service and remains a paper instrument, though. Eventually, ASEAN's decisions are left on the consensus norm. The agreements they produced so far are non-binding and do not often generate concrete regional action. Rather than a functional organization for problem solving, ASEAN is usually recognized as a forum to serve institutional balancing needs.⁵³ Particularly, the regional regime refrains members to address issues that involve the domestic affairs.⁵⁴

In summary, ASEAN norms were not the initiatives of ASEAN itself, but they are general norms of international community. In the early stage, ASEAN did not refer the norms as the culture of ASEAN. Even though ASEAN further developed them as the ASEAN Way during 1990s to promote regional cooperation among member states and expand their roles to external countries, the ASEAN Way limits the organization to solve regional problems. In other word, the development of "ASEAN Way" does not consequently change the general expectations of inter-state behavior, at least not immediately.⁵⁵ ASEAN norms play important roles to integrate economic cooperation among members and frame the human rights regime. Both of them are inseparable aspects for the formation of ASEAN governance on data privacy.

2) ASEAN Norms and Regional Governance

⁵⁰ Taku Yukawa, "The ASEAN Way as a Symbol: An Analysis of Discourses on the ASEAN Norms," p. 10.

⁵¹ Jurgen Ruland, "Southeast Asian Regionalism and Global Governance: 'Multilateral Utility' or 'Hedging Utility'?", p. 98.

⁵² Jurgen Haacke, "ASEAN's Diplomatic and Security Culture: a Constructivist Assessment," p. 71.

⁵³ Jurgen Ruland, "Southeast Asian Regionalism and Global Governance: 'Multilateral Utility' or 'Hedging Utility'?", p. 99.

⁵⁴ Amitav Acharya, "How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism," *International Organization*, vol. 58, no. 2, Spring 2004, p.263 - 264.

⁵⁵ Jurgen Haacke, "ASEAN's Diplomatic and Security Culture: a Constructivist Assessment," p. 83.

The development of ASEAN norms depends on the international context in each era. It is true that the Cold War conflicts and western dominance in inserting universal values do play role in shaping regional norms. Still, ASEAN is not a passive norm receiver. In this part, I would like to review the concepts of well-known scholars - Jürgen Rüländ, Amitav Acharya and Jürgen Haacke – who explain ASEAN regionalization on the basis of normative institution.

First of all, Jürgen Rüländ examines that ASEAN does not act as a “multilateralism utility” based on the purpose of association building. Generally, regional organizations are regarded as building blocks for global governance and a part of the multilateral order to manage the global problems.⁵⁶ For example, the regionalization of the European Union strictly follows its normative agenda. Despite the absence of the hierarchical international order in the Post-Cold War World, multilateral organizations still serve as devices to influence the regional and global power equation or contribute international order rather than cooperate for problem solving. Members in regional organization deploy the notion of soft balancing, institutional balancing or hedging as devices to influence the global and regional distribution of power through institutional politics. Based on the idea of institutional balancing, Rüländ purposes that ASEAN regionalization supports “hedging utility”.⁵⁷

To support his argument, Rüländ uses indicators to distinguish ASEAN from other organizations governing for multilateral utility. As for the level of institutionalization, ASEAN is a shallow institutionalization with non-binding, non-precise and decentralize mechanism that do not intend to infringe members’ sovereignty. ASEAN can operate in a highly independent international environment and its functions cover broadly for almost every issue as reflected in the ASEAN Charter. Even though they try to build a rule-based organization with attempt to transform its structure, ASEAN members value sovereignty higher than regional governance effectiveness.⁵⁸ The formation against communist advances and American interference in the past is indeed a legacy of ASEAN regionalization and non-

⁵⁶ Jürgen Rüländ, “Southeast Asian Regionalism and Global Governance: ‘Multilateral Utility’ or ‘Hedging Utility’?,” p. 89.

⁵⁷ Ibid, p. 86-87.

⁵⁸ Ibid, p. 96-97.

interference remains the cornerstone norm of the association. Furthermore, ASEAN avoids huge governance cost,⁵⁹ creates institutional redundancy and limits its role of agenda settler in the international fora.⁶⁰ Interestingly, ASEAN is considered as a “productive” or “constructive” power and has been an important norm entrepreneur in the international relations. ASEAN acts as a norm brewery who produces and promotes norms that do not threaten others.⁶¹ However, they do not necessarily assonant with a multilateral utility since ASEAN socialized UN norms and international conduct in their local political culture. As for the mode of interaction, ASEAN does not confront or argue the issue at the regional level. ASEAN interaction patterns at the global forums are mostly in rhetorical action and controversial argumentation.⁶² Through these indicators, Rüländ hence concludes that the concept of hedging utility portrays the ASEAN’s institutional balancing and limits the association attempt to deepen institutionalization and problem-solving capacities.

Furthermore, Amitav Acharya suggests that local actors are not passive norm recipients from transnational agents. Acharya explores how normative changes have been conditioned by domestic political structures and actors through a dynamic congruence-building process called localization.⁶³ Through the framework of localization, the local institutions may accept, reject, or transform particular norms to pursue the region's goals and prior beliefs. Localization is a complex process and outcome of the contestation between emerging transnational norms and preexisting regional normative and social orders.⁶⁴ Acharya illustrates the localization of transnational norms in ASEAN through 2 cases: 1) ASEAN and cooperative security and 2) ASEAN and flexible engagement.

As for the cooperative security which was the dominant idea of regionalization during the Cold War era, ASEAN initially resisted military-security cooperation to avoid provoking a new front of great-power rivalry. Hence, Zone of Peace, Freedom and Neutrality (ZOPFAN) was equipped to minimize the role of external powers in the

⁵⁹ Ibid, p. 100.

⁶⁰ Ibid, p. 102.

⁶¹ Ibid, p. 103-104.

⁶² Ibid, p. 106-107.

⁶³ Amitav Acharya, “How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism,” p. 244.

⁶⁴ Ibid, p. 241.

regional affairs at that moment. However, the inclusive approach of ZOPFAN that once built ASEAN in the early age was later displaced. The association localized the common security idea to insert the new task of ASEAN as a regional driver through the establishment of ASEAN Regional Forum (ARF). ZOPFAN was discredited by ASEAN members themselves so that the association could expand broader regional relevance and role in international politics.⁶⁵ Meanwhile, the flexible engagement - the reformative proposal for responding to transnational challenges especially the financial crisis – was refused. Flexible engagement emphasizes political openness and transparency at both domestic and regional level. The idea was not supported since it challenges the regional norm of non-interference. It is emerged from the western concept of humanitarian intervention, human rights and democratization. Indeed, most of ASEAN members are a group of authoritarian regimes that refuse such universal norms.⁶⁶ Therefore, the cases portray the variable of success in normative localization in ASEAN. To resist, localize or displace transnational norms, it depends on how they uphold local value and identity.⁶⁷

Last of all, Jürgen Haacke also suggests that ASEAN norms are still perceived as an important function to prevent any disagreement among ASEAN leaders and interference from outside the region.⁶⁸ Haacke does not refuse the development of ASEAN norms through the constructivist analysis that ASEAN concerns about its image, reputation and external pressure from western states who emphasize the value of liberal democracy. Some long-standing norms have been relaxed by new regional mechanism such as ASEAN Troika, ASEAN minus x, ASEAN High Council and the participation of ASEAN Countries in the International Force for East Timor (INTERFET).⁶⁹ However, this development does not yet lead to the radical change in ASEAN's diplomatic and security culture.

Focusing on the regional normative structures that shaping behaviors, forming interests and creating identities of actors, Haacke explains the reasons why the association continues to endorse the ASEAN way. First of all, the ASEAN way

⁶⁵ Ibid, p. 259-260.

⁶⁶ Ibid, p. 260-262.

⁶⁷ Ibid, p. 263.

⁶⁸ Jürgen Haacke, "ASEAN's Diplomatic and Security Culture: a Constructivist Assessment," p. 57.

⁶⁹ Ibid.

maintain the region's most important function in mediating and preventing the insecurity caused by disputes among ASEAN leaders. They also help members to normalize their ties in case that the norms themselves are breached.⁷⁰ Secondly, the new members – Indochina countries and Myanmar – are not democratic countries. So, they prefer the strict interpretation of the ASEAN way to prevent any interference for the change of their political regime.⁷¹ Third, the promotion of ASEAN way that consists of basic norms of international community is the validity for making relationship and security ties between members and external powers.⁷² Lastly, authoritarian ASEAN members concern about security regime based on the association's diplomatic and security culture. The normative shield of the ASEAN way prevents members to avoid any agreement that will infringe such diplomatic and security culture.⁷³ ASEAN remains to conduct quiet diplomacy, attributes to the norms of sovereign equality as well as the norm of consensual decision-making.

In summary, the institutional norms – the ASEAN way – have significant impact in the regionalization process and cooperation of ASEAN. It is true that ASEAN norms have developed in each period. Still, the most important norm of non-interference remains as ASEAN diplomatic and security culture. ASEAN norms have been a focal point of regional cooperation to pursue its goals. ASEAN is an institutional balancing or hedging utility rather than a regional organization for multilateral order. Also, ASEAN is not a passive local actor since it has resisted, localized or even displaced transnational norms that will be most beneficial with their local value and identity. Indeed, ASEAN normative structure plays indispensable role for the regional cooperation and governance in all dimensions. Therefore, this study will utilize it as an analytical framework for analyzing the efficacy and challenges of ASEAN governance on data privacy in cyberspace.

⁷⁰ Ibid, p. 80.

⁷¹ Ibid, p. 80-81.

⁷² Ibid, p. 81.

⁷³ Ibid p. 81-82.

1.3 Research question

Due to the nature of cross-border data flows in cyberspace, data privacy requires international cooperation for functional solution. ASEAN has been working on this issue but the efficacy of regional governance on data privacy is questionable. As the core norm of ASEAN – the ASEAN way – has played significant role in shaping regional governance on all areas, it also affects how the association copes with data breaches, the exploitation of personal data and infringement of rights to privacy. In the moment, ASEAN privacy safeguard is considered inadequate and inefficient. Based on the normative structure of the association, this study will find out the challenges of ASEAN governance on data privacy. Particularly, why the existing cooperation and governance do not work reflecting in the continuous misuse of personal data and infringement of privacy? Why ASEAN cannot integrate and harmonize their existing safeguard measures to protect their people's personal data?

1.4 Objectives

1. To investigate the existing governance of data privacy in ASEAN, how it has evolved and compare them with the governance of other regional organizations, multilateral organizations and countries.
2. To estimate the efficacy and address the challenges of data governance in ASEAN for promoting security and privacy of personal data.
3. To suggest the solution to overcome the challenges and develop better governance on data privacy in the region.

1.5 Theoretical framework

In the present, data governance on the Internet - specifically the privacy and security of personal data - is one of the sub-issues of cyberspace regimes. The governance reflects the emergence of regimes which are subsets of norms that shared expectations about appropriate behavior in that area. Hence, this study applies the theory of international regimes to investigate ASEAN data governance and to address its challenges. By focusing on the influence of ASEAN norms in shaping the related frameworks, this study utilizes cognitivism that analyzing the regime based on

knowledge. However, the approach does not completely overlook other variables such as interest and power that play significant role in shaping regimes.

The definitions of regimes vary in degree, from broad to middle-ground and restricted definition. Regimes could be reduced as merely patterned behaviors in an issue-area. Moreover, Stephen Krasner proposes influential definition of regimes as “implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations.” Meanwhile, Oran Young defines regime in a more restrictive approach as “multilateral agreements among states which aim to regulate national actions within an issue-area.”⁷⁴

Regarding to the regimes in cyberspace, relevant issue areas such as cyber espionage, privacy, content control and cybercrime still have no unitary regime. However, the related regimes do exist.⁷⁵ The loose norms and institutions have been set and imposed with fragmented practice. The core institution is unidentifiable within the relative context of the cyber governance. It is comprised of a wide range of actors, activities and relationships with the existing norms and regime structures outside the issue area. Moreover, specific issues in the Internet overlap frameworks of existing international organizations such as telecom regimes under ITU, trade regimes under WTO, intellectual property regimes under World Intellectual Property Organization (WIPO), human rights regimes under International Covenant on Civil and Political Rights (ICCPR) including other actors or institutions that their missions are not focus directly on cyber issues.⁷⁶ In other word, the current existence of norms and regimes that lack of hierarchy and coherence in the international system with different level of compliance is defined as regime complex.⁷⁷ Nevertheless, the regime complex has high flexibility to help states adjust with the uncertainty and opens for the group formation

⁷⁴ Stephan Haggard and Beth A. Simmons, “Theories of International Regimes,” *International Organization*, vol. 41, no. 3, June 1987, p. 495.

⁷⁵ Tim Stevens, “Global Code: Power and the Weak Regulation of Cyberweapons,” in *Regulating Global Security: Insights from Conventional and Unconventional Regimes*, (Cham: Palgrave Macmillan, 2019.), p. 287.

⁷⁶ Joseph S. Nye, Jr., “The Regime Complex for Managing Global Cyber Activities,” in *The Global Multi-Stakeholder Model of Internet Governance*, vol. 2 (Ottawa: Centre for International Governance Innovation and the Royal Institute of International Affairs, 2014), p. 7-8.

⁷⁷ Karen J. Alter and Sophie Meunier, “The Politics of International Regime Complexity,” *Symposium: International Regime Complexity*, vol. 7, no. 1, March 2009, p. 13.

among like-minded countries to develop their norms which might be adopted by other groups.⁷⁸

Moreover, it is important for cognitivist to explore the ideology, values and the belief that actors hold about interdependence and cooperation for specific goals. How the regimes and norms are formed, evolved and functioning should not be analyzed on power and interest basic only. Nevertheless, it is difficult to generalize cognitivist regime theory as the scholarship does not completely refuse the impact of consequentialist disciplinary.⁷⁹ In addition, the Tübingen School of thought tried to link the three factors which are power, interest and knowledge together. Firstly, power-based approach is important to address states' security concerns in the anarchical structure of international politics such as hegemonic stability and cooperative behavior based on realist view. Furthermore, interest also takes an important role for cooperation in order to seek the solution of collective security dilemma through the institutional bargaining, institutional mechanism, spillover effects and surrounding environments. Finally, knowledge extends the scope of regime theorization. The weak cognitivism tries to make sense of the actor's behavior while the strong cognitivism interrogates the relationship between the self and other in the structure. The latter is based on thick constructivism which emphasizes the agency structure and four specific cooperation areas. They are power of legitimacy, the power of arguments or narrative structures, the power of identity or identity-related binary separations and the power of history, especially conditions of historical orders' transformation.⁸⁰

Some criticize that cognitivism cannot explain how power and ideas interact and is difficult to prove. Scholars are encouraged to specify "what types of issues and conditions under which consensual knowledge is likely to drive cooperation."⁸¹ Nevertheless, cognitivism portrays the importance of actors' identities, beliefs and history in forming norms, behavior and regime. In this regard, it is impossible to neglect the history, culture and ideas of ASEAN member states in the context of international politics that have driven the ASEAN norms, values and mechanism since its

⁷⁸ Joseph S. Nye, Jr., "The Regime Complex for Managing Global Cyber Activities," p. 9.

⁷⁹ Stephen Haggard and Beth A. Simmons, "Theories of International Regimes," p. 511.

⁸⁰ Nik Hynek, "Evolutionary and Disciplinary Characteristics of Regime Theorization," in *Regulating Global Security* (Cham: Palgrave Macmillan, 2019), p. 15-16.

⁸¹ Stephen Haggard and Beth A. Simmons, "Theories of International Regimes," p. 512.

establishment in 1967. Based on knowledge approach, it is necessary to analyze how ASEAN values, identities and norms shape the governance of data in the region especially questioning its actual purpose. Also, the study aims to compare between ASEAN and universal values in their practice and governance.

Therefore, this study mainly utilizes cognitivist perspective of regime theory to explain the formation and evolution of ASEAN data governance and its challenges. Nevertheless, the significant variables such as interest and power are not overlooked to examine the interaction of transnational and local norms which affect the formation of regime in the region. The cognitivist perspective of regime theory is most appropriate for analyzing the political production and use of knowledge because it can bridge the gap between the actors' interpretation and interaction between domestic and regional politics that forming norms and governance. Especially in ASEAN context, norms have taken significant role for regional cooperation and governance since its establishment.

1.6 Hypothesis

ASEAN has just focused on data governance on the Internet for a decade and has recently created the related frameworks in this field. The governance has just taken off and is too soon to evaluate the outcome. However, there are obvious challenges toward data protection in ASEAN that can obstruct the promotion of human security in form of privacy of personal data. They are the ASEAN norms – the ASEAN way - that play significant role in regional regime, cooperation and governance. The association's normative structure prevents deeper regional integration to respond with the transnational issue and non-traditional threat like the infringement of personal data in cyberspace.

1.7 Scope

The chronological scope of this independent study covers from the launch of ASEAN's first concrete framework, ASEAN ICT Masterplan (AIM) 2010 - 2015. The first ASEAN member states, Malaysia, also implemented the Personal Data Protection Act (PDPA) in the same year. Following AIM and Malaysia PDPA, ASEAN member states as well as ASEAN civil societies have been actively promoted the protection of personal data until present. This study also mentions the events prior to the said duration

in order to illustrate the development of ASEAN norm development as well as the international cooperation regarding data in cyberspace.

As for the actors, this study focuses on the role of ASEAN and member states who design regional frameworks and cooperation relating to the protection of personal data flowing on the Internet at both regional and domestic levels. Regarding to the institutional norms, state actors indeed are the important norm entrepreneurs of the association. This study recognizes that most of the online platforms and other Internet Service Providers (ISP) are the owners of many personal data and they play significant role in governing their users' data. Hence the relationship between the private technological corporates, who mostly come from the United States, and their government is not overlooked as one of the existing regimes in the present. Nevertheless, the current circumstance of cyberspace regime complex allows the fragmented practices for all actors around the world. Therefore, I explore the efficacy and challenges of the existing of ASEAN data governance that currently conducted by state actors.

1.8 Methodology

This independent study is qualitative research based on both primary and secondary sources available in English and Thai that are available online or published documents.

- Primary sources are: 1) official documents and statements such as official declarations or frameworks launched by ASEAN 2) international and multilateral agreement or documents 3) national laws, regulations, measures or policies and 4) statistical data collected by ASEAN, international organizations, and non-profit organization.
- Secondary sources are: 1) academic researches 2) thesis 3) academic journals 4) analyzed articles and 5) news, articles and personal opinions.

1.9 Structure

This independent study will explore the challenges of ASEAN data governance aiming for the promotion of human security and privacy. The structure of this study is comprised of:

1) Introduction – this chapter states the problems of misuse of personal data in cyberspace, briefly explains background of international and regional cooperation on data privacy and reviews related literatures and theoretical framework of this study;

2) Background of ASEAN Cooperation and Governance of Data Privacy and Regime Complex of Privacy in Cyberspace – this chapter explains the regional development toward the personal data protection, explores the existing safeguard measures of each ASEAN country and compares ASEAN governance with other international regimes;

3) Analysis of ASEAN Norms and ASEAN Governance on Data Privacy – this chapter analyzes how the ASEAN norms, which are the cornerstones of ASEAN regional cooperation, affect the governance on data privacy in both digital economy and human rights dimensions;

4) Challenges of ASEAN Governance on Data Privacy – this chapters addresses the challenges of ASEAN governance on data privacy that driven by the institutional norms;

5) Conclusion and Recommendations – this chapter concisely summarizes and answers research question, proposes recommendations as well as states the limitations of this study.

2. Background of ASEAN Cooperation and Governance of Data Privacy and Regime Complex of Privacy in Cyberspace

The misuse of personal data in the Internet is not overlooked by ASEAN member states which can be reflected in their attempt to promote the protection of personal data in cyberspace. This chapter will explain the overview of ASEAN data governance in 3 dimensions. Firstly, I will report the development of ASEAN cooperation in promoting privacy and security for personal data on the Internet. ASEAN have been actively working on this issue along with cybersecurity in regional meetings as well as launching guidelines, plans and frameworks. In the second part, I would like to elaborate how ASEAN member states protect personal data and users' privacy based on their domestic regulations and related national policies which are varied by countries. The last part specifically aims to analyze how the regime complex of cyberspace, including the issue area of data privacy, plays an important role for ASEAN data governance.

