

# Facing Unfair Criticisms

## Tan Sri Ahmad Fuzi bin Abdul Razak

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It was Tuesday, 20 November 2007. As I stood together with my fellow ASEAN High Level Task Force (HLTF) colleagues in the imposing Banyan Ballroom of Shangri-La Hotel, Singapore to witness the signing ceremony of the ASEAN Charter, I could not help feeling a deep sense of satisfaction.

There was every justification to rejoice at a job well done. We have managed to complete our work within the stipulated

11-month time frame. We have proven what a dedicated collective effort could achieve within ASEAN by acting together.

The event itself was epochal for ASEAN. It marked a significant stage in the evolution of the 40-year-old regional organisation.

## Criticisms of the Charter

Critics of ASEAN however, were quick to highlight the inadequacies of the Charter. It was belittled as merely a “compendium of ASEAN’s existing principles and agreements already developed and in force in the last four decades”. It was criticised as not being “bold and visionary” enough and “a huge let-down”. The Charter, it was asserted, contained “no single big idea or single overarching policy to revitalise ASEAN’s appeal to its 500 million people”. Particular criticisms were directed at the absence of specific provisions in the Charter on the mobilisation of resources including the setting up of a “Special Fund” to narrow the development gap within ASEAN as recommended by the Eminent Persons Group (EPG). The retention of the principle of consensus in decision-making and non-interference was also criticised as being not progressive or forward-looking. There was no provision for suspension or expulsion of members for non-compliance. Even ASEAN’s attempt at defining and developing its own identity was ridiculed. The various “blemishes” it suffers would eventually relegate the Charter to nothing more than “a piece of paper”. In the wider context, comparisons were made between ASEAN and the EU, by looking at what had been achieved by ASEAN on the basis of the Charter, with the EU in Europe.

## The Significance of the Charter

These criticisms need to be addressed. Some of the critics did not fully appreciate the complexity of ASEAN including how ASEAN works as an evolving regional organisation. ASEAN's institutional building initiatives and improvement of its organisational structure through the Charter process were not fully understood. They also failed to appreciate the totality of the whole exercise. Criticisms of the Charter appeared to be premised more on critics' disappointment at not seeing what they themselves wanted to see in the document. Realism and pragmatism seemed to be far from their consideration. Indeed, their rather condescending attitude smacks of arrogance whilst being unfair to the ASEAN Charter drafting process and what it took to draft and complete such a major document involving ten member states.

## Vientiane and Kuala Lumpur

It should be appreciated that whilst the Charter proposal was not an entirely new idea, the political decision made within ASEAN to pursue a Charter, as formally reflected in the 2004 Vientiane Action Programme and the 2005 Kuala Lumpur Declaration on the establishment of the ASEAN Charter, was a very significant development. The KL Declaration marked the formal end of whatever misgivings and initial reluctance on the part of some member states, for ASEAN to have such a legal document. Tribute in this regard should go to those dedicated ASEAN Senior Officials whose initiative at accelerating the process of pursuing a Charter was subsequently endorsed by ASEAN's political leadership. Without such initiative

the Charter idea would remain just that — an idea to be continuously and endlessly explored and debated.

## **From EPG to HLTF**

It was to ASEAN's credit that, following the submission and acceptance by the ASEAN Leaders of the Report and Recommendations of the Eminent Persons Group (EPG) in Cebu, the Philippines in January 2007, the task of drafting the ASEAN Charter was delegated to Senior Officials who were familiar with ASEAN's history, contemporary realities and vision of the future. Their comprehensive understanding of ASEAN and the position of member states on various sensitive issues provided a useful backdrop in enabling them to complete their work whilst preserving the unity and integrity of ASEAN as an organisation.

## **Mutual Accommodation and Consensus**

Members of the HLTF took great pains to preserve the principle of equality within ASEAN in the course of tediously negotiating the 55 Articles contained in the Charter. No undue pressure of one or more states by other member states was tolerated. Persuasion and the power of arguments were recognised as the basis for compromise and final agreement. No single member state could claim to play the dominant role or that the Charter was based on its original draft. It was entirely a collective effort from the beginning to the end. The process itself reflected a clear example of a politically negotiated but legally binding ASEAN document par excellence.

## Some Dramatic Moments

Negotiations throughout the 13 meetings held by the HLTF were not without tension, occasional outburst of emotions or dramatic moments. The absence of “undue pressure” did not mean the complete absence of “threats” exhibited by some members from time to time. Such conduct or negotiating techniques reflected the burden held by the HLTF members in protecting their respective national interest pertaining to key provisions in the Charter. The older ASEAN member states namely Indonesia, Malaysia, the Philippines, Singapore and Thailand even had to counter the notion of being seen to be “too generous” in conceding to the CLMV (Cambodia, Laos, Myanmar and Vietnam) member states on various critical and sensitive issues in the Charter.

## ASEAN Human Rights Mechanism

Perhaps the single most sensitive issue faced by the HLTF was the drafting of the enabling provision pertaining to the establishment of an ASEAN Human Rights mechanism. The HLTF had to contend with the well-known positions held by member states on the issue including the fact that Indonesia, Malaysia, the Philippines and Thailand had already established their own National Human Rights Commission. Continuous pressure was also being exerted by the relevant NGOs during the drafting process on the governments concerned to the extent that the inclusion or otherwise of a reference to an ASEAN Human Rights mechanism was looked upon as a measure of the relevance and significance of the Charter itself.

