

**Lecture of
Ambassador Rosario G. Manalo
“The ASEAN Charter and
the Building of an ASEAN Community”
Supreme Court of the Philippines
19 February 2010**

The Honorable Chief Justice,
The Honorable Justices of the Supreme Court of the Philippines,
Excellencies,
Distinguished Guests,
Friends,
Ladies and Gentlemen,

I wish to convey my appreciation to the Supreme Court of the Philippines, the Philippine Judicial Academy and the ASEAN Law Association for their kind invitation for me to address this august gathering on a topic which is highly significant to our country and the Asia-Pacific region.

I started working on issues relating to the then newly-organized Association of Southeast Asian Nations (ASEAN) in this very hall, as a junior Foreign Service Officer, when this majestic building was the home of the Department of Foreign Affairs.

It is with a feeling of homecoming that I render this presentation on ASEAN as it passes the forty-first year of its existence.

I would have wanted to address this gathering of learned persons in the law and other disciplines as a practicing lawyer, arguing for a client. For the longest time, however, the client I serve is our government and the Filipino people. If I have accomplished some in the international arena, it is because I was able to draw on the skills of a lawyer and the knowledge of the law, initially obtained in the hallowed halls of my Alma Mater, the College of Law of the University of the Philippines¹...and where, I may add, the law is taught in the grand way.

A few members of this Court have made similar marks in the international arena -- Cesar Bengzon and Florentino Feliciano as members of leading international tribunals, and Roberto Regala, Claudio Teehankee and Hilario Davide in the frontlines of Philippine diplomacy. All were deeply aware that law has a large role in diplomacy, in that inter-state relations is most stable and mutually beneficial to all when based on amity and the law of nations.

¹ *Ambassador Manalo holds a law degree from the University of the Philippines' College of Law and passed the Bar in 1958. She passed the competitive Foreign Service Exams for Filipino Career Diplomats in 1959 making her the first Filipina to successfully hurdle these examinations, thus pioneering for Filipino women to be career diplomats.*

For a developing country like the Philippines, there is no other path, as the Constitution itself states that the Philippines “*adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.*” We have been guided by this constitutional mandate in the various facets of the country’s relations with the rest of the world and most especially with ASEAN.

We, the peoples of ASEAN, are journeying in a significant crossroad of our region’s destiny. Our states and societies are together in a major regional effort towards greater integration to realize by 2015 the vision of an **ASEAN Community**.

ASEAN was established on 06 August 1967, out of an earnest desire of its five (5) founding Members – **Indonesia, Malaysia, the Philippines, Singapore and Thailand** – to ensure stability and security in South East Asia, which at that time was besieged with tensions and conflicts arising from the Cold War. This common aspiration for regional peace and harmony found expression in the ASEAN Declaration of 1967. From a simple document consisting of merely five (5) clear articles, the Association of Southeast Asian Nations, or ASEAN was born and built, operating for a little more than forty years to the present.

As ASEAN moved from strength to strength, coping with the many challenges posed by the political realities of changing times, more countries of the region joined ASEAN --- **Brunei** in 1984, **Viet Nam** in 1995, **Lao PDR** and **Myanmar** in 1997 and **Cambodia** in 1999. Well before the start of a new century, ASEAN emerged as a concert of ten peace-loving South East Asian States cooperating and strengthening relations among themselves, and relating to friendly states outside its region.

In 1989, with the end of the Cold War and the outset of globalization, the world order and the dynamics of international life were drastically altered. New actors and elements beyond the traditional nation-states, with their challenges have turned the conduct of international relations and diplomacy more complex. The evolving global challenges of the 21st century compelled the ASEAN of 1967 to rethink its vision, its objectives, its approach, and its structure and operations.

The ASEAN Charter: The Way Forward

After surveying the region’s prospects for the future, and preoccupied in maintaining the Organization’s credibility and relevance, the Member-States concluded that ASEAN had to become increasingly integrated to be able to better respond to the demands and needs of the region.

Under the 1967 Declaration, ASEAN suffered from the absence or the presence of idiosyncrasies described as follows: It had no legal personality, its decisions were not legally-binding, its meetings were quite informal, it had no political legal framework, nor a set of principles and purposes attuned to the times, it was in need of an updated machinery, and more efficient processes to formulate policies and decisions as a region.