2.1 Development of ASEAN cooperation in protecting security and privacy of personal data on the Internet

As the previous chapter has briefly mentioned about the problems of data privacy ASEAN members face, ASEAN has been engaged in the sub-issue of security and privacy in cyberspace along with cybersecurity since early 2000s. Nevertheless, the progress of data governance was not noticeable in the early years of discussion. Even after ASEAN frameworks of data governance has already launched, the outcome and efficacy of their cooperation is questionable. In this part, I would like to inform the development of ASEAN cooperation in privacy and security of data flows in cyberspace in chronological order from the launch of e-ASEAN Framework Agreement in 2000 and the first meeting of ASEAN Telecommunications & IT Ministers (TELMIN) in 2001 to the publication of ASEAN Framework on Personal Data Protection in 2016.

First of all, after the adoption of the e-ASEAN Framework Agreement signed in the Fourth ASEAN Informal Summit in 2000, the First ASEAN Telecommunications & IT Ministers (TELMIN) was established to carry out, develop, strengthen and

enhance the competitiveness of the ICT sector.⁸² The priority of ASEAN high-level ICT bureaucrats in the 2000s is to create telecommunications infrastructure and ICT human resources as much as they can. ASEAN people could access to the Internet and other way of communications to improve their quality of life and boost up their economic opportunity. This attempt is reflected in the establishment of ASEAN ICT Fund in 2004 to accelerate the implementation of the ASEAN ICT Work Program. Moreover, network security has always been mentioned in every TELMIN, TELSOM and ATRC meetings. In 2004, ASEAN established National Computer Emergency Response Team (CERT) to ensure a coordinated ASEAN response to cyber-threats.⁸³ In the following year, TELMIN, TELSOM and the ASEAN Telecommunication Regulators' Council (ATRC) joined hands to collaborate in the area of network security particularly to fight SPAM.⁸⁴ This was accounted for the improvement of ASEAN agenda that aware of individuals' problems caused by the unsolicited electronic messages of scammers which many of them intrude users' privacy with deceived intention.

At an international level, ASEAN launched the statement as input to World Summit on the Information Society (WSIS) held in Tunis, 2005. They supported the discussion regarding Internet governance including spam, cybersecurity and Internet technical issues. ASEAN also emphasized that any disciplines discussed in WSIS should reach global consensus and consider members' difference in term of culture, language and level of development.⁸⁵ In the same year, ASEAN also launched Ha Noi Agenda and the ASEAN ICT Focus (2005-2010) as well as engaged ASEAN + 3 which all of them are leading technology countries in East Asia to attend TELMIN +1 by countries.⁸⁶

⁸² ASEAN Joint Media Statement of the First ASEAN Telecommunications & IT Ministers (TELMIN), Kuala Lumpur, 13-14 July 2001.

⁸³ ASEAN, Joint Media Statement of the Fourth ASEAN Telecommunications & IT Ministers (TELMIN), Bangkok, 5 August 2004.

⁸⁴ ASEAN, Joint Media Statement of the Fifth ASEAN Telecommunications & IT Ministers (TELMIN), Ha Noi, September 27, 2005.

⁸⁵ ASEAN, Statement by the Association of Southeast Asian Nations' Telecommunications and IT Ministers as Input to WSIS, Tunis 2005.

⁸⁶ ASEAN, Joint Media Statement of the Fifth ASEAN Telecommunications & IT Ministers (TELMIN), Ha Noi, 27 September 2005.

Since 2001, ASEAN leaders were aware of potential threats from cyberspace but the concerns over the security and privacy of Internet users were barely mentioned in ASEAN official press releases or statements in early stage. In 2009, ASEAN cooperation became more tangible by the adoption of ASEAN ICT Masterplan (2015) in the Ninth TELMIN in 2006. This Masterplan marks a significant improvement for ICT and technology infrastructure in Southeast Asia. It is obvious in the first ASEAN ICT Masterplan in which the 6 strategic thrusts in ICT become core enabler for ASEAN's social and economic integration. They are economic transformation, people empowerment and engagement, innovation, infrastructure development, human capital development and lastly but most importantly, bridging the digital divide. It is noted that the expected achievement in this masterplan mainly focuses on economic purposes,⁸⁷ particularly promoting ASEAN as a global ICT hub.⁸⁸

Even though the masterplan itself does not emphasize the aspect of cybersecurity, ASEAN leaders keeps working to promote practical and effective cooperation among the ASEAN Member States for cybersecurity in both TELMIN and ADMM. Data security and privacy protection are considered necessary instruments for economic opportunity and development of e-commerce⁸⁹. For example, ASEAN and dialogue partners occasionally hosted meetings for cybersecurity such as ASEAN-Japan Collaboration Framework on Information Security, Korea-ASEAN ICT Partnership Project as well as the signing of Memorandum of Understanding on Joint Cooperation on Information and Communication Technology Development in ASEAN Countries between ASEAN and ITU in 2012.⁹⁰

Nevertheless, the lack of mutual concrete solution, fragmentation of security policy landscape and complexity of network operations in the region lead to the absence of comprehensive cybersecurity approach in ASEAN.⁹¹ Despite the lack of integrated approach, some of ASEAN member states have begun to implement their domestic

⁸⁷ ASEAN ICT Masterplan 2015.

⁸⁸ ASEAN, Joint Media Statement of the Twelfth ASEAN Telecommunications and IT Ministers Meeting and its Related Meetings with Dialogue Partners, Cebu, the Philippines, November 16, 2012.

⁸⁹ Graham Greenleaf, "Data Privacy Laws in Asia – Context and History" in *Asian Data Privacy Laws: Trade & Human Rights Perspectives*, (New York: Oxford University Press, 2014), p. 17.

⁹⁰ Ibid.

⁹¹ Jirapon Sunkpho, Sarawut Ramjan and Chaiwat Oottamakorn, "Cybersecurity Policy in ASEAN Countries" in *Information Institute Conferences*, (Las Vegas: NV, March 26-28, 2018), p. 1-2.

regulations and specific policy toward the protection of personal data flowing on the Internet. They are notably Malaysia, Philippines and Singapore. The details about regulation and policy development in each ASEAN member states will be elucidated in the second topic of this chapter.

ASEAN has implemented the second ICT Masterplan for 2016 – 2020. In these years, ASEAN has reach to the most concrete cooperation toward data governance that they have ever done before. AIM 2020 also includes ICT in the Single Market, new media and content and information security and assurance. ASEAN leaders are fully aware that the safety, secured and trustworthy environment of informatic exchanges, content delivery and synergies are indeed indispensable for creating ASEAN digital economic and society.⁹² The application of this framework gives room for exempt in any areas members deem appropriate and the matters relating to national sovereignty, national security, public safety, public policy as well as any government activities are exception.⁹³ Although this framework marks a strong improvement of ASEAN cooperation toward the personal data for the first time, the association's cooperation that strongly preserves each member's sovereignty in domestic governance remains the obstruction to create effective and functional safeguard for protecting personal data in cyberspace. Nevertheless, ASEAN got an opportunity to hold ASEAN Data Protection and Privacy Forum in 2019, Bangkok, which participants shared knowledge and developed framework for cooperative enforcement of data privacy laws and cross-border data flow.⁹⁴

Furthermore, related frameworks and declarations were launched to support the protection of data owners. In 2018, ASEAN adopted Framework on Digital Data Governance to support the ASEAN digital economy by four strategic priorities such as ASEAN Data Classification Framework, ASEAN Cross Border Data Flows Mechanism, ASEAN Digital Innovation Forum and ASEAN Data Protection and Privacy Forum.⁹⁵ In The Nineteenth TELMIN, 2019, Lao PDR, the meeting also

⁹² ASEAN ICT Masterplan 2020.

⁹³ ASEAN Framework on Personal Data Protection 2016.

⁹⁴ "Philippines Helms 1st ASEAN Data Protection and Privacy Forum," Rappler, August 22, 2019, accessed April 14, 2020. <https://www.rappler.com/technology/news/238332-philippines-helms-first-asean-data-protection-privacy-forum>.

⁹⁵ ASEAN Framework on Data Governance 2018.

adopted Key Approaches for ASEAN Cross Border Data Flows Mechanism which is a voluntary mechanism to facilitate intra-ASEAN data flows.⁹⁶ Lastly, ASEAN expand data mechanism in other social issue to strengthen human rights. As a result, the Thirty-fifth ASEAN Summit adopted Declaration on the Protection of Children from all Forms of Online Exploitation and Abuse in ASEAN in 2019, Bangkok.⁹⁷ The ICT Masterplan for the next 5 years is set to announce in 2020, naming ASEAN Digital Masterplan 2025.⁹⁸

In summary, ASEAN has been firmly working together on IT and Internet governance since the establishment of TELMIN. During the early years, ASEAN leaders and senior officers mostly concerned about ICT development and technical issues. After the first AIM, ASEAN engaged more in other areas such as network security, but the protection of personal data has not yet explicitly mentioned. However, some member states started to set specific regulations of personal data protection. After the AIM 2020 in which information security was added as one of new strategic thrusts, ASEAN have adopted more related frameworks, notably Framework on Personal Data Protection in 2016, and held meetings to integrate their cooperation as well.

2.2 Personal data protection: policy, regulation and practice in ASEAN member states

Protection of personal data is not new for ASEAN member states. Prior to the widespread of Internet in Southeast Asia, most of them have already imposed sectoral legislations to protect personal data in financial, health, communications sectors and consumer protection as well as the fundamental privacy rights prescribed in the constitution. In parallel with those legislations, some ASEAN countries ratified relevant international conventions, for example, International Covenant on Civil and Political Rights (ICCPR) and incorporate provision of privacy in domestic law.⁹⁹ However, the emergence of technology reshapes the protection approach because the former

⁹⁶ The Nineteenth ASEAN Telecommunications and Information Technology Ministers Meeting and Related Meetings, Vientiane, Lao PDR, October 25, 2019.

⁹⁷ Declaration on the Protection of Children from all Forms of Online Exploitation and Abuse in ASEAN 2019.

⁹⁸ "ASEAN ICT Masterplan 2020 (AIM 2020)," ASEAN Thailand 2019, accessed April 14, 2020, <https://www.asean2019.go.th/en/infographic/asean-ict-masterplan-2020-aim-2020/>.

⁹⁹ "Status of Ratification Interactive Dashboard," International Covenant on Civil and Political Rights, accessed April 15, 2020, <https://indicators.ohchr.org/>.

mechanisms do not completely cover all the aspects of data privacy on the Internet unlike the specific data privacy instruments.¹⁰⁰

Hence, some countries began to implement comprehensive law which called the Protection of Personal Data Protection Act (PDPA) to encompass all aspects of data privacy. In the present, approximately 107 countries around the world such as the European Union, Australia and some ASEAN fellows implement measures to protect their people's personal data¹⁰¹ and it is expected that PDPA will be ubiquitous in the near future.¹⁰² The minimum principles set in most PDPA are, for instance, requirement of personal data owners' consent for data transfer, binding corporate rules, codes of conduct, certifications, privacy marks, seals and standards, adequacy and whitelists.¹⁰³ Each country may have different perception toward the scope of personal data and privacy which will directly affect the measures in PDPA.

Nevertheless, the protection of personal data does not necessarily ensure that data owners will be granted privacy. The PDPA simply provides the minimum principles that are internationally accepted but more restricted standards might be included in each national laws and international agreements. Moreover, the protection of personal data is “a subset of a broader concept of privacy”¹⁰⁴ The principles in PDPA are applied for personal data processing on the Internet, electronic and traditional communications means, not all physical aspects of privacy.¹⁰⁵ The scope of PDPA application and definition of personal data are also varied by countries. While some countries guarantee people's data privacy from both companies and state's interference, many only prevent the misuse by private sector. The same situation goes for ASEAN countries that only have a very board framework on personal data protection. The existing measures for data privacy safeguard of each ASEAN member appeared in table 1.

¹⁰⁰ Graham Greenleaf, “Data Privacy Laws in Asia – Context and History”, p. 6.

¹⁰¹ "Data Protection and Privacy Legislation Worldwide", United Nations Conference on Trade and Development (UNCTAD), April 2, 2020, accessed April 15, 2020, https://unctad.org/en/Pages/DTL/STI_and ICTs/ICT4D-Legislation/eCom-Data-Protection-Laws.aspx.

¹⁰² Graham Greenleaf, “Data Privacy Laws in Asia – Context and History”, p. 6.

¹⁰³ Ibid.

¹⁰⁴ Ibid, p. 4.

¹⁰⁵ Ibid.

Table 1 Data privacy measures of ASEAN countries

| Countries | Measures |
|-----------|---|
| Malaysia | <p data-bbox="528 443 1043 472"><u>Malaysia Personal Data Protection Act 2010</u> ¹⁰⁶</p> <ul data-bbox="579 495 1554 1025" style="list-style-type: none"> <li data-bbox="579 495 1554 584">• Scope: The act regulates the processing of personal data in commercial transactions and relating matters along with sectoral regulations and codes of conduct in aviation, banking and financial, insurance, communications and healthcare sectors. <li data-bbox="579 607 1554 725">• Commission: Personal Data Protection Commission is established in which the Chairman and Commissioners are appointed by the Minister. The Commission is assisted by the Personal Data Protection Department, an agency under the Ministry of Communications and Multimedia (MCMC). <li data-bbox="579 748 1554 837">• Disciplines: Privacy notice requirements, consent requirements, choice to stop marketing use, right of data subject to request access and make corrections, security policy to protect personal data. <li data-bbox="579 860 1554 949">• Registration: Malaysia requires data users in some sectors to register with the Commissioner and establish the representative in Malaysia, but they are not required to appoint a data protection officer. <li data-bbox="579 972 1554 1025">• Cross-border transfer of data: Restriction that the terminal destination shall have comparable standard. ¹⁰⁷ <p data-bbox="528 1039 916 1068"><u>Other related policies and measures</u></p> <ul data-bbox="579 1090 1246 1211" style="list-style-type: none"> <li data-bbox="579 1090 995 1120">• MSC Malaysia Cloud Initiative ¹⁰⁸ <li data-bbox="579 1137 1246 1167">• Digital Transformation Acceleration Program (DTAP) ¹⁰⁹ <li data-bbox="579 1184 1091 1211">• The Whistleblower Protection Act 2010 ¹¹⁰ |
| Singapore | <p data-bbox="528 1249 1050 1279"><u>Singapore Personal Data Protection Act 2012</u> ¹¹¹</p> <ul data-bbox="579 1301 1554 1653" style="list-style-type: none"> <li data-bbox="579 1301 1554 1391">• Scope: The act applies for all organizations which are individual, company or corporates that carries out activities involving the processing and collecting of Singapore citizen or resident's personal data <li data-bbox="579 1413 1554 1467">• Commission: The Personal Data Protection Commission (PDPC) is designated by the Info communications Media Development Authority (IMDA). <li data-bbox="579 1489 1554 1608">• Disciplines: The requirement of data owners' content to collect, use or disclose personal data, the rights of data owner to withdraw consent, notification of purpose, the right of data owners to access to and correct their personal data, removal of personal data upon request, security arrangements to protect personal data. <li data-bbox="579 1630 948 1653">• Registration: No requirement |

¹⁰⁶ Malaysia Personal Data Protection Act 2010, section 2, 14, 30 – 44 and 47.

¹⁰⁷ Sharon Suyin Tan, "Personal Data Protection in ASEAN", *Zico Law*, April 2019, accessed April 17, 2020, http://zico.group/wp-content/uploads/resources/asean_insiders/ASEAN_Insiders-PDPA.pdf.

¹⁰⁸ Sarawut Pitiyasak et al., *Cloud Computing Policy and Personal Data Protection in the Cloud among the EU, the US, Australia and ASEAN: A Thailand Perspective*, (Bangkok: Thailand Science Research and Innovation (TSRI), March 2017), p. ii.

¹⁰⁹ "Making 'Cloud First' a Reality for Malaysia", Malaysia Digital Economy Corporation, April 24, 2018, accessed April 17, 2020, <https://mdec.my/blog/?p=165>.

¹¹⁰ Christopher Leong, "A Critical look into the Whistleblower Protection Act 2010", *Institute for Democracy and Economic Affairs (IDEAS)*, February 2017, accessed April 17, 2020, p. 1, <http://ideas.org.my/wp-content/uploads/2017/03/PI36-Whistleblower-Protection.pdf>.

¹¹¹ Singapore Personal Data Protection Act 2012, section 3 – 5 and part IV - V.

| Countries | Measures |
|-------------|---|
| | <ul style="list-style-type: none"> • Cross-border transfer of data: Organizations can transfer personal data oversea if the terminal country provides the mutual standards to protect personal data. <p><u>Other related policies and measures</u></p> <ul style="list-style-type: none"> • PDPA minor regulations and guidelines: Do Not Call Registry, Composition of offences, Enforcement, Appeal, PDPA for National Registration Identity Card (NRIC), the application of PDPA to election activities ¹¹² • Singapore Government or G-Cloud ¹¹³ • Multi-Tier Cloud Security (MTCS) ¹¹⁴ |
| Philippines | <p><u>Philippines Data Privacy Act 2012</u> ¹¹⁵</p> <ul style="list-style-type: none"> • Scope: The act protects individual personal information in information and communications systems in the government and the private sector. • Commission: The National Privacy Commission is appointed by the President of the Philippines. • Disciplines: The privacy notice requirements, consent requirements, rights to withdraw consent, right to access and correct personal data, agreement requirements for marketing purposes, appropriate security measures, breach notification requirements. • Registration: Data users are required to register if they process, access or require sensitive personal information of at least 1,000 individuals or those employing fewer than 250 persons but process data that might pose risks to the right of freedom. • Cross-border transfer of data: It is not restricted but the PDA prescribes extraterritorial application <p><u>Other related policies and measures</u> ¹¹⁶</p> <ul style="list-style-type: none"> • Cloud First Policy • Philippines ICT plan and iGovPhil • Freedom of Information Order 2016 |
| Thailand | <p><u>Thailand Personal Data Protection Act 2019</u> ¹¹⁷</p> <ul style="list-style-type: none"> • Scope: The act delays the implementation of some sections and exemptions for some private, public and social enterprise sectors until May 2021. ¹¹⁸ |

¹¹² "Advisory Guidelines," Personal Data Protection Commission (PDPC) Singapore, accessed April 18, 2020, <https://www.pdpc.gov.sg/Guidelines-and-Consultation?keyword=&type=advisory-guidelines&topic=all&page=1>.

¹¹³ "Fact Sheet: Cloud Computing for Singapore Government", Infocomm Development Authority of Singapore, accessed April 18, 2020, https://www.imda.gov.sg/~media/imda/files/inner/about%20us/newsroom/speeches/2013/1505_cloudasia2013/gcloudfactsheet.pdf.

¹¹⁴ "Multi Tier Cloud Security Certified Cloud Services," Infocomm Media Development Authority of Singapore, April 19, 2017, accessed April 18, 2020, <https://www.imda.gov.sg/industry-development/infrastructure/ict-standards-and-frameworks/mcsc-certification-scheme/multi-tier-cloud-security-certified-cloud-services>.

¹¹⁵ Philippines Data Privacy Act 2012, section 2, 4, 5, 13, 33.

¹¹⁶ Sarawut Pitiyasak et al., *Cloud Computing Policy and Personal Data Protection in the Cloud among the EU, the US, Australia and ASEAN: A Thailand Perspective*, p. 236-237.

¹¹⁷ Thailand Personal Data Protection Act 2019, chapter 1 and 7.

