A NEW PHASE AND FACE OF ASEAN LAW: OPPORTUNITIES AND CHALLENGES

ASEAN Law, the ASEAN Way and the Role of Domestic Courts[1]

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Law and Courts

The giving of the 10 Commandments, as an historical reality or as a founding myth, is considered a momentous occasion in the history of law the importance of which transcends the cultures which are part of the Abrahamic religions – Christianity, Islam and Judaism. Little noticed, however, is the singular fact, that before Moses ascends Mount Sinai to receive the Law he has an encounter with his father-in-law, the Midianite Priest Jethro. Jethro, an icon of wisdom, advises and then instructs Moses that it is essential that a system of courts (not just one court!) be put in place a system resembling that which we find till this day in practically all civilizations – lower courts, intermediate courts and supreme courts. Grant me the singularity of this sequence of events: Courts and judges are to be put in place even before the Law is given.

Singular but neither surprising nor shocking. For what is law if there are no courts to interpret it, apply it, enforce it? What are legal obligations if there are no remedies in case these obligations are breached? There are some extreme manifestations of this, ontological, relationship between law and courts. In the Common Law countries at law faculties students essentially learn the law through a study of judicial decisions, leading students to an overly court-centric view of the law. The teaching of law in Civil law countries adopts a more balanced approach putting the norms themselves, constitutions, legislation, administrative law at the core of the curriculum, but even there courts are not epiphenomenal but central to the overall understanding of law and the legal system, an indispensable component.

Thus, thousands of contracts, whether simple (any purchase of a car of that matter a loaf of bread or a bowl of rice) or complex (mega mergers of multinationals), are

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made day in and day out. Most are executed faithfully. Only a tiny fraction of these will ever end up in court. But it is the existence of courts, always there, promising and menacing at the same time, which accounts for this record of faithful compliance. I would go as far as saying, given the human condition, and aware that not all legal philosophers will agree but confident that all practicing lawyers and judges will, that to imagine law without courts, is to imagine something other than law.

ASEAN Law and the Exclusion of the Judicial Branch

Let me now challenge and shock you. I am addressing a gathering of the ASEAN Law Association. We have here lawyers and judges from all ASEAN countries. How many of you can put your hand on your heart and claim to be experts in ASEAN law in the same way and with the same confidence that you would say that you are experts in, say, corporate law, commercial law, criminal law, constitutional law or even international law? Am I wrong in suggesting that very few of you would profess such expertise? Having conducted a major research project with participation of experts from all ASEAN countries over the last 6 years I can say that this is true even of many public officials whose portfolio includes the implementation and application of ASEAN law. I would respectfully suggest that a better appellation of the gathering should be the Association of Lawyers from ASEAN Member States.

If we reflect for just a short while this should neither embarrass nor surprise us. And this for the simple fact that ASEAN law as it has been conceived and perceived to this very day is a law which has by design and by default excluded from its reach, with very very few exceptions, any contact with the courts in the ASEAN countries, the very courts where the business of law takes place, the very courts which make the “law” of our countries real law.

Why should a practicing lawyer ever busy himself or herself with ASEAN law if no case having a breach of ASEAN law as cause of action will ever reach his or her desk? How would a judge develop an expertise in ASEAN law if no case pleading ASEAN law as a cause of action, civil, commercial or administrative, ever reaches his or her courtroom?

Now, I will grant you that in order to capture your attention I might have overstated the case, somewhat. But you grant me that what I have just stated is largely true and that any disagreement regarding the factual veracity of what I have argued is on the margins.

I want to mention what could be the most serious challenge to the reality I described. One might argue that since in important ways ASEAN has changed the conditions for doing business, trading and investing, surely ASEAN law will inform the decisions of enterprises and their legal advisors. Yes, ASEAN law has changed the framework for doing business to the benefit of all ASEAN citizens. But, I would argue, both enterprises and their legal advisors, do not look to ASEAN law itself. They look to the national law which implements, when it does, ASEAN obligations. In the reality of business planning and legal advice, ASEAN law is present only as refracted through its implementation, not infrequently absent or faulty, by national law. And, again, this is understandable and natural given that ASEAN law as such will never, the legal advisor tells the enterprise, provide an enforceable remedy through the courts. At best a polite letter to the administration involved will be sent; and from the little data we have, this last recourse is rarely effective.

