

How Asian Should Asian Law Be? – An Outsider’s View

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In 2016, Singapore saw a conference with the ambitious title “Doing Business Across Asia: Legal Convergence in an Asian Century”.¹ Amongst other things, the conference celebrated the inauguration of an Asian Business Law Institute (ABLI).² The keynote address was given by Sundaresh Menon, Chief Justice of the Republic of Singapore and chair of ABLI’s board of governors.³ Menon invoked the demands of globalization and lamented the fragmentation of laws in Asia as appearing “somewhat out of kilter”. Legal convergence, he suggested, was necessary because “a fragmented Asia is holding business back;” inconsistent regulations and regimes across the Asia-Pacific were the single biggest barrier to trade. Menon juxtaposed this situation in Asia with that in Africa, where the Organization for the Harmonization of Business Laws (OHADA) had made significant progress towards unification. That success could not be copied, however: “A world with an identical legal framework that applies in every space would neither be realistic nor even desirable. Laws reflect political, social and economic realities and these realities are not evenly flat even in an otherwise

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¹ For information on the conference, see <http://www.ije.be/img/user/files/pdf-en/doingbusinessacrossasia.pdf>

² <http://abli.asia/>.

³ Sundaresh Menon, Doing Business Across Asia: Legal Convergence in an Asian Century, <https://www.supremecourt.gov.sg/news/speeches/chief-justice-sundaresh-menon--doing-business-across-asia--legal-convergence-in-an-asian-century>.

flattening world.”⁴ “The conditions in Asia are different and we must find what best suits our needs.”⁵

On its face, such a plea for convergence sounds familiar to European observers. The dual invocation of matters of trade and business on the one hand, political and social commonalities on the other, seems familiar from discussions about legal unification in Europe. The European Union has always invoked both aspects, as have proponents of a European Civil Code. On the one hand, legal unification is often said to be necessary for trans-border commerce. Such commercial justification underlies much EU law; it has also repeatedly been brought up in favor of a European civil code. On the other hand, legal unification in Europe is regularly linked to an idea of a European cultural identity.⁶ Behind these two justifications are two ideas about what Europe is. For the commercial justification, Europe is an optimal market, facilitated through the institution of the European Union. Nothing much hinges on a more precise definition of Europe that goes beyond such economic considerations. Or, put differently, the definition of Europe is institutional: it hinges on membership in the European Union. For the cultural justification, by contrast, Europe is a natural unity, bound together by a common culture, a common history, a common background in religion and subsequent secularization. Here, therefore, the idea of Europe is substantive.

Can the same be said about Asia? Is there an Asian identity comparable to European identity and therefore similarly useful as a justification for unification projects? If so, what does it look like? And if so, does this make Asia more like Europe, or less so? Or is this question itself already a mere European projection? When Menon speaks of different conditions in Asia, what are these? When he speaks of Asia’s needs, and what exactly suits them best, is he talking only economics or also culture? In short: what is meant by ‘Asia?’ And when we speak of Asian law, what makes law Asian?

This chapter tries to address such questions. In particular, I look at a concrete project of Asian law unification—the Principles of Asian Comparative Law—and connect discussions about its Asian identity with four concepts of Asia. The first such concept is a European idea of Asia and Asian law, which defines a presumably homogeneous Asia on the basis of its level of difference from Europe. The next three concepts are concepts that emerged from Asian debates. Two of them explicitly invoke leadership of one country. A sinocentric concept of Asian law attempts to reinvigorate concepts from the time of Chinese dominance of East Asia prior to

⁴ Id. at p. 12.

⁵ Id. at p. 7.

⁶ Nils Jansen, *Binnenmarkt, Privatrecht und europäische Identität—Eine historische und methodische Bestandsaufnahme* (Mohr/Siebeck 2003); Stephanie Law, *From Multiple Legal Cultures to One Legal Culture? Thinking About Culture, Tradition and Identity in European Private Law Development*, *Utrecht Journal of International and European Law*. 31(81), pp.68–89.

colonization. A Japanese concept of Pan-Asian law by contrast is built on Japanese modernization, which in turn was influenced by Europe. Finally, the idea of Asian values attempts to avoid leadership by any one country in favor of a truly Asian identity. None of these three chapters can fully avoid the central problems of the European projection: they are all defined by their relation to the West, and all of them invoke a relative degree of homogeneity as basis for identity. I close, therefore, with an alternative concept of Asia “as method” that attempts to overcome these two shortcomings and may offer a more promising path towards an idea of Asian law.

I. Asian Law? The Example Principles of Asian Contract Law

If the ABLI discussion largely avoids discussions on an Asian identity, another project has generated such a debate: the Principles of Asian Contract Law (PACL).⁷ Their origin lies in a proposal made by Naoki Kanayama, Professor for French law at Keio University in Japan, during a conference at Tsinghua University 2009 for an Asian project after the model of the PECL. The project was inaugurated on the spot with what Shinyuan Han, professor of civil law at Tsinghua University in China, calls the “Beijing declaration”.⁸ It involves a good number of East and Southeast Asian countries, has since led to a number of conferences, country reports and draft chapters towards a final product.

⁷ Shiyuan Han, *Principles of Asian Contract Law: An Endeavor of Regional Harmonization of Contract Law in East Asia*, (2013) 58 *Villanova Law Review* 589-599; Mary E. Hiscock, *The universality of good faith and moral behaviour: A challenge for the principles of Asian contract law*, in *Legal Thoughts between the East and the West in the Multilevel Legal Order: A Liber Amicorum in Honour of Professor Herbert Han-Pao Ma* 355-367 (Chang-fa Lo, Nigel Li, LinTsai-yu Lin eds., 2016); Jung-Joon Ka, *Introduction to PACL*, in: Tony Angelo – Luca Castellani – Yves-Louis Sage (eds), *Contributions to the study of international trade law and alternative dispute resolution in the South Pacific* (2014) 55-65; Naoki Kanayama, *PACL (Principles of Asian Civil/Commercial Law)* (in French), [2010] *Revue des contrats* 995-1006, revised and updated as Kanayama, *PACL (Principles of Asian Civil Law)* (in French), in : *Mélanges Jean-Louis Baudouin* 393-419 (Benoît Moore ed., Éditions Yvon Blais, 2012) (hereinafter Kanayama, *Mélanges Baudouin*), further revised and updated as Kanayama, *PACL (Principles of Asian Contract Law)* (in French), in *Droit japonais, droit français, Quel dialogue ?* (Béatrice Jaluzot ed., Schulthess, 2014) p. 185-196 (hereinafter Kanayama, *Quel dialogue?*); Young-June Lee, *The basic direction of the Principles of Asian Contract Law* (in Korean, with Chinese and Japanese translations), 3 *Asia Private Law Review* Arts. 23-25 ; Lee, *Introduction to the Draft Articles*, (2014) 4 *Asia Private Law Review* 3-11. (The *Asia Private Law Review* is available at <http://www.kcjlaw.co.kr/>.)

⁸ Kanayama, *Mélanges Boudouin* (n. ___) 398; Han (n. ___) 590-91.

The PACL are being conceived in view of existing non-Asian Restatements like PECL and UPICC; in addition, the Convention on the International Sale of Goods has served as an inspiration.⁹ The form of the project is very similar to that of its Western predecessors: to present, in the form of rules, a Restatement of Asian contract law, based on research into existing laws. Its proposed functions also resemble those of PECL and UPICC: to serve as a model law for modernization, and to offer themselves as an applicable law in transnational contracts.¹⁰ Even the language of the product (and of the preparatory work) is the same as for the PECL and PICC, namely English—not a language native to Asia.