¹¹⁸ Komsan Tortermvasana and Suchit Leesa-Nguansuk, "Delay Muller for Personal Data Law Enforcement," *Bangkok Post*, April 22, 2020, accessed April 25, 2020, <https://www.bangkokpost.com/business/1905210/delay-mulled-for-personal-data-law-enforcement>.

| Countries | Measures |
|-----------|--|
| | <ul style="list-style-type: none"> • Commission: Personal Data Protection Committee consists of 9 honorary directors selected by the Nominating Committee and PDP committee from high-level bureaucrats from the Prime Minister Office, the Council of State, Consumer Protection Office, Rights and Liberties Protection Department and Office of the Attorney General. ¹¹⁹ • Disciplines: Consent requirements, privacy notice requirements, and security measures to protect personal data including the notification of data breach within 72 hours upon the knowledge. • Registration: No requirement • Cross-border transfer of data: Extraterrestrial application <p><u>Other related policies and measures</u></p> <ul style="list-style-type: none"> • The Official Information Act 1997 • guidelines and standards for government agencies to use cloud services promoted by the Digital Government Development Agency, e.g. (Draft) Thailand Digital Government 2021 - 2023 • the Committee for driving Big Data, Data Center and Cloud Computing |
| Indonesia | <p><u>Other related policies and measures</u> ¹²⁰</p> <ul style="list-style-type: none"> • Electronic Information and Transaction Law 2008 • Personal Data Protection in Electronic System (PDP Regulation) 2016 <ul style="list-style-type: none"> ○ Scope: the regulation does not apply for public service ○ Registration: If the data is used for public services, such data users are required to register with the authority (Ministry of Communication and Information Technology, Ministry of Health, Ministry of Internal Affairs or the Financial Services Authority.) ○ Disciplines: require privacy notice, consent and security measures from data owners before collecting, processing and disclosing data, notify data users in case of data breach ○ Cross-border transfer of data: require to notify to the Ministry of Communication and Information Technology before and after the transfer. • Public Information Disclosure Act 2008 |
| Vietnam | <p><u>Other related policies and measures</u> ¹²¹</p> <ul style="list-style-type: none"> • Protection of Consumers' Rights Act 2010 • Cyber Information Security Act 2015 • Information Technology Act 2016 and Cyber Security Act 2018 |

¹¹⁹ "Thailand Personal Data Protection Act," Baker McKenzie, May 8, 2019, accessed May 7, 2020, <https://www.bakermckenzie.com/en/insight/publications/2019/05/thailand-personal-data-protection-act>.

¹²⁰ Zacky Zainal Husein and Muhammad Iqsan Sirie, "Indonesia," in *The International Comparative Legal Guide to: Data Protection 2019*, 6th ed., (London: Global Legal Group, June 2019), p. 183-187.

¹²¹ Sharon Suyin Tan, "Personal Data Protection in ASEAN".

| Countries | Measures |
|------------------------------|---|
| | <ul style="list-style-type: none"> ○ General disciplines: Notification of privacy and consent for the purpose of collecting processing and using personal data, the right of consumers to opt out their consent. ○ Registration: Representatives are required in some sectors, for example, foreign entities that provide telecommunications, internet and value-added services in Vietnam's cyberspace. |
| Laos | <p><u>Other related policies and measures</u> ¹²²</p> <ul style="list-style-type: none"> • Law on Electronic Data Protection 2017 <ul style="list-style-type: none"> ○ Registration: Data controllers do not have to register ○ Disciplines: Identify the purpose of collecting data, receive prior consent before the collection, use, disclose and transfer of data, impose security measures, notify the authority in case of data breaches. |
| Cambodia, Myanmar and Brunei | <p><u>Other related policies and measures</u> ¹²³</p> <ul style="list-style-type: none"> • As for the sectoral legislation involving personal data protection, the provisions are still unclear and too broad to scope. <ul style="list-style-type: none"> ○ Cambodian citizens' data and right to privacy are embedded in the Constitution 1993, civil code 2007, labor law 1997, law on banking and financial institution 1999, law on credit reporting 2011, law on press 1995 and codes of medical ethics 2003. ○ Myanmar promulgated 4-page Law Protecting the Privacy and Security of Citizens in 2017 and Electronic Transaction Law 2004 to protect citizens' data from unauthorized access to the storage owned by private enterprises. However, the laws open room for access if granted "order" by the authority. ○ Brunei has been published Data Protection Policy in 2014 as the only data guideline for Brunei government. |

According to the status of existing measures shown in the table, ASEAN member states currently have different approaches for the protection of personal data and privacy. While Malaysia, Singapore, Philippines and Thailand have already implemented the comprehensive legislation of personal data protection, others regulate the protection of personal data based on sectoral laws and some only set broad guidelines without clear criteria and obligations. The objectives of PDPA are mainly to regulate private enterprises that collecting, using and disclosing citizens' personal data. Generally, data users shall be granted consent by data owner, notify and inform the purpose of collecting and using data as well as comply with the security measure in accordance with relevant technical standards stipulated by each country. Most of them apply the standards for private entities that process their citizens' personal data outside

¹²² Ibid.

¹²³ Ibid.

their territories or extraterrestrial application by requiring that the designation shall have the mutual standard. Nevertheless, the effectiveness of implementation for foreign entities that do not have local representatives is questionable. As for legal and administrative procedures, exemptions of PDPA are applied because each state agency shall have duty as prescribed in their own legislations or follow government policies and guidelines. Only the Philippines extends their scope of PDPA to the government agencies. Other countries such as Indonesia and Thailand have already published specific regulations similar to the PDPA for state agencies, but it is still considered an incomplete public sector law.¹²⁴

In other word, ASEAN state members have been working to improve the security and privacy of their subject's data collected by both electronic and traditional means. ASEAN frameworks and guidelines for data governance are flexible and non-binding, as a result, there are variations in ASEAN member states' protection measures. The diversity of data protection approaches appears worldwide where there is no single regime regarding data privacy and values underlying "privacy" are even more different by countries.

2.3 ASEAN governance and international regimes

The environment of data privacy in cyberspace is complex and so are the international regimes. It is undeniable that international norms, especially those shaped by superpowers, more or less influence regional and domestic governance. As cyberspace and many of its sub-issues are considered one of the most complicated activities in the world, there is still no single regime and practice is varied and fragmented.¹²⁵ Hence, the global regime complexity of cyber privacy is one of the variables that affects ASEAN governance in protecting the security and privacy of ASEAN people's personal data. In the last topic, this study will analyze the regime complex of data privacy, compare how ASEAN conforms to the existing norms and explore the challenge of regime complex.

Similar to other sub-issues in cyberspace such as content control, espionage, sabotage and human rights, digital privacy is regarded as a complex rather than one

¹²⁴ Graham Greenleaf, "The Philippines and Thailand – ASEAN's Incomplete Comprehensive Laws," p. 17.

¹²⁵ Joseph S. Nye, "The Regime Complex for Managing Global Cyber Activities," p. 7.

integrated regime. The different characteristics in regime complex can be compared through the four dimensions which are depth, breadth, fabric and compliance.¹²⁶ In this regard, a well-known political scientist Joseph S. Nye compares the norms that affect data privacy through the four dimensions as medium depth, low breadth, mixed fabric and mixed compliance.¹²⁷

Firstly, the depth refers to the hierarchical coherence of a set of rules and norms, in other word, it refers to the availability of overarching set of rules that are mutually used and reinforced.¹²⁸ The depth of cyber privacy in the present is considered medium¹²⁹ as there are compatible guidelines, frameworks and standards in the international system. The examples of international frameworks are the United Nations' resolution on the right to privacy in the digital age in 2013, United Nations Human Rights Office of the High Commissioner's Special Rapporteur on the right to privacy, Organization for Economic Cooperation and Development's Amendment of Guidelines on the Protection of Privacy and Transborder Data Flows of Personal Data in 2013, APEC Privacy Framework and Information Privacy Principles in 2005, APEC Cross-Border Privacy Rules (CBPR) System endorsed in 2011 and similar frameworks of ASEAN in the past few years. Notably, the EU's GDPR is considered the most effective standard to benefit both the privacy of individuals and EU digital economy. Furthermore, The EU and U.S. adopted the EU-U.S. Privacy Shield Framework in 2016 to ensure that the U.S. companies will at least comply with EU's main principles of privacy protection so that they can transfer EU individuals' data to the U.S.¹³⁰

Although there are international frameworks on personal data protection, they are not completely comparable. The greater harmonization of privacy regimes is unlikely possible in the near future despite the occasional calls for international convention on privacy and data protection within UN framework.¹³¹ The lack of single dominant norms in data privacy is due to the power play in the international regime and

¹²⁶ Ibid, p. 9.

¹²⁷ Ibid.

¹²⁸ Ibid, 10.

¹²⁹ Ibid, 11.

¹³⁰ Sarawut Pitayasak et al., *Cloud Computing Policy and Personal Data Protection in the Cloud among the EU, the US, Australia and ASEAN: A Thailand Perspective*, p. 38.

¹³¹ Lee A. Bygrave, "International Agreements to Protect Personal Data," in *Global Privacy Protection: The First Generation*, ed. James B. Rule and Graham Greenleaf, (Massachusetts: Edward Elgar Publishing, 2008), p. 48.

sovereignty factor. Even though the EU directive has become the most prominent data protection norms, it is impossible to expect all non-European countries to meet the adequacy criterion that EU prefers. The extension of EU's regime in extraterritorial application specifically for transborder data flow in the third countries also faces weak implementation and limitation. Moreover, non-binding model for the protection of personal data such as APEC Privacy Framework challenges the EU strict rules. APEC framework is unlikely to become the significant force for the data privacy, but the model is strongly supported by corporate players such as Google. Lastly, it is important to remind that the concept of data privacy in cyberspace is complicated in the globalization context. Cross-border data flow on the Internet is inseparable with trade, technology and communications networks, crime, security and human rights. Like other plurilateral agreements, the future of data privacy is "increasingly destined to fail in terms of offering clear and relatively stringent norms."¹³²

The second dimension of regime complex in data privacy is breadth. Regardless of compliance, breadth refers to the scope of numbers of state and non-state actors that have accepted the norms. As there is no prominent convention of data privacy and no assessment of how many countries have comply with the same standards so far, the breath of this area is considered low.¹³³ Currently, there are 107 countries that have put in place legislation to secure the protection of data and privacy according to UNCTAD.¹³⁴ The percentage of countries with safeguard measures is 66, but the legislations and monitoring mechanisms of each country differ in detail. For example, the European Commission has recognized 13 countries whose data protection measures are assimilated with the EU's GDPR.¹³⁵ In fact, the EU adequacy criterion emphasizes how other countries' PDPA cannot not be completely harmonized with the GDPR and that EU standard is not the only accepted regime.

Furthermore, fabric is one of the dimensions to compare level of regime complexity. It refers to the mixture of state and non-state actors in that issue which can

¹³² Ibid, p. 49.

¹³³ Joseph S. Nye, "The Regime Complex for Managing Global Cyber Activities," p. 9.

¹³⁴ "Data Protection and Privacy Legislation Worldwide", United Nations Conference on Trade and Development (UNCTAD).

¹³⁵ "Adequacy Decisions: How the EU Determines if a Non-EU Country Has an Adequate Level of Data Protection", European Commission, accessed April 29, 2020, <https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions>.

be tight, loose or mixed. Due to the low entry barriers in cyberspace, non-state actors can easily participate in the Internet especially the transnational technology companies who own most of social media platforms.¹³⁶ These companies, also called as the Big Techs, set their own privacy policies to some extent which might be higher or lower than the local standard where these transnational firms provide their services. Meanwhile, states increasingly have more control to regulate and set standards that private to organizations are required comply with. Hence, fabric of privacy regimes is mixed. A large number of organizations, individuals and states have actively participated to set online privacy measures because they are fully aware of the significance and concern about the upcoming “Big data”, which can be both beneficial and harmful to them at the same time.

Lastly, the widespread of behavioral adherence to a set of norms or the compliance of privacy norms in cyberspace is also considered a mixed one. Comparing to the high compliance of the norms in domain names and Internet technical standards that mostly initiated by organizations in United States, the mixed participation of companies, civil organizations and states directly results to the compliance of privacy norms. For them, data privacy and personal data protection are necessary, but it is obvious that their interests from personal data are varied.¹³⁷ For individuals, privacy is fundamental human rights so that the misuse of personal data such as data exploitation for commercial purposes conducted by transnational platform owners, the surveillance by the government disguised as national security and data breaches are not tolerated. Meanwhile, states are aware that massive collection of their citizens’ personal and sensitive data by companies can become non-traditional threat for national security when processed. Besides, companies concern that privacy and security policy are important to build users’ trust and promote business, but they have always been guilty of selling personal data to the third person without consent and authorization for their commercial benefits.

But whose regimes prevail? The government of each country accepts different norms, as a result, the compliance of norms is mixed. In the present, the privacy

¹³⁶ Joseph S. Nye, "The Regime Complex for Managing Global Cyber Activities," p. 9.

¹³⁷ Ibid, p. 10.

approaches in cyberspace can be categorized into 3 types. Firstly, the EU - holding onto the value of privacy as fundamental human and civil rights - imposes high-standard regulations like the GDPR. The EU proved to the world that the GDPR is more than regional or domestic standard and even beyond the cross-border nature of data in cyberspace, reflecting in the case of Maximilian Schrems v Data Protection Commissioner. In 2015, the European Union Court of Justice declared that the Commission's U.S. Safe Harbor Decision which provides flexible disciplines for private sector was invalid. In the light of Edward Snowden's disclosure of secretive surveillance by the U.S. National Security Agency (NSA) through Facebook, the European Court finds that the U.S. legislation refused the national supervisory authorities to question the protection of the privacy of individual and required Irish supervisory authority to examine upon the EU citizen's complaint.¹³⁸ In the following year, both EU and the U.S. issued the EU-U.S. Privacy Shield Framework to provide a legal mechanism that acceptable for both countries.¹³⁹

On the contrary, the U.S. approach to data privacy differs from the EU. Instead of comprehensive legislation, the U.S. approach is a patchwork of existing sectoral legislations combined with self-regulation of industry.¹⁴⁰ This approach is challenged by the widespread collection of personal data on the Internet. It is criticized for the overlapping and contradictory principles for protection as well as the inadequate mechanism to prevent threats from commercial and governmental intrusion. American law professor, Lori Andrews, observes that the absence of laws preventing companies from being "sued for invasion of privacy, defamation, or criminal acts based on people's posting" signifies that government does not only accept but also accelerate and facilitate the ISP cartels and digital empires.¹⁴¹

¹³⁸ Court of Justice of the European Union, *The Court of Justice declares that the Commission's US Safe Harbour Decision Is Invalid*, Press Release no.117/15, October 6, 2015, accessed April 29, 2020, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-10/cp150117en.pdf>.

¹³⁹ "U.S.-EU Safe Harbor Framework", Federal Trade Commission Protecting America's Consumers, accessed April 30, 2020, <https://www.ftc.gov/tips-advice/business-center/privacy-and-security/u.s.-eu-safe-harbor-framework>.

¹⁴⁰ Franz-Stefan Gady, "EU/U.S. Approaches to Data Privacy and the "Brussels Effect": A Comparative Analysis," *Georgetown Journal of International Affairs*, 2014, p. 12, accessed July 28, 2020, www.jstor.org/stable/43773645.

¹⁴¹ Robert W. McChesney, "The Internet and Capitalism II: Empire of the Senseless?" in *Digital Disconnect: How Capitalism is Turning the Internet against Democracy*, (New York: New York Press, 2013), p. 142.

Last but not least, China has recently presented the alternative approach toward privacy through its Cybersecurity Law in which the privacy provisions developed from the convergence of foreign legislations such as GDPR. Nevertheless, Chinese approach is unique in term of data localization, strict cross-border transfer and the excessive rights of authority to access for "national security" reason. James D. Fry, a law professor comments that "Chinese laws protect better and better individuals' rights against private entities"¹⁴² ... However, it is the Chinese consumer's data privacy protection rather than a citizen's."¹⁴³

The four dimensions portray the complexity of regimes for protecting people's privacy in the present. Among the fragmented arrangements of data privacy where a legal instrument still enforces in one end, ASEAN's broad frameworks and the global regime complex provide opportunity for each member state to retain a significant degree of autonomy to design their own approach. Referring to the EU approach, only three countries which are Malaysia, Singapore and Philippines have already implemented comprehensive legislation to protect their citizens' personal data through any commercial transaction. Thailand have also implemented its new PDPA with exemptions of some provisions for several sectors until 2021. Their PDPA refers to GDPR's basic principles which are purpose limitation, data minimization, accuracy, data retention, data security and accountability. Regarding to the cross-border transfer of data, no country restricts it, but adequate or comparable standards are required. However, it is controversial to assume that ASEAN data privacy laws are legal transplants of EU's directive and that they conform to the EU's privacy norm.¹⁴⁴ Although basic protection measures are adopted in PDPA, they apply for commercial transaction or private sector only. Meanwhile, EU clearly includes the coverage of authority to access personal data under the obligations of GDPR.¹⁴⁵ The EU and ASEAN have different norms underlying their data privacy policies and legislations.

There are also ASEAN countries that have not yet decreed comprehensive rule for personal data protection, but they have sectoral laws or related measures to deal

¹⁴² Emmanuel Pernot-Leplay, "China's Approach on Data Privacy Law: A Third Way between the U.S. and the EU?" *Penn State Journal of Law and International Affairs*, vol. 8, no. 1, 2020, p. 51, accessed April 30, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3542820.

¹⁴³ Ibid, p. 52.

¹⁴⁴ Graham Greenleaf, "Data Privacy Laws in Asia – Context and History", p. 11.

¹⁴⁵ The European Union General Data Protection Regulation (GDPR), Article 86.

with data breach or misuse by data collectors. Indonesia and Vietnam protect their people's personal data through targeted or sectoral legislations. Sectors that have regulations relating to the privacy obligations are, for instance, electronic transaction, telecommunications, banking and finance and healthcare. However, this approach is considered inflexible when a massive of personal data is collected, processed and disclosed in computing facilities, cloud services or social media platforms because personal data are mixed and not divided by sectors.

Moreover, Lao LDP, Cambodia, Myanmar and Brunei are categorized as countries that do not have both comprehensive legislation and sectoral rules for personal data protection. These countries adapt related mechanism such as Lao LDP's Prevention and Combating Cyber Crime Law 2015, Cambodia' Civil Code 2007, Brunei's Electronic Transactions Act 2004 when violation occurs. A Thai Law Professor Kanathip Thongraweewong observes that the purpose of these legislations is mainly for protecting national security rather than protecting privacy and misuse of individuals' personal data. Also, they do not cover basic principles of personal data protection set by OECD, APEC as well as EU's GDPR.¹⁴⁶

Recognizing the restriction gap between commercial transaction and authority access, it is impossible to overlook the upcoming trend of data localization in ASEAN. Even though the obligations do not apply for the state to prevent the threat of "national security", they usually have limited access to their citizens' personal data stored outside their jurisdiction. As long as data still flows freely on the Internet especially through the facilities of transnational Big Techs, it is difficult for authority to effectively regulate not only the misuse of personal data but also the online publication generated by data users themselves. In the present, Indonesia, Malaysia and Vietnam require Internet Service Providers that collect their citizen's personal data to store data in the country. Thailand, Philippines and Brunei do not explicitly require data to be localized in the country, but certain obligations relating sensitive information and cybersecurity mandate companies to reach their standards for cross-border transfer which might affect the data storage.¹⁴⁷ It seems that ASEAN knows their weakness in protecting citizen's

¹⁴⁶ Kanathip Tongraweewong, *The Personal Data Protection Law Reform for ASEAN*, (Bangkok: Inter Parliamentary Affairs, 2016,) p. 114.

¹⁴⁷ Ibid.

data including the difficulty to access data owned by transnational companies. However, there is currently no evidence whether the restriction of data localization will achieve the purpose of personal data protection in practice. Certainly, there is concern about the trend of data protectionism among ASEAN states as non-tariff trade barrier and does away the principle of net neutrality for free and open Internet.¹⁴⁸

The global data privacy complex includes human rights, trade, politics and technology which involve the number of international institutions, state actors and other non-state actors. The tensions and differences of the U.S., EU and other actors will shape the international initiatives and impact the privacy policy at the international level and national regulations.¹⁴⁹ Moreover, non-governmental organization and civil groups may play active role in lobbying the international institutions in drafting agenda and regulations. For example, the International Chamber of Commerce (ICC) actively participate in the European Union¹⁵⁰ and World Trade Organization (WTO) to ensure that privacy safeguard will not obstruct the business.¹⁵¹ Meanwhile, Electronic Privacy Information Center (EPIC) and Privacy International (PI) always launch campaigns against the exploitation of personal data by governments and corporations.¹⁵² However, they create little impact for the international agreement.¹⁵³ Due to the different approaches of data protection and overlapping international agreements relevant to data privacy, it is no longer possible for international community to arrange for a single data privacy regime.¹⁵⁴ The formation of regime will inevitably expand to other areas of world and regional politics¹⁵⁵ and that dilemma will make actors to wonder about creating or not creating the comprehensive regime regarding data privacy. The ambiguous feature results from non-hierarchical regime complex may provide

¹⁴⁸ Gloria Pasadilla, Yann Duval and Witada Anukoonwattaka, *Next Generation Nontariff Measures: Emerging Data Policies and Barriers to Digital Trade*, United Nations Economic and Social Commission for Asia and the Pacific, Working Paper no. 187, 2020, p. 7, accessed May 1, 2020, <https://www.unescap.org/sites/default/files/AWP%20187.pdf>.