ASEAN Law and the ASEAN Way

Why is this so? Why have courts played no appreciable role in the interpretation and enforcement of ASEAN law?

There are several reasons. The first is generic and not ASEAN related. Since ASEAN law is rooted in international treaties and agreements it is a reflection in many systems of the weak position of international law within the domestic legal orders.

The second reason is the fact that in creating obligations through a myriad of decisions and agreements there is not infrequently a certain confusion and even neglect in clarifying the precise legal nature of the commitments taken therein. Are they aspirational or legally binding commitments? This creates a penumbra of uncertainty over the “hardness” of ASEAN obligations.

But, I think, the third reason is the most important. ‘Going to court is not the ASEAN Way’ one all too often hears. There are as many versions as to what exactly the ASEAN Way is, as there are people you ask. But there seems to be a

tacit consensus around the following propositions which I shall paraphrase as follows:

- In ASEAN we work by consensus. We move ahead when we find unanimous consent among our Members.

- We in ASEAN do not solve our disputes by going to courts. We resolve disputes by negotiations which finally leads to amicable solutions.

- The cardinal sin according to the ASEAN Way is to shame a State in public. Honor plays a very important part in ASEAN inter state relations.

Judicial decisions result in Winners and Losers. And that is precisely what the ASEAN Way is not about. So, even the idea of a role for courts in the universe of ASEAN is frowned upon and thus *de facto* excluded. ASEAN has inter-state procedures for dispute settlement but these procedures are distinguished by the great reluctance to put them into use, for the very same reason.

Reconsidering the Role of Courts and the ASEAN Way

What I am about to suggest now might not be what you expect. I am not going to challenge the ASEAN Way. I think there is much wisdom in it and in many ways it has served ASEAN well. And I am certainly not going to argue for a wholesale juridification of ASEAN not only because such would be politically laughable but mostly because I do not think that deep juridification would work well in, and serve well, ASEAN. Instead I want to outline a discrete role for national courts which in my view is not only consistent with the ASEAN Way but can even enhance it.

The Infractions

The infractions in relation to which I see a role for national courts are not of high political significance or visibility. When those occur, should those occur, they should be dealt with politically or, rarely, by the ASEAN dispute settlement mechanisms. But the truth is that those high visibility infractions are not only rare but they do not constitute the real challenge to ASEAN. The infractions I have in mind are the ones that take place below the political radar. That are not the result of conscious governmental decision (say at Cabinet or Ministerial level) to deny or postpone the implementation of an ASEAN commitment but are the result of

administrative inertia, administrative ignorance of ASEAN commitments and/or administrative error. A misclassification of a good, a misapplication of the highly technical rules of origin, a defective procedure for licensing not following ASEAN rules put in place to facilitate doing business are examples of the infractions I have in mind. They are ubiquitous. They may also be the result of Special Interest capture, protectionism in disguise, which may help a certain sector but harm all citizens in this or that ASEAN country.

If you were to consult the experts they would tell you that infraction at this infra-political level is both widespread and harmful not to some abstract 'rule of law' principle but the very interest of the citizens in the country in which they take place, denying these citizens some of the benefits ASEAN is designed to produce. This is a case where, indeed, the devil is in the detail. These are not the type of infractions which normally would be on the radar of our leaders when they meet in ministerial meetings, and if they were to be raised at that level, it would violate the spirit of the ASEAN way since a minor technical administrative breach would suddenly be elevated to a political issue inviting contention, national prestige and the like. It is also not practical since the sheer number of such would just be throwing sand into the system – our Ministers and top civil servants have better things to do than deal with such.

