

# Realizing the Asian Union: Integration of Asia Through a Court of Justice of Asian Union (ACJ)

Legal Aliens

Jaewoo Shin, University of St. Gallen

010-2702-8968

jaewoo.shin@student.unisg.ch

Chorok Lee, Yonsei University

010-2874-0544

chorok1030@naver.com

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### I. Introduction

We imagine a Court of Justice of Asian Union (ACJ) established by agreed upon foundational documents that would work as a crucial driver of the integration process in Asia through the creation of a platform of shared rules, values, and commitments.

The rule of law and the principle of legal certainty are fundamental to today's rule-based social order. We nowadays depend on law to provide us with a predictable, efficacious, and just environment.<sup>1</sup> The great legal philosopher, Gustav Radbruch, even goes as far as calling legal certainty one of three central pillars to the very idea of law.<sup>2</sup> This philosophy has not just guided the creation of national legal systems, but has, in the international realm, also led to the creation of more and more international courts and tribunals in recent decades. At a time where the power-based international system is increasingly replaced by a rule-based order, it is about time for Asia to think about its own norms, values, and legal order.

We argue that a regional judicial body would not just be an institutional element of a possible union, but in itself could facilitate Asian countries to come closer in a way that transcends mere legal cooperation and state dispute settlement. With already existing regional judicial institutions in other parts of the world, such as the European Court of Justice, the African Court of Justice, or the Caribbean Court of Justice, history provides us with convincing success stories telling us that courts are crucial in achieving real integration.

### II. Structure

The Court of Justice of Asian Union would be the judicial institution of the Asian Union. Its primary task is to ensure the uniform interpretation and application of AU law and settle disputes related to it.

AU law has yet to be written upon the establishment of Asian Union itself and Asian Union Parliament. For the purpose of this proposal, we will focus on the structure and the duties of ACJ.

We emphasize that especially in the inception of the ACJ the Court should focus on the interpretation of the AU law in order for any gap of legal writing to be filled in the process of applying the newly written law in a regional group that has never been tied under one jurisdiction. We also emphasize that to allow for flexible legal thinking of the Court that it considers not only the AU law itself but also relevant precedents such as past regional treaties as an important source of AU law.

The Court of Justice has the authority to identify an obligation on administrations and national courts to modify any conflicting national provision to secure the primacy of AU law over national law. The Court also recognizes the principle of liability of member states for breach of AU law to ensure a more diligent application of AU provisions by member states.

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<sup>1</sup> Krasner, S. (2004). The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law. *Michigan Journal of International Law* 25(4), p. 1075.

<sup>2</sup> Sellers, M. & Tomaszewski, T. (2010). *The Rule of Law in Comparative Perspective*. Berlin, Springer, p. 43.

Any breach of AU law by a member state may be brought before the Court and, where a judgment finding such an infringement is not complied with, the Court can order payment of a periodic penalty and/or a fixed sum.

Only states can file a case toward ACJ, but member states can always bring the court's attention on behalf of their citizens' complaints. One judge from each member states will be appointed, and judges from the disputing states in each case will not be participating in the judgment to eliminate any controversy over its fairness.

### III. Influence

#### i. Economic

Through the establishment of ACJ, we anticipate economic cooperation to be fostered even further than achievable without the existence of a region-specific court. Having an own regional court with jurisdiction based on regional law would ensure decisions to be made more appropriately to the regional context, which would also be more readily accepted by member states bringing cases to the court. Being able to rely on 'better decisions', made in a timely efficient manner, and would provide incentives for states to comply with its obligations.

Through legalizing the regional block, we would also create an environment of legal certainty to all member states. The existence of a regional judicial body alone can have a deterrence effect against any state considering a breach of agreements made and incentivize others to be more careful in their state conduct. This would positively influence overall economic decision making, transparency in the region, and enhance mutual trust between member states

#### ii. Political

The ACJ would help de-politicize issues that would be left in a legal limbo without a regional court. A neutral court with jurisdiction over hotly contested issues that are often only up to subjective political interpretation and rhetoric would improve political relations in those areas that member states have decided to codify.

Asia is a region constituted by countries of vastly different economic achievements, but in the face of law, any and all states ought to be treated fairly and in good faith. By creating a platform that treats any state solely based on its body of law, past agreements, and universal principles, it would integrate the region under common goals: clarifying legal responsibility and seeing justice being served regardless of one's economic capacity.

We attempt to achieve this through a number of measures such as appointing one judge per member state, and also setting aside the involvement of judges from the disputing state.

#### iii. Cultural

A nation's culture is to a large extent constitutive of the kind of law that its constituents conscientiously agree to be subjected to. Law may begin as culture, eventually becoming law.<sup>3</sup> For law to be willingly embraced as legitimate by the people, there needs to be cultural foundation and social bond. While this kind of bond is not as pronounced supranationally in Asia yet, we increasingly see hopeful signs that intercultural understanding and connectedness in the age of

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<sup>3</sup> Mautner, Menachem (2011). Three Approaches to Law and Culture. *Cornell Law Review*, 96(4), p. 844.

globalization and the so-called 'Asian Century'<sup>4</sup> have improved by a lot.

Reversely, creation of law may also act as an impetus for cultural change. Lawmakers may see the need to improve social interaction through regulating it in a way that does not necessarily reflect preexisting cultural norms. The French civil code of 1804 attempted to do just that and turned France from a feudal to a modern society through legal reform. By scholars, the Code Napoléon is now regarded as one of the most important and influential legal documents of modernity.<sup>5</sup>

For a possible Asian Union, however, inspiration may be more directly drawn from the European Union experience: In its foundational post-war period, in a time span of merely around 20 years, the ECJ achieved with a handful of landmark decisions - constitutionalization<sup>6</sup> of the legal system and built a foundation for a federal-type Europe.

Countries in Asia have yet to reach a similar level of actual cooperation and trust for them to explicitly allow outside cultural influences through supranational codifications. Nevertheless, legal cooperation on matters such as trade, the environment, or human rights, might positively affect not just the Asian integration process, but cultural progression of contemporary society at large.

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<sup>4</sup> Fidler, David P (2005). The Asian Century: Implications for International Law. *Singapore Year Book of International Law*, 9(19), pp. 19-35.

<sup>5</sup> Holtman, Robert B. (1979). *The Napoleonic Revolution*. Balton Rogue, LSU Press.

<sup>6</sup> Weiler, Joseph H.H. (1991). The Transformation of Europe. *The Yale Law Journal*, 100(6), pp. 2403-2484.

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