¹⁴⁹ Lee A. Bygrave, "International Agreements to Protect Personal Data," p. 17.

¹⁵⁰ *Ibid.*, p. 18.

¹⁵¹ "Reforming the Multilateral Rules-based Trading System: the Outcomes We Want for People and Planet," International Chamber of Commerce, accessed May 11, 2020, <https://iccwbo.org/content/uploads/sites/3/2019/10/2019-icc-recommendations-on-wto-reform.pdf>.

¹⁵² "Campaigns", Privacy International, accessed May 11, 2020, <https://privacyinternational.org/campaigns>.

¹⁵³ Lee A. Bygrave, "International Agreements to Protect Personal Data," p. 18.

¹⁵⁴ Amandine Orsini, Jean-Frédéric Morin and Oran Young, "Regime Complexes: A Buzz, a Boom, or a Boost for Global Governance?," *Global Governance*, vol. 19, 2013, p. 27.

¹⁵⁵ *Ibid.*, p. 33.

ASEAN's autonomy to perform their governance and still cooperate widely,¹⁵⁶ reflecting in their non-binding frameworks and different legislations in each country.

The contestant for data privacy regimes has intensely emerged in the past few years so that it might be too early to measure the political effects from the complexity of data privacy regimes. Nevertheless, the regime complex causes governance difficulty for ASEAN in some extent. First of all, regime complex might facilitate flexibility and provide opportunity for cooperation by simplifying the architecture of governance. Generally, more integrated governance architecture brings more effectiveness for solving problems in an issue area¹⁵⁷, be it a comprehensive legislation or alternatives. The fragmentation of global governance tends to be more harmful than bringing positive effects and "seen as a burden on the overall performance of the system."¹⁵⁸ The synergizing of governance fragmentation might be useful for the second-based alternative instead.¹⁵⁹

Moreover, the conflictive data privacy regimes might allow ASEAN to "shopping" their preferred approach for regulating personal data protection. However, underlying the fragmentations, great powers likely possess the capabilities to enforce, implement or resolve inter-regime disputes.¹⁶⁰ ASEAN member states face the dilemma of the tensions from regime complex. For example, the exemption in Philippines' DPA is somehow considered as "pyrrhic victory". While the intention of DPA is to protect their citizen's personal data from the misuse of both private and public sectors, the act exempts data collected overseas that process in Philippines in order to protect their outsourcing business exclusively the investors from the United States. Therefore, it is not possible for the EU to consider Philippines PDA "adequate" for personal data protection and the private sectors of the 2 countries still have to rely on case-by-case contract or binding corporate rules for data exports in commercial

¹⁵⁶ Malte Brosig, "Converging Actors and Policies: Mediocre by Nature? Some cumulative Findings", *African Security*, vol. 6, no. 3-4, December 2013, p. 322.

¹⁵⁷ Frank Biermann, Philipp Pattberg, and Fariborz Zelli, "The Fragmentation of Global Governance Architectures: A Framework for Analysis," *Global Environmental Politics*, vol. 9, no. 4, February 2010, p. 24.

¹⁵⁸ *Ibid.*, p. 31.

¹⁵⁹ *Ibid.*

¹⁶⁰ Daniel W. Drezner, "The Power and Peril of International Regime Complexity," *Perspectives on Politics*, vol. 7, no. 1, March 2009, p. 67.

activities.¹⁶¹ Philippines decides to maintain flexible business environment that the U.S. companies prefer.

Besides, the regime complex might provide opportunity for powerful states to capture particular regime for their own interest depending on the degree of hypocrisy in the regime complex.¹⁶² The tension of “digital iron curtain” between the U.S. and China is the recent example of the contestation in data privacy regimes along with political competition. The U.S. government has continuously banned Chinese technology companies who sacrifices users' privacy to profits and cyber-espionage.¹⁶³ The U.S.-China rivalry is a potential challenge for the region since they might pressure ASEAN countries to pick side even though they hold onto technological neutrality as a balanced approach.¹⁶⁴ Meanwhile, the U.S., Japan, Singapore, the EU, New Zealand and China initiate the "Data Free Flow with Trust" (DFFT) at the Group of 20 summit in Osaka, 2019. They are open for the new treaty in which the core principles consist of the free flow of data, prohibition of data localization, and due process in government access to privacy and industry data¹⁶⁵. While the international regime on data governance and related issue has not yet been finalized, ASEAN takes advantage of the situation to adapt the existing regimes that suit them the most.

In conclusion, ASEAN is aware of the non-traditional threat from the cross-border transfer of their people's personal data on the Internet which mostly stored by the foreign companies. Even though their attempt to protect personal data and digital privacy is still skeptic, they have been working on this issue and launched frameworks on data governance. The approaches of ASEAN states are varied from comprehensive legislation of Personal Data Protection Act, sectoral rules to none at all. Each country's different mechanism is more or less affected by the regime complex of privacy in cyberspace, particularly the influence of great powers through their economic or

¹⁶¹ Graham Greenleaf, "The Philippines and Thailand – ASEAN's Incomplete Comprehensive Laws," p. 12.

¹⁶² Daniel W. Drezner, "The Power and Peril of International Regime Complexity," p. 68.

¹⁶³ Julian Gewirtz and Moira Weigel, "Grindr and The 'New Cold War': Why US Concerns Over The App Are Dangerous," *the Guardian*, May 18, 2019, accessed May 11, 2020, <https://www.theguardian.com/commentisfree/2019/may/18/grindr-us-security-china-new-cold-war>.

¹⁶⁴ Muhammad Faizal Bin Abdul Rahman and Russell Huang, "The Asia-Pacific's Huawei Conundrum," *the Diplomat*, March 12, 2020, accessed May 11, 2020, <https://thediplomat.com/2020/03/the-asia-pacifics-huawei-conundrum/>.

¹⁶⁵ Yasu Ota, "How to Avoid a Technology Cold War," *Nikkei Asian Review*, June 19, 2019, accessed May 1, 2019, <https://asia.nikkei.com/Spotlight/Cover-Story/How-to-avoid-a-technology-cold-war>.

political regimes. It is true that the dent, tension and ambiguity of the regime complex might provide opportunity for great powers to capture interest, create uncertainty and put pressure on ASEAN member states. At the same time, a set of loose norms and fragmented practices provides opportunity for ASEAN to choose the available devices and adapt them to their own norms which will be elaborated in the next chapter.



3. Analysis of ASEAN Norms and ASEAN Governance on Data Privacy

The interplay of great powers, the development of information technology and the interdependence of electronic commerce play significant roles in promoting the issue of data privacy in ASEAN. Nonetheless, ASEAN Frameworks on Personal Data Protection does not incorporate the wholesale of the existing international regimes and each member's domestic legislations are heterogenous. It is true that ASEAN member states support the protection of personal data as a part of the regional economic integration. However, the ASEAN way forms a normative shield to the organization's structure and cooperative mechanism that avoid the break of its long-standing diplomatic and security culture.¹⁶⁶ ASEAN has so far localized the existing international regimes regarding to personal data protection in line with the regional norms. This chapter aims to analyze how the ASEAN norms which are the cornerstone of ASEAN regional cooperation affect the governance on data privacy. The first part will explore the role of ASEAN norms - the ASEAN Way - in ASEAN Framework on Personal Data Protection for promoting digital economy. Besides, this chapter explores how ASEAN norms and ASEAN human rights regime play significant role in the regional governance on data privacy in practice.

3.1 ASEAN Way, economic cooperation and ASEAN Framework on Personal Data Protection

ASEAN is aware of their limits in enhancing economic cooperation. The association faces external economic challenges which are both the rapid economic growth of China and worldwide proliferation of Free Trade Agreements.¹⁶⁷ The region has reformed itself, recovered from the financial crisis and restored the economic growth. Vision, ideas, action plans and agreement relating to economic cooperation among ASEAN have been continuously launched ever since, for example: 1) the promotion of electronic commerce 2) the development of Information Technology and 3) connectivity and the flow of data in cyberspace in order to create good business environment. Nevertheless, the distinctive ASEAN Way remains the dominant norm

¹⁶⁶ Jurgen Haacke, "ASEAN's Diplomatic and Security Culture: a Constructivist Assessment," p. 82.

¹⁶⁷ John Ravenhill, "Fighting Irrelevance: An Economic Community 'with ASEAN Characteristics'", *The Pacific Review*, vol. 21, no. 4, 2008, p. 469.

for regional cooperation. In this topic, I will explain the progress of ASEAN economic cooperation and its criticism. The next part will elaborate the norms underlying ASEAN Framework on Personal Data protection. Lastly, this study will analyze the efficacy of ASEAN norms in promoting regional cooperation on data privacy for commercial activities.

First of all, the economic governance in ASEAN has dramatically changed. After the adoption of ASEAN Charter in 2007, the organization launched the first ASEAN Economic Community (AEC) Blueprint 2015 which some consider it as "the most ambitious regional economic integration initiative in the world outside of Europe."¹⁶⁸ The Blueprint aims to deepen and broaden economic integration, acting in accordance with multilateral trade rules, rules-based systems for an open, outward-looking, inclusive, and market-driven economy.¹⁶⁹ The key characteristics of the AEC are: 1) a single market and production base 2) a highly competitive economic region 3) a region of equitable economic development and 4) a region fully integrated into the global economy.¹⁷⁰ The structure of ASEAN Economic Community consists of sectoral bodies that are related to trade in goods and, services as well as investment. ASEAN leaders and senior officers meet at least annually to operate the agenda set in the Blueprint. For instance, they are 1) ASEAN Economic Ministers (AEM) 2) ASEAN Free Trade Area (AFTA Council) 3) ASEAN Transport Ministers Meeting (ATM) 4) ASEAN Telecommunications and IT Ministers Meeting (TELMIN) 5) ASEAN Ministerial Meeting on Science, Technology and Innovation (AMMSTI) and 6) ASEAN Ministers on Energy Meeting (AMEM), etc.¹⁷¹ The structure of AEC is designed to cover all aspects of economic cooperation.

Moreover, there are several masterplans and frameworks to support the implementation of the Blueprint, especially to promote the digital trade in the region. They are, for instance: ASEAN Connectivity Masterplan 2025, ASEAN ICT Masterplan 2020, ASEAN Digital Integration Framework, ASEAN Framework for

¹⁶⁸ Lee Jones, "Explaining the Failure of the ASEAN Economic Community: The Primacy of Domestic Political Economy," *The Pacific Review*, vol. 29, no. 5, 2016, p. 647.

¹⁶⁹ *ASEAN Economic Community Blueprint 2015*, ASEAN, (Jakarta: ASEAN Secretariat, 2008), p. 5.

¹⁷⁰ *ASEAN Economic Community Blueprint 2015*, ASEAN, p. 6.

¹⁷¹ "ASEAN Economic Community", ASEAN, accessed May 10, 2020, <https://asean.org/asean-economic-community/>.

Personal Data Protection and ASEAN Agreement on Electronic Commerce, etc. Despite the numerous cooperative frameworks, ASEAN made slow progress in economic cooperation.¹⁷² Referring to ASEAN Secretariat's comment: "ASEAN's problem is not one of lack vision, ideas, or action plans. The problem is one of ensuring compliance and effective implementation."¹⁷³ The lack of compliance and implementation of those plans are the outcome of ASEAN cooperation norms. Because of the grouping's heterogeneity, ASEAN avoids making decisions that alter or sacrifice members' sovereignty so that the action plans are not more than formula compromises.¹⁷⁴ ASEAN also does not impose any sanction on any member for the non-compliance of any agreements,¹⁷⁵ nor that the ASEAN's trade dispute settlement mechanism called ASEAN Protocol on Dispute Settlement Mechanism (DMS) which signed in 1995 has ever been revoked.¹⁷⁶

The ineffectiveness of AEC can be explained by 3 approaches. Firstly, realist scholars view the ineffectiveness of ASEAN trade agreements and related frameworks as political imperatives rather than economic ones. The flexibility of liberalization agreement and non-binding frameworks aim to pursue diplomatic and security goals. The strengthening of ASEAN alliances, the assertion of regional leadership or the cooperation to reflect that no member is "left behind" are camouflaged by the economic agreements, frameworks and meetings.¹⁷⁷ Meanwhile, the constructivists see the shared norms and identity of the ASEAN way as main factor in economic cooperation. The principle of non-interference, non-binding legalism as well as the traditions of informality and consensus provide flexibility for ASEAN states to comply with the economic agreements. If the members choose not to incorporate the rules, ASEAN has no authority to intervene with their domestic regulations.¹⁷⁸

¹⁷² John Ravenhill, "Fighting Irrelevance: An Economic Community 'with ASEAN Characteristics'", p. 469.

¹⁷³ Ibid.

¹⁷⁴ Jurgen Ruland, "Southeast Asian Regionalism and Global Governance: 'Multilateral Utility' or 'Hedging Utility'?" p. 98.

¹⁷⁵ Ibid.

¹⁷⁶ Rungnapa Adisornmongkon, "The Dispute Settlement Mechanism of ASEAN, Does It Work?" *Payap University Journal*, year 26, no. 2, July - December 2016, p. 3.

¹⁷⁷ Lee Jones, "Explaining the Failure of the ASEAN Economic Community: The Primacy of Domestic Political Economy," p. 648.

¹⁷⁸ Ibid, p. 649.

However, the last approach suggests that ASEAN's non-binding frameworks are not completely meaningless. In some extent, the AEC is "arguably a form of regulatory regionalism" even though there is no supranational authority and legal obligation. AEC and ASEAN trade agreements rescale economic governance in the regional level and promote domestic regulatory changes that redistribute power and resources. There are both political imperatives for some economic openness. Nevertheless, ASEAN limits the full level of economic liberalization in the region. Trade liberalization is supported for larger-scale economic growth, the increasing of exports and imports, the economic competitiveness in global value chains and the attraction of foreign investment. So, there are compelling change in domestic governance.¹⁷⁹ However, the scale of compliance in each state is different and selective based on the political forces. It is noted that most of ASEAN countries are developing nations with low value-added business, unfair competition between small and medium business and large conglomerates that assisted by the state as well as a number of State-owned Enterprises (SOEs).¹⁸⁰ In other word, there is some progress in ASEAN economic integration and connectivity. However, some AEC measures that expected to be completed by 2015 ended up in failure¹⁸¹ as ASEAN norms provide the flexibility in conforming with the AEC.

Parallel with the related economic frameworks of the AEC, ASEAN recognizes the importance of personal data protection to contribute the promotion of trade growth and the flow of information within ASEAN in the digital economy.¹⁸² Personal data protection will support and enable the operation of AEC Blueprint 2025, ASEAN ICT Masterplan 2020 and other relevant international standard.¹⁸³ The framework aims to protect and prevent misuse of individual's personal data through the principles that are the basic principles of PDP in the international guidelines such as OECD and APEC Privacy Framework.¹⁸⁴ Nevertheless, ASEAN PDP is not a transplant from the

¹⁷⁹ Ibid, p. 650.

¹⁸⁰ Ibid, p. 653.

¹⁸¹ "Mid-Term Review of the Implementation of AEC Blueprint: Executive Summary," Economic Research Institute for ASEAN and East Asia, October 2012, accessed May 10, 2020, <https://www.eria.org/Mid-Term%20Review%20of%20the%20Implementation%20of%20AEC%20Blue%20Print-Executive%20Summary.pdf>.

¹⁸² ASEAN Framework on Personal Data Protection 2016, preamble.

¹⁸³ Ibid.

¹⁸⁴ Benjamin Wong, "Data Localization and ASEAN Economic Community," p. 176.

international frameworks but is localized in parallel with the ASEAN norms. First of all, the norm of non-interference is reflected in section 4 in which the scope of application excludes any matters relating to national sovereignty, national security, public safety, public policy and all government activities.¹⁸⁵ Moreover, the norms of informality and non-binding legalism can be identified in section 2 that “the effect of framework does not constitute obligations under domestic or international law or create any legally binding obligations.”¹⁸⁶ In addition, the principle of consultation underpins the resolution of disputes regarding the Framework will be held through consultation or negotiations without interference by the third party or international tribunal.¹⁸⁷ Indeed, this framework does not mandate ASEAN members to legislate domestic regulations to protect individual’s data in commercial transaction. By the time this Framework was adopted in 2016, Malaysia, Philippines and Singapore have already implemented the comprehensive PDA in their domestic governance. After that, Thailand was the only ASEAN member that promulgated the PDA in 2019. However, Thailand’s compressive legislation for private sector is not the outcome of this framework. The drafting process of Thailand PDA started in 2005 but the legislation process was obstructed by the political turmoil.¹⁸⁸ As a result, the criteria and obligations of each member’s PDA are diverse and not interoperable as mentioned in the previous chapter.

Finally, the existing of board and non-binding ASEAN Framework on Personal Data Protection for private sector can be both the challenge and opportunity for ASEAN. First, the absence of regional mechanism and harmonized legal infrastructure is a major hindrance for ASEAN to effectively respond to non-traditional threats¹⁸⁹ that are transnational in origin. In this regard, data privacy is not a problem that can be resolved on a national level.¹⁹⁰ ASEAN has been targeted for data breaches, for

¹⁸⁵ ASEAN Framework on Personal Data Protection 2016, section 4.

¹⁸⁶ Ibid, preamble.

¹⁸⁷ Ibid, section 13.

¹⁸⁸ Graham Greenleaf, "The Philippines and Thailand—ASEAN’s Incomplete Comprehensive Laws," p. 22.

¹⁸⁹ Mely Caballero–Anthony, "From Comprehensive Security to Regional Resilience: Coping with Nontraditional Security Challenges," in *Building ASEAN Community: Political–Security and Socio-cultural Reflections*, ed. Aileen Baviera and Larry Maramis, (Jakarta: Economic Research Institute for ASEAN and East Asia, 2017), p. 141-142.

¹⁹⁰ Arianne Vanessa Tanopo Jimenez, “Towards A Data Protection Soft Law Framework for the ASEAN Region,” (Dissertation, University of California Berkeley, 2016), p. 79.

instance, Singaporean's HIV data leak in 2019¹⁹¹, the leak of 46 million mobile subscriber's data in Malaysia to the dark web and the publication of 46,000 mobile customers of Thailand telecommunications operators. The incidents shake the confidence of ASEAN citizens and lower business trust in ASEAN digital economy. Moreover, the exploitation of personal data by the Big Techs who process the data for commercial benefits are likely to create anticompetitive practices and unfair competition in online platforms.¹⁹² To promote trustworthy and fair digital ecosystem in ASEAN's, it is imperative to have regional framework that help integrate different national laws regarding personal data protection¹⁹³. Obviously, ASEAN members are conscious that their traditional norms can conflict with the practical response to the non-traditional threat.¹⁹⁴ Nevertheless, enforcing a "one-size-fits-all" regional framework has long been a challenge for ASEAN that adheres to the norms of ASEAN Way. Moreover, ASEAN has different level of economic growth, cyber maturity and diverse political regimes which make it difficult to create the rules that everyone could get on board.¹⁹⁵

If the international fragmented regimes and non-binding guideline can influence states to legislate comprehensive law for personal data protection, ASEAN soft law instruments also dominate its members to share the norms of data governance. It is true that the characteristics of ASEAN lies within this framework, but some norms regarding data governance have emerged. Certainly, they support the free flow of information on the Internet, personal data protection and regulatory alignment in some extent as these principles appear in several ASEAN agreements, guidelines and frameworks.

