

## **ASEAN'S LEGAL FRAMEWORK: LOST ITS STRIPES OR BACK WITH A ROAR?**

*Address by T. Jasudasen, Singapore Ambassador to Malaysia,  
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(slightly edited and abridged)*

For a long while now, we have all heard criticisms of ASEAN being a paper tiger or even a toothless tiger. The “ASEAN way” of building consensus and our policy of non-interference in each other’s internal affairs are regularly ridiculed as being ineffective. We are chided for not having a strong legal and decision-making framework. In short, we are criticised for not being the European Union. These criticisms tend to neglect the fact that ASEAN developed under different circumstances. ASEAN is evolving at a pace it is comfortable with. It does not have the “push” factor of fratricidal wars that relentlessly drove the creation of the EU.

When ASEAN was conceived in 1967, the Cold War was at its height, regional disputes were fresh, and communist insurgencies were raging inside some member-countries. By then, centuries of competing colonial interests of the British, French, Dutch, Americans, Spanish and Portuguese had cut off the historical web of connections in Southeast Asia. We were suspicious of each other. Thus, ASEAN began with one very simple ambition – to keep the peace in Southeast Asia.

This was a time of tension in a region filled with racial, ethnic, religious, and ideological cleavages. ASEAN’s aim was to allay suspicions among the founding members. Today, peace has largely been achieved, perhaps imperfectly, but successfully all the same. This is no mean achievement at a time when comparable regions elsewhere were seeing many bloody wars.

### **Early Years**

During its early years, ASEAN managed its affairs with the barest minimum of legally binding arrangements. ASEAN’s founding document was a mere two-page declaration. The choice of the word “declaration” was deliberate. It offered the five participating countries the easy option of walking away, which a treaty or agreement may have made more difficult.

It was not until 1976, nearly 10 years after its founding, that ASEAN concluded its first binding treaty, the Treaty of Amity and Cooperation in Southeast Asia. It also established a small, deliberately weak central secretariat in Jakarta. The Secretariat was designed to be so, because member-states feared that ASEAN might grow to be a supranational monster with potential to erode their sovereign powers as independent states. It took another 16 years, in 1992, for ASEAN to conclude another binding agreement. It was the Agreement on Common Effective Preferential Tariff for the ASEAN Free Trade Area (CEPT). Here there were still few means to ensure that member-states met their treaty obligations. Thus, even technically binding agreements were dependent on voluntary compliance.

However, this loose arrangement served members well. ASEAN operated on the basis of broad international norms and conventions. ASEAN members felt reassured that their respective sovereignties would not be threatened. They understood that decisions would not be imposed on them by others, like in the days of colonial rule.

What are these so called “broad international norms and conventions” that ASEAN used to guide its affairs? These norms are found in three categories of documents.

In the first category are documents on inter-state relations among ASEAN members. Examples of this include the exclusive reliance on “peaceful processes in the settlement of intra-regional differences” (Declaration of ASEAN Concord, 1976) and “fundamental principles” in the Treaty of Amity and Cooperation in Southeast Asia (1976), such as the right of every state to lead its national existence free from external interference.

The second category is ASEAN’s relations with states outside the region. These include adherence to “the principles of the United Nations Charter” (1967 ASEAN Declaration) and recognition of “ASEAN as an effective force for peace, justice and moderation in the Asia-Pacific and in the world” (ASEAN Vision 2020, 1997).

The third category is the standards of behaviour within the ASEAN member-states. These include the “promotion of social justice” and the “improvement of the living standards of their peoples” (Declaration of ASEAN Concord, 1976). I would argue that what in 1976 we referred to as “social justice” and “improving living standards” is today called Human Rights. We were thus ahead of our time where good intentions were concerned.

## The ASEAN Charter

In September 2007, the then-Malaysian Foreign Minister, Syed Hamid Albar, speaking at the London School of Economics on the 40th anniversary of ASEAN, listed four of the organisation's weaknesses: (1) Lack of coordination; (2) Proliferation of ASEAN bodies and meetings; (3) Securing compliance with ASEAN decisions; and (4) ASEAN's (non)-role in the external relations of member-states. The cumulative impact of such self-critical thinking pushed ASEAN ahead.

After four decades of informal coexistence and cooperation, ASEAN members decided that an ASEAN Charter was the next concrete step in developing the organisation. The signing of the ASEAN Charter in November 2007 was a milestone in the building of an ASEAN Community.