Considering all the foregoing, the ASEAN Charter had to come into being.

Thus, on **20 November 2007**, the ASEAN Charter was signed by the ten Heads of States and Governments of the Member-States. It comprises 13 Chapters, 55 Articles, and 4 annexes.

More than a year after, on **15 December 2008**, the Charter entered into force, ratification by respective national processes having been completed before said date by each of the ten Member-States!

The Charter is brief yet written in clear unequivocal statements. It is comprehensive yet flexible. The Charter was formulated as such to allow it to endure and to adapt with the mutating circumstances and dynamic conditions, regionally and internationally.

From this Charter, as the political legal framework of the Organization, implementing protocols and other legal and political instruments are to be derived and will bind all Member-States to comply. This framework codifies the Organization's fundamental principles which have consistently bound the Member-States as a group, and the most outstanding of these principles being: (a) decision-making by consultations and consensus; and (b) non-interference in the internal affairs of the Member-States.

The Organization will remain intergovernmental.

Recognized in the Charter itself as integral to the creation of an **ASEAN Community** is *"the need to strengthen existing bonds of regional solidarity...that are politically cohesive, economically integrated and socially responsible."* Hence, the setting up of three community pillars, which are essential parts of the institutional structure of the Organization, as is the ASEAN Human Rights Body presently established with its Terms of Reference and now officially known as the ASEAN Intergovernmental Commission on Human Rights (AICHR).

Aside from the three community pillars and their respective councils, the other important institutional changes to ASEAN as a result of the Charter are:

- convening of two ASEAN Summits in a year, instead of just one;
- establishment of the ASEAN Coordinating Council composed of ASEAN Foreign Ministers;
- appointment of Permanent Representatives to form the Committee of Permanent Representatives to ASEAN in Jakarta;
- single Chairmanship in one (1) year;
- strengthening the role of the Secretary-General of ASEAN; and
- provisions for dispute settlement mechanisms.

To summarize, ASEAN is to be served by the Charter in three (3) interrelated ways: (1) formally accord ASEAN a legal personality, (2) establish greater institutional accountability and compliance system, and (3) reinforce the perception of ASEAN as a serious regional player in the future of the Asia-Pacific region.²

The Three Pillars of the ASEAN Community

The ASEAN Community's foundations are to be solidly built on three pillars which are all equally important, namely: (1) ASEAN Political-Security Community (APSC) pillar; (2) ASEAN Economic Community (AEC) pillar; and (3) ASEAN Socio-Cultural Community (ASCC) pillar. To bolster efforts to realize these three community pillars, the ASEAN Charter provides the creation of their respective community councils.

The three (3) pillars have developed their respective Blueprints, all incorporated in a program document entitled, "**Roadmap for an ASEAN Community**". The Blueprints contain action points to deliver outputs during a period of six years, that is, from 2009 up to 2015.

But the evolution towards an integrated **ASEAN community**, sustained by the political will of the Member States, will necessarily lead to the development of an ASEAN law regime. The creation of such a legal system will form part of ASEAN's own body of laws, apart from the municipal or national laws of each Member State, akin perhaps to what the European Union labels the EU Law built on an *acquis communautaire*. Standard setting activities and norms are at the core of a rules-based community, hence the role of an ASEAN law and its system to sustain the **ASEAN Community** will be crucial and indispensable.

The ASEAN Political-Security Community (APSC)

Political-security cooperation continues to be at the heart of ASEAN's existence.

Originally, this Community was known as the ASEAN Security Community. The inclusion of the term "*political*" in the nomenclature was an initiative of the Philippines. We believe that in recognizing the **comprehensive nature of security**, there exists equally, if not even more highly and more significant, the political dimension of state relations. The non-acknowledgement of this reality will not allow ASEAN to effectively address or resolve any security concern. We only have to remind ourselves that in the international arena, regardless of whatever the **sectoral** source of a dispute or conflict, the ultimate prevention or peaceful resolution of the crisis will always be **political**, for these solutions will be found only in the game called, **the power politics of states**.

² <http://www.aseansec.org/21085.htm>: "ASEAN Leaders Sign ASEAN Charter", Media Release, ASEAN Secretariat, 20 November 2007.