However, some scholars observe that ASEAN tends to impose data localization as measure of personal data protection. Striking at the heart of cross-border data flow on the Internet, the upcoming data localization regime requires that the computing

¹⁹¹ Sharanjit Leyl, "Singapore HIV Data Leak Shakes a Vulnerable Community," *BBC News*, February 22, 2019, accessed May 15, 2020, <https://www.bbc.com/news/world-asia-47288219>.

¹⁹² Chen Chen Lee and Erin Low, "Handling Big Tech in ASEAN," *Nikkei Asian Review*, March 12, 2019, accessed May 15, 2020, <https://asia.nikkei.com/Opinion/Handling-Big-Tech-in-ASEAN>.

¹⁹³ Jason Thomas, "ASEAN's Data Governance Challenge," *The ASEAN Post*, June 20, 2019, accessed May 15, 2020, <https://theaseanpost.com/article/aseans-data-governance-challenge>.

¹⁹⁴ Taku Yukawa, "The ASEAN Way as a Symbol: An Analysis of Discourses on the ASEAN Norms," p. 13.

¹⁹⁵ Candice Tran Dai and Miguel Alberto Gomez, "Challenges and Opportunities for Cyber Norms in ASEAN," *Journal of Cyber Policy*, vol. 3, no. 2, 2018, p. 6.

facilities of data collectors and processors are located within the national territory.¹⁹⁶ The requirement of both physical and juridical entity is claimed to serve the legitimacy of state in protecting both their national security and personal data of citizen.¹⁹⁷ The example of country that imposes this measure is China. The requirement for Internet network operators to collect important data that related to national security, economic development, and societal and public interests in China automatically restricts that all data have to be stored in the country and discriminate the foreign players in China market.¹⁹⁸ Similar to the China's localization approach, ASEAN members have claimed the application of "the legitimate public policy objectives"¹⁹⁹ to adopt this requirement for the past few years. Foreign technological companies, which their computing facilities are not located in every country they do business with, view this requirement as a trade barrier for market access. They are also against the principle of most-favored nation in the GATS that ASEAN have already ratified and ASEAN Electronic Commerce Agreement that encourages "eliminating or minimizing barriers to the flow of information across borders"²⁰⁰ The requirements in ASEAN member states' PDA and other sectoral legislations show moderate level of data localization as appeared in table 2.

The ambiguity of ASEAN soft law and their fragmented practices on privacy safeguard do not facilitate economic activities in the region. ASEAN's uncertainty and the emerged trend of data localization are inseparable with political motives. In this regard, it is questionable if ASEAN governance on personal data protection really aims to promote good digital ecosystem and economy. Is it simply "the convergence results from the shared beliefs of a relatively coherent and enduring network of elites bound by expertise on an issue and a common concern for its resolution"?²⁰¹ Paradoxically, measures for protecting personal data can turn into the infringement of people's privacy by states. Therefore, the intensification of data localization and digital nationalism in

¹⁹⁶ Claire Scharwatt, "The Impact of Data Localization Requirements on the Growth of Mobile Money-Enabled Remittances," *GSMA*, March 2019, p. 1, https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2019/03/GSMA_Understanding-the-impact-of-data-localisation.pdf.

¹⁹⁷ Ibid, p. 5.

¹⁹⁸ Ibid, p. 9.

¹⁹⁹ Benjamin Wong, "Data Localization and ASEAN Economic Community," p. 178.

²⁰⁰ Ibid, p. 177.

²⁰¹ Colin J. Bennett, *Regulating Privacy: Data Protection and Public Policy in Europe and the United States*, (New York: Cornell University Press, 1992), p. 5.

ASEAN member's domestic regulations raise concerns for both private sector and civil society. The blockade of cross-border flow of information does not only affect the growth of electronic commerce and technological advancement in the region,²⁰² but also becomes an instrument for monitoring government threats which often blurred as a national threat.²⁰³ The laws allow government to obtain individual's information freely align with the criticism toward the abuse of human rights and freedom of speech in ASEAN.

Table 2 Comparative table of data localization requirements in ASEAN member states ²⁰⁴

| Country | Local processing | Transfer limitation |
|-------------|---|--|
| Brunei | No requirement | No requirement |
| Cambodia | No requirement | No requirement |
| Indonesia | Local copy and action (Indonesia OEST Regulation). Local copy and action (Indonesia PPDES Regulation). | No requirement |
| Laos | No requirement | No requirement |
| Malaysia | No requirement | Qualified restriction (Malaysia PDPA). |
| Myanmar | No requirement | No requirement |
| Philippines | No requirement | Qualified restriction (Philippines DPA). |
| Singapore | No requirement | Qualified restriction (Singapore PDPA). |
| Thailand | No requirement | Qualified restriction (Thailand PDPA). |
| Vietnam | Local copy (Vietnam Law on Cybersecurity). Local copy and action (Vietnam Decree 72). | No requirement |

Much in line with the development of how ASEAN has adopted international norms, the framework and domestic PDA reflects ASEAN's intention to conforming with universal standard of privacy. Personal data safeguard is one of the economic agenda that many international fora have worked, discussed and implemented so far through economic cooperation in order to create trust in electronic transaction. Pressured by the trend in global economy, ASEAN consequently launched related

²⁰² Jeff Paine, "Southeast Asia's Internet Needs a Light Touch," *Nikkei Asian Review*, February 6, 2019, accessed May 25, 2020, <https://asia.nikkei.com/Opinion/Southeast-Asia-s-internet-needs-a-light-touch>.

²⁰³ Marwaan Macan-Markar, "Thai Cybersecurity Bill to Give Junta License to Snoop," *Nikkei Asian Review*, January 28, 2019, accessed May 26, 2020, <https://asia.nikkei.com/Politics/Turbulent-Thailand/Thai-cybersecurity-bill-to-give-junta-license-to-snoop>.

²⁰⁴ Benjamin Wong, "Data Localization and ASEAN Economic Community," p. 169.

measures to ensure their participation in global digital economy. However, ASEAN has always adopted universal principles based on its regional norms. At a result, the framework possesses the characteristics of non-binding legalism, non-interference of domestic affairs and regulations as well as the principle of consultation for dispute settlement. Nevertheless, it does not mean that ASEAN has no tangible progress in economic cooperation at all. ASEAN member states select to adopt some regional provisions in their domestic regime to compromise with the development of trade growth and maintain their national interest at the same time.

In summary, ASEAN accepts international basis of personal data protection. However, ASEAN norms still play significant role in shaping governance in this area and there are concerns about the diversity of each member's legislations and uncertainty of the framework. Particularly, ASEAN's proclivity for data protectionism is recognized as trade barrier, infringement of individual's privacy and violation of the right to freedom of expression.

3.2 ASEAN human rights regime and data privacy

ASEAN recognizes the importance of personal data protection to protect the privacy of individuals. Nevertheless, one can notice a great difference between ASEAN's personal data protection and others such as EU's GDPR. In fact, ASEAN Framework on Personal Data Protection's efficacy is regarded with skepticism because it carves out the whole activities of government agency.²⁰⁵ Noted that the concept of "data protection" is a subset of broader concept of "privacy", the Framework and PDA do not cover all aspects of privacy safeguards. The cultural context and norms within data protection can be lost if we focus too narrowly on the wording of law. As the rights to privacy is included in the human rights, ASEAN human rights regime and practice must not be overlooked to estimate the efficacy of ASEAN governance for privacy. This topic is divided into 2 main parts. 1) the development of ASEAN Human rights and its discourse and 2) the effect of ASEAN human rights toward the governance of data privacy.

²⁰⁵ ASEAN Framework on Personal Data Protection, section 4.

Before mentioning the background of ASEAN's human rights regime and the formation of governance on data privacy, it is necessary to briefly mention the state's perception for privacy which rooted in deep-seated cultural orientations.²⁰⁶ The rise of data processing technology facilitates the surveillance of the massive collection of individuals' data by both public and private organization. The reaction of state toward the surveillance and commodification of personal data are based on the assumptions of individualism and the relationship between the politics and privacy. It has been always a controversial debate to what extent one should be granted privacy because of the potential conflicts between individual privacy and community values.²⁰⁷ For democratic society, privacy is a prerequisite because it plays substantial role for the freedom of individuals in political participation and protects them from unnecessary interference by government. For instance, the voting in secret ballot practice prevents the state surveillance of their citizen's voting record.²⁰⁸

Meanwhile, the totalitarian states who distrust their citizens tend to seek balance between privacy rights for fairer use of personal data while continue the practice of personal data surveillance.²⁰⁹ Indeed, they provide legal mechanism to manage the unacceptable level of data commodification by entrepreneurs. At the same time, the doctrine of "fair information principles" (FIPs) is raised to balance the public administration over personal data.²¹⁰ The authorities have legitimacy to investigate the privacy of their citizens only for appropriate purposes based on essential principles, for example: transparency, individual access and correction, limitation of personal data collection and disclosure limitation, etc.²¹¹

Many countries launch guidelines for government agency to collect citizen's personal data based on those principles to justify their practice.²¹² The political structure underlying the implementation of privacy and data protection laws are indispensable to the governance efficacy. Unless the human rights are guaranteed, the states tend to

²⁰⁶ Colin J. Bennett, *Privacy in the Political System: Perspectives from Political Science and Economics*, Ethical, Legal and Social Issues (ELSI) Component of the Human Genome Project, U.S. Department of Energy, 2001, p. 7, accessed June 1, 2020, <http://dx.doi.org/10.2139/ssrn.2230389>.

²⁰⁷ Collin J. Bennett, "Privacy in the Political System: Perspectives from Political Science and Economics," p. 11.

²⁰⁸ *Ibid.*, p. 8.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*, p. 13.

²¹¹ *Ibid.*

²¹² *Ibid.*, p. 22.

conduct surveillance and infringe citizen's privacy. Moreover, the belief in privacy is closely related to broader attitudes of politics, public affairs and trust in the state.²¹³ Each country formulates their governance on personal data protection differently based on their normative and political structure, especially their attitude toward the privacy and human rights. Beyond the privacy protection and fair principle to access citizen's data by the state, there is also a debate over the discourse of privacy that has always been misguided by the focus on the state-centric approach. The superpanopticon of people's behavior is raised by the post-structuralism that people are always under everyday surveillance from the social control.²¹⁴ Nonetheless, it is not within the scope of this study.

Therefore, the first part will explore the background of ASEAN human rights regime in order to address the formation of ASEAN Framework on the Personal Data Protection and evaluate the efficacy of ASEAN governance on data privacy. ASEAN has been enthusiastic to respond with criticism of human rights abuse since 1990s.²¹⁵ Ruled by authoritarian regime, ASEAN members have had bad records of human rights infringement and failure to protect freedom of expression.²¹⁶ ASEAN's participation in the UN World Conference on Human Rights 1993 marked the first movement of human rights promotion in ASEAN. They later adopted the Vienna Declaration and Programme of Action at the subsequent ASEAN Foreign Ministers Meeting in the same year. Nevertheless, ASEAN faced condemnation in welcoming Myanmar as new member after the bloody massacre of democracy movement in 1988.²¹⁷ The organization responded to their expansion of membership as "constructive engagement". ASEAN claimed to "democratize Myanmar"²¹⁸ rather than isolate and leave the country behind. Several years later, it is proved that Myanmar is still far from democratic country. Myanmar is considered as the worst violator of human rights in the

²¹³ Ibid, p. 15.

²¹⁴ Ibid, p. 11.

²¹⁵ Hien Bui, "The ASEAN Human Rights System: A Critical Analysis," p. 4.

²¹⁶ Ibid, p. 2.

²¹⁷ Anja Jetschke and Jurgen Ruland, "Decoupling Rhetoric and Practice: The Cultural Limits of ASEAN Cooperation," p. 195.

²¹⁸ Lee Jones, "ASEAN's Albatross: ASEAN's Burma Policy, from Constructive Engagement to Critical Disengagement," *Asian Security*, vol. 4, no. 3, 2008, p. 271.

world, for instance: the Rohingya genocide, the long rule of military government and the prohibition of freedom of speech.²¹⁹

The adoption of the Declaration of ASEAN Concord II at the 9th ASEAN Summit in 2003 added progress for ASEAN democratic and harmonious environment²²⁰ even though the term ‘democratic’ that used in the document was opposed by Vietnam, Laos and Myanmar.²²¹ Later in 2007, the community’s responsibility in contributing human rights is explicitly prescribed in the ASEAN Charter.²²² Moreover, the Charter provides the establishment of ASEAN human rights body which was officially inaugurated as the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009. Nevertheless, the operation of this body is determined by the ASEAN Foreign Ministers Meeting (AMM)²²³ and is not an independent body. ASEAN further promulgated and adopted the ASEAN Human Rights Declaration (AHRD) in 2012. AICHR has worked closely with the Civil Society Organizations (CSOs) and specifies high priority programmed on the Work Plan responding to the emerging urgency on human rights. AICHR annually holds 2 regular meetings and reports to the ASEAN Foreign Minister.²²⁴

Despite the enthusiastic movements and regional instruments toward human rights, ASEAN is not able to effectively respond to the violation of human rights committed by its members. AICHR has always been criticized for its failure in addressing the abuses of human rights.²²⁵ It is argued that a set of ASEAN human rights mechanisms contradict with ASEAN’s underlying norms and culture. Firstly, ASEAN mechanisms do not adhere with the universal idea of human rights. Instead, the concept of human rights in ASEAN is differentiated “on the ground of national and regional particularities.”²²⁶ As they rely on the particularism of human rights concept, ASEAN human rights instruments are merely means to limit the protection of individual’s

²¹⁹ Hien Bui, "The ASEAN Human Rights System: A Critical Analysis," p. 5.

²²⁰ Taku Yukawa, "The ASEAN Way as a Symbol: An Analysis of Discourses on the ASEAN Norms," p. 12.

²²¹ Ibid.

²²² ASEAN Charter 2007, article 2, section 2 (i).

²²³ Ibid, article 14.

²²⁴ "About AICHR: Structure, Work and History of the AICHR," ASEAN Intergovernmental Commission on Human Rights, accessed May 18, 2020, <https://aichr.org/about-aichr/>.

²²⁵ Hien Bui, "The ASEAN Human Rights System: A Critical Analysis," p. 2.

²²⁶ Ibid, p. 10.

human rights and they are tools to justify the violators.²²⁷ Moreover, the ASEAN way that places the ultimate value on the respect of sovereignty prevent both the organization and other member states to face the problems of human rights and democracy. The adherence to the principle of non-interference of ASEAN is parallel with authoritarian countries' proclivity to remain its status quo of their domestic politics.

Nevertheless, it is impossible for ASEAN to maintain the mild atmosphere in the region for good. ASEAN members, especially Myanmar, have been pressured to deal with the infringement of human rights by the external powers in form of "Western human rights diplomacy."²²⁸ Hence, the ASEAN way is regarded as a symbol that emerged by a force that tried to change their traditional norms and to reserve their cultural relativism toward human rights. ASEAN mechanisms undermine the human rights and freedom of expression themselves. Therefore, the passive reaction of ASEAN generates the continuous violation of human rights in the region.²²⁹

Moreover, the absence of independent human rights mechanism that separated from each members' governments is problematic for AICHR operation. The AICHR Chair position is rotated annually and is the representative from the member state that chairs ASEAN that year.²³⁰ As the representative is nominated and appointed by the government, their functions are designed to accommodate governments. They are unable to make final decisions which are under the authority of AMM.²³¹ Furthermore, the declarations regarding human rights are not mandatory so that AICHR can only do "promotional work" and cannot effectively handle with the violations or investigate them.²³² It is true that soft law of ASEAN human right regime might exert normative influence in the future. However, if ASEAN still maintains their norms in responding to the human rights violation, their mechanisms and declarations are merely window dressing. ASEAN simply represents that they are doing something with the issue to ease both internal and external resistance.²³³

²²⁷ Ibid, p. 11.

²²⁸ Taku Yukawa, "The ASEAN Way as a Symbol: An Analysis of Discourses on the ASEAN Norms," p. 8.

²²⁹ Hien Bui, "The ASEAN Human Rights System: A Critical Analysis," p. 15.

²³⁰ Ibid, p. 19.

²³¹ Ibid.

²³² Ibid, p. 22.

²³³ Ibid, p. 8.

ASEAN's perception, norms and practice toward human rights directly shape their governance in data privacy. In ASEAN Human Rights Declaration (AHRD), specific reference to privacy is included in section 21 of the declaration concerns the need of privacy protection by laws. It clearly states that: "Every person has the right to be free from arbitrary interference with his or her privacy, family, home or correspondence including personal data, or to attacks upon that person's honour and reputation. Every person has the right to the protection of law against such interference or attacks."²³⁴ Following by the launch of ASEAN Framework on Protection of Personal Data and relevant documents, ASEAN indeed has focused on promoting the privacy for their people. The concept of privacy prescribed in the official documents are similar to the privacy provision in the Universal Declaration of Human Rights (UDHR) proclaimed by the United Nations General Assembly in 1948 which prescribes that: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."²³⁵ In this regard, the provisions in Human Rights Declaration, ASEAN Framework on Protection of Personal Data as well as other related documents are in line with the universal concept of human rights. However, ASEAN member states considerably disagree on the value of human rights and there is no common approach to the importance of human rights or shared opinion of the value among them.²³⁶

Hence, there are questions and concerns about the real intention of ASEAN toward the protection of individual's privacy based on their human rights practices. There are sophisticated differences between the meaning of privacy in the official agreements and the underlying values of privacy. It is obvious that ASEAN frameworks mainly focus on the growth of digital economy because they carve out all kind of state's activities. Privacy is depoliticized to the consumer protection for facilitating the growth of electronic commerce in the region.²³⁷ Not only the private sector who is skeptic to

²³⁴ ASEAN Human Rights Declaration 2012, section 21.

²³⁵ The Universal Declaration of Human Rights 1948, article 12.

²³⁶ Mathew Davies, "An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia," *Journal of Current Southeast Asian Affairs*, vol. 33, no. 3, 2014, p. 109.

²³⁷ Graham Greenleaf, "Data Privacy Law in Asia – Context and History," p. 17.

ASEAN's emerging trend of "data protectionism" in form of personal data protection, the requirement of data localization might block the cross-border flow of data on the Internet. By storing data in their jurisdiction, ASEAN member states can easily access to the personal information of their citizens. The concerns over the abuse of privacy conducted by ASEAN members are based on 3 main reasons: 1) the violation of human rights by states 2) ASEAN ineffective human rights system based on their state-centric structure and 3) their heterogenous perceptions on privacy.

Firstly, the advancement of technology is often account for the abuse of users' privacy by private companies and facilitating mass surveillance by states. However, we can hardly blame technology for the repercussion of the infringement of privacy. It is misleading to consider the change of technology as an utmost force in human activities and the formation of privacy regimes.²³⁸ It is true that people will lose control over their own data due to the sophisticated Information technology and computerization.²³⁹ Be they companies or states, the abuse of privacy is caused by human intervention – specifically through laws, policies and pattern of governance.²⁴⁰ In ASEAN, human rights have been violated by states throughout the history. The founding ASEAN members were all authoritarian or military states which prefer to remain their political regimes among both internal and external conflicts in the Cold War context. In the present, only Indonesia and the Philippines are considered to have democratic regime based on largely procedural notions of democracy. Thailand, Singapore and Malaysia are categorized as semi-democratic regimes with authoritarian residues. Meanwhile, Vietnam, Brunei, Laos and Myanmar are grouped as authoritarian regime²⁴¹ that do not have general election or just hold the "sham" election without civil involvement.²⁴²

In fact, "ASEAN has been a mixed creature of politics and governance, but this topsy-turvy mix of democracy and authoritarianism is likely to persist indefinitely."²⁴³ Human rights defenders and civil society activists have still been under threats of arrest and murder that operated by the state. The violations of human rights in ASEAN are,

²³⁸ James B. Rule, *Privacy in Peril*, (New York: Oxford University Press, 2007), p. 18.

²³⁹ *Ibid*, p. 19.

²⁴⁰ James B. Rule, *Privacy in Peril*, p. XV.