Beyond that, however, there are important differences with the work on the PECL. While authors of the PECL and the UPICC strongly emphasize their desire to transcend national law, this seems less prominent with the PACL, which focus more on representation of national systems and on national reports. No centralized national background exists, so the projects rests on the shoulders of the national groups, which are in charge of most of the work. Even the drafting of sections of the PACL were left first to representatives of national groups, before the results were discussed and voted upon. A number of such draft sections have been drafted: the sections on performance and non-performance, prepared by the Korean delegation, are available.¹¹ Moreover, two participants from Singapore have published the first two of an intended six volumes of essays in a series entitled “Studies in the Contract Laws of Asia,” based on work towards the PACL, though they are no longer involved in the project.¹²

The PACL are not the first project aimed at restating Asian contract law. Earlier proposals exist for an ASEAN project based on the UPICC and PECL.¹³ A predecessor

⁹ Han (n. **Error! Bookmark not defined.**) 591-2.

¹⁰ Kanayama, *Mélanges Boudouin* (n. ___) 396-7.

¹¹ Draft articles non-performance of contract for principles of Asian contract law, (2010) *Asia Private Law Review* No, 4 special; Young Jun Lee (ed.,) *A study on draft articles, principles of Asian contract law : performance & non-performance*, (2016) *Asia Private Law Review* No. 7 special.

¹² Mindy Chen-Wishart, Alexander Loke, and Burton Ong (eds), *Remedies for Breach of Contract* (OUP 2016); Mindy Chen-Wishart, Alexander Loke, and Stefan Vogenauer (eds), *Formation and Third Party Beneficiaries* (OUP 2018). The other intended volumes deal with contents of contracts and unfair terms, invalidity of contract, ending and changing contracts, and public policy and illegality.

¹³ Lim Yew Ngee, ‘UNIDROIT Principles—A Model for the Harmonization of ASEAN Contract Law’ [1997] *Singapore L. Rev* 355; R Amoussou-Guenou, ‘Perspectives des Principes Asean (ou Asiatiques) du droit des contrats’ [2005] *Int’l Bus LJ* 573; B Hardjowahono, ‘The UNIDROIT Principles and the Law Governing Commercial Contracts in Southeast Asia’ [2002] *ULR* 1005, especially 1010–1011 and 1013–1014; B Hardjowahono, *The Unification of Private International Law on*

project under the guidance of the then-new Law Association for Asia and the Western Pacific led to a book edited by three scholars from the University of Tasmania, but relying on reports from scholars from a number of other Asian countries.¹⁴ The editors of that book decided in favor of a comprehensive presentation of contract law in Asia rather than on country report in view of the fact that such country reports would be very repetitive, given that most laws in Asia are based on either civil or common law.¹⁵ An unfortunate consequence of this focus was that the editors saw themselves unable to include detailed comparison with legal systems outside of this dichotomy, for example Islamic or Chinese law.¹⁶ They were mindful, throughout the book, of the practical problems that emerge from imposing Western law on countries with very different traditions, including the inadequacy of both Western concepts and Western solutions for local problems. Nonetheless, the discussion of concrete problems could not avoid going along Western trajectories, and it does not, in the end become clear what makes the project particularly Asian, other than that it is not European.¹⁷

In the PACL project, this question of how Asian a project of Asian contract law should be has been discussed, and created different answers. On the one side stands Shiyuan Han from Tsinghua University in Beijing, head of the Chinese delegation. He supports a specifically Asian nature for the PACL, suggesting that “the PACL as a model law should not be a simple copy of the PICC or the PECL,”¹⁸ because “the CISG was designed by European and American scholars and specialists. It reflects mainly the experiences of the western world. For East Asian people, it is still necessary for Asian scholars to produce an Asian voice.”¹⁹ “[T]o ‘uphold the ideal of a restatement’ means to draft a set of rules and principles appropriate for Asian people.”²⁰ As a consequence, “if the PACL’s position is consistent with the custom of Asia and

International Commercial Contracts within the Regional Legal System of ASEAN (2005) 167–176; Samuel M.P. Hutabarat, ‘Remodelling ASEAN Contract Law: By Creating ASEAN’S Own Contract Law or By Adoption [of] the Unidroit Principles’ (2012) 12 Law Review (Universitas Pelita Harapan) 215, 236 (<http://dspace.library.uph.edu:8080/handle/123456789/1092>).

¹⁴ D.E. Allan et al. (eds.), *Asian Contract Law: A Survey of Current Problems* (D.E. Allan, Mary E. Hiscock and Derek Roebuck eds., 1969); see also Hiscock (n. 7) 358-60.

¹⁵ D.E. Allan, Preface in *Asian Contract Law* (n. 14) ix, x. The book does contain, in addition to overview chapters for civil and common law respectively, a brief chapter on adat contract law; *ibid.* at 72-78.

¹⁶ *Ibid.*

¹⁷ See also D. Heydon, Review, (1971) 34 *Modern Law Review* 118-120.

¹⁸ Han (n. **Error! Bookmark not defined.**) 593.

¹⁹ Han (n. **Error! Bookmark not defined.**) 591.

²⁰ Han (n. **Error! Bookmark not defined.**) 593.

different from the position of the CISG, we should rethink whether the CISG sufficiently addresses Asian customs.”²¹ Indeed, Han finds such Asian specificities, for example in the creditor’s right of subrogation and right of revocation, and in unilateral, as opposed to bilateral, release from a contract.²² His consequence for the working method is that the project would necessarily be thorough and take a long time.²³ In particular, it is necessary, in his view, to base the PACL on thorough comparative law of existing Asian laws, in order to make them compatible with what merchants are already aware of. Rules that are “appropriate for Asian people” should not, in his view, be too simple and abstract, or they will be of no use to judges.

On the other side stands Naoki Kanayama from Keio University in Japan, head of the Japanese delegation. He does not disagree that the PACL should sometimes diverge from existing European models like PICC or PECL. However, his explanation is not a specific Asian character of the law, but a specific stage of modernity. Kanayama suggests that contemporary Asian law, and by implication the PACL, are by their nature European, and the difference between Japanese law and German or French law is not greater than the difference between French Law and German law. Law in Asia is an import from Europe, he suggests, but that does not imply inferiority: frequently copies can be better than originals. Kanayama calls any specifically Asian character of the PACL a “pure illusion”²⁴ and suggests that not a single properly Asian element can be found in them;²⁵ just as he suggests that the Japanese Civil Code has no particularly Asian quality.²⁶ As a consequence, Kanayama proposes that the PACL could be written relatively quickly, given that European and international methods already existed. The result and that the emphasis should be on the formulation of simple and clear rules without extensive notes, more like the French Civil Code than the US Restatement.²⁷ This became indeed the method followed by the Japanese working group under his leadership.

What to make of this debate between Han and Kanayama? Is it idiosyncratic? Or does it reflect a deeper debate about the Asian nature of Asian law, a debate that would be instructive also to the Western observer? It seems to me that through the debate we can see remnants of a fundamental disagreement. It does not merely go to

²¹ Han (n. **Error! Bookmark not defined.**) 592; similarly Ka (n. 7) 65.

²² Han (n. **Error! Bookmark not defined.**) 598.

²³ Id.

²⁴ Naoki Kanayama, *Quel dialogue?* (n. ___) 192-3.

²⁵ Id. at 194. For a largely similar view from the head of the Korea delegation, see Lee, *Introduction* (n. ___).

²⁶ Naoki Kanayama, *Le caractère non-occidental du Minpo, mythe ou réalité ?*, in Pierre Brunet, Ken Hasegawa & Hajime Yamamoto (eds), *Rencontre franco-japonaise autour des transferts de concepts juridiques* (2014) 31-38

²⁷ Kanayama, *Mélanges Baudouin* (n.) 406.

policy questions, a balancing between local culture and global commonality. Rather, it addresses the very question of what would even make a project like the PACL Asian, what it would mean for the project to be Asian. And it reflects very different ideas of what that might mean.