The Charter provides ASEAN with a clear legal framework after more than 40 years of gradual and comfortable institutionalisation. It provides, for the first time in many instances, norms for the domestic behaviour of governments towards their respective populations, namely democracy, human rights and fundamental freedoms, good governance, constitutional government, social justice and the rule of law.

The Charter also codifies ASEAN's well-established norms for inter-state conduct – *inter alia*, the rejection of the use or threat of force, the peaceful settlement of disputes, and non-interference in states' domestic affairs.

The Charter formally accords ASEAN a legal personality, which establishes its capacity to join other international organisations and gatherings in its own right and to sue and be sued. It also establishes greater institutional accountability and reinforces ASEAN as a serious player in the Asia Pacific region.

The ASEAN Secretariat in Jakarta has been strengthened. As ASEAN now has a legal personality, each member-country has despatched a Permanent Representative to ASEAN, just as we do to the United Nations in New York and Geneva and to the European Union in Brussels. Some 33 non-ASEAN ambassadors have been accredited to ASEAN.

While politics will necessarily drive ASEAN integration, it is economics that will keep it going. The 2007 ASEAN Summit in Singapore saw the signing of the Declaration on the ASEAN Economic Community (AEC) Blueprint. The Blueprint maps out the steps towards transforming ASEAN into a single market and production base by 2015. Thus, ASEAN aspires to be at the centre of global

economic development through regional economic integration, with free-flowing goods, services, investment and skilled labour.

### **An unfinished Charter?**

As countries amend their constitutions, ASEAN too anticipates changing its Charter when the conditions are opportune. In any case, the Charter has a built-in review clause, which calls for a review in five years.

Like the World Trade Organization and other inter-governmental associations, according to the Charter, "decision-making in ASEAN shall be based on consultation and consensus".

The ASEAN Secretary-General has been empowered to monitor compliance and report non-compliance to the Summit. When sitting with his peers no Prime Minister or President wants to be labelled as hailing from a laggard country. The reality of the "compliance and enforcement" issue is that no ASEAN country is ready to say, "Punish me if I am recalcitrant."

### **Human Rights body**

Perhaps the most controversial element of the Charter is Article 14, which calls for the establishment of an ASEAN Human Rights body. Article 14 was given effect a year later, when ASEAN inaugurated its Intergovernmental Commission on Human Rights (AICHR) in October 2009. The AICHR is mandated to support and protect human rights by promoting public awareness and education and providing advice and capacity-building to government agencies and ASEAN bodies.

The AICHR is a start, a significant first step. It is in the current state of equilibrium where every Member State is comfortable. The establishment of the AICHR is not an end in itself. Its terms of reference note that an evolutionary approach will be adopted. ASEAN leaders expect it to evolve and take on more difficult functions, including various aspects of human rights protection.

### **Conclusion**

I will conclude with four quick observations.

First, the ASEAN legal framework evolved much like the English common-law system. On the other hand, the United Nations and other organisations were created only after officials had drafted a Charter or

Constitution along the Napoleonic Civil Law traditions. If ASEAN is not neat and tidy, and even a little messy, it is not unlike all common-law legal systems, but it offers room for flexibility.

Second, we will not see a unified, EU-style bloc in the immediate future. Such a construct does not suit Southeast Asia at this point in time, but we will progressively reach higher and higher levels of equilibrium that suits us all. This ensures a more defensible and robust set of rules that no single member can argue is disadvantageous to it.

Third, a legal framework serves the needs of the organisation. The dog should wag the tail and not vice versa. ASEAN has forged for itself a role as a neutral core around which a robust regional ecosystem has evolved. Today it hosts successful regional forums like the ASEAN+3 (China, Japan and South Korea), the ASEAN Regional Forum (ARF) and the East Asia Summit (EAS). In fact, more and more countries have shown an interest in participating in these forums. All the major global powers have signed on to the Treaty of Amity and Cooperation, which enshrines our core values. If we can continue to strengthen these ASEAN-based processes, we will be positioned at the centre of an evolving architecture for regional cooperation. The legal framework must serve this purpose and has done so admirably so far.

Finally I return to the question I posed at the beginning. Have we lost our stripes? Can we still roar? My response is that ASEAN is not a tiger. Tigers are an endangered species. Tigers may be fast but may lack the stamina to stay the course. ASEAN is, in my view, a tortoise. It moves at a slow and deliberate pace. Although it has very few natural enemies, it is well protected with body armour. It enjoys a long life, and, as told in the Aesopian fable, the tortoise will win the race.