²⁴¹ Graham Greenleaf, "Data Privacy Law in Asia – Context and History," p.18.

²⁴² *Ibid*, p. 24.

²⁴³ Thitinan Pongsuhirak, "ASEAN Regionalism Amid Authoritarianism," *Bangkok Post*, August 5, 2017, accessed May 18, 2020, <https://www.bangkokpost.com/opinion/opinion/1300259/asean-regionalism-amid-authoritarianism>.

for example: 1) crime against humanity of Rohingya, 2) the deprivation of freedom of expression and press, 3) minority and ethnic conflicts, 4) enforced disappearance, 5) gender and religious orientation, 6) repressive laws and 7) access of information.²⁴⁴ Comparing to the European Union, the relationship between democracy and privacy are barely considered as a foreground of GDPR's effectiveness because almost European states all now democratic. On the contrary, ASEAN political regimes make us question the correlation between democracy and the efficacy of their privacy governance.²⁴⁵ Particularly, they have always been violated human rights and conducted surveillance even before the emergence of Information Technology.

Second, as privacy is one of the fundamental rights stated in AHRD, the efficacy of ASEAN's privacy governance seems unpromising referring to the organization's failure in coping with the violation of human rights led by the states. It is true that ASEAN has improved their human rights agenda through the establishment of AICHR and the adoption of AHRD. However, the structure of ASEAN itself is the non-hierarchical power distribution²⁴⁶ and that AICHR is essentially "a government's club"²⁴⁷. It has no permanent secretariat and representatives are appointed by the government of each member.²⁴⁸ Hence, the regional mechanism and governance to promote and protect human rights and other fundamental rights are constrained by the institutional features. Even though ASEAN has promoted "people-centered" ASEAN as a lexicon of the ASEAN Way for institutional transformation in the regional governance. In fact, a true people-oriented ASEAN community cannot be achieved due to the attachment to existing norms of non-interference and respect for sovereignty.²⁴⁹ The new perception of people engagement in ASEAN is not shared among ASEAN officials in practice, at least shared in the very limited and selective ways.²⁵⁰ The state-centric governance of ASEAN will become another obstacle to promote the privacy and

²⁴⁴ Ahmad Farhan, "The Sad Case of Human Rights in ASEAN," *The ASEAN Post*, April 21, 2019, accessed May 18, 2020, <https://theaseanpost.com/article/sad-case-human-rights-asean>.

²⁴⁵ Graham Greenleaf, "Data Privacy Law in Asia – Context and History," p. 18-19.

²⁴⁶ Amitav Acharya, "How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism," p. 267.

²⁴⁷ John D. Ciorciari, "Institutionalizing Human Rights in Southeast Asia," *Human Rights Quarterly*, vol. 34, no. 3, August 2012, p. 715.

²⁴⁸ *Ibid.*

²⁴⁹ Aarie Glas and Emmanuel Balogun, "Norms in Practice: People-Centric Governance in ASEAN and ECOWAS," *International Affairs*, vol. 96, no. 4, July 2020, p. 10, accessed May 27, 2020, <https://doi.org/10.1093/ia/iaa013>.

²⁵⁰ *Ibid.*, p. 11.

human rights which are the cornerstone benefit of the people in community. States are the main actor to govern both the overall privacy rights and personal data protection in commercial activities. The lack of connection between the organization and other stakeholders will undermine the efficacy of the regional regime.²⁵¹

Last but not least, the diversity of ASEAN members becomes a hindrance to create a common perception of privacy. As ASEAN members have different expectation toward the norms of human rights, the norms of personal data protection are not naturally emerged due to the increased dependence on cyberspace and advancement of Information Technology.²⁵² Indeed, ASEAN member states have increasingly integrated information technology into their overall socio-economic development strategy. The norms of each ASEAN member states in data privacy especially in cyberspace are different yet compatible.²⁵³ The diversity in economic development, political regime and cyber maturity paly significant role in their domestic policy, measures and governance relating to privacy. Due to heterogenous perception and valuation of cyber norms and data privacy, they could only have flexible cooperation so that the framework is accepted by all members. However, the absence of regional mechanisms relating to the norms and rules of state behaviors likely to bring the economic and political risks in the region.²⁵⁴

Therefore, ASEAN norms are more highlighted when we consider about the rights of privacy as a subset of human rights. Much in line with how ASEAN has adapted themselves for acceptance by international community while most of the ASEAN leaders are authoritarian per se, they launched several declarations and mechanisms to portrays their compliance with human rights value. However, underlying those mechanisms, the regional norms obstruct functional solution for human rights violation so that the authoritarian governments in ASEAN can maintain their rule. Comparing to PDP framework, ASEAN specifically focuses on “privacy” in commercial activities rather than the universal aspects of privacy. It is true that some ASEAN states sometimes go along with the international agenda to broaden the scope

²⁵¹ Hien Bui, "The ASEAN Human Rights System: A Critical Analysis," p. 18.

²⁵² Candice Tran Dai and Miguel Alberto Gomez, "Challenges and Opportunities for Cyber Norms in ASEAN," p. 4.

²⁵³ Ibid, p. 1.

²⁵⁴ Ibid, p. 7.

of privacy protection for their people such as Philippines. Nevertheless, most still reserve their sovereign rights to regulate data privacy and prefer to conduct surveillance.

In conclusion, the personal data protection is categorized in ASEAN's economic cooperation or the AEC. The pattern of data governance is aligning with the ASEAN norms and identity which called the ASEAN way. The norms can both strengthen cooperation among ASEAN members and become the challenge for their governance at the same time. Its dual characteristics promote the strong sense of community and enhance regional cooperation especially in economic integration. Meanwhile, the norms of non-interference, consensus, informality and non-binding legalism also lead to the ineffective cooperation. ASEAN promotes the protection of personal data for the growth of electronic commerce. Nevertheless, private sector raises concern about the uncertainty of ASEAN frameworks particularly the trend of data protectionism. Moreover, civil society is worried about the abuse of privacy by state that disguised as measures of personal data protection. It is important to note that most of ASEAN members are not democratic and the regional human rights regime cannot effectively response to the violation of human rights. In this regard, ASEAN members' heterogenous perception toward the rights of privacy is also an important factor and challenge for the regional data privacy regime.

4. Challenges of ASEAN Governance on Data Privacy

It is not only the international norms but also the regional norms, particularly the ASEAN way, that shape the formation of ASEAN governance on data privacy. In one end, the association eagers to promote functional cooperation to elevate the protection of personal data as well as to create good digital environment. Nevertheless, the norms and structure of ASEAN strongly reserve the sovereignty of each member states. As a result, regional cooperation is not functional to cope with the problems arising from transnational threat and human security like the data breaches and commodification of personal data. Moreover, the promotion of data privacy is not limited to the abuse and commodification conducted by private sectors but also the governmental agencies. In this regard, the failure of ASEAN in stemming the violation of human rights is considered a hindrance in protecting people's privacy in the community. Further to the analysis of ASEAN norms in its governance on data privacy, the last chapter attempts to address the challenges of ASEAN governance and recommendations for regional cooperation beyond the existing instructional norms and structure. I categorize the challenges of ASEAN governance on data privacy into 3 groups: 1) ASEAN ineffective governance on data privacy and the institutional norms 2) self-management governance on data in ASEAN member states 3) the absence of people-centric approach for ASEAN governance on data privacy.

4.1 ASEAN ineffective governance on data privacy and the institutional norms.

Some might state it is too early to evaluate the effectiveness of ASEAN Framework on Personal Data Protection which has just adopted by members in 2016. However, I argue that ASEAN meta-regime of non-interference underlying ASEAN governance structure consequently leads to the ineffectiveness of data privacy protection in the region. ASEAN cannot foster deeper integration due to the significant challenges of its institutional norm of non-interference which has been developed in the context of security in Southeast Asia.²⁵⁵ Based on the institutional norms, this part portrays the 3 factors that hinder ASEAN effective governance on data privacy which

²⁵⁵ Vinod K. Aggarwal and Jonathan T. Chow, "The Perils of Consensus: How ASEAN's Meta Regime Undermines Economic and Environmental Cooperation," *Review of International Political Economy*, vol. 17, no. 2, May 2010, p. 263.

are: 1) the lowest common denominator of interests in mutually accepted framework 2) the informal mechanism based on voluntary basis 3) the lack of regional authority.

First of all, ASEAN's non-interference norm and embrace of consensus-based decision inevitably result in the lowest common denominator of interests in the mutually accepted framework on personal data protection. ASEAN institutional norms hinder the deeper regional cooperation, especially the collective response to the non-traditional security and transnational issues such as the abuse of personal data in cyberspace. The development of ASEAN cooperation depends on the consensual knowledge among policymakers and a demand for international institution prompted by changing systematic conditions. In some extent, the basic principles of personal data protection, particularly the OECD privacy guidelines, are included in the ASEAN framework.²⁵⁶ OECD guidelines is the modern foundation of consent principle which has shaped and highlighted in other personal data frameworks worldwide. The principles of OECD are served as a backdrop of ASEAN framework which portrayed in table 3.

Table 3 Comparison of principles in the OECD Privacy Framework (2013) and ASEAN Framework on Personal Data Protection (2016)

| The OECD Privacy Framework (2013) ²⁵⁷ | ASEAN Framework on Personal Data Protection (2016) ²⁵⁸ |
|---|--|
| Collection Limitation Principle | Consent, Notification and Purpose |
| Data Quality Principle | Accuracy of Personal Data |
| Purpose Specification Principle | Security Safeguards |
| Use Limitation Principle | Access and Correction |
| Security Safeguards Principle | Transfers to Another Country or Territory |
| Openness Principle | Retention |
| Individual Participation Principle | Accountability |
| Accountability Principle | |

At this rate, ASEAN has internalized most of OECD basic principles in their framework. Nevertheless, there is a huge difference in term of application scope. As for the OECD framework, it clearly states that they “apply to personal data, whether in the public or private sectors,”²⁵⁹ Moreover, OECD limits the abuse of privacy measure in “different protective measures to different categories of personal data and in a manner

²⁵⁶ Leon Trakman, Robert Walters and Bruno Zeller, "Digital Consent and Data Protection Law – Europe and Asia-Pacific Experience," *Information & Communications Technology Law*, vol. 29, no. 2, February 12, 2020, p.7.

²⁵⁷ The OECD Privacy Framework 2013, Part II Basic Principles of National Application.

²⁵⁸ The OECD Privacy Framework 2013, section 6.

²⁵⁹ *Ibid*, section 2.

which unduly limits the freedom of expression.”²⁶⁰ Particularly, the exceeded exceptions are not encouraged reflecting in the provision that: “exceptions to these Guidelines, including those relating to national sovereignty, national security and public policy, should be as few as possible and made known to the public.” However, those obligations are not expected among ASEAN members who preserve the importance of respecting state sovereignty as their core norm. On the contrary, ASEAN Framework provides flexibility for member states to not apply the principles of personal data protection to the “matters relating to national sovereignty, national security, public safety, public policy and all government activities deemed suitable.”²⁶¹

It is noted that broad exceptions are common in ASEAN economic agreements. For instance, the ASEAN Free Trade Agreement (AFTA) allows members to suspend the implementation if the import of some products under the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for AFTA could threaten ‘serious injury’ to domestic producers²⁶² as well as the general exception for the protection of its national security and the protection of public morals.²⁶³ In other word, ASEAN agreements – including its framework on personal data protection – are necessarily based on minimum principles so that they do not override the sovereignty of member states and can reach consensus. The broad scope of application and uncertain exemptions in ASEAN frameworks reflect the apparent weakness of the regime because they are too moderate and weak to create substantial change in the governance.²⁶⁴ Indeed, the specific standards of expected behavior are necessary to constitute regional cooperation.²⁶⁵ Therefore, the consensual approach and broad exemptions with the intention to reserve sovereignty will eventually lead to the impractical framework and ineffectiveness of regional governance on data privacy.

Furthermore, the informality of the ASEAN way is also reflected in the regional governance on data privacy. It is true that ASEAN aims to develop a coherent and

²⁶⁰ Ibid, section 4.

²⁶¹ Ibid.

²⁶² ASEAN Framework on Personal Data Protection 2016, section 6.

²⁶³ Ibid, section 9.

²⁶⁴ Vinod K. Aggarwal and Jonathan T. Chow, "The Perils of Consensus: How ASEAN's Meta Regime Undermines Economic and Environmental Cooperation," p. 273.

²⁶⁵ Ibid, p. 281.

comprehensive framework for personal data protection.²⁶⁶ However, ASEAN framework serves only as a record of the participants' intentions and does not constitute or create obligations under domestic or international law.²⁶⁷ Members can also withdraw to adopt this framework at any time.²⁶⁸ As a result, the adoption of this framework is on voluntary basis. In the present, there are members who have already imposed comprehensive PDA while some govern data privacy based on their sectoral or the existing laws which are not practical to deal with the online exploitation of personal data. Certainly, ASEAN – who does not define their cooperation through the legally enforceable commitments - requires moral force, mutual expectation and action for compliance and effectiveness of regional cooperation.²⁶⁹ Nevertheless, the lack of coordination and compliance mechanism for the implementation of this framework means that the effectiveness of regional governance “will remain dependent on their effective implementation and regulatory translation at national level.”²⁷⁰

Last but not least, the absence of supra-national authority is also a challenge for ASEAN in promoting data privacy regime in the region. Unlike the European Union, ASEAN Secretariat is not equivalent to the EU Commission and has no sovereign ASEAN authority. In case of an abusive behavior of privacy such as “the arbitrary interference” of privacy rights specified in the AHRD, member states are not subject to ASEAN sanctions for the failure of protecting their people's privacy.²⁷¹ ASEAN has resolution mechanism which is not really separated from the states. Reflected in the lack of AICHR's independence, ASEAN has failed to stem the human rights violation in the community. The AICHR Representatives are nominated by the respective governments and the decision-making is based on consultation and consensus.²⁷² As for ASEAN Protocol on Enhanced Dispute Settlement Mechanism, the Senior Economic Officials Meeting – appointed by the states - establish the panel²⁷³, adopt the report and

²⁶⁶ Leon Trakman, et al., "Digital Consent and Data Protection Law – Europe and Asia-Pacific Experience," p. 7.

²⁶⁷ ASEAN Framework on Personal Data Protection 2016, section 2.

²⁶⁸ Ibid, section 16.

²⁶⁹ Ibid, p. 268.

²⁷⁰ Candice Tran Dai and Miguel Alberto Gomez, "Challenges and opportunities for cyber norms in ASEAN," p. 10.

²⁷¹ Leon Trakman, et al., "Digital Consent and Data Protection Law – Europe and Asia-Pacific Experience," p. 6.

²⁷² "About AICHR Structure, Work and History of the AICHR," ASEAN Intergovernmental Commission on Human Rights (AICHR).

²⁷³ ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2004, article 5.

ensure the effective resolution of disputes.²⁷⁴ However, the EDSM has never been applied once and ASEAN members still relied on the World Trade Organization, the International Court of Justice or International Court of Arbitration.²⁷⁵ In other word, regional settlement mechanism has low practical value of commitments despite the attempts of revision to replicate rulings of the WTO.²⁷⁶

In summary, the regional norms are considered as one of the challenges for ASEAN to promote effective governance on data privacy. The ASEAN norms of non-interference in domestic governance, informality and lack of regional authority result in the impractical framework without monitoring and sanction mechanism. Eventually, ASEAN member states are left to manage the problem arising from the misuse of personal data protection and data breaches in cyberspace on their own. The cyberspace issues, in fact, are non-traditional and transnational threats that require international cooperation to solve the problems.

If ASEAN would like to create “the digitally - enabled economy that is secure, sustainable and transformative”²⁷⁷ as they aim in the framework, the shift from the localization to the transformation paradigm is crucial. The violation of non-interference norm is inevitably the expense of deep multilateral integration.²⁷⁸ ASEAN needs to overcome the sovereignty prevalence and informal cooperation in order to create obligation and commitment in their domestic governance. If the framework mainly focus on the scope of commercial application without unsettling security issue, ASEAN possibly makes it as legal-binding commitment like other economic agreements. Despite the weak regime and unfixed timetable of AFTA, CEPT and AFAS, the liberalization of trade in goods and services did take place and even exceeded the members' commitment in WTO. After the implementation, the average of tariffs among members fell from 12.76% in 1993 to 4.43% in 2000.²⁷⁹ Moreover, ASEAN continuously revised their agreements and protocol for more economic integration, for instance, the Trade in Services Agreement (ATISA) and the fourth protocol amending

²⁷⁴ Ibid, article 15.

²⁷⁵ Rungnapa Adisornmongkon, "The Dispute Settlement Mechanism of ASEAN, Does It Work?", p. 1.

²⁷⁶ Ibid, p. 3.

²⁷⁷ ASEAN Framework on Personal Data Protection 2016, preamble.

²⁷⁸ Vinod K. Aggarwal and Jonathan T. Chow, "The Perils of Consensus: How ASEAN's Meta Regime Undermines Economic and Environmental Cooperation," p. 283.

²⁷⁹ Ibid, p. 272.

the ASEAN Comprehensive Investment Agreement (ACIA).²⁸⁰ In this regard, ASEAN might consider to include the Framework on Personal Data Protection as an additional commitment for the high-standard agreements. The inclusion of personal information safeguard in ASEAN Agreement on Electronic Commerce (2019)²⁸¹ is a promising progress but it has not yet ratified by all members. ASEAN might later consider expanding the scope of data privacy protection to the government activities. Nevertheless, the effective governance of data privacy is unlikely to happen without the transformation of ASEAN's state-centrism which will be discussed in the next 2 parts.

4.2 Self-management governance of data privacy in ASEAN member states

“With Southeast Asia’s intergovernmentalist regionalism based on Westphalian sovereignty norms, which is less an institutional device for solving cross-border problems through collective action, than for strengthening the region’s nation states through regional resilience.”²⁸² While the ASEAN framework localizes and selects the international standards that adaptable to the regional norms of non-interference, the effectiveness of data privacy protection depends on each member’s capacity. Referring to the domestic regulations and policies in personal data protection, they are indeed heterogenous and diverse based on their economic development, technology growth and political regime. This part aims to portray how the heterogeneity of data privacy in each country can become the challenges for the effective governance in 2 aspects: 1) the connection between digital economy and technology development and 2) the political regime and threat perception.

First of all, not every country is motivated to launch policy, measure or legislation for the protection of personal data. Each country’s engagement in the global supply chain of electronic commerce plays significant role in the attempts to secure information in cyberspace, be it personal or not. The growth of digital economy is inseparable with the development of information technology infrastructure. The more people can access to the internet for online shopping, the more pressure puts on the government to create measures for protecting consumer’s personal information because

²⁸⁰ ASEAN *Integration Report 2019*, (Jakarta: ASEAN Secretariat, October 2019), p. xv-xvi.

²⁸¹ ASEAN Agreement on Electronic Commerce 2019, article 7, paragraph 5.

²⁸² Jurgen Ruland, “The Limits of Democratizing Interest Representation: ASEAN’s Regional Corporatism and Normative Challenges”, *European Journal of International Relations*, vol. 20, no. 1, March 2012, p. 245.

the lack of information security capacities will directly threaten their economic interests. There is a significant connection between the numbers of internet penetration, internet server security and index value of electronic commerce as appeared in table 4 and 5.