Tackling this Category of Infraction – the Role of Domestic Courts

It is, thus, consistent with the ASEAN way, that such issues not be 'internationalized', that they remain local and be dealt with within the system where the infraction takes place. Here is one of the paradoxes of law and courts. International tribunals politicize and dramatize issues: For one State to take another State "to court" is a dramatic move, in some respects even hostile. Very alien to the ASEAN way. To resolve an ASEAN infraction by a state, whether a result of non-implementation or erroneous application, by that State's own courts, de-politicizes the issue, de-dramatizes it, makes it part of the normal administration of justice on par with a challenge by a citizen to an allegedly wrongful tax assessment, or refusal to grant a license and the like.

Giving a role to national courts has two further great advantages.

First it is the most effective way to give teeth to ASEAN commitments. ASEAN commitments, as mentioned above, are adopted by consensus, by unanimous agreement, an Article of Faith of the ASEAN Way. In reaching such consensual agreement States negotiate, they bargain, there is give-and-take. ASEAN

agreements, in the economic arena, are often complex package deals where States in a spirit of mutual cooperation make concessions to each other. Subsequent failure to implement or faithfully comply and execute damages the consensus based system. What kind of consensus is it if States solemnly agree, after hard negotiations, and then this or that State fails to honor the consensus in the implementation phases? This is not least the case whether that uneven implementation and application is, as I emphasized, not a result of a deliberate government decision, but a result of the vagaries of administration, ubiquitous North and South, East and West? Administrations, after all, regularly slip in the implementation of decisions of national parliaments and governments. And what better way to ensure compliance than the national judiciary? The compliance pull of local national courts is, paradoxically, often times greater than that of fancy international tribunals. Most of the time, most governments, obey most of the decisions of their local courts.

Second, ASEAN Law suffers from a challenge common to the law of all Regional Trade Agreements of which in today's world there are more than 400 – the challenge of monitoring. These agreements are hugely detailed and the infractions take place at the micro-level: A wrongful application by a customs official, a failure to amend arcane administrative law by some parliamentary committee etc. etc. We cannot put a 'compliance officer' at every post where ASEAN law is to be implemented. But we can turn individual stake holders into 'Private Compliance Officers' by giving them – and their legal advisors – legal redress in case they are faced with an infraction. And the only way we can do that is by empowering the national judiciary to become, in these discrete areas, the ASEAN judiciary.

Empowering National Courts – The Legal Techniques

Being a pragmatist I am not about to propose some constitutional revolution – giving, say, ASEAN constitutional status in its Member States or anything like that. I am proposing, instead, harnessing existing legal principles and processes to serve ASEAN law. In some countries, even in ASEAN, treaties have already the status of law and can be pleaded directly before national courts. But what of all the rest?

I want to make three proposals – conservative, moderate and the last somewhat more radical. But even if the radical proposal is not likely to be adopted, embracing the first two will represent a veritable and meaningful change.

1. The “Charming Betsy” Doctrine

The “Charming Betsy” is a time honored principle of interpretation enunciated by Chief Justice Marshall of the United States Supreme Court back in 1804 and ubiquitously adopted in most legal system. At its simplest the doctrine provides that in interpreting national measures – parliamentary acts as well as administrative law – courts within the margin of interpretative discretion available to them, will endeavor to interpret such so as to make them compatible and compliant with the international treaty obligations of the State. Let’s imagine a national licensing procedure which an ASEAN rule is meant to simplify. Let’s further imagine that an ASEAN Member State has failed to implement the ASEAN rule by rewriting the national procedure to offer the more simple form. An individual affected by the non implementation could seize a domestic court challenging the complicated conditions imposed by the extant, unamended national procedure. This would be a standard action for judicial review of administrative action under domestic law, similar to an action if the administrator in question was misinterpreting a national provision. Under the “Charming Betsy” Doctrine, the national court would look carefully at the national procedure and investigate whether it would be possible, without doing violence to its normal cannon of interpretation, to interpret it in a way which would be consistent with the ASEAN obligation. It could, for example, come to the conclusion, *under normal national standards*, that some of the language and conditions in the extant national procedure were superfluous to achieve the objectives of the regulation and thus fail a proportionality test, and in this way bring the national procedure into compliance with the ASEAN rule. No fuss, no compromising of ‘sovereignty’, no political conflict, no big deal. Just doing justice and giving, indirectly, teeth to the ASEAN commitment and rule.

