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ASEAN RULES: RHETORIC OR REALITY?

A dynamic documentary analysis of the nature of ASEAN and its instruments

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From the time of ASEAN's establishment in 1967, the regional organisation has amassed numerous institutional pronouncements which put forth, either directly or indirectly, ASEAN's telos (purpose) and ethos (character). With approximately 367 instruments as of 2012 which are considered to have some binding effect,¹ this works out to be an average of eight instruments that ASEAN adopts annually expressing what ASEAN is, what its purposes are and what it means to do.

A reading of these instruments reveals the pivotal junctures in ASEAN's evolving telos and ethos. First established as an informal regional grouping of states which sought peace and security and economic progress through diplomacy and consensus rather than supranationalism and the law, the fundamental reason for ASEAN's existence evolved from conflict avoidance to encompass closer regional economic cooperation, the strengthening of external relations, the management of geopolitics in the face of the rise of China and India, and, especially in the current phase, an increased momentum for ASEAN Community-building – an ambitious ideal that was first mooted in 1976. These critical regional developments culminated in the 2007 ASEAN Charter which espoused that ASEAN would have legal personality and adhere to the rule of law in order to be taken seriously in the international order. Through the Charter, therefore, ASEAN proclaimed to the international community that it could and would be taken at its word – that what it professed to do could be relied upon seriously as it integrated into an ASEAN Community built on the political-security, economic, and socio-cultural pillars.

Nonetheless, rhetoric surpasses reality. ASEAN wishes to do and be many things but, apart from its original aim to prevent armed conflict from breaking out in the region, it has fallen short of its other goals. Even in the case of binding agreements, it has been estimated that ASEAN has to date adhered to only thirty percent of its obligations. What really is the nature of ASEAN as an international organisation and can it be relied upon in the global legal order? This complex relationship between ASEAN's purpose and character and the quality and effect of ASEAN Rules leads to two profound questions:

1. Are ASEAN Rules merely Rhetoric or Reality? I.e. Are ASEAN instruments an exercise in persuasive language and exaggeration (Rhetoric) or do these rules have genuine effect (Reality)?
2. Given the status of ASEAN Rules, can and does ASEAN Rule? I.e. Can ASEAN wield the influence it seeks in regional and international relations?

The authors' methodology in answering both questions has been the dissection of ASEAN Rules literally and factually. In our literal analysis, we investigated the contradictions in the text of ASEAN

¹ The "Table of ASEAN Treaties/Agreements and Ratification" is issued by the ASEAN Secretariat on an ongoing basis to update the public on the status of selected ASEAN instruments which are considered binding. The Table does not include the other non-binding ASEAN instruments which number into the thousands.

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instruments – how what ASEAN wants to be and achieve conflicts with other priorities enunciated in its instruments. An example of this is how ASEAN’s expressions to uphold human rights and democracy can conflict with its continuing policy of non-interference. We then examined the variance between text and fact, for instance how ASEAN’s vow to become a rules-based entity conflicts with its continuing preference for non-legalisation.

In order to understand ASEAN’s nature, we had to systematically unpack ASEAN’s purpose and character as expressed in its regional instruments. In Chapter 1, therefore, we sought to uncover the authentic ASEAN Telos (Purpose). Comparing the teloi in the constituent instruments of ASEAN and examining ASEAN’s actions through the years, we found that the ASEAN Telos comprises four essential purposes or teloi. ASEAN exists to achieve (1) Peace and Security and Prosperity, (2) the ASEAN Community, (3) a Caring and Sharing Society, and (4) Centrality in External Relations. We also considered the extent to which these purposes have been achieved and the reasons for their achievement and non-achievement.