Table 4 UNCTAD B2C E-commerce index, 2019 ²⁸³

| 2019 Rank (ASEAN) | 2019 Rank (World) | Economy | Share of individuals using the Internet (2018 or latest) | Share of individuals with an account (15+, 2017) | Secure Internet servers (normalized 2018) | UPU postal reliability score (2018 or latest) | 2019 Index value |
|-------------------|-------------------|------------------------|--|--|---|---|------------------|
| 1 | 3 | Singapore | 88 | 98 | 97 | 97 | 95.1 |
| 2 | 34 | Malaysia | 81 | 85 | 75 | 86 | 81.9 |
| 3 | 48 | Thailand | 57 | 82 | 61 | 94 | 73.5 |
| 4 | 64 | Viet Nam | 70 | 31 | 66 | 77 | 61.1 |
| 5 | 84 | Indonesia | 40 | 49 | 64 | 48 | 50.1 |
| 6 | 89 | Philippines | 60 | 35 | 43 | 57 | 48.6 |
| 7 | 113 | Lao People's Dem. Rep. | 26 | 29 | 30 | 56 | 35.1 |
| 8 | 122 | Cambodia | 40 | 22 | 41 | 20 | 30.8 |
| 9 | 126 | Myanmar | 31 | 26 | 24 | 26 | 26.8 |

Table 5 ASEAN Information Security Maturity ²⁸⁴

| State | ICT Development ^a | Digital Economy Dependence ^b | Information Security ^c | Silo |
|-------------------|------------------------------|---|-----------------------------------|------|
| Singapore | HIGH | HIGH | HIGH | A |
| Brunei Darussalam | HIGH | HIGH | LOW | A |
| Malaysia | HIGH | HIGH | HIGH | A |
| Vietnam | LOW | HIGH | LOW | B |
| Philippines | LOW | HIGH | LOW | B |
| Thailand | HIGH | HIGH | HIGH | A |
| Indonesia | LOW | HIGH | LOW | B |
| Myanmar | LOW | LOW | LOW | C |
| Cambodia | LOW | LOW | LOW | C |
| Laos | LOW | LOW | LOW | C |

^a Taken from the annual ITU ICT Development Index. The original value is converted into a two-level scale.

^b Taken from the ASPI/ICPC Cyber Maturity in the Asia Pacific Report. The original value is converted into a two-level scale.

^c Taken from the 2014 ITU Global Cyber Security Index (GCI). The original value is converted into a two-level scale.

²⁸³ "UNCTAD B2C E-Commerce Index 2019," United Nations Conference on Trade and Development, p. 7-10, accessed June 1, 2020, https://unctad.org/en/PublicationsLibrary/tn_unctad_ict4d14_en.pdf.

²⁸⁴ Candice Tran Dai and Miguel Alberto Gomez, "Challenges and Opportunities for Cyber Norms in ASEAN," p. 11.

The research about ASEAN members' perception of cybersecurity finds that the influence of tangible realities such as technological capacities resulting to the functional decisions of policy makers. Countries with advanced ICT development internalize the economic potential threats from cyberspace. For example, Singapore and Malaysia are aware that the cybersecurity offers have direct benefits on their economic growth. The security of information in cyberspace, be it personal or not, is imperative for the economic stability and wealth creation.

Countries with high technological capacities are the first to impose the comprehensive legislation of personal data protection in order to reach the acceptable standards of their trade partners. Particularly, Singapore - as the highest rank in economic and digital potential - invests a lot in the cybersecurity for 0.22 percent of its GDP which considers far more than the global average. Singapore has continuously launched minor regulations relating to the PDA and plans to revise the legislation in correspondence with the current situation, proposing for higher fines in case of data breaches.²⁸⁵ Meanwhile, the gap of development within the region reflects that Cambodia, Lao LDP and Myanmar do not enjoy the same economic benefits from internet access. Due to the limited advantage from digital economy, policy makers in these countries do not view the malicious actors in cyberspace as economic threats and result in the absence of appropriate safeguard.²⁸⁶

Even though other ASEAN members do not reach the same level of Singapore's economic and technological capacities, they are more or less pressured to create safeguard measures for data privacy by the widespread trend of international agreements on electronic commerce. The main purposes in the international e-commerce regulations are to facilitate trade, increase the involvement opportunity for micro, small and medium enterprises (MSMEs)²⁸⁷ and especially create trust between consumers and suppliers. According to the World Economic Forum's White Paper on the Global Governance of Online Consumer Protection and E-commerce, domestic data

²⁸⁵ Yip Wai Yee, "Proposals to Amend Data Protection Law Include Stiffer Fines," *The Straits Times*, May 15, 2020, accessed May 31, 2020, <https://www.straitstimes.com/singapore/proposals-to-amend-data-protection-law-include-stiffer-fines>.

²⁸⁶ Candice Tran Dai and Miguel Alberto Gomez, "Challenges and opportunities for cyber norms in ASEAN," p. 12.

²⁸⁷ Rutendo Tavengerwei, "Using Trade Facilitation to Assist MSMEs in E-commerce in Developing Countries," *Journal of International Economic Law*, vol. 21, no. 2, June 2018, p. 349.

protection law needs to be developed to create a certain level of "system trust"²⁸⁸ along with broader governance frameworks such as international soft laws, WTO options or regional deal options.²⁸⁹ At domestic level, countries that recognize the importance of data protection such as Singapore, Malaysia, Thailand and Philippines have already promulgated comprehensive legislation and established independent authority. The future domestic regulations of each member are expected to be more harmonized in accordance to the adoption of ASEAN E-Commerce Agreement, Electronic Commerce Chapter in Comprehensive and Progressive Agreement for Trans-Pacific Partnership and future multilateral cooperation under WTO. Nevertheless, those international economic agreements and cooperation are not the only reason for the development of data privacy measures in ASEAN. Even in the CPTPP which is considered as the highest-standard agreement, Brunei and Vietnam reserve to comply with the provision of personal data protection in electronic commerce chapter before the date on which they implement their own regulations²⁹⁰

While the global trend of online consumer protection significantly motivates many countries to establish domestic mechanism for protecting personal data, online privacy does not limit in commercial activities only. In fact, the rights of privacy are inseparable with the fundamental human rights. The interlink between privacy and freedom of expression that requires adequate legislation and legal standards to ensure the privacy, security and anonymity of communications, journalists, human rights defenders and whistleblower and cannot be subject to state surveillance.²⁹¹ Human rights mechanism and freedom of expression in ASEAN member states do play important role in the governance on data privacy. It is noted that there is still no empirical or statistical evidence representing the interaction between the level of human rights and the effectiveness in each country's governance on data privacy. Nevertheless, the lack of effective privacy and data protection measures, which is the consequence of

²⁸⁸ Ioannis Lianos et al., "The Global Governance of Online Consumer Protection and E-commerce Building Trust," *World Economic Forum*, March 2019, accessed May 31, 2020, http://www3.weforum.org/docs/WEF_consumer_protection.pdf.

²⁸⁹ Ibid.

²⁹⁰ Comprehensive and Progressive Agreement for Trans-Pacific Partnership, chapter 14 Electronic Commerce, article 14.8.

²⁹¹ Frank La Rue, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, Frank La Rue, United Nations General Assembly Human Rights Council, A/HRC/23/40, April 17, 2013, p. 79.

expanding State's surveillance practices for the rights of privacy and freedom of speech, is in accordance with the human rights standards.²⁹² By addressing the challenge of privacy protection in ASEAN, I would like to compare the perils of people's privacy with the lack of practical human rights mechanism and the actual violation of human rights in each member state.

Much in line with the infringement of human rights and privacy rights by ASEAN member states, it is obvious that regional frameworks and agreements such as AHRD and PDP are impractical at all. ASEAN members' commitment in the international human rights and civil rights regimes barely comes into effect. According to online database of The United Nations Human Rights Office of the High Commissioner, half of ASEAN members signed core human rights treaties but does not ratify or really incorporate to their domestic practice. Meanwhile, the rest of ASEAN members are considered as countries who take no action in human rights at all, let alone the rights of privacy.²⁹³ The status of ratification of the international human rights treaties in Southeast Asia appeared in table 6.

*Table 6 Status of ratification of 18 International Human Rights Treaties*²⁹⁴

| Country | Overall Status | Number of Treaties Ratified | Number of Treaties Signed | Declarations |
|-------------|----------------|-----------------------------|---------------------------|--------------|
| Brunei | No action | 5 | 1 | 4 |
| Cambodia | Signatory | 12 | 3 | 1 |
| Indonesia | Signatory | 10 | 5 | 6 |
| Lao PDR | No action | 9 | 1 | 3 |
| Malaysia | No action | 5 | 0 | 5 |
| Myanmar | No action | 6 | 0 | 3 |
| Philippines | Signatory | 14 | 0 | 3 |
| Singapore | No action | 5 | 0 | 5 |
| Thailand | Signatory | 12 | 1 | 8 |
| Vietnam | No action | 9 | 0 | 5 |

Furthermore, non-governmental organization and private companies published privacy ranks of each member states. It is true the methodology of each ranking indices is too varied so that the level of privacy protection of each country is not comparable. Nevertheless, ASEAN countries share mutual characteristics of privacy and freedom of

²⁹² Ibid. p. 9.

²⁹³ "Status of Ratification of 18 International Human Rights Treaties," United Nations Human Rights Office of the High Commissioner, accessed June 1, 2020, <https://indicators.ohchr.org/>.

²⁹⁴ Ibid.

speech on the Internet. According to Internet Freedom Scores calculated by the Freedom House in table 7, none of ASEAN members are classified as “free”.

*Table 7 Internet Freedom Scores*²⁹⁵

| Country | Status | Total Score | Score of Obstacles to Access | Score of Limits on Content | Score of Violations of User Rights |
|-------------|-------------|-------------|------------------------------|----------------------------|------------------------------------|
| Philippines | Partly Free | 66 | 16 | 27 | 23 |
| Malaysia | Partly Free | 57 | 17 | 21 | 19 |
| Singapore | Partly Free | 56 | 19 | 18 | 19 |
| Indonesia | Partly Free | 51 | 14 | 19 | 18 |
| Cambodia | Partly Free | 43 | 12 | 18 | 13 |
| Myanmar | Not Free | 36 | 10 | 16 | 10 |
| Thailand | Not Free | 35 | 16 | 11 | 8 |
| Vietnam | Not Free | 24 | 12 | 7 | 5 |

Despite the available legal safeguards, ASEAN members rank among the bottom in protecting personal data and preventing state surveillance. However, different statistic methodologies and gap of unavailable information in some countries make it difficult to precisely evaluate the effectiveness of ASEAN members’ governance on data privacy protection. The limitation of statistical evaluation might require more integrated cooperation from international bodies such as ASEAN Statistics Division (ASEANstats), United Nations Human Rights Office of the High Commissioner (OHCHR) and other non-governmental bodies especially the technical agency for the further research. Apart from the statistics that show low scores privacy rights and freedom of speech, the challenges of their governance on data privacy can also reflect in the events of human rights violation on the Internet conducted by the states. Some ASEAN members have already launched necessary measures to prevent the abuse of personal data by state that might threaten civil rights. Nonetheless, these governments have abused the people’s privacy rights and freedom of speech in cyberspace through other legal mechanisms in practice, mostly claimed as the prevention of cybercrime, fake news and illegal content. The example cases and measures that violate human rights are illustrated in the table 8.

²⁹⁵ “Internet Freedom Scores,” Freedom House, accessed June 1, 2020, <https://freedomhouse.org/countries/freedom-net/scores>.

Table 8 Example cases and measures that violate human rights, specifically the abuse of freedom of speech in cyberspace.

| Countries | Examples of related measures | Example Cases |
|----------------|---|---|
| 1. Malaysia | <ul style="list-style-type: none"> Internal Security Act (1960) Security Offences (Special Measures) Act 2012²⁹⁶ Anti-Fake News Act, later rejected by the parliament in 2019²⁹⁷ | <ul style="list-style-type: none"> Arrest of politician Teresa Kok, blogger Raja Petra and journalist Tan Hoon Cheng in 2008 Arrest of Maria Chin Abdullah an activist from anti-corruption movement Berish in 2016²⁹⁸ |
| 2. Singapore | <ul style="list-style-type: none"> Anti-Fake News Act 2019²⁹⁹ | <ul style="list-style-type: none"> Arrest of Roy Ngerng, blogger in 2012 Investigating and warning news website, The Independent Singapore in 2016 Arrest of Jolovan Wham, activist in 2017³⁰⁰ |
| 3. Thailand | <ul style="list-style-type: none"> Martial Law/ Lèse-majesté law Cybersecurity Act 2019 Computer Crime Act amended 2016³⁰¹ The establishment of Anti-Fake News Center 2020³⁰² | <ul style="list-style-type: none"> Report of imprisonment and abduction of activists |
| 4. Philippines | <ul style="list-style-type: none"> The Cybercrime Prevention Act 2012 | <ul style="list-style-type: none"> Revocation of the operating license of Rappler, leading news website in 2018³⁰³ |
| 5. Indonesia | <ul style="list-style-type: none"> Law on Electronic Information and Transaction 2008 | <ul style="list-style-type: none"> Blocking and filtering contents against Islamic values³⁰⁴ |

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²⁹⁶ Chew Chuan Yang, "Malaysia: A Study on the Criminalization of Free Expression Online," in *Unshackling Expression: A Study on Laws Criminalizing Expression Online in Asia*, (India: APC, 2017), p. 85-86.

²⁹⁷ "Malaysia Parliament Scraps Law Criminalizing Fake News," AL Jazeera, Oct 10, 2019, accessed June 1, 2020, <https://www.aljazeera.com/news/2019/10/malaysia-parliament-scraps-law-criminalising-fake-news-191010024414267.html>.

²⁹⁸ Ibid.

²⁹⁹ Tessa Wong, "Singapore Fake News Law Polices Chats and Online Platforms," *BBC News*, May 9, 2019, accessed June 1, 2020, <https://www.bbc.com/news/world-asia-48196985>.

³⁰⁰ "Singapore: Laws Chill Free Speech, Assembly End Repressive Prosecution, Regulations and Human Rights," Human Rights Watch, December 13, 2017, accessed June 1, 2020, <https://www.hrw.org/news/2017/12/13/singapore-laws-chill-free-speech-assembly>.

³⁰¹ "Thailand: Authorities Using Repressive Laws to Intensify Crackdown on Online Critics," Amnesty Thailand, April 23, 2020, accessed June 1, 2020, <https://www.amnesty.org/en/latest/news/2020/04/thailand-authorities-using-repressive-laws-to-intensify-crackdown-on-online-critics/>.

³⁰² "Govt's Anti-fake News Centre Gets Help," Bangkok Post, Feb 18, 2020, accessed June 1, 2020, <https://www.bangkokpost.com/thailand/general/1859719/govts-anti-fake-news-centre-gets-help>.

³⁰³ "Philippine News Website Rappler Has Licence Revoked by SEC," *BBC News*, January 15, 2018, accessed July 8, 2020, <https://www.bbc.com/news/world-asia-42692723>.

³⁰⁴ Liu Yangyue, "Transgressiveness, Civil Society and Internet Control in Southeast Asia," *The Pacific Review*, vol. 27, no. 3, May 2014, p. 401.

| Countries | Examples of related measures | Example Cases |
|-------------|---|--|
| 6. Vietnam | <ul style="list-style-type: none"> Cybersecurity law 2019 ³⁰⁵ | <ul style="list-style-type: none"> Request Facebook to take down anti-government comments ³⁰⁶ |
| 7. Cambodia | <ul style="list-style-type: none"> Telecommunications Law 2015 Cybersecurity draft | <ul style="list-style-type: none"> Convicting Sam Rainsy, opposition leader in 2016 Charging Kong Raya, student in 2016 ³⁰⁷ |
| 8. Myanmar | <ul style="list-style-type: none"> Electronic Transaction Law amended 2014 Telecommunications Law 2013 News Media Laws 2014 ³⁰⁸ | <ul style="list-style-type: none"> Self-censorship of media ³⁰⁹ |
| 9. Laos | <ul style="list-style-type: none"> Law on Prevention and Combating Cyber Crime 2015 | <ul style="list-style-type: none"> Imprisonment of Houayheuung Xayabouly (Muay), activist in 2019 ³¹⁰ |
| 10. Brunei | <ul style="list-style-type: none"> Shari'a Penal Code ³¹¹ | NA |

Therefore, the association's ineffective mechanism for protecting human rights also poses the challenges for regional governance on data privacy. It is noted that the regional human rights mechanisms are not functional due to the attachment of normative structure of non-interference. If the human rights are not supported in both regional and national level, one might wonder if the protection of data privacy is at all possible. In this regard, some scholar suggests that the AICHR should be more independent from members states "to ensure that human rights issues will be addressed more critically."³¹² In the present, it is unlikely that ASEAN member states will extend the scope of application of personal data protection in measures associated with state

³⁰⁵ "Vietnam's Cybersecurity Law Sparks Concerns from Businesses," *Nikkei Asian Review*, June 12, 2018, accessed June 1, 2020, <https://asia.nikkei.com/Politics/Vietnam-s-cybersecurity-law-sparks-concerns-from-businesses>.

³⁰⁶ Tomoya Onishi, "Facebook Runs Afoul of Vietnam's New Cybersecurity Law," *Nikkei Asian Review*, January 10, 2019, accessed June 1, 2020, <https://asia.nikkei.com/Spotlight/Facebook/Facebook-runs-afoul-of-Vietnam-s-new-cybersecurity-law>.

³⁰⁷ "Mapping the Criminalisation of Online Expression: Cambodia," in *Unshackling Expression: A Study on Laws Criminalizing Expression Online in Asia*, (India: APC, 2017), p. 37.

³⁰⁸ Htaike Htaike Aung, "Myanmar: a Study on the Criminalisation of Online Freedom of Expression," in *Unshackling Expression: A Study on Laws Criminalizing Expression Online in Asia*, (India: APC, 2017), p. 98 – 101.

³⁰⁹ "Dashed Hopes: The Criminalization of Peaceful Expression in Myanmar," Human Rights Watch, January 31, 2019, accessed June 1, 2020, <https://www.hrw.org/report/2019/01/31/dashed-hopes/criminalization-peaceful-expression-myanmar>.

³¹⁰ Netiwit Chotiphathpaisal and Adam Bemma, "In Laos, Price of Free Speech a Heavy One," *Bangkok Post*, February 20, 2020, accessed June 1, 2020, <https://www.bangkokpost.com/opinion/opinion/1861639/in-laos-price-of-free-speech-a-heavy-one>.

³¹¹ "Brunei: New Report on Abusive Penal Code," Human Right Watch, May 22, 2019, accessed June 1, 2020, <https://www.hrw.org/news/2019/05/22/brunei-new-report-abusive-penal-code>.

³¹² Pavin Chachavalongpong, "Is Promoting Human Rights in ASEAN an Impossible Task?," *The Diplomat*, January 19, 2018, accessed June 1, 2020, <https://thediplomat.com/2018/01/is-promoting-human-rights-in-asean-an-impossible-task/>.

or governmental agencies due to the lack of state's motivation in promoting human rights. It is true that there are regional agenda to promote the protection of personal data and the advancement of human rights agenda, but they remain secondary to the members' larger concern with state building.³¹³ If ASEAN really wishes to pursue the "people-oriented" community with determination, the involvement of civil society, people, and non-state actors in the organizational structure is vital for changing the regional environment.

4.3 The people-centric approach for ASEAN governance on data privacy.

ASEAN organizational structure is considered as a sovereign-centric order where the Southeast Asian political elites shape the organization in a way that compatible with local organicist tradition.³¹⁴ However, non-governmental organizations within ASEAN have been formulated since the 1970s to act as a regional intermediary. Particularly during the Post-Cold War era, the democratization pressures from international communities triggered the regional change and many non-state organizations emerged within the region. Nevertheless, ASEAN member governments still reject the transformation of the norm. ASEAN simply localizes the concept of human rights and its mechanism does not lead to strong impact against ASEAN fundamental norms of non-intervention and respect for state sovereignty.³¹⁵ As a result, civil society and people remain excluded from the regional decisions and governance. They lack of the confidence in the AICHR and other human rights project of ASEAN due to the association's underpinning norms.³¹⁶ The absence of people's engagement in regional structure will make the regional governance ineffective and unfunctional, especially for the protection of data privacy that directly involves with the civil and human rights of individuals. In this part, I will explore the challenge for governance on data privacy based on the ineffectiveness the existing civil organizations. Moreover, I will suggest how the people-centric approach can lead to the effective governance beyond the existing regional framework.

³¹³ Shuan Narine, "Human Rights Norms and the Evolution of ASEAN: Moving without Moving in a Changing Regional Environment," *Contemporary Southeast Asia*, vol. 34, No. 3, 2012, p. 384.

³¹⁴ Jurgen Ruland, "The Limits of Democratizing Interest Representation: ASEAN's Regional Corporatism and Normative Challenges", p. 243.

³¹⁵ Shuan Narine, "Human Rights Norms and the Evolution of ASEAN: Moving without Moving in a Changing Regional Environment," p. 375.