II. A European Asia: Orientalism and Modernization

What makes Asian law Asian? The first answer: the West does. As Chinese historian Wang Hui puts it, “Historically speaking, the idea of Asia is not Asian but, rather, European.”²⁸ Asia, was a name given by outsiders, Europeans—first to depict a minuscule part of today’s Asia, later extended to the entire continent. Term and concept did not arrive in East Asia before the Jesuits; they did not gain wide currency before the 19th century.²⁹ Today, Asia describes, technically, the part of the Eurasian land mass that is on the other side than Europe from the Ural, an enormous territory with a multitude of cultures and countries and laws. In common parlance, however, Asia is often used in a narrower sense to describe East Asia, possibly in connection with South East Asia. In each case, Asia is a construct, and a primarily Western construct at that. And it is, at the same time, a geographical entity and a cultural concept.³⁰

As Asia is a Western concept, so is the idea of “Asian” law (as opposed to Chinese, or Buddhist, etc.). Courses in “Asian” or “East Asian” law have long been taught primarily in Europe and the United States, not in Asia.³¹ Chairs and Centers for “Asian law” exist in Europe and the United States, not in Asia, at least traditionally. At the National University of Singapore (which calls itself “Asia’s Global Law School”)³², the Asian Law Institute, which brings together law schools all across Asia, the Centre for Asian Legal Studies, and the Asian Journal of Comparative Law, which it publishes, represent recent developments. The study of Asian law is also promoted elsewhere.³³

²⁸ Wang Hui, The politics of imagining Asia: a genealogical analysis (transl. Matthew A. Hale), (2007) 8 *Intra-Asia Cultural Studies* 1-33, 2; Ralph Weber, On Wang Hui's re-imagining of Asia and Europe, (2009) 17 *Europa Regional* 221-228.

²⁹ Christopher W. A. Szpilman and Sven Saaler, Pan-Asianism as an Ideal of Asian Identity and Solidarity, 1850–Present, *The Asia-Pacific Journal* 9.17.1 (April 25, 2011).

³⁰ See Ruskola, Where is Asia (n.) 881-3.

³¹ See, e.g., Chin Kim, Asian Law and Comparative Legal Studies: A Proposed Curriculum Design, 5 *B.C. Int'l & Comp. L. Rev.* 91 (1982); Whitmore Gray, The Challenge of Asian Law, 19 *Fordham Int'l L.J.* 1-8 (1995).

³² Simon Chesterman, ‘The Fall and Rise of Legal Education in Singapore’ [2017] *Singapore Journal of Legal Studies* 201, 208-10.

³³ E.g. Sang-Yong Kim, The Necessity and the Methodology of Studies on Asian Law (2004) 1 *Asia Law Review* 1-19.

If Asian law is primarily a Western concept, what is its content? Essentially, there are two variants of such concepts. One is the idea of an essential difference: Asia is the opposite of Europe; it is everything that Europe is not.³⁴ The strongest version of this view is the one that suggests that Asia has no law at all. We do indeed find such suggestions in scholarship. René David explained that in the Far East, especially in China, law is only for barbarians, an opposition against law that is explained both with Confucian and with Maoist thought.³⁵ Zweigert and Kötz posit, somewhat more cautiously, that law matters, but not too much: informal means of dispute resolution are much more important. (They concede, in the third edition, that things are changing).³⁶ Patrick Glenn sees Asian law as characterized especially by a relative absence of law, an emphasis on social harmony and a high importance of informal dispute resolution mechanisms.³⁷ Ugo Mattei defines Asian law as traditional law, apparently in opposition to Western 'professional' law.³⁸

This view is now rightly viewed as problematic for a variety of reasons: it overestimates (ancient) history and underestimates modern law in Asia, it reads even that ancient history only partially, and it uses as universal a notion of law that is intrinsically Western.³⁹ The claim that formal law is irrelevant is certainly overrated for modern Asian legal systems. The frequent claim that Asians prefer informal dispute resolution mechanisms, for example, highlights cultural constraints at the cost of institutional conditions. The view is also problematic in their disproportionate focus on ancient history over contemporary developments. The focus on

³⁴ See Teemu Ruskola, *Where is Asia? When is Asia? Theorizing Comparative Law and International Law*, (2011) 44 U.C. Davis L. Rev. 879.

³⁵ René David/John E.C. Brierley, *Major Legal Systems in the World Today* (3rd ed. 1985) 30; see René David, *Existe-t-il un Droit Occidental?*, in *XXTH CENTURY COMPARATIVE AND CONFLICTS LAW: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA* 56, 60 (1961). Similarly e.g. Michael Bogdan (2013), *Concise Introduction to Comparative Law* ch. 13; Peter de Cruz, *Comparative Law in a Changing World* (3rd ed. 2007) 209-10.

³⁶ Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* (3rd ed. 1998, Tony Weir transl.) 287-288.

³⁷ H. Patrick Glenn, *Legal Traditions of the World* (5th ed. 2014) ch. 9, pp 319ff.

³⁸ Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, *Am. J. Comp. L.* 45 (1997) 5, 35ff.

³⁹ See, especially, Teemu Ruskola, *Legal Orientalism* (2013); see also Norman P. Ho, *Internationalizing and Historicizing Hart's Theory of Law*, 10 *Wash. U. Jurisprudence Rev.* 183 (2017). For differentiated conceptions in the introductory comparative law literature, see Dong Jiang, *An Introduction to Chinese Legal Culture*, in Søren Koch et al. (eds.), *Comparing Legal Cultures* (2017) 317, 327ff; Mathias Siems, *Comparative Law* (2nd ed. 2018) 94-96.

Confucianism tends to prioritize the past over the present and continuity over disruption; it also ignores the many other ideas and values that have shaped Asia⁴⁰

A different Western concept of Asian law responds and goes to the other extreme, viewing contemporary Asian law as essentially similar to Western law. From this perspective, laws in Asia can safely be understood as either civil law or common law; after the effective decline of communism, this is thought true even for Vietnam and China. The widely influential “Legal Origins” project sees only civil law and common law (and communist law) as legal families across the globe.⁴¹ From this perspective, the biggest conflict among Asian laws is, ironically, a quintessentially European conflict, namely that between civil and common law.⁴²

That approach is quite obviously also problematic: it underestimates the other legal cultures that shape law in Asia, and it underestimates the fact that Western law, born against the specific cultural, political and economic background of the West, operates very differently in Asian circumstances. The suggestion that laws in Asia are, essentially, no different from Western laws, makes sense only for a focus on formal law that ignores the interplay between formal law and society. Below the surface of formal rules, laws in Asian countries differ significantly from those in the West.⁴³

A third type of view suggests a middle way. Both views, in this view, err in opposite directions, and the truth is in the middle: Asian law is a little bit like European law and a little bit not. Or, a variant of this, Asian law is formally, on the surface, very much like European law, but substantively (as “living law”) is different. This view seems more accurate. But it is also imprecise and unsatisfactory to find that Asian law is somewhat like and somewhat unlike European law. And the distinction between form and substance is actually problematic as well: does such a distance not exist in Europe as well?

⁴⁰ See Christoph Antons, What is ‘Asian law’? Asia in law, the humanities and social sciences, in *Routledge Handbook of Asian Law* (2017) 3-27.

⁴¹ Rafael La Porta et al., The Economic Consequences of Legal Origins, *Journal of Economic Literature* 2008, 46:2, 285–332.

⁴² See, e.g. Mary Hiscock, Remodelling Asian Laws, in *INDONESIA: BANKRUPTCY, LAW REFORM & THE COMMERCIAL COURT* 28-42 (Tim Lindsey ed., 2000); Margaret Fordham, Comparative Legal Traditions - Introducing the Common Law to Civil Lawyers in Asia, (2006) *Asian Journal of Comparative Law* Vol. 1, Issue 1, Article 11; Alexander Loke, Insights from Comparing the Contract Laws of Asia on Formation and Third Party Beneficiaries, in Chen-Wishart/Loke/Vogenauer (n. ___ supra) 516-545; see also Kwai Hang Ng & Brynna Jacobson, How Global is the Common Law? A Comparative Study of Asian Common Law Systems – Hong Kong, Malaysia, and Singapore, *Asian Journal of Comparative Law*, 12 (2017), pp. 209–23.

⁴³ Masaji Chiba (ed.), *Asian Indigenous Law in Interaction with Received Law* (1986).