For a long time “human rights” was considered “taboo” within ASEAN and was never the subject of detailed

deliberations. As such, even to discuss it in the manner undertaken by the HLTF was a major progress for ASEAN. The final resolution of the issue among member states certainly spoke well of ASEAN's increasing recognition of the importance of human rights for the general wellbeing of all citizens of the region, consistent with the notion of transforming ASEAN into a "people-oriented" organisation. A major challenge now is to ensure that the body would be able to function well without allowing itself to become the subject of ridicule by critics within and outside the region.

## **Mobilisation of Resources**

It was true that no specific provision was made in the Charter with regard to the mobilisation of resources. Many within the HLTF itself were unhappy with its inability to achieve a consensus on this. Various proposals put forth on the table were not even considered. ASEAN currently has to contend with the USD904,000 (USD Nine Hundred and Four Thousand) annual contribution made by each member state for its operating budget and whatever additional funds voluntarily contributed towards the ASEAN Development Fund.

In practice, however, each member state had to incur more than their respective annual contribution when account was taken of the financial commitments made in hosting and attending the relevant ASEAN Meetings at various levels and in organising ASEAN-related events throughout the year. Critics should also take note that the mobilisation of resources issue is now being administratively addressed within ASEAN with

the establishment of an Experts Group to improve ASEAN's finances for the benefit of the organisation.

## Myanmar

Western observers were particularly critical on the question of Myanmar in relation to the ASEAN Charter drafting process. It was argued that the provisions on decision-making which made no reference to "suspension or expulsion" as recommended by the EPG was inadequate in allowing ASEAN to effectively deal with such issues. Such a view reflects a misinterpretation of Paragraph 2 of Article 20 on Decision-Making which clearly provides that "where consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made". The spirit behind this formulation is to allow ASEAN Leaders to discuss and ultimately take a stand on any issue other than by resorting to the principle of consensus once the Charter comes into force. Such an option would allow the Leaders some measure of flexibility in making firm decisions on issues considered sensitive as in the case of Myanmar in the larger interest of ASEAN and the region. The challenge now is for ASEAN Leaders to garner the necessary political will to do so in conformity with the provision of the Charter.

## Joining ASEAN

As a member of the HLTF, I was particularly happy that the Charter had finally put to rest any uncertainty on the issue of membership considered highly sensitive by several members. The Charter lists down four criteria for membership:

- (i) location in the recognised geographical region of Southeast Asia;
- (ii) recognition by all ASEAN member states;
- (iii) agreement to be bound and to abide by the Charter; and
- (iv) ability and willingness to carry out the obligations of membership.

The only country outside ASEAN which could potentially satisfy all four criteria is Timor Leste.

In completing the Charter drafting exercise, tribute should be given to the ASEAN Leaders for their vision, ASEAN Ministers for their guidance, the EPG for their views and recommendations, and ASEAN Members of Parliament, Government Agencies, sectoral ASEAN bodies, NGOs and relevant members of the private sector for their commendable inputs. A special tribute should also be given to the ASEAN Secretariat, as represented by the Secretary General and his able Assistants, for their professional advice and to the Assistants of the HLTF themselves for their indefatigable role in enabling the HLTF to resolve sensitive provisions through the creative formulation of provisions acceptable to all member states. Ambassador Manalo and Ambassador Tommy Koh, who took turns to chair the HLTF meetings, also deserve credit for adding colour, vigour and urgency to the deliberations.

## **Not Perfect But Best Achievable**

In the final analysis, the ASEAN Charter cannot but reflect the prevailing regional realities. It is not intended to be an ideological thesis but a broad framework of rules, regulations and procedures to govern the conduct of relations involving

members of ASEAN. No Charter can be perfect. The language in the Charter too can never be simpler or clearer. Any semblance of ambiguity that exists is creatively intended to achieve consensus which can only be understood and appreciated within ASEAN. The Charter is also as bold and visionary as it can be so as to ensure compliance. Pragmatism, ultimately, is the key word.

ASEAN member states should take pride in finally having the “mother of all documents” that could be the source of common reference and that should prevail over all other ASEAN instruments of the organisation.

### **Charter a Living Document**

A useful Charter is one that is implementable and fully complied with. Compliance, however, cannot be on a selective basis. Disappointment with any provision of the Charter should not be an excuse for non-compliance or for withdrawal from member states’ commitment to ASEAN. The Charter must also be a living document. The provisions on Amendments and Review can take care of whatever inadequacies that currently exist. The so-called “lowest common denominator” can be gradually upgraded over the years as ASEAN matures. ASEAN’s capacity to continue to evolve in meeting changing circumstances should not be underestimated. To compare it with the EU equivalent document (if ever it is eventually agreed upon) is not only unnecessary but inappropriate and irrelevant. The relevance of ASEAN with its own distinct Charter in any case is not and should not be measured by the degree of similarity that it enjoys with the EU. ASEAN is not about “simply copying” the EU. ASEAN is ASEAN with its own

wisdom, practices and evolutionary pace and there should be no apology for that.

As ASEAN turns 42 in 2009, the existence of a fully ratified Charter, ready for enforcement, should mark the beginning of a new era for the organisation. It has every right to function well as a rules-based organisation with, *inter alia*, clearly defined principles, purposes, legal personality, membership, organs, decision-making process, settlement of disputes mechanisms, privileges and immunities, protocols and practices, identity and conduct of external relations.

### **ASEAN's Future**

Much work, no doubt, lies ahead for ASEAN. Creating an ASEAN Community to cover all the three Security, Economic and Socio-cultural pillars requires the full commitment of all member states. And so is the commitment towards ASEAN's central position and as the cornerstone in the foreign policy of member states. Such commitments will be strongly rooted now with the existence of the ASEAN Charter which should enjoy a special place within ASEAN as it continues to evolve in the years ahead for the benefit of all members.