

Asia's Role in the Recalibration of International Law as a Polyphonic Normative System

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Structure of Presentation

1. Introduction
2. Role of Asia in the International Legal Process: State of the Play
3. Some Challenges for Asia's Role in the Recalibration of International Law as a Polyphonic Normative System
4. Some Suggestions

I. Introduction

- an ‘interesting’ (& challenging) time to be an international lawyer

Some Examples

(a) David E. Sanger & Michael D. Shear, “Trump Floats Using Force to Take Greenland and the Panama Canal”, *New York Times* (January 7, 2025)

“President-elect Donald J. Trump refused on Tuesday to rule out the use of military or economic coercion to force Panama to give up control of the canal that America built more than a century ago and to push Denmark to sell Greenland to the United States.”

Article 10 of the League of Nations Covenant

“The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.”

(b) Promulgation of the REPO (Rebuilding Economic Prosperity and Opportunity) for Ukrainians Act (April 2024)

“unprecedented”

“unthinkable”

“go[ing] so far as to weaponize the entire world’s financial system” (Henry Farrell & Abraham Newman, *Underground Empire* (2023), p. 198)

(c) What is called a ‘strategic rivalry’ plays out in *Asia*, resulting in, among others, “national securitization” of international relations and law.

- Are we witnessing the ‘banality of the unthinkable’ and ‘Re-Hobbesizing’ of international law?

II. Role of Asia in the International Legal Process: State of the Play

- Weak regional identity and solidarity
- Lack of significant presence in the international legal process (eg, low participation in international 'law-making' and dispute settlement, weak contribution to the doctrinal debate)

- Persistence of many disputes in the region
- Relative absence of regional or sub-regional cooperation mechanisms
- * 'Asymmetric rise' for the past eight decades: a rise in economic and (international) political terms, but not a rise in ideational terms

III. Some Challenges

1. Geographical (Identity and Solidarity): How to Define 'Asia'

Henry Kissinger, *World Order* (2014)

p. 172) The term “Asia” ascribes a deceptive coherence to a disparate region. Until the arrival of modern Western powers, no Asian language had a word for “Asia”; none of the peoples of what are now Asia’s nearly fifty sovereign states conceived of themselves as inhabiting a single “continent” or region requiring solidarity with all the others.

2. Lingering misgivings about international law (and, as a consequence, the insufficient internalization of it)

(a) ‘foreign origin’ of international law (which used to be known as ‘public law of Europe’) (NB: One should not *ab initio* exclude the commensurability between the traditional Asian order(s) and ‘public law of Europe’)

(b) negative memory of (ab)use of international law as a means of colonialist domination

- (c) insufficient participation in the formation of international law
- (d) seeming persistence of ‘Euro-centrism’ in the field of international law, including international judicial organs
 - Does international law, at a deeper level, still remain a *lehnwort* (loanword, *fremdwort*) in Asia?

3. Dilemma arising from what is known as ‘strategic rivalry’

(a) Core question

“To what extent and how does change in international power relations (to use the expression frequently used by Hans Morgenthau, ‘the distribution of power’ in international relations) translate into change in international law and norms?”

- Answer by 'realists' such as Morgenthau:

“Since it is in its essence the status quo couched in legal terms, existing law favors the status quo, and the courts can only apply the existing law to the case in hand.” (*Politics among Nations: The Struggle for Power and Peace*, 4th ed. (1967), p. 411)

- Such answer is analytically incorrect and practically baneful. International law (the crucial component of which is international judicial process) enjoys relative autonomy from and a certain degree of constructivist impact on the ‘politics among nations.’
- As the ‘normative Esperanto’ of international relations, international law plays an indispensable and crucial role, if in a nuanced and limited manner, unlike the pet phrase of international relations scholars, ie, ‘international anarchy’, misleadingly suggests.

- (b) ‘Strategic rivalry’ and its impact on international law in Asia and beyond:
‘National securitization’ of international law and its ‘fall-out’ as an example
- Increasing attempt to ‘immunize’ certain questions of international law from legal and judicial scrutiny (eg, resurgence of the traditional distinction between legal and political disputes?)

- shrinking of the space within which international law can evolve in a gradual and inter-subjective manner
- weakening of regulatory impact of international law, in particular, dispute settlement mechanisms
- progressive blurring of the distinction between peace and war (“*tertium non datur*”) and frequent resort to ‘sanctions’

IV. Some Suggestions

1. (Re-)confirmation of the indispensable and crucial role of international law as the ‘(virtually) universal grammar’ of international relations
2. Internalization, vernacularization and recalibration of international law as a polyphonic normative language (which, in the main geared towards an inter-subjective reinforcement of the current international law in respect of justificatory/legitimizing grounds, is expected not to result in a significant revision of the law in substantive terms)

- discharge the discursive duty of actively engaging others in matters of international law
- participate actively in international 'law-making' by, among others, bringing enhanced publicity to state practice
- change the way how international law is researched and taught

2. 'Rise' in ideational terms as well

- mining Asia's normative experiences and expectations and using these materials to formulate an articulate discourse of international law (eg, Han-Key Lee ('western law and eastern wisdom'), Singapore Convention on Mediation, Onuma Yasuaki ('trans-civilizational law'), 'ASEAN way')
- production and provision of 'ideational goods' (*Gedankengut*) based on enlightened and sustainable national interests

3. Importance of the role of ‘enlightened actors/agents’

- (international) law as the product of anthropopoiesis (wikipedia: “In anthropology, anthropopoiesis is the self-building process of social man and of a whole culture, particularly referred to what concerns modifications of socialized body.”)
- Koskenniemi: “International law is what international lawyers do and how they think.”

- (Inadvertent) admission by an ‘arch-realist’ of ‘constructivist’ impact of ‘enlightened agents’

Morgenthau, *op. cit.*, p. 448)

“This controlling influence of the great powers, regardless of the legal structure of the organization, operated in the League of Nations side by side with the brilliant intellectual leadership of the representatives of a number of small and medium nations. These representatives exerted an influence upon the work of the League of Nations out of all proportion to, and irrespective of, the power of their particular countries.”