There is no need, here, to decide this. What matters more is to see how all three concepts, although in some ways diametrically opposed, they actually suffer from common shortcomings. Both views, that of difference and that of similarity, define Asian law primarily by its relation to Western law. They take European law as the universal standard against which Asian law as the particular is measured. Moreover, both exist against an assumed universal historical trajectory from informal to formal law; they only differ on how far along Asian law is on this trajectory. The main problem of such visions is, put simply, that it cannot take Asian law seriously on its own terms: it becomes a mere projection of Western ideas.

A related problem is equally important: By defining Asian law purely in juxtaposition to Western law, it is given a unity that it does not have on its own. Patrick Glenn, in earlier editions of his book on comparative legal traditions, conceded that “Asia may exist more in western thinking than in Asian” and nonetheless posited the existence of “a kind of Asian default position, which must necessarily address all the particular traditions which the people of Asia have known”.⁴⁴ After it was suggested to him that the concept is far too broad and what he means is, essentially, Chinese law,⁴⁵ Glenn replaced in later editions the “Asian legal tradition” with a “Confucian legal tradition” where the focus explicitly narrows to China.⁴⁶ And yet, even a narrower East Asian legal tradition may today be a questionable entity, at least when compared to a Western legal tradition: even East Asia is more diverse in ideological, cultural, and religious terms than is Europe.⁴⁷ Nonetheless, in such presentations Japan’s place is unsure, Korean law is mostly absent altogether.⁴⁸

In the end, then, both the idea of Asian law as essentially different from and that of Asian law as essentially similar to Western law, suffer from the same shortcomings: they define Asian law only in relation to Western law, and they therefore ascribe to it a level of internal homogeneity and identity that are more

⁴⁴ H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (2nd ed. 2004) 301ff.

⁴⁵ Andrew Huxley, *Buddhist Law, Asian Law, Eurasian Law*, (2006) *Journal of Comparative Law* 158, 160f; see also Uwe Kischel, *Rechtsvergleichung* (2015) § 9 no. 3.

⁴⁶ See H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (5th ed. 2014) 319ff.

⁴⁷ See Teemu Ruskola, *The East Asian Legal Tradition*, in Mauro Bussani/Ugo Mattei (eds), *The Cambridge Companion to Comparative Law* (___) 257, 275f; see also Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (3d ed 1998) 287-8.

⁴⁸ Chongko Choi, *Western Jurists on Korean Law: A Historical Survey*, (2002) 2 *Journal of Korean Law* 167-193, also in Choi, *Law and Justice in Korea* (2005) 15ff.

projections than actual empirical truths. Asia is not Europe, but Asia is also not simply the opposite of Europe. These are not promising avenues.

But is this already the whole story? Is a cultural identity of Asian law really merely a European projection?⁴⁹ Can we not find traces also within Asia? The European projections are not fully without an object, even though they define the object in problematic ways. They are constructs, but constructs have their own reality in the world. And although they were originally imposed on Asia from the outside, they spurred inner-Asian alternative concepts.⁵⁰ When we comparative lawyers attempt, to the extent we can, to understand debates from the inside rather than from the outside, we find inner-Asian projects of Asian identity of law, too.

III. A Chinese Asia: Sinocentric Law

A first candidate for an Asian identity parallels the idea of difference. Such ideas of difference have often focused on China as stand-in for China, and indeed China is important for such concepts. Recall how Professor Han, in his presentation of the PACL, emphasizes China's leadership (he refers to the founding document as the Beijing declaration⁵¹) and requests that it be sensitive to the multiculturalism to be found in Asia. These are contemporary suggestions, but they implicitly relate to older ideas about Asia.

The first of these ideas is the old idea of China as the Middle Kingdom, the center of a potentially universal political order. It established a view of China as a universal kingdom, which covered the entire (known) world (*tianxia*). The historical expression of that idea was the tributary system of the Ming and Qing dynasties.⁵² Boundaries were social rather than geographical; the main distinction was that between civilization and barbarity, and the latter was defined by a refusal to accept the values of Chinese culture. Chinese hierarchy rested on power, but that power was mainly perceived to be cultural: China ruled (allegedly) not because it was powerful

⁴⁹ This is the tendency, e.g., in Gayatri Chakravrti Spivak, *Our Asias—2001: How to be a Continentalist*, in *id.*, *Other Asias* (Wiley-Blackwell 2007) 209ff.

⁵⁰ See Pekka Korhonen, *Common Culture: Asia rhetoric in the beginning of the 20th century*, (2008) 9 *Inter-Asia Cultural Studies* 395; Prasenjit Duara, *Asia Redux: Conceptualizing a Region for Our Times*, *The Journal of Asian Studies* Vol. 69, No. 4 (November) 2010: 963–983.

⁵¹ Han (n.) 590.

⁵² For scholarship linking the concept to the present, see, e.g., Li Zhaojie, *Traditional Chinese World Order*, *Chines JIL* 1 (2002) 20, 24ff; Fei-Ling Wang, *From Tianxia to Westphalia: The Evolving Chinese Conception of Sovereignty and World Order*, in: Ikenberry G.J., Jisi W., Feng Z. (eds) *America, China, and the Struggle for World Order*. *Asia Today* (2015) 43-68; see also Phil C.W. Chan, *China, State Sovereignty and International Legal Order* (2015)

but because it had superior culture.⁵³ Those nations that accepted this superiority engaged in tributary relations with the Chinese emperor, but these were, at least rhetorically, conceived less in terms of colonialism and subjugation and more on the basis of values: an autonomous acceptance of Chinese superiority on the one side, a government based on values on the other.⁵⁴ The result, again somewhat idealistically, was a multicultural universalism: joined by the focus on China and the commitment to certain (Confucian) ideas, but otherwise internally plural. A “Beijing declaration” for the PACL can be viewed as a continuity of such ideas.

The tributary system, of course, largely disappeared, at least for some time. The inherent multiculturalism, by contrast, was revived in connection with the influence of communism, the second important background idea. After World War I, Asian intellectuals became disenchanted when they realized that Wilsonian principles of self-determination were largely confined to European nations. Western nationalism was abhorred by many, both as representing everything that was bad about a Western fascination with rationality at the cost of culture, spirituality, and community, and as underlying the colonialist project. Leninism provided an alternative. Lenin had celebrated a revolutionary awakening of Asia as early as 1913.⁵⁵ His interest in Asia came from the hope of building alliances against Western capitalist nations, and of spurring revolutions in Asia rather than, as classical theory had predicted, in Europe. Asian attraction to Leninism on the other hand came not just from the opposition to the West as such. It also promised an alternative to the Western type of state and law, and an embrace of a multicultural idea of Empire, in accordance with similar such suggestions from Asia, most prominently perhaps by Sun-Yat Sen.⁵⁶ Unlike *tianxia*, this now was an explicit idea of an Asian identity, one opposed to European concepts.⁵⁷

⁵³ See already John K. Fairbank, Tributary Trade and China’s Relation with the West, *Far Eastern Quarterly* 1 (1942) 129.

⁵⁴ Whether this is more a self-serving mythization than a historical fact is a different matter; see Peter C. Perdue, *The Tenacious Tributary System*, (2015) 24 *Journal of Contemporary China* 1002-1014.

⁵⁵ V.I. Lenin, *The Awakening of Asia*, *Pravda* No. 103, May 7, 1913, translation at <https://www.marxists.org/archive/lenin/works/1913/may/07b.htm>; Lenin, *Backward Europe and Advanced Asia*, *Pravda* No. 113, May 18, 1913, translation at <https://www.marxists.org/archive/lenin/works/1913/may/18.htm>; see Shinkichi Etō, *China’s international relations 1911-1931*, in John K Fairbank and Albert Feuerwerker (Eds.), *The Cambridge History of China Vol. 13—Republican China 1912-1949, Part 2* (1986) 74 at 107ff.

⁵⁶ See Wang Hui, *The politics of imagining Asia: a genealogical analysis*, (2007) 8 *Inter-Asia Cultural Studies* 1-33, 12-13.

