

The Ongoing Transformation of ASEAN into a Rules-based Community

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Introduction to the Rules-based ASEAN: Power, Politics, Law, and Institutions

Overview

The Association of Southeast Asian Nations (ASEAN) is arguably the most important form of regional cooperation for its ten member states – Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam – notwithstanding other multilateral arrangements they might have. ASEAN has facilitated the region's peace and security and, increasingly, its economic significance vis-à-vis Asian powers (e.g. China, India, and Japan) and other global powers (e.g. the US and the EU). Yet since 1967, ASEAN had for 40 years operated under an ostensibly informal status and flexible modality, eschewing an overt reliance on the law.

In 2007, however, ASEAN member states sought to 'catch up', adopting the ASEAN Charter to radically transform the organisation into a tri-pillared (political-security, economic, and socio-cultural) Community based on the rule of law and rule of institutions. Through the Charter, ASEAN expressed its ambition to have a meaningful presence on the global plane, wield significant leadership in the regional order, and improve the lives of ASEAN citizens. At the end of 2015, the tri-pillared ASEAN Community (political-security, economic, and socio-cultural) was established, with a new roadmap stretching to 2025. To date, ASEAN remains the only formal, rules-based organisation in the Asia-Pacific.

As ASEAN gradually evolves and progresses in its rules-based modality (i.e. both hard and soft laws), the growing impact of the organisation will necessitate basic knowledge of ASEAN laws and policies by those in the public and private sectors both within and without the region. This course examines the emerging area of ASEAN law and its intersection with national and international law and politics, the management of power relations, and the metamorphosis of ASEAN into a contemporary international (regional) organisation. It deals primarily with Law but is also attentive to the Non Law and Quasi Law aspects inherent in ASEAN's character as an international person, its values and principles, and its operational modalities, processes, and institutions.

Learning outcomes

Participants will get a good grounding in ASEAN Law and Policy (and the core essentials of public international law). More importantly, as this course straddles the realm of international law and international relations, participants will understand:

1. How international and regional events, powers, politics, and strategic relations shape ASEAN Law and Institutions, and vice versa;
2. The objectives of ASEAN in moving towards Law and Institutions, and the parameters of a Rules-based ASEAN;
3. How Law is important in ASEAN, and where Non-Law or Quasi-Law is even more important;
4. How various actors – states, public institutions, private corporations, civil society, and individuals – can effect regional and state-level changes in ASEAN; and
5. How the growing impact of ASEAN will necessitate basic knowledge of ASEAN laws and policies by those in the public and private sectors both within and without the region.

Modules

- I. The Ongoing Transformation of ASEAN into a Rules-based Community (Teaching time: 3-4 hours)
- II. The Rule of Law and Law-making in a Rules-based ASEAN (Teaching time: 3 hours)
- III. Regional Governance, Decision-making, and the Rule of Institutions in ASEAN (Teaching time: 3 hours)

The Ongoing Transformation of ASEAN into a Rules-based Community

(Teaching time: 3-4 hours)

Key Module Takeaways

Although the undertaking to be a Rules-based ASEAN is in progress, the role and the rule of law and institutions in ASEAN remain highly contested by internal players and external observers. Yet, it is an undeniable fact that the requirements of a Rules-based ASEAN are increasingly gradually and will be a permanent part of the ASEAN landscape. This introductory module discusses the Power, Politics, Law, and Institutions in the Transformation of ASEAN from a Political Creature (1967–2007) to an Evolving Legal Creature (2007–). At the end of the module, participants would be able to form a substantiated opinion on the extent to which ASEAN may be viewed through the legal lens.

- The history and evolution of ASEAN
- The raison d'être of ASEAN and its morphing purposes
- The ASEAN Way – norms, values, and principles (diplomatic/political/non-legalistic), Westphalian mindset, absolute sovereignty
- The modus operandi of ASEAN
- The laws and institutions of ASEAN and their development
- Rationale for transformation to the Rule of Law and Institutions by becoming a Rules-based Community
- What ASEAN wants to achieve in this phase of development (integration, tri-pillared Community)
- New concepts, norms and principles – rule of law, rules-based, legal personality, compliance, dispute settlement, monitoring, human rights, etc.
- New institutions and competences – Summit, AMM, ACC, SG, Sectoral Groups, etc.