2. Judicial Review of Administrative Action

Most of our legal systems recognize in one way or another some form of judicial review of administrative action. There are two fundamental tests which under different guises one finds in all jurisdiction where judicial review of administrative action – be it an administrative law or an action of a state official. The first is whether the administrator acted *Ultra Vires* – beyond the limits of authority granted to him or her. The second principle is whether the administrative act or action was such that no reasonable administrator could act in that manner in the execution of his or her duties. The courts do not turn themselves into administrators and insist on a measures which they think would be most or more reasonable. They leave the administration wide discretion. But some acts of the

administration are such that the court will find that they are so unreasonable as to be struck down. It is, if you wish, a form of substantive *ultra vires*.

I want to remind you that I am talking of infractions, by omission or commission, which are not the result of deliberate government action consciously deciding, for political or other reasons, to negate their ASEAN commitments. We are dealing instead with infractions the result of inertia, ignorance, or error. At the core of my argument, at the core of this legal technique, is the proposition that, for a civil servant through commission or omission, to bring his or her State into violation of their international legal obligations thereby engaging their international legal responsibility, would, *ipso facto and ipso jure*, be an unreasonable exercise of his or her legal authority. It would, arguably, fall foul of one or both of the substantive tests.

Note that to adopt this legal technique is hardly radical. It is simply to say that a court in examining the reasonableness or otherwise of an administrative act, can add to the factors it takes into consideration also the question whether the act brings the State into violation of its ASEAN legal obligations.

Note, too, that, for example, should the government, at trial, aver before the court that it was aware of the violation at the time the challenged act took place, or having been made aware of it now, still stands by its practice for political reasons which are within the province of the government, the court could defer and not overturn the act, on the condition that such affirmation comes from the political level and not be confined to the administrative level. In other words, the courts would not be in the business of thwarting the political discretion of the Executive Branch, but in the business of ensuring that bringing the State into violation of its international legal obligation was not the result of inadvertence, inertia or error.

Knowing the universe of ASEAN infractions I am confident that in most cases the Government will say, to its own courts, “oops our mistake” and do the necessary correction. They might even do such before the case reaches a court. But they would never do such, or do such far more reluctantly or tardily, if there was no risk of finding themselves before one of their courts. In other words I do not predict a floodgate of cases. The principal role of the national court would be deterrence.

3. Nudging Incorporation

Non-implementation is one of the major afflictions of ASEAN – though as stated it is typically not a result of defiance but of busy legislative schedules, inertia and the

like. Correctly implemented ASEAN law, would, *ipso facto*, give a role to domestic courts since in this case they would be implementing and supervising the application of domestic law. My proposal is simple enough. For the appropriate instruments, the ASEAN decision or agreement should be drafted in a way that would facilitate its implementation by allowing the State to bring it into domestic law without the need for any further elaboration. The ASEAN Measure would, as such, thus become domestic law enforceable before domestic courts.

I am further suggesting, and this might seem to some somewhat radical, that such measures would have a clause stating that if they are not implemented within a predetermined time (say 12-18 months) they would automatically become part of the law of the Member State in question unless its legislature specifically interdicted such. This is not in fact as radical as it seems. We are, after all, talking about consensus decision making. The content of the measure must by definition be acceptable to everyone. And so must there be consensus that the measure should be part of domestic law. And there is also the safety valve that if an unforeseen problem arises, the Member State always has the last word and can block the automatic incorporation. So in the final analysis the Member State retains its full sovereignty. But why should we object to automaticity if all it does is to prevent non implementation by inertia and not by the will of the sovereign State?

Conclusion

What I have suggested here is a discrete and modest role for domestic court in the implementation and application of ASEAN law within the Member States in a manner that is consistent with the ASEAN Way. I do not expect a flood of cases – it is the possibility of judicial enforcement which will provide an incentive to better implementation and application of ASEAN Law. The suggestion may be modest and discrete but they could contribute very significantly to a better ASEAN.