By its very nature, the APSC emphasizes the pivotal role of ASEAN in addressing both traditional military security concerns and non-traditional security issues, such as for example, effective border controls so necessary in preventing and managing transnational crimes which involve military and/or police cooperation. It is obvious that the work of the APSC is directed towards realizing in concrete terms a peaceful, stable, safe and secure **ASEAN Community**.

The important contribution in this Community by the legal sector of the region is hereby acknowledged and underscored. The APSC has linkages with the following ASEAN sectoral bodies dealing on legal matters, namely: the ASEAN Law Ministers Meeting (ALAWMM) and the ASEAN Senior Law Officials Meeting (ASLOM). In addition, the ASEAN Charter in its Annex 2 recognizes the ASEAN Law Association (ALA) and the ASEAN Law Student Association (ASLA) as entities associated with ASEAN.

In the Blueprint of the APSC, a major action point relates to the establishment of programs for mutual support and assistance among Member-States to develop strategies that will strengthen the rule of law, the judiciary systems and legal infrastructures of the member states. As a step towards this direction, it is proposed that a comparative university curriculum be established on the legal systems of each ASEAN Member-State. This is, indeed, well and good. However, this effort is still nationally rather than regionally oriented, and the legal needs of an ASEAN Community, which is the region as such, is still not being addressed nor responded to by this strategy.

This therefore is a challenge I pose to all the legal luminaries in this distinguished audience Please study and prepare for the role of an ASEAN law because it will have to be there in building a rules-based **ASEAN community**.

The ASEAN Economic Community (AEC)

The ASEAN Economic Community is most significant in that it touches on the wealth of the nations in ASEAN. Currently, the AEC pillar has crafted three major Agreements: the ASEAN Free Trade Area Common Effective Preferential tariff (AFTA-CEPT), which is now metamorphosing into the ASEAN Trade in Goods Agreement; the ASEAN Framework Agreement on Services (AFAS), and the ASEAN Comprehensive Investment Agreement.

All these Agreements may be considered as being derived from the Charter's call for an ASEAN Community. The commitment of each ASEAN Member-State to the Charter and subsequent agreements will necessarily demand an alignment of domestic or national laws, regulations, policies and practices. It is an important task for all the branches of the Governments of ASEAN Member-States to accept the reality that changes have to come nationally, albeit gradually, in their respective legal landscape and in the national policies of each Member-State, if these Governments are truly serious to create the **ASEAN Community**.

For example, these trade engagements in ASEAN are instruments to stimulate change for the better in every ASEAN country's economic functions and the region as a whole. The judiciary of an ASEAN country concerned may be called upon to rule on an issue on any of these instruments, and its ruling may be pivotal to attain a proper settlement, bearing in mind the ASEAN Charter and its vision.

The Philippine Supreme Court, for its part, has exhibited a keen appreciation of trade liberalization and other developments in the world economy. In *Wigberto Tañada v. Edgardo Angara* (G.R. No. 118295, May 2, 1997) which dealt with the ratification of the World Trade Organization, the Court observed:

...Aside from envisioning a trade policy based on "equality and reciprocity," the fundamental law encourages industries that are "competitive in both domestic and foreign markets," thereby demonstrating a clear policy against a sheltered domestic trade environment, but one in favor of the gradual development of robust industries that can compete with the best in the foreign markets. Indeed, Filipino managers and Filipino enterprises have shown capability and tenacity to compete internationally.

The ASEAN Socio-Cultural Community (ASCC)

Primary in the goals of the third pillar of ASEAN is a people-oriented and socially responsible **ASEAN Community**, wherein development is to the exclusion of no one, and that the rights and welfare of all, especially women, children, and the most vulnerable are promoted, protected and upheld.

The ASEAN Socio-Cultural Community brings to the fore the conceptualization and eventual realization of (1) human development, (2) social welfare and protection, (3) social justice and rights, (4) environmental sustainability, (5) building an ASEAN identity, and (6) narrowing the development gap.

The 17 sectoral ministerial bodies that compose the ASCC Council are challenged to meet the goal of a **One Caring and Sharing ASEAN Community** by 2015.