Required reading

- Shaun Narine, Forty years of ASEAN: A Historical Review, 21(4) Pacific Review (2008) 411-29.
- Report of the Eminent Persons Group (EPG) on the ASEAN Charter (2007)
- Walter Woon, The ASEAN Charter: A Commentary (Singapore: NUS Press, 2016), pp. 40-78.
- At 50, ASEAN is a neighbourhood, not yet community, Jakarta Post (reprinted in the Straits Times, 29 July 2017)
- Barry Desker, Is ASEAN a Community?, RSIS Commentary No.145, 2 August 2017

ASEAN instruments and documents

(Note: To be skimmed through for a feel of the developing of law and institutions in ASEAN through the years, especially at the important junctures.)

- ASEAN Declaration (1967) [Bangkok Declaration (1967)]
- Treaty of Amity and Cooperation (1976)
- Declaration of ASEAN Concord I (1976) [Bali Concord I (1976)]
- Agreement on the Establishment of the ASEAN Secretariat (1976)
- Singapore Declaration (1992)
- Declaration of ASEAN Concord II (2003) [Bali Concord II (2003)]
- ASEAN Charter (2007)
- ASEAN Political Security Community Blueprint (2009)
- ASEAN Economic Community Blueprint (2007)

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- ASEAN Socio-Cultural Community Blueprint (2009)
 - Kuala Lumpur Declaration on the Establishment of the ASEAN Community (2015)
- ASEAN 2025: Forging Ahead Together (Jakarta: ASEAN Secretariat, November 2015) – package of 5 instruments comprises:
- i. Kuala Lumpur Declaration on ASEAN 2025: Forging Ahead Together;
 - ii. ASEAN Community Vision 2025;
 - iii. ASEAN Political-Security Community Blueprint 2025;
 - iv. ASEAN Economic Community Blueprint 2025;
 - v. ASEAN Socio-Cultural Community Blueprint 2025.

Further reading

- History of ASEAN <http://asean.org/asean/about-asean/history>
- Helen E. S. Nesadurai, ASEAN and regional governance after the Cold War: from regional order to regional community? 22(1) Pacific Review (2009) 91-118
- Amitav Acharya, Constructing a security community in Southeast Asia: ASEAN and the problem of regional order (Routledge, 2009), Ch. 2.
- Rodolfo Severino, ASEAN (ISEAS, 2008).
- Jean-Claude Piris and Walter Woon, Towards a rules-based community: an ASEAN legal service (CUP, 2015), Ch. 1.
- Robert Beckman, Leonardo Bernard, Hao Duy Phan, Tan Hsien-Li, and Ranyta Yusran, Promoting Compliance (Cambridge: Cambridge University Press, Feb 2016), Ch. 1.
- Hao Duy Phan, The Association of Southeast Asian Nations: International Legal Personality and Its Treaty-Making Power, 13(2) International Organizations Law Review (2016) 273–307. 2016.

Discussion questions

1. Introductory icebreaker which will set the tone and pace of the class – Make a short list of:
 - What issues and concepts intrigue you about ASEAN or what you think is important from the reading materials
 - What you hope to get out of this class
2. Consider ASEAN in its first forty years of existence (1967-2007). Who holds the power? Is it the ASEAN member state(s) or the ASEAN Secretariat (representing the organisation as a single entity)? Or a combination?
3. Consider the major constituent instruments of ASEAN in its first forty years (Bangkok Declaration, TAC, Bali Concord I and Bali Concord II). How have the principles, purposes and actions of ASEAN changed? Has ASEAN demonstrated rule of law characteristics through the adoption and practice of these instruments? What degree of the rule of law has been evidenced?
4. The ASEAN Charter (2007) is meant to bring about significant transformation to ASEAN in form and substance. What were these ground-breaking changes that were intended? What does ASEAN want to achieve?
5. What was the rationale behind the ASEAN Charter aspirations?
6. What are the legal and institutional changes that have been mandated by the ASEAN Charter to bring about the goals of the ASEAN Charter? Do the new institutions and competences of ASEAN

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wield real power? What degree of power do they have? Do they wield potential expanded powers?