³¹⁶ *Ibid.*

First of all, ASEAN has created fora for non-state organizations, for instance: 1) ASEAN Chambers of Commerce and Industry (ASEAN – CCI) in the 1970s 2) ASEAN inter-parliamentary forum which would later developed to the ASEAN Inter-Parliamentary Organization (AIPO) and lastly renamed as ASEAN Inter-Parliamentary Assembly (AIPA) in 2007 3) ASEAN Institutes for Strategic and International Studies (ASEAN-ISIS) in the 1980s as a scholar dialogue. However, the engagement of “people” in the formative period has still been limited in ASEAN due to the norms of non-interference and sovereignty. Although ASEAN-ISIS could finally convene the first ASEAN People’s Assembly (APA) in 2000, the APA were held no less than 7 meetings with the reluctance of the ASEAN governments.³¹⁷

The shift of thinking about “people-centered” occurred after the financial crisis as Indonesia proposed the need for change in both ASEAN’s decision-making processes and its objectives³¹⁸. The ASEAN Civil Society Conference (ACSC) or ASEAN Peoples’ Forum (ARF) was convened in 2005 with the attempt to present more liberal governance in ASEAN. Meanwhile in 2006, another network called Solidarity for Asian People’s Advocacy (SAPA), was formed by civil society organizations themselves.³¹⁹ Besides, the 2008 ASEAN Charter emphasized the people-centered ASEAN as a lexicon of ASEAN in the so-called ASEAN way.³²⁰ The institutionalization of the norm can be reflected in the 2009 Socio-Cultural Community Blueprint in which its strategic objective is “to contribute to realizing an ASEAN Community that is people-centered and socially responsible”³²¹. Moreover, ASEAN later adopted the Kuala Lumpur Declaration on a People-Oriented, People-Centered ASEAN in 2015.³²² Last but not least, the establishment of the ASEAN Intergovernmental Human Rights Commission (AICHR) and the ASEAN Commission for Women and Children (ACWC) as new human rights mechanisms also support the

³¹⁷ Jurgen Ruland, “The Limits of Democratizing Interest Representation: ASEAN’s Regional Corporatism and Normative Challenges”, p. 252.

³¹⁸ Aarie Glas and Emmanuel Balogun, "Norms in Practice: People-centric Governance in ASEAN and ECOWAS," p. 8.

³¹⁹ Jurgen Ruland, “The Limits of Democratizing Interest Representation: ASEAN’s Regional Corporatism and Normative Challenges”, p. 253.

³²⁰ Aarie Glas and Emmanuel Balogun, " Norms in Practice: People-centric Governance in ASEAN and ECOWAS," p. 9.

³²¹ ASEAN Socio-Cultural Community Blueprint 2009, article 2, paragraph 4.

³²² Aarie Glas and Emmanuel Balogun, "Norms in Practice: People-Centric Governance in ASEAN and ECOWAS," p. 9.

promotion of people-centered community.³²³ Through this progressive development, it is expected that ASEAN might transform the institutional norms of “dramatic reorientation of the Association’s *raison d’être*”³²⁴ to be the people-centered community that really benefit ASEAN people in a visible way.³²⁵

The establishment of civil organizations and the new human rights mechanism aim to facilitate the communications of all regional entities. However, ASEAN still reserves the corporatist structure of regional governance.³²⁶ Some argue that ASEAN does not just localize the demands of international norms of human rights and democracy by changing the identity portrayed in the ASEAN Way as “people-oriented” community. Some ASEAN governments such as Indonesia, the Philippines and Malaysia support the commotion of ASEAN institutional change. It is obvious that strengthening ASEAN civil society in the grouping’s cohesion is necessary for the regional governance in some extent. Despite the proclaiming of civil society attraction in regional integration, ASEAN still cannot deal with “the dilemma of framing their reformist agenda as a participatory discourse, while at the same time grafting the underlying set of values in a way that the new norms conform to ideational orthodoxy.”³²⁷

Consequently, ASEAN civil society and other representatives from non-governmental organizations have no room in ASEAN official meetings. In fact, the representatives from ASEAN Civil Society and ASEAN People Forum (ACSC/APF) have not been able to meet with leaders in ASEAN Summit since 2015 but they were allowed to meet with ASEAN senior officials from some member states. The event reflects the “controlled partnership” preferences of ASEAN leaders. ASEAN member states have failed to reach consensual decision to arrange a meeting and discuss the critical issues of human rights with the civil society organizations (CSOs). Instead, ASEAN leaders decide to meet with the non-governmental bodies that are not directly

³²³ Jurgen Ruland, “The Limits of Democratizing Interest Representation: ASEAN’s Regional Corporatism and Normative Challenges”, p. 254.

³²⁴ Ibid.

³²⁵ Aarie Glas and Emmanuel Balogun, “Norms in practice: people-centric governance in ASEAN and ECOWAS,” p. 11.

³²⁶ Ibid.

³²⁷ Jürgen Rüländ, “The Limits of Democratizing Interest Representation: ASEAN’s Regional Corporatism and Normative Challenges”, p. 252.

related to human rights such as ASEAN Inter-Parliamentary Assembly (AIPA), the ASEAN Youth, and ASEAN Business Advisory Council (ABAC).³²⁸ It is noted that other civil groups are lack of support from ASEAN as well. For example, the Malaysia - ASEAN Regional Bloggers Conference in 2011, which arranged by the civil groups and the attendants had opportunity to discuss about Internet censorship with then Prime Minister Najib Razak,³²⁹ was not further developed by the association. In other word, the existing civil society conferences are criticized as “a ceremonial talk shop” that financially restricted and isolated by ASEAN Summit. The absence of people or civil groups’ participation in regional governance also reflects ASEAN’s failure in human rights protection.³³⁰

In parallel with the absent implementation of declarations and mechanisms to promote human rights, the regional framework on personal data protection is criticized for its unpredictable characteristic does not produce the mechanism to check and control that business will comply to the lists of regulations around data protection and privacy.³³¹ Beyond the limitation of compliance and implementation, the criteria set in ASEAN framework is questioned for its effectiveness in promoting data privacy due to the lack of people participation in the development process. The most critical concern of the existing regulations - the EU's GDPR, OECD Privacy Framework and ASEAN Framework that replicates the basic principles from OECD – are attacked by the absent recognition of the cognitive capacities and behavior of data users.³³² The existing principle in data privacy regulations mainly focuses on the consent and it is criticized for the lack of cognitive dimension. If ASEAN intends to enforce the framework and extend the scope of application to the state agencies, ASEAN policy makers should respond to the concern of linear concepts and principle of personal data protection in their existing framework. In other word, they need to focus more on data consumers or

³²⁸ Yiamyut Sutthichaya, "No Room for Civil Society Groups at ASEAN Summit," *The Nation Thailand*, June 19, 2019, accessed June 1, 2020, <https://www.nationthailand.com/asean-plus/30371418>.

³²⁹ Mohd Zaid, "At the 1st Malaysian-ASEAN Regional Bloggers Conference," *UNSPUN* (personal blog), May 8, 2011, accessed June 1, 2020, <https://theunspunblog.com/2011/04/27/at-the-1st-malaysian-asean-regional-bloggers-conference/>.

³³⁰ Yiamyut Sutthichaya, "ASEAN Civil Society Seeks Meeting with Leaders," *The Nation Thailand*, May 5, 2019, accessed June 1, 2020, <https://www.nationthailand.com/asean-plus/30368887>.

³³¹ Thio Tse Gan, "Data and Privacy Protection in ASEAN: What Does it Mean for Businesses in the Region?," *Deloitte*, 2018, p. 6, accessed June 1, 2020, <https://www2.deloitte.com/content/dam/Deloitte/sg/Documents/risk/sea-risk-data-privacy-in-asean.pdf>.

³³² Leon Trakman, et al., "Digital Consent and Data Protection Law – Europe and Asia-Pacific Experience," p. 1.

people's perspective because the generating of consent in many international and domestic governance fails to protect data privacy.³³³ Ironically, the very nature of the present data framework pose threats to the scope of people's consent in data privacy.³³⁴

In this regard, the revision of framework for governing data privacy in the region is necessary and ASEAN people who are the data owners should be able to participate in the process of governance. Generally, the challenges of consent principle in data privacy governance requires the participation of consumers or data users to properly design the privacy system.³³⁵ First of all, people tend to not understand the complicated technological process of data down-steaming. Data users do not know how their data will be used due to the lack of information from data entities that could be both companies and state agencies. Nevertheless, the legal consent requirement allows the compromise between data entities and users.³³⁶ Furthermore, the weakness of legal consent overlooks the cognitive behavior of users. People are usually in hurry and distracted by the long conditions so that they automatically click the consent button in order to gain access to the website or application. The proliferation of conditions and disciplines designed to protect personal data protection in consent agreements could consequently lead to “content fatigue”³³⁷. Last but not least, people will be accustomed with various consent conditions and feel exhausted to distinguish between the harmless services that require preliminary consent to protect themselves in legal term and the illegal ones that aim to exploit personal data.³³⁸ In the end, people will be less concern about their privacy and the privatization of human rights on the Internet.

In order to properly cope with the illusion of consent regime in many frameworks on data privacy protection, the governance should include the communications with all stakeholders, the promotion of awareness on privacy rights and the cooperation with the international community.³³⁹ Hence, the centralization of state actors in data governance is considered a hindrance for the protection of data

³³³ Ibid, p. 22.

³³⁴ Ibid, p. 26.

³³⁵ Ibid, p. 1.

³³⁶ Ibid, p. 25.

³³⁷ Ibid, p. 26.

³³⁸ Ibid.

³³⁹ Emily Taylor, "The Privatization of Human Rights: Illusions of Consent, Automation and Neutrality," *Global Commission on Internet Governance*, no. 24, January 2016, p. 15 – 16.

privacy in any level. As for ASEAN context, the participation of data entities and Internet users are the important step to formulate effective measures for privacy protection in cyberspace.³⁴⁰ Moreover, the participation of NGOs and civil society is necessary for formulating the regimes that will benefit data users the most. The NGOs, civil society and academic institutes are bound together by their common concern for human rights protection in which their views are in accordance with the universal value. The association needs to take further step from the cooperation with civil society in the form of education, information exchange and training. It is important to “strengthen democratic institutions and popular participation” to prevent and resolve conflicts³⁴¹ as well as develop mechanisms that really respond to the human rights abuses.

In conclusion, this chapters explore the challenges to the effectiveness of ASEAN governance on data privacy. First of all, the long-standing institutional norms prevent the organization to comply with their regional framework. It is true that ASEAN accept the basic principles of data privacy from international regimes. However, the principles in the association’s framework are considered impractical. The framework was set upon the consensual decision so that it is simply the lowest possible requirement for privacy safeguard and excludes all the state obligations. This does not lead to effective governance and solve the abuses of privacy rights on the internet, particularly by the states. This study also suggests that ASEAN might take further step by adding this discipline in the regional economic agreements for further development of data privacy in digital economy first. Secondly, as the regional structure is state-centric, the governance on data privacy depends on each member’s self- management. There is a huge gap of technological and economic development among member states which leads to different capacity and motivation in investing and launching privacy safeguard measures. Moreover, the protection of privacy rights is inseparable from the political regimes and human rights. In this regard, ASEAN members all share authoritarian characteristics in their political regimes. They infringe both fundamental rights of privacy and freedom of expression of their citizens. Reflecting in the cybersecurity, media and anti-fake news laws, the future of privacy rights on the

³⁴⁰ Ibid, p. 17.

³⁴¹ Shuan Narine, “Human Rights Norms and the Evolution of ASEAN: Moving without Moving in a Changing Regional Environment,” p. 370.

Internet is not promising in ASEAN. Members are not motivated to form regional governance because they would like to reserve their sovereignty in monitoring their citizen's movement on the Internet. Also, some members do not enjoy the same economic benefits so that they do not see the necessity of the governance on data privacy. Lastly, the participation of people and civil society is required to reform ASEAN's state-centric structure and takes part in designing more practical governance that is far beyond the existing principles. As long as ASEAN states remain the sole actors in regional governance, the prevalence of sovereignty and members' non-democratic politics reflecting through their core norms consequently become major challenges to ASEAN cooperation and effective governance on data privacy.



5. Conclusion and Recommendations

This chapter will summarize the findings of this study's research question: the challenges of ASEAN governance on data privacy in cyberspace. As the analysis of this study based on the role of norms, values and practices of actors in shaping regime, the ASEAN way and its prominent non-interference have formed the regional governance and cooperation in all dimensions including the issue-area of data privacy in cyberspace. It is true that international regimes of cyberspace and personal data protection create impact on ASEAN framework. Nonetheless, this study illustrates that ASEAN has localized the existing international frameworks in a way that consistent with their regional norms. Similar to other areas of cooperation such as human rights, trade liberalization, climate change and so on, ASEAN normative structure which allows the prevalence of members' sovereignty above all cooperative agenda indeed challenges the function of regional governance on protecting ASEAN people's data privacy in cyberspace. I divide the last chapter into 2 main parts: 1) the conclusion of findings in this study and 2) recommendations and limitations.

5.1 ASEAN norms and regional governance on data privacy

Amid the rapid development of communication technologies, it is important to create the safeguard measures of data processed through any electronic instruments. Although international community, regional organizations as well as states have work closely for protecting personal data flowing in cyberspace, the existing measures are ineffective and inadequate. At the international level, the regimes of data privacy and other issue areas in cyberspace are complex and fragmented in the present. Different approaches in coping with the abuses of privacy on the Internet are, for example, 1) the European Union's comprehensive legislation 2) the U.S. sectoral laws, ad-hoc regulations and self-regulated mechanism 3) China's measure specifically protecting consumers' data. In ASEAN context, 4 member states already applied the European comprehensive approach, yet their disciplines are incompatible with the GDPR. In other word, even the members' most progressive governance is still ineffective to protecting their citizens' personal data in both commercial and political activities.

ASEAN core norms create challenges for governing such complicated and transnational issues. In the last decade, ASEAN members have been discussed about

technological cooperation and launched several regional frameworks. ASEAN members have also implemented domestic measures responding to the issues on the Internet. Nevertheless, the outcome of regional cooperation is not fruitful. First of all, ASEAN regional framework on personal data protection and the governance are shaped by the association's core norms: non-interference, consensual decision and negotiation approach. As a result, it becomes non-binding and non-precise cooperation without enforcement mechanism and financial cost in order to not infringe members' sovereignty in their domestic governance. Hence the international disciplines of personal data protection are localized in a way that suit with the association's norms. The framework is the least common condition that everyone agrees with. In line with the region's unfunctional mechanism to protect people's privacy, the absence of single global regime also provides members opportunity to create their own domestic measures or not regulate it at all.

Recognizing the difference of economic and technological capacities of each ASEAN state, members with high capability such as Singapore and Malaysia have motives to produce privacy safeguard in order to increase trust in digital economy. Meanwhile, countries who do not share economic benefits from the electronic commerce feel less pressured for complying with expected standards of foreign investors. Different and unharmonized measures among members become the obstruction for functional regional governance, particularly with the nature of data flow in borderless space that require transnational cooperation. It is noted that there are concerns about the existing PDPA and related measures of some members. The new safeguard requiring data localization might turn to obstruct the flow of data on the Internet which is the core of electronic commerce.

Last but not least, the deep-rooted authoritarianism in ASEAN governments prevent further development of privacy safeguard that is inseparable with human rights. At the regional level, ASEAN is criticized for the incompetence in stemming the violation of human rights by governments in both online and offline space. Despite the existing regional frameworks and institutions, ASEAN still does not accept the universal values of human rights. Even though the association has continuously faced with the pressure from both international community and local people, the state-centric

structure of ASEAN preserves the reformative change at both regional and domestic levels. It is true that ASEAN portrays themselves as an active actor in promoting human rights in line with the global agenda. On the other hand, ASEAN as an association has no regional authority to intervene in the violation of human rights conducted by member states because it will infringe the regional norms. In fact, member states increasingly suppress anti-government criticism on the Internet. They less concern about the privacy of online users when it comes to political issue, reflecting in PDPA and related measures that mainly focus on protecting personal data in commercial activities. Moreover, new measures such as data localization, cybersecurity or anti-fake news laws facilitate state surveillance of citizens' activities in cyberspace, abuse people's online privacy and deprive freedom of speech on the Internet.

In sum, this study finds that ASEAN core norms prevent deeper integration of the association in responding with non-traditional and transnational issues like data privacy in cyberspace. Despite the attempt for more functional cooperation, ASEAN member states do not trade their cherished sovereignty for the efficacy of regional governance. Back to the concept of regionalization, ASEAN was established as a political organization to interests between members as well as prevent the intervention from non-member states in the Cold War context. If ASEAN would like to become more functional and problem-solving association, the reformation of regional norms is inevitable.

5.2 Recommendations and limitations of this study

Recommendations

Through the analytical framework of regime theory based on cognitivist approach, this study highlights the importance of the actor's norms, beliefs and values in forming regime and governance particularly in regional organization. The policy recommendations to develop regional governance on data privacy can be briefly explained for 3 points.

Firstly, ASEAN members should overcome the ASEAN norms in order to create more integrated association and functional cooperation. It is true that the regime of protecting personal data is fragmented at the international level. Nevertheless,

ASEAN will be able to effectively respond to the misuse of personal data conducted by transnational corporations or individuals if the association can reach compatible and harmonized regional framework. In this regard, the regional authority is important to administer and implement the framework. Comparing to the EU's case, the Union can pressure the United States to improve the safe harbor agreement that accepted by both sides. It is impossible for ASEAN to negotiate with external stakeholders in such a way if each member still reserves their sovereignty to design their own governance. For the next step, ASEAN members might further discuss for more concrete and clearer commitments regarding to the protection of their citizens' personal data and later add them in the free trade agreement for the enforcement.

In the present, ASEAN people need to rely on their domestic regime of data privacy. The huge gap in technology and economic development among members become a matter of grave concern. Members have different approaches for the governance of data privacy based on their capacities, motives and other related conditions. Therefore, if they would really like to cooperate for the single and harmonized regime of data privacy, those variables needed to be concerned so that the regime will be able to get everyone on board. Further study to bridge the gap of development between ASEAN former and new members is necessary for designing appropriate regional governance on data privacy.

Moreover, ASEAN norms that preserve the prevalence of sovereignty becomes useful instrument for ASEAN governments to maintain their authoritarian regimes and ignore the abuses of human rights despite the international pressure. The lack of effective mechanism to protect human rights consequently facilitates states to suppress freedom of speech in cyberspace, conduct state surveillance and deprive their citizen's privacy. To reform both regional and domestic governance that will truly benefit and protect people's privacy, the participation of people in designing, monitoring and regulating governance and other related frameworks is indeed necessary. Apart from state actors, ASEAN should create platform for people or engage the existing civil society and other representatives from non-governmental organizations in their agenda. In other word, states must not be the sole actors in shaping and governing regional regime.

Limitations

Due to the limited timeline, I cannot collect the important information especially the statistical data of privacy abuses in each country in order to estimate the efficacy of existing governance in ASEAN to support my argument. The findings of this study are based on qualitative approach. Further research about the regional governance on data privacy through statistic collection and interviews is recommended, for example: the statistic data of how each government imposes technical international standard to protect their citizens' personal data, the cases that are solved through the existing regulations, the role of civil society and non-government organization in driving the issues as well as survey of Internet users to evaluate the existing governance, etc.

Furthermore, this study focused on the role of state actors in the regional governance because of the limited resources. In fact, most data flowing on the Internet have been processed, stored and used by the platform owners who are the transnational cooperates and the American Big Techs. As the technology creators and developers, those business entities are indeed the important actors in the global regimes on cyberspace and data privacy. Particularly, they have been engaged and actively cooperated with international organization, their government and users around the world. Studying the role of business sectors in ASEAN context through the analytical framework of international politic economic is recommended to complete the gap of this research that does not cover the transnational actors' role in shaping regional regime and governance.

Lastly, the complex dynamics of variables in shaping privacy policy, measure and practice require the inter-disciplinary methodology to further explore the challenges of governance in data privacy in all aspects. Particularly, the deeper ontological questions about the nature on "privacy" in modern on postmodern conditions or cultural relativity which this study does not cover.

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