It is thus in this context that we look into ourselves as a Member-State of the ASEAN and determine our role in the noble task of building the **ASEAN Community**. For the Philippines, we have contributed, among others:

- In ensuring environmental sustainability through the hosting of the ASEAN Center for Biodiversity in Los Baños, Laguna and in the ratification of the ASEAN Agreement on Disaster Management and Emergency Response, which eventually led to the agreement's entry into force on 24 December 2009. Let it be known, too, by this highly esteemed body that this year, the Philippines takes chairmanship of the ASEAN Committee on Disaster Management and is committed to ensuring that the ASEAN Community is prepared and ready to respond to disasters and manage risks within the region.

- In promoting social justice and mainstreaming people's rights as we take lead, together with Indonesia, in working towards an instrument to operationalize the ASEAN Declaration on the Protection and Promotion of Rights of Migrant Workers. Perhaps this may call for an eventual ASEAN Agreement on Migration.

While thinking out of the box, I would add my own proposal hoping to contribute to social justice, social cohesion and understanding in the ASEAN Community, and that is: that the working masses of ASEAN must enjoy the coverage and benefit of an ASEAN Social Charter. This is perhaps another challenge to tackle and pass on to the political and legal luminaries of the region.

***The Regional Mechanism to Promote and Protect Human Rights:
The ASEAN Intergovernmental Commission on Human Rights (AICHR)***

The topic most debated by the High Level Task Force (HLTF) charged with the Drafting of the ASEAN Charter was the establishment of a human rights body. Initially, there were some who believed that there is actually no need to establish a human rights body in ASEAN. Majority, however, thought otherwise. But even then, it was unclear what type of body will be established: will it be a "Commission", "Forum", "Board", "Body", "Agency", "Mechanism", etc. As such, the HLTF decided to recommend an enabling clause in the Charter towards the establishment of an ASEAN Human Rights Body. But in order to determine what this "body" would really be, the HLTF recommended that the nature of the "body" be defined in the terms of reference (TOR) that was to be adopted by the ASEAN Member States at a later date.

The TOR creating the ASEAN Intergovernmental Commission on Human Rights (AICHR), hereinafter called the Commission, is more of a political document than a legal one. It is still a legal document in a sense, since it is an extension of the Charter as far as the establishment of the Commission is concerned. And yet, it is more of a political document since it was crafted to be flexible, to accommodate the varying comfort levels on human rights of the different ASEAN Member-States with respect to human rights issues and concerns. This is only a starting point.

If there are some differences in the interpretation on the TOR, the Commission can rely on the summary records of the High-Level Panel that drafted it. If still no consensus is achieved, then the solution is not a legal one but a political one. The Commission does not go to court but submits the question of interpretation to the Foreign Ministers to decide, also by consensus.

The Commission is an intergovernmental and consultative body. It is intergovernmental and reflects the nature of ASEAN itself: an intergovernmental organization. As such, the membership of the Commission consists of the Member-States of ASEAN, each appointing a Representative.

With regard to the Commission being a consultative body, it was agreed by the drafters of the TOR that the term “consultative” is not the same as the context of “consultative status” under the United Nations system. Unlike in the UN system where a non-governmental organization with a consultative status is not a part of the UN body concerned, but can be consulted on matters within its competence, the Commission is part and parcel of ASEAN as one of its principal organs. The AICHR as being a “consultative body” merely relates to its decision-making process which is by **consultations and consensus**.

Towards a Rules-Based Organization

The ASEAN Charter formally accorded the ASEAN a distinct legal personality which is separate from those of its Member-States as well as established a system for greater institutional accountability and compliance.

The ASEAN Foreign Ministers established a High Level Legal Experts’ Group to work on the legal issues arising from the ASEAN Charter which required implementation, namely:

- (a) Legal personality of ASEAN in accordance with Article 3;
- (b) Privileges and immunities of ASEAN pursuant to Articles 17, 18 and 19; and
- (c) Dispute settlement mechanisms in accordance with Articles 25 and 26.

After extensive negotiations, the experts group submitted the following agreements for adoption:

- (a) The Agreement on the Privileges and Immunities of ASEAN; and
- (b) Protocol on Dispute Settlement Mechanisms and its attached Rules of Arbitration, Rules of Conciliation, Rules of Mediation and Rules of Good Offices.

A Legal Personality for ASEAN

The *Agreement on Privileges and Immunities of ASEAN* was signed on 25 October 2009 by the Foreign Ministers of ASEAN Member-States. It is awaiting the ratification of the Member-States before it enters into force.