Concomitant with ASEAN’s Telos is its Ethos (Character). Chapter 2 uncovers ASEAN’s institutional character – what we term the “ASEAN Way” – and the contradictions inherent in it. At the most fundamental level, we observe the conflict between the erstwhile ASEAN *modus operandi* characterised by consultation, consensus, and non-intervention et al. – what we term as the “Old ASEAN Way” – and the “New ASEAN Way” of possessing legal personality and abiding by the rule of law, both of which ASEAN proclaims unequivocally in its Charter. In light of this, we propose a reformulation of the contemporary ASEAN Ethos taking into account the pre-2007 institutional ethos and the pronouncements of the 2007 Charter and subsequent documents. We posit that there are ostensibly six principles in the contemporary ASEAN Ethos: (1) Non-use of force and peaceful dispute resolution, (2) Non-interference, (3) Consultation and consensus, (4) Informal and non-legalistic engagement and decision-making, (5) Human rights and democracy, and (6) Rule of law and institutions. In this list, we find that there are inherent normative contradictions which demonstrate a “split personality” and norm clash for ASEAN as it struggles to successfully adopt and adapt to its new values to integrate into a Community. We find that because a lacklustre record of implementation conflicts with ASEAN’s constant avowal of becoming a rules-based organisation, the value of ASEAN’s promises diminishes. Simply put, ASEAN could, in a worst-case scenario, be construed as an institution which cannot be taken at its word; that it cannot be taken seriously alongside other international organisations if it arbitrarily straddles both the Old and New ASEAN Way. Given how ASEAN wants to be taken seriously as an international legal person, not only is matching action to purpose important, its words are instrumental in building up a reputation of clarity and reliability.

What then are the reasons for ASEAN’s continued rhetorical posturing? Chapter 3 theorises such institutional behaviour. We go down to the crux of why ASEAN dispenses so much rhetoric, who are the drivers of specific rhetorical themes, and also uncover the purposes this rhetoric serves. The functions of rhetoric in ASEAN include (1) Generating and maintaining group identity and unity among member states, (2) Negotiation as an information-gathering and coordination exercise between member states, (3) Proposing and modifying progressive visions for ASEAN development, (4) Addressing specific domestic issues with perceived regional initiatives, and (5) A perception of governments’ achievements in the eyes of their domestic constituents. We posit that ASEAN is in the Business of Dreaming – it wants to be a fully-fledged international organisation, a coherent and

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integrated Community based on the rule of law, and that its words and actions bear significance in the global order. However, ASEAN demonstrates a poor understanding of the ramifications of what it wants to be and have. ASEAN does not fully grasp the full dimensions of its ambitions – that in order to achieve certain aims, sacrifices in other areas have to be made.

Hence in Chapter 4, we evaluate the ASEAN practice of rhetoric and propose practical recommendations for turning Rules from Rhetoric into Reality. It is not realistic to prescribe that ASEAN should desist from rhetoric entirely because of the critical functions outlined. However, to be to be the leader in regional relations and a credible international person, ASEAN must demonstrate itself to be a reliable international person that takes its commitments seriously, that it will discharge its responsibilities to other actors it engages with by strong implementation of its laws and policies and the provision of viable and effective mechanisms for the resolution of disputes if they arise.

Some of the measures we recommend include, first and foremost, ASEAN clarifying its telos and ethos and what it really wants to do in its transformation post-Charter. If it truly wishes to be a rules-based legalised institution and institute the “Contemporary ASEAN Way”, it should strengthen its political will to do so and ensure that the resources are available to make this happen. If ASEAN wishes to continue the “Old ASEAN Way”, it should then state so clearly and scale down its rule of law ambition accordingly. Furthermore, ASEAN needs to reconcile principles of the “old ASEAN Way” while maintaining new principles of human rights and democracy and the rule of law and institutions because these are its credentials in the international order. The principles of non-interference and non-legalisation can still remain part of the ASEAN Ethos but they must be used with discretion, calibrated such that the application of law becomes the norm and flexibility and ambiguity are the exceptions reserved for special circumstances where it justifiably procures better outcomes. If ASEAN wishes to choose legalisation for specific pillars for development, it should also make a distinction where and which pillars should incorporate the rule of law for consistency, e.g. the ASEAN Economic Community, and clarify the areas where more flexible, non-legalistic methods would be more useful to integration. Second, ASEAN should institute clear treaty-making procedures in line with international legal practice such that the existing jumble of ASEAN instruments is unequivocally separated as binding or non-binding. It would be helpful to identify a set of core ASEAN commitments and those which are of secondary importance. Third, ASEAN should mean what it says and actual results should follow. The principle of the rule of law and institutions encompass good governance, transparency, and accountability. The Secretary-General and Secretariat should be permitted to carry out their mandate on the monitoring of compliance and publishing the results in a regional report. Lastly, ASEAN needs to be more careful in its rhetoric-making – the speed and volume at which it is produced is overwhelming; it would be much better to have realistic timelines for the achievement of goals. For instance, the 2015 deadline to build the ASEAN Community is improbable.

Sustaining the future of an ASEAN Community and the unity that has served the region so well for nearly half a century necessitates sacrifice and whether these sacrifices are worth making to ensure ASEAN’s place in the contemporary international order is ultimately the ASEAN member states’ call.