⁵⁷ Wang Hui, *supra* n. __, 11; see also Fei-Ling Wang, *The China Order—Centralia, World Empire, and the Nature of Chinese Power* (2017) 209ff.

The consequence was, for some time, that law in several Asian countries bore some similarities to Chinese and, by extension, Soviet law. Soviet laws were transplanted early, in the short-lived Chinese Soviet Republic (1931-1934)⁵⁸ Socialist law became influential again after revolutions in China, Vietnam, and other countries.⁵⁹ Much of this borrowing occurred from the Soviet Union, not from China per se, given that Maoist law was more informal than the (civil-law based) law in the Soviet Union.⁶⁰ Yet, when China began to formalize its law after 1978 in a way different from both Europe and the Soviet Union, the new “socialist law with Chinese characteristics⁶¹ became influential. Such Chinese ideas of law have competed, among socialist countries, with more Soviet Union oriented laws. In North Korea, Soviet and Chinese legal influence coexisted.⁶² Vietnam’s legal development, especially in the rule of law context, followed more along China’s model than a presumed universal Western model, searching for Confucian values for a move forward.⁶³

Although both the tribute system and communism have withered, this idea of a plural Asian law under Chinese leadership is arguably still present, most prominently in the current Belt and Road project.⁶⁴ The project focuses on transnational trade and infrastructure, linking up to 70 countries in Asia, Europe, and Africa. A project like this also requires law, and it is in this law that we can see a revival of a traditional sinocentric concept of Asian law. To some extent it may look as though China merely attempts to impose its own law on the initiative. The Chinese

⁵⁸ W.E. Butler (ed.), *The Legal System of the Chinese Soviet Republic 1931-1934* (1983).

⁵⁹ Bui Ngoc Son, *The Law of China and Vietnam in Comparative Perspective*, (2017) 41 *Fordham Int’l L. J.* 135, 153ff.

⁶⁰ Shao-Chuan Leng, *The Role of Law in the People's Republic of China as Reflecting Mao Tse-Tung's Influence*, (1977) 68 *Journal of Criminal Law and Criminology* 356-373.

⁶¹ Mo Zhang, *The Socialist Legal System with Chinese Characteristics: China’s Discourse for the Rule of Law and a Bitter Experience*, (2010) 24 *Temple Int’l & Comp. L.J.* 1-64; Zhu Jingwen, *The Socialist Legal System with Chinese Characteristics: Its Structure, Features and Trends*, (2011) 32 *Social Sciences in China* 87-103, English translation at http://en.theorychina.org/xsqy_2477/201306/t20130611_270446.shtml.

⁶² See Darren C. Zook, *Reforming North Korea: Law, Politics, and the Market Economy*, 48 *Stan. J. Int’l L.* 131 (2012).

⁶³ Pham Duy Nghia, *Confucianism and the conception of the law in Vietnam*, in John Gillespie/Pip Nicholson (Eds), *Asian Socialism and Legal Change: The dynamics of Vietnamese and Chinese Reform* (2005) 76ff; see also John Gillespie, *Changing concepts of socialist law in Vietnam*, *ibid.* 45, 61ff.

⁶⁴ Tom Miller, *China’s Asian Dream—Empire Building Along the New Silk Road* (2017).

government has announced the establishment of three special courts: one for the silk road in Xi'an, one for the maritime road in Shenzhen, one headquarter in Beijing.⁶⁵ In addition, a Belt and Road International Dispute Management Center will assist existing arbitration centers.⁶⁶ A push is being made to establish Chinese, rather than English, law as the regularly applied law in arbitration.⁶⁷ The Chinese Supreme Court has issued no less than sixteen “guiding opinions” as information on how to handle legal issues concerning the Belt and Road Initiative.⁶⁸

But the idea does not appear to be merely to expand the application of Chinese law. The concept endorsed by the Chinese government is not Chinese domination but rather “bringing the outside in.” (youwai zhinei). In this sense, the project is a sinocentric network—respecting difference, but under leadership of China, and thus ideally enhancing China’s power without limiting that of its neighbors.⁶⁹ Xi Jinping explicitly advocated the project as one for a “community of shared destiny”—an Asian dream, within which each country and region is entitled to its own particular dreams.⁷⁰ The International Academy of the Belt and Road published a book titled “The Dispute Resolution Mechanism for the Belt and Road” which puts forward a new system to “make up for the existing system and formulate a mechanism that can better reflect the culture, customs, traditions, legal systems and values of the countries along the Belt and Road”.⁷¹ Such calls for mutual coordination, under leadership of China, are more reminiscent of the tributary system than of a mere

⁶⁵ <https://www.merics.org/en/blog/dispute-settlement-chinas-terms-beijings-new-belt-and-road-courts>.

⁶⁶ Ibid.

⁶⁷ See also more generally on the role for arbitration Tommi Yu, China’s “One Belt, One Road Initiative”: What’s in It for Law Firms and Lawyers?, *The Chinese Journal of Comparative Law* (2017) Vol. 5 No. 1 pp. 1-21; Patrick M. Norton, China’s Belt and Road Initiative: Challenges for Arbitration in Asia, *13 U. Pa. Asian L. Rev.* 72 (2018); Jingzhou Tao and Mariana Zhong, *The Changing Rules of International Dispute Resolution in China’s Belt and Road Initiative*, in Zhang W., Alon I., Lattemann C. (eds) *China's Belt and Road Initiative*. (2018) 305-320.

⁶⁸ See <https://cgc.law.stanford.edu/belt-and-road/>. More generally on the concept of guiding cases, see Chen Xingliang, *China’s Guiding Case System—A Study on the Mechanisms of Rule Formation*, (2014) *1 Peking University Law Journal* 215-258; DENG Jinting, *Functional Analysis of China’s Guiding Cases*, (2016) *14 China: An International Journal* 44-70.

⁶⁹ William A. Callahan, *China’s “Asia Dream”—The Belt Road Initiative and the new regional order*, (2016) *1 Asia Journal of Comparative Politics* 226-243.

⁷⁰ Ibid. at 235.

⁷¹ <https://beltandroad.blog/2017/11/26/how-will-china-shape-the-legal-future-of-belt-and-road/>; see also Guiguo Wang, *The Belt and Road Initiative in quest for a dispute resolution mechanism*, (2017) *25 Asia-Pacific Law Review* 1-16.

imposition of Chinese law.⁷² This looks like a sinocentric, not merely Chinese, model of Asian law—one that rests on cooperation rather than legal unification, and on attention to cultural differences rather than homogenization.

The project is not confined to Asia; it includes African and European countries, as well as countries in the Pacific. Further, although it is not explicitly directed against the West at large (though it does suggest an alternative to US domination). What makes it Asian is the fact that it is presented as an alternative to a particular Western conception of both economics and of international relations; the initiative is explicitly advertised as an alternative to Western neoliberalism.⁷³

IV. A Japanese Asia: Pan-Asian Law

If the sinocentric idea of Asian law is one of difference, then a different idea of Asian law emphasizes similarity. Arguably, Prof. Kanayama's quite different ideas of an Asian nature of the PACL, or rather the lack thereof, also have a broader background, though one to be found, originally, in Europe. His preference for a brief and abstract style of codification reflects experience with a European model, namely the French Civil Code, and reflects his own specialization: Prof. Kanayama holds a chair for French law his University. His idea of a restatement that is detached from local culture, potentially universal, reflects similar ideas of the French civil code.⁷⁴ And altogether, the suggestion that an Asian Restatement can be modelled closely after European models, only to improve on them where they appear deficient, reflects the old Japanese idea of emulating Europe in order to surpass it.

⁷² See also Su-Yan Pan & Joe Tin-Yau Lo, Re-conceptualizing China's rise as a global power: a neo-tributary perspective, (2017) 30 *The Pacific Review* 1-25. Tianxia has been proposed as a general model for global governance, especially by Zhao Tingyang, Rethinking Empire from a Chinese Concept 'All-under-Heaven' (Tianxia), *Social Identities* Vol. 12, No. 1, January 2006, pp. 29-41; see also William A. Callahan, Chinese Visions of World Order: Post-hegemonic or a New Hegemony?, (2008) 10 *International Studies Review* 749–761; Zhang Feng, The Tianxia System: World Order in a Chinese Utopia, (2010) 4 *Global Asia*: 108-112; Prasenjit D'Uara, The Chinese World Order and Planetary Sustainability, in Ban Weng (ed.), *Chinese Visions of World Order: Tianxia, Culture, and World Politics* (2017)

⁷³ He Yafei, "Belt & Road" v. Liberal Order (2017) 34 *New Perspectives Quarterly* 31-33.

⁷⁴ See Ralf Michaels, Code vs Code: Nationalist and Internationalist Images of the Code Civil in the French Resistance to a European Codification, (2012) 8 *Eur. Rev. Contract L.* 277-295.

This idea of Asia is reminiscent of earlier Japanese ideas of Pan-Asianism.⁷⁵ Indeed, although the idea of Asia emerged in Europe, it spurred a counterconcept in Asia, as a concept not to extend European influence but to resist it, as a promise of an identity that could be opposed to, withstand, that of Europe (and, slightly later, America). Japan had, in the 19th century, viewed the subjugation of once mighty China with a sense of horror, fearing a similar fate for itself. Not long after Commodore Perry forced Japan to open its ports for trade and the Tokugawa regime crumbled, the country, under the new Meiji regime, responded with a radical response of modernization, and that meant: westernization. This modernization included all aspects of public life, including, of course, the law. Japanese lawyers traveled to Europe and the United States in order to learn about Western laws. Professorships were established for various Western law: French law, common law, German law.⁷⁶ And, of course, Japan adopted a whole series of new codes in civil and criminal law, strongly influenced Western, especially French and German law.⁷⁷

This well-known story has led comparative layers, not only from abroad, to proclaim that Japanese law would be, simply, civil law; it is still often described as such, also by Japanese scholars themselves.⁷⁸ This suggests why we can think of Asian law as Western. But that, as we know, is misleading. First, the adoption of European law required a significant translation.⁷⁹ Necessarily, even at the level of official law, Japanese law became a careful combination of foreign and domestic elements. Translations of civil codes were difficult because the concepts used were unfamiliar, down to basic issues like the concept of rights.⁸⁰ The civil code may be mostly an

⁷⁵ For an excellent collection of translated primary texts, see Sven Saaler & Christopher W.A. Szpilman (eds), *Pan-Asianism—A Documentary History* (2 Vols, Rowman & Littlefield 2011). Useful summaries are Sun Ge (transl. Hui Shiu-Lun & Lau Kinchi), *How Does Asia Mean?*, 1 *Inter-Asia Cultural Studies* 13-47 (Part I), 319-341 (Part II).

⁷⁶ Kenzo Takanyagi, *Contact of the Common Law with the Civil Law in Japan*, (1955) 4 *Am. J. Comp. L.* 60-69, 60.

⁷⁷ Harald Baum, *Comparison of law, transfer of legal concepts, and creation of a legal design: The case of Japan*, in John O. Haley and Toshiko Takenaka (eds), *Legal Innovations in Asia: Judicial Lawmaking and the Influence of Comparative Law* (2014) 67ff; comprehensively *A History of Law in Japan since 1868* (Wilhelm Röhl ed., 2005).

⁷⁸ See already N Hozumi, *Lectures on the New Japanese Civil Code as Materials for the Study of Comparative Jurisprudence* (Tokyo 1904) 19.

⁷⁹ Ko Hasegawa, *Normative translation in the heterogeneity of law*, (2015) 6 *Transnational Legal Theory* 501-517.

⁸⁰ See Ken Mukai & Nobuyoshi Toshitani, *The Progress and Problems of Compiling the Civil Code in the Early Meiji Era*, in: *Law in Japan Vol. 1* (1967) 25, 49-50 (1967); Yu-Cheol Shin, *Übersetzungsprobleme bei der Rezeption europäischer*

amalgam of French and German law,⁸¹ but the family system was based on traditional Japanese customs. Similarly, the Constitution was largely Prussian, but state Shintoism as the underlying constitutional identity, codified in the Rescript of Education, was intrinsically local.⁸²

Second, the westernization of Japan and the westernization of Japanese law must be understood within the broader context of politics, including geopolitics, of the time. Japan did not simply join the West, and Japanese law did not simply join the civil law tradition. Western observers easily overlook that westernization was not meant to enable Japan to join the West; it was meant to strengthen Japan so it could withstand Western colonization. The Western secularized and centralized state with its bureaucracy served as a forceful model of state success, and as a reason for the military success of European countries in colonizing much of the world. Whatever (cultural) superiority the Japanese saw for themselves, that superiority did not translate into competitiveness. The Meiji regime adopted elements of the Western state in view of its superior effectivity, but the goal was not so far to emulate the West as to keep it at bay. Adopting this model meant, for Japan, to step up to a similar level of development, and to achieve a similar level of strength.

This interest clearly underlay law reform. One important goal of codification of civil law was to move beyond the unequal treaties that Japan, like China, had entered into with Western powers.⁸³ Under these treaties, foreigners were exempt from the jurisdiction of Japanese courts and the application of Japanese law because these courts and laws were considered inferior and therefore not acceptable for Westerners. The ensuing system of extraterritoriality, under which Western countries had their own courts for their citizens in Japan, created a situation considered unbearable for a Japanese sense of pride and sovereignty. That created an important reason for a Westernization of Japanese laws.⁸⁴

Rechte in Ostasien, in Martin Josef Schermaier/Werner Gephart (eds.), *Rezeption und Rechtskulturwandel. Europäische Rechtstraditionen in Ostasien und Russland* (2016) 35-55.

⁸¹ Béatrice Jaluzot, *Les origines du Code civil japonais*, (2015) 40 *J. Jap. L.* 121-146.

⁸² On the Rescript's return to national debate, see recently Shaun O'Dwyer, *What's so bad about Imperial Rescript on Education anyway?*, *The Japan Times* March 19, 2017, <https://www.japantimes.co.jp/opinion/2017/03/19/commentary/japan-commentary/whats-bad-imperial-rescript-education-anyway>.

⁸³ See Michael R. Auslin, *Negotiating with Imperialism—The Unequal Treaties and the Culture of Japanese Diplomacy* (2004).

⁸⁴ Tokichi Masao, *The New Civil Code of Japan*, (1897) 18 *Arena* 64-69, 64; Kazuo Hatoyama, *The Civil Code of Japan Compared with the French Civil Code*, (1902) 11 *Yale LJ* 296-303, 298.

This means that the Westernization of Japanese law did not lead to a submission to the West but rather the opposite: it was an anticolonialist move in that it justified the application of (albeit westernized) Japanese law to Westerners. What looks like Western law imposed on Japan to the careless comparative lawyer is actually appropriated law that becomes, through the process of Japanization, Japanese law.⁸⁵

Early 20th century Japanese attitudes can be grouped, with some simplification, into two seemingly opposite positions: “leaving Asia” and “leading Asia.”⁸⁶ The first idea, that of leaving Asia, is most famously linked to Yukichi Fukuzawa’s famous plea, in an editorial, for “Shedding Asia.”⁸⁷ Fukuzawa—whose now famous essay was hardly discussed before it was revived after the second World War—⁸⁸ did not call for joining Europe, however, and the Asia he wanted to leave behind was only the old Asia which had been unable to withstand Europe. The idea of leading Asia, on the other hand, draws on Japan’s modernization and new confidence, leading to claims for a united Asia—with Japan as its leader. “Asia is one” proclaimed Okakura in 1903,⁸⁹ and this Asia was formulated as an alternative to Europe: Okakura juxtaposed the Western racist concept of a “yellow peril” with the countercomplaint over a “white disaster”. On closer perspective, therefore, both positions are closer to each other than one might think: for each of them, the old Asia has to be left behind and Japan has to endorse modernization. In this sense, the seeming opposition against Asia formulated by Fukuzawa does not stand in complete opposition to voices of others who argued for an Asian identity.⁹⁰

⁸⁵ H. Coing (ed.), *Die Japanisierung des westlichen Rechts (The Japanization of Western Law)* (1990); Jean-Louis Halpérin, *Transplants of European Normativity in India and in Japan: a Historical Comparison*. (2014) *22 Rechtsgeschichte* 150-157.

⁸⁶ Miwa Kimitada, *Pan-Asianism in modern Japan—Nationalism, Regionalism and Universalism*, in Sven Saaler/J. Victor Koschmann (eds.), *Pan Asianism in Modern Japanese History—Colonialism, Regionalism and Borders* (Routledge 2007) 21-33.

⁸⁷ Dwight Tat Wai Kwok, *A Translation of Datsu-Aron: Decoding a Prewar Japanese Nationalistic Theory* (MA Thesis, U. of Toronto 2009) 25ff. See Urs Matthias Zachmann, *Blowing Up a Double Portrait in Black and White: The Concept of Asia in the Writings of Fukuzawa Yukichi and Okakura Tenshin*, positions: east asia cultures critique, Volume 15, Number 2, Fall 2007, pp. 345-368.

⁸⁸ Hirayama Yō, *Fukuzawa Yukichi no shinjitsu* (2004), as discussed in Akiko Uchiyama, *Translation as Representation—Fukuzawa Yukichi’s representation of the “Others”*, in John Milton/Paul Fadio Bandia (eds.), *Agents of Translation* (2009) 63ff.

⁸⁹ Okakura Kakuzō, *The Ideals of the East, with Special Reference to the Art of Japan* (1903) 1.

⁹⁰ This point is made by Pekka Korhonen, *Leaving Asia? The Meaning of Datsu-A and Japan’s Modern History*, *The Asia-Pacific Journal* Vol. 11 Issue 50, 1ff.

Underlying this new Pan-Asianism was a (largely counterfactual) suggestion that Asia was racially and culturally uniform—and that its racial and cultural features were, largely, those of Japan. It was such ideas that were used for the subsequent Japanese colonization of large parts of East Asia and its role in World War II. Pan-Asianism and the subsequent colonization project represented a remarkable intellectual step, described by one scholar as “Japan’s orient.”⁹¹ Orientalist ideas about Asia, expressed at first by Europeans and imposed on Asia, were adopted and appropriated by intellectuals and politicians in Japan and elsewhere in Asia themselves. They thereby expanded on the European construct of a largely uniform Asia, in need of development through colonization.⁹² What differed was that now Japan, rather than Western powers, had the role of bringing about this development. What did not differ was that this idea of an Asian homogenous identity was a construct, built more on ideology than on empirical facts. The result was a curious, arguably internally incoherent, concept: Japanese Pan-Asianism rejected the West and at the same time adopted its tools and mechanism; it criticized the Western sense of racial and cultural superiority of Westerners over Asians, and at the same time endorsed a sense of superiority of Japanese over other nations in Asia. In this way it also created mixed reactions amongst those other Asian nations: they admired the Japanese resistance to the West and its endorsement of a pan-Asian civilization that could overcome the West, and they opposed a Japanese imperialism that continued the work of Western imperialists.

Pan-Asianism spurred ideas for what can well be called pan-Asian law: a project of law convergence in Asia, modelled on Japanese law. Japanese imperialism is often, for obvious reasons, compared to the German Nazis. Yet at least insofar as law is concerned law, the more apt comparison may be with Napoleonic France. The Nazis had no great interest in exporting their laws; they were generally suspicious of law. Napoleon, by contrast, not only saw the Civil Code as one of his main achievements, he also actively advocated for its adoption as a European code—an odd amalgamation of a nationalist and a transnationalist ideal.⁹³ And indeed, the French civil

(2013). On Fukuzawa and Okakura and the convergence of their thoughts, see, e.g., Sun Ge, *How Does Asia Mean? (Part 1)*, (2000) 1 *Inter-Asia Cultural Studies* 13-47.

⁹¹ Stefan Tanake, *Japan’s Orient: Rendering Pasts into History* (1993).

⁹² E.g. Chao-Ju Chen, *Producing ‘Lack as Tradition’: A Feminist Critique of Legal Orientalism in Colonial Taiwan*, (2013) 1 *Comparative Legal History* 186-210.

⁹³ See Ralf Michaels, *Code vs Code: Nationalist and Internationalist Images of the Code Civil in the French Resistance to a European Codification*, (2012) 8 *Eur. Rev. Contract L.* 277-295.

Code was adopted elsewhere through different means—sometimes through conquest, sometimes through persuasion, sometimes through inspiration.⁹⁴

We can find similar developments with regards to Western law as adopted by Japan. In the same way in which Japanese expansion in Asia represented an internal colonization, its export of Japanese laws created a secondary wave of transplant of civil law. To some extent it was exported through conquest as a consequence of Japanese imperialism. After colonizing Taiwan in 1895, the Japanese reformed Taiwanese law, first through a mixture of civil-law based ideas of customary law and colonial laws, later through direct expansion of Japanese law—and thus, indirectly, on a civil law model.⁹⁵ The situation in Korea was somewhat similar, even though Korea was at first considered, at least nominally, sovereign: Western law (including the idea of customary law) was imposed through its Japanese version.⁹⁶ Finally, Manchukuo, the Japanese puppet state in China, was justified in large part on legal grounds: Manchuria, it was said, needed modern law, and this could come only from Japan, not from China.⁹⁷ As a consequence, its new law codes resembled closely those in Japan.⁹⁸ (Remarkably, the Japanese did not terminate the unequal treaties granting Western nationals special extraterritorial rights, but rather extended this principle of extraterritoriality to themselves.)⁹⁹

In all these cases, Western-Japanese law came about as a matter of imposition, but it was not confined to that. Often, this law was also viewed as superior and as necessary for economic modelling. Thus, in Manchukuo, many locals supported the idea of sovereign (Japanese) stewardship in order to bring about modernization—

⁹⁴ Jean Limpens, "Territorial Expansion of the Code," in Schwartz (ed.), *Code Napoleon and the Common-Law World* (1956) 92–109; Michel Grimaldi, *L'exportation du code civil*, in: *Pouvoirs* No. 107—*Le code civil* (2003) 80, 81ff.

⁹⁵ Tay-sheng Wang, *Legal Reform in Taiwan under Japanese Colonial Rule, 1895–1945—The Reception of Western Law* (2000) 36ff; for a briefer version see Tay-sheng Wang, *The Modernization of Civil Justice in Colonial Taiwan, 1895–1945*, J. Japan

⁹⁶ Marie Seong-Hak Kim, *Law and Custom in Korea: Comparative Legal History* (2015); see also Chongko Choi, *On the Reception of Western Law in Korea* (1981) 9 *Korean J. Comp. L.* 141, 146-7; Choi, *Law and Justice in Korea* (2005) 161-62);

⁹⁷ Thomas David Dubois, *Inauthentic Sovereignty: Law and Legal Institutions in Manchukuo*, (2010) 69 *J Asian Studies* 749-770, 751.

⁹⁸ *Id.* at 756.

⁹⁹ Thomas David Dubois, *Rule of Law in a Brave New Empire: Legal Rhetoric and Practice in Manchukuo*, *Law and History Review*, Vol. 26, No. 2 (Summer, 2008), pp. 285-317, 296-7.

and establish stronger opposition to the West.¹⁰⁰ Koreans were fascinated with German legal thought after the triumph in the French-German war and thus eager themselves to modernize their laws in face of this model—which happened to resemble the Meiji model.¹⁰¹ And indeed, just like the French Civil Code, Japanese-Western law was exported not just through conquest but also through inspiration. Japan, at the end of the 19th century, was a country that had been able to modernize in record time, had managed to avoid the fate of China, a country whose navy was able to defeat a European nation (Russia) in the battle of Tsushima.¹⁰² The fascination with the success of Japanese modernization had impacts, including in law. Chinese law reformers of the Qing dynasty began to look to Japanese law (and thus indirectly to European law) for inspiration.¹⁰³ In this sense, if European law became influential in much of Europe, this happened to a large extent in its Japanese form.

The result was a partial unification of law in East Asia on civil law models. Given the background, it would therefore not appear fully accurate to understand the adoption of civil law in East Asian countries as a mere adoption of Western law, as joining a European legal tradition. Western law indeed influenced East Asian countries significantly, but it did so at least in part by way of what can be called a secondary reception: a reception of Japanese law, which itself had been received from the West.¹⁰⁴ The result, in this regard, is less a mere adoption of civil law and more an establishment of a Pan-Asian law—civilian in form, but Asian in its attitude.

Pan-Asianism of course led into Japanese imperialism and then into the catastrophe of the second World War. That war, and Japan's complete moral and

¹⁰⁰ Thomas David Dubois, *Rule of Law in a Brave New Empire: Legal Rhetoric and Practice in Manchukuo*, *Law and History Review*, Vol. 26, No. 2 (Summer, 2008), pp. 285-317, 291-2.

¹⁰¹ Marie Seong-Hak Kim, *Can There Be Good Colonial Law? Korean Law and Jurisprudence under Japanese Rule Revisited*, in Marie Seong-Hak Kim (ed.), *The Spirit of Korean Law—Korean Legal History in Context* (2015) 129.

¹⁰² For reactions all over Asia and beyond, see Rotem Kowner, *Between a colonial clash and World War Zero—The impact of the Russo-Japanese War in a global perspective*, in id. (ed.), *The Impact of the Russo-Japanese War* (2007) 1-25, 15-20; Cemil Ayden, *A Global Anti-Western Moment? The Russo-Japanese War, Decolonization, and Asian Modernity*, in Sebastian Conrad and Dominic Sachsenmaier (eds), *Competing Visions of World Order—Global Moments and Movements, 1880s–1930s* (Springer 2007) 213-236.

¹⁰³ Dan Fenno Henderson, "Japanese influences on Communist Chinese Legal Language," in Jerome Cohen (ed.) *Contemporary Chinese Law* 158-187 (1973); Jinfang Zhang (n. ___) 701..

¹⁰⁴ Kun Yang, *Law and Society Studies in Korea: Beyond the Hahm Theses*, *L. & Soc. Rev.* 23 (1989) 891, 897.

military defeat, shattered any sense of Japanese superiority. After the defeat, any Japanese aspiration for an Asia-wide Empire became as implausible in Japan as would be the readiness of other Asian countries to accept this. This may also be why, at least to an outside observer, it appears that both Japanese and non-Japanese scholars alike often tend to downplay the role that Japan had in the introduction of civilian systems in Korea and elsewhere—even though their subsequent development was independent.¹⁰⁵

To the extent that ideas of Japanese Pan-Asianism still exist (or are rediscovered), they tend to come without the imperial ambition of earlier times.¹⁰⁶ Today, the Japanese approach to law reform in other Asian countries is unusual for the degree to which the Japanese are willing to defer to local interests: The starting point for Japanese legal aid is not so much the model of their own law (as is the case for much law reform elsewhere) but instead the local needs and traditions of the respective country.¹⁰⁷ The idea that law in Asia should be unified under Japanese leadership and after the Japanese model would appear highly implausible. However, this leaves the idea of Pan-Asian law not without any influence. On the one hand, much law in East Asia remains indeed somewhat similar at least superficially, insofar as it is civilian. This represents a remnant of the Japan-led Pan-Asianism. On the other hand, this civilian character of law comes without a deeper aspiration towards a political entity led by Japan.

In this sense, civil law in Asian countries now seems to hold a curious existence: it is linked neither to European civilization (which it never embodied), nor to Japanese projects of Pan-Asianism (which have failed). It remains, in that sense, a

¹⁰⁵ Takao Tanase, 'The Empty Space of the Modern in Japanese Legal Discourse' in J Feest and D Nelken (eds), *Adapting Legal Cultures* (Oxford, Hart 2001) 187. For a Northeast Asian legal complex, see, e.g., Tom Ginsburg, *Japanese Law and Asian Development*, in Gerald-Paul McAllinn & Caslav Pejovic (eds.), *Law and Development in Asia* (Routledge 2012) 68-88; for criticism, e.g. Lee-Eun Young, *A Criticism of the Northeastern Legal System Theory*, (2003) 24 *Civil Law Study* (Korea Civil Law Study Association) 173-196, cited after Sang-Yong Kim, *The Necessity and the Methodology of Studies on Asian Law* (n.) 12 n. 9.

¹⁰⁶ See also Simon Avenell, *What is Asia for Us and Can We Be Asians? The New Asianism in Contemporary Japan*, *Modern Asian Studies* 48, 6 (2014) pp. 1594–1636.

¹⁰⁷ On this, see Isabelle Giraudou, *L'assistance juridique japonaise aux pays dits "émergents" d'Asie*, (2009) 7 *Transcontinentales* 47-67; Hiroshi Matsuo, "Let the Rule of Law be Flexible to Attain Good Governance," in Per Bergling, Jenny Ederlöf and Veronica L. Taylor (eds.), *Rule of Law Promotion: Global Perspectives, Local Applications*, Iustus, Uppsala, 2009, pp. 41-56; also (briefly) Akio Morishima, *Japanese Approach toward Legal Development Assistance (Law and Development)*, in Yoshiharu Matsuura (ed.), *The Role of Law in Development—Past, Present and Future* (2005) 19-20.

formal remnant. Kanayama's perspective that this law does not represent Asia in any meaningful sense becomes plausible against this specific historical background.

V. An Essentialist Asia: Asian Values

It seems appropriate, thirdly, to discuss at least briefly what is arguably the most well-known recent concept of an Asian identity of Asian law, namely the idea of Asian values. Asian values were promoted in the 1980s and 1990s, under the leadership of Lee Kuan Yew and Mahathir Mohamad, then Prime Ministers of Singapore and Malaysia respectively, as well as other leaders in the region. The main argument was that Asian society was governed by values drawn from Confucianism, and that political and legal systems in Asia would function best when in accordance with these values. Underlying this suggestion was an identity claim: Asian identity brought together different cultures in Asia and at the same time distinguished them from the West.

The idea was, in some ways, a continuation of the earlier two. It took up the Japanese idea of a Pan-Asianism and combined it both with Confucianism as a sinocentric idea and the idea of a pluralism that could account for Buddhism, Hinduism, and Islam as well. Indeed, although Pan-Asianism started off with an adoption of European over Asian models of governance, the idea of Asian values had (and still has) supporters among Japanese conservatives¹⁰⁸ At the same time, however, the idea of Asian values represented a powerful new idea. It was voiced after the end of colonization in Asia, and in response to the quick rise of Asian economies that were now becoming competitors to Western countries. It is, in this sense, the most explicit formulation of an Asian identity of law.

Situated in this competition, it becomes clear that the idea of Asian values, even more so than its two predecessors, was directed, at least nominally, against the West, and against what was perceived as colonial ideas. The economic success of Asia seemed like a powerful refutation of European ideas about Asian intrinsic backwardness. If Max Weber had suggested that Asian values were anathema to development, did not the existing development suggest that they were actually conducive? And, further, that they therefore provide a valid alternative to Western values?

Western countries had criticized Asian countries for neglecting human rights and democracy, often also for strategic purposes. Asian values were a response to both criticisms. As concerns human rights, the relation is complicated. The Bangkok Declaration of 1993, a leading document of the Asian Values debate, did not reject the

¹⁰⁸ See Avenell (supra n.) 1604ff; see also Shigenori Matsui, *Fundamental Human Rights and 'Traditional Japanese Values': Constitutional Amendment and Vision of the Japanese Society*, (2018) 13 *Asian Journal of Comparative Law* 59-86.

idea of human rights or their universal character at least at an abstract level.¹⁰⁹ Instead, the carefully crafted document suggested “that the promotion of human rights should be encouraged by cooperation and consensus, and not through confrontation and the imposition of incompatible values.” What this meant was that the particular conception of human rights espoused by the West was not universal in nature and should therefore not be imposed on