The Agreement will operationalize two important aspects of the ASEAN Charter. The first concerns the legal personality of ASEAN as an inter-governmental organization under Article 3 of the ASEAN Charter. Accordingly, ASEAN will have relevant legal capacities both under the domestic laws of the ASEAN Member-States and under international law. These pertain to its capacities to enter into contracts, acquire and dispose of movable and immovable property, to institute and defend itself in legal proceedings, and to conclude agreements with other countries or sub-regional, regional and international organizations.

Secondly, the Agreement lays down the harmonized minimum standards of privileges and immunities to be conferred upon ASEAN (*Article 3*) and entities mentioned in the ASEAN Charter, namely, the Secretary-General of ASEAN and staff of the ASEAN Secretariat (*Article 4*), experts on missions for ASEAN (*Article 5*), Permanent Missions (*Article 6*), Permanent Representatives and officials on ASEAN duties (*Article 7*), staff of the Permanent Missions (*Article 8*) and officials of the Member States (*Article 9*).

Dispute Settlement Mechanisms

The ASEAN Foreign Ministers also approved the proposed *Protocol on Dispute Settlement Mechanisms* and its relevant Rules on 14 January 2010. It is expected to be signed shortly, and thereafter ratified according to the national laws of the Member-States.

In accordance with Article 25 of the ASEAN Charter, the Protocol establishes appropriate dispute settlement mechanisms, where such mechanisms are not otherwise specifically provided, for disputes which concern the interpretation or application of the ASEAN Charter and other ASEAN instruments.

The Protocol encourages the Parties to the dispute to make every effort to mutually agree on a solution to their dispute. If the Parties are unable to do so, including through the dispute settlement mechanisms specified in the Protocol, the Protocol provides for a procedure whereby the Parties may bring the dispute to the attention of the ASEAN Coordinating Council, composed of ASEAN Foreign Ministers. The ASEAN Coordinating Council may then direct the Parties to the dispute to resolve their dispute through good offices, mediation, conciliation or arbitration.

Attached to the Protocol as an integral part are rules of procedure for good offices, mediation, conciliation and arbitration.

Arbitration will take place in two instances: (a) when there is mutual consent by the disputing Parties to proceed to arbitration; and (b) when there is a direction by the ASEAN Coordinating Council for the disputing Parties to proceed to arbitration, provided that both disputants go along with the Council's decision.

An important feature of the Rules of Arbitration is the provision of an indicative list of arbitrators to be maintained by the ASEAN Secretary-General. Each ASEAN Member-State may nominate ten individuals to the list. The list is only an indicative one, in recognition of the right of sovereign states to choose their own arbitrators, and considering the eventuality that there might be no one in the list with expertise on the subject matter of a particular dispute. Disputing parties may therefore choose arbitrators from outside the list.

The Protocol and its attached Rules is an important step towards realizing the dream of the ASEAN leaders to transform ASEAN into a rules-based organization.

Other Instruments

Besides the Agreement and the Protocol, other instruments are necessary to address important legal issues under the ASEAN Charter. However, HLEG was unable to finalize said instruments due to time constraints and the complexity of issues to address. These instruments are the following:

- (1) Procedures for ASEAN to exercise its legal capacities at international and domestic levels;
- (2) Rules of procedure for referring unresolved disputes to the ASEAN Summit;
- (3) Rules of procedure for requesting the ASEAN Secretariat to interpret the Charter, and
- (4) Comprehensive Agreement on Privileges and Immunities of ASEAN *(to be proposed to Dialogue Partners and other parties).*

Perhaps, the legal community in ASEAN may wish to make contributions in the development of these instruments

Conclusion

Honorable Chief Justice
and Associate Justices
Excellencies, Guests
Ladies and Gentlemen

I have laid before you the ASEAN Charter and its ramifications. We have worked hard for all of these in the last four years together with our counterparts from the other ASEAN capitals. As ASEAN's stakeholders yourselves, you Honorable Justices, judges and distinguished lawyers in ASEAN, I now invite you to do your share in the building of this immense political edifice, and as partners, we shall be the architects of an **ASEAN Community** as set out in the ASEAN Charter.

I am certain that together, we will succeed in contributing to our region's peace, prosperity and solidarity.

Thank you all for your kind attention.

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