

If the Charter ain't broke, why fix it?

By Sharon Seah

Revising the ASEAN Charter will not be a panacea to regional problems, but options to make its implementation more people-centric should be considered.

Will a revision of the ASEAN Charter help strengthen or unravel its already fragile unity against geopolitical shocks? This question has become more pertinent as the organisation finds itself in the middle of a maelstrom of deeply disturbing geopolitical developments. These include the persistent Sino-US rivalry, threats of regional instability over the Taiwan Straits and the South China Sea, the proliferation of new security groupings, and the growing political and humanitarian crisis of a troubled fellow member Myanmar.

The violent crisis in Myanmar should have triggered some soul-searching within the bloc. ASEAN's efforts thus far to bring multiple stakeholders together and deliver much-needed humanitarian aid have failed but ASEAN leaders have decided to soldier on. ASEAN should have in its drawer even sharper tools to unpick at the stalemate than when it was Charter-less fifteen years ago. Yet it has failed to utilise the Charter because at the core of ASEAN's problems is the absence

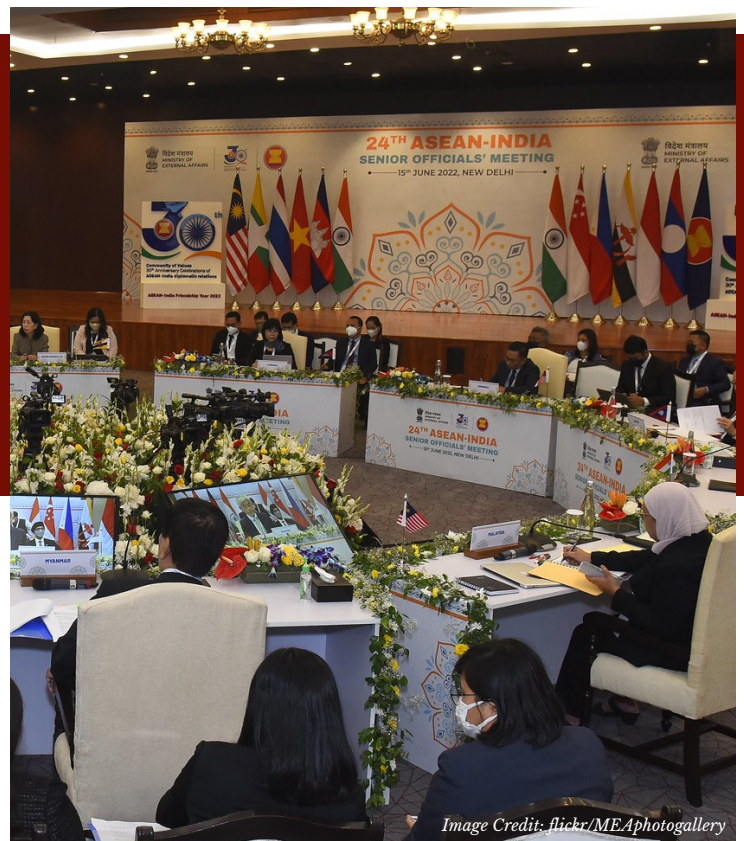


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of unity which promises to be even more challenging with the potential admission of a new member.

The Charter established ASEAN's legal personality, codified ASEAN norms, rules, and values, and gave the grouping institutional form and structure when it came into force in 2008. As the late former ASEAN Secretary-General Rodolfo Severino noted, the Charter is "a commitment for us to become a rules-based community. It is time for us, especially the weaker countries among us, to be ruled by law *rather than by political whim, national interest, or military power*". Members are thus legally bound to observe Charter provisions.

Article 50 of the Charter states that the document may be reviewed five years after its entry into force, or as otherwise determined by the ASEAN Summit. The original suggestion to review it *every* five years was

dropped. Hence, the only window to review the Charter would have been in 2013. At the five-year mark, Singapore circulated a **non-paper** on proposals to review ASEAN institutions. This led to the establishment of a **High-Level Task Force (HLTF)** to enhance the efficiency and procedural coherence of ASEAN institutions and activities. This was to enable ASEAN to respond more effectively to the changing dynamics of the region. It identified several areas for review: (1) a common voice to engage external powers; (2) dispute settlement mechanisms; (3) the publicity of human rights work; and (4) the scope of the Committee of Permanent Representatives.

There is reason to believe that there was serious intent to revise parts of the Charter. The **2017 Philippines Chairmanship Statement** noted that ASEAN was considering “factual updates and revisions of certain articles of the ASEAN Charter”. But under Vietnam’s chairmanship in 2020, this morphed into tasking the Secretariat to produce a scoping report of the review of the Charter’s implementation over ASEAN organs’ operations and the application of the rules and procedures that govern ASEAN’s daily activities.

How did an update of the Charter become a review of its implementation? To long-time observers of ASEAN, this is not surprising. Intentions often get diluted, and texts get mis/re-interpreted all the time. **Death by committee** remains one of the favoured tactics of bureaucrats.

Is the Charter fit-for-purpose then to meet rapidly changing geopolitical challenges? Is the consultation and consensus principle standing in the way of ASEAN integration?

The divisions over Myanmar underscore a need to **revamp** the Charter with respect to the ASEAN consensus-based decision-making principle (codified in Article 20). Some argue this needs to be reviewed as it is hampering ASEAN’s ability to move together with one voice. There have been, among many others, suggestions for a voting mechanism on critical issues in which no consensus can be taken, for example, the use of the ASEAN minus X formula, or the revival of an ASEAN Troika.

However, some member states worry that not all will have equal say in such a review and that non-consensus decision-making could lead to more harm than good. ASEAN’s aversion to revising any part of the Charter is ultimately about the fear that it would lead to fragmentation of its fragile cohesion.

But as far as ASEAN’s response to Myanmar is concerned, the cherished non-interference principle has already been stretched. In its dictates to Myanmar to “show progress”, ASEAN took an unprecedented step of disallowing political representation at the Foreign Affairs track and Summit level meetings. The military junta protested at this perceived interference. But the **commitment to constitutional government** in the Charter means that ASEAN is against coups and other unconstitutional changes of government. One

suspects that ASEAN's inherent discomfort has to do with the breach of pre-emptory norms such as the disproportionate and excessive use of force. This could also be indicative of ASEAN's slow evolution to a rules-based community, one ruled by law.

Arguably then, a revision of the Charter will not be a panacea to its problems. If one were to read accounts of how the Charter came to be, the Charter is itself a consensus document with inherently contradictory principles (e.g., protection of human rights vs non-interference).

However, could a rethink of how to implement Charter decisions in a way that would make ASEAN more people-centric be worth considering? This could be done, for example, by giving more voice to ASEAN's elected representatives, by strengthening the mandate of the ASEAN Inter-Governmental Commission on Human Rights, by establishing dispute settlement mechanisms in "all fields of ASEAN cooperation", or by having a Secretary-General "who will serve with the confidence and at the pleasure of ~~the Heads of State or Government~~ *the people of ASEAN*". Are these options too much to ask for?

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