7. Does the ASEAN Charter enhance regionalism? Why? Why not? How does it do so?
8. The ASEAN Community has just been declared officially established on 1 January 2016. Has the ASEAN Charter succeeded in bringing about the intended outcomes? Why? Why not?
9. What do you see as hindering the further development of the rules-based ASEAN Community?
10. Making the leap from politics to law to reality: Clash between the Old and New ASEAN? What is the tension (or clash) between the norms of the Old (pre-2007) and New (post-2007) ASEAN?
11. Is it possible to view ASEAN through the legal lens? Which do you think is a more effective organisation and/or more suited to the ASEAN member states – the Old or New ASEAN? What is the likely trajectory of ASEAN development – the rule of law or politics?

Teacher's Guide

From the time of the adoption of the ASEAN Charter (2007), ASEAN has professed to be rules-based. Nonetheless, this objective is arguably still in fairly early stages of development. There are certain issues with regard to understanding what a Rules-based ASEAN is:

1. What does ASEAN mean by being rules-based? Is there a collective understanding or does this vary across all member states?
2. It must be acknowledged that there is some disparity between profession and actual practice of being and/or becoming rules-based. Why? Do ASEAN members take the rules-based transformation seriously?
3. Whatever the contentions or different viewpoints, it should be clear that being rules-based will become a permanent part of the ASEAN landscape.

This introductory module is meant to guide students to understand the what ASEAN was in its 'pre-law' phase as a Political Creature (1967–2007); what the ASEAN Charter was meant to bring about; and what ASEAN has done and will continue to do in its evolution to becoming rules-based (2007–). This is a multi-faceted and interdisciplinary issue involving Power, Politics, Law, and Institutions, which will necessitate the critical deconstruction of preconceived and one-sided notions about ASEAN. At the end of the module, participants should be able to form a substantiated and nuanced opinion on the extent to which ASEAN may be viewed through the legal lens.

While the questions in the syllabus are meant as a reading guide to help students pinpoint the core issues in the materials, the questions also double up as class exercises.

(Tip: It is to be expected that the questions when verbalised in class as class activities elicit shy or no responses. But ask the students to discuss for 1-2 minutes in groups of 2-3 persons and then share their answers. Much more engaging and participative, and students will learn by critically thinking as in small groups.)

Exercise 1: ASEAN as a Political Creature (1967-2007)

Consider ASEAN in its first forty years of existence (1967-2007).

- Who holds the power? Is it the ASEAN member state(s) or the ASEAN Secretariat (representing the organisation as a single entity)? Or a combination?
- Consider the major constituent instruments of ASEAN in its first forty years (Bangkok Declaration, TAC, Bali Concord I and Bali Concord II). How have the principles, purposes and actions of ASEAN changed?
- Has ASEAN demonstrated rule of law characteristics through the adoption and practice of these instruments? What degree of the rule of law has been evidenced?

Note: This activity should draw out all the substantive historical and political components of ASEAN in its first four decades through (1) its activities and (2) as enunciated in its constituent instruments.

Exercise 2: ASEAN Charter as the Turning Point for Becoming Rules-based

The ASEAN Charter (2007) is meant to bring about significant transformation to ASEAN in form and substance.

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- What were these ground-breaking changes that were intended? What does ASEAN want to achieve?
- What was the rationale behind the ASEAN Charter aspirations?
- What are the legal and institutional changes that have been mandated by the ASEAN Charter to bring about the goals of the ASEAN Charter?
- Do the new institutions and competences of ASEAN wield real power? What degree of power do they have? Do they wield potential expanded powers?

Exercise 3: ASEAN as an Evolving Legal Creature (2007-)

The ASEAN Community was declared officially established on 1 January 2016.

- Has the ASEAN Charter succeeded in bringing about the intended outcomes? Why? Why not?
 - What do you see as hindering the further development of the rules-based ASEAN Community?
 - Making the leap from politics to law to reality: Clash between the Old and New ASEAN? What is the tension (or clash) between the norms of the Old (pre-2007) and New (post-2007) ASEAN?
 - Is it possible to view ASEAN through the legal lens? Which do you think is a more effective organisation and/or more suited to the ASEAN member states – the Old or New ASEAN? What is the likely trajectory of ASEAN development – the rule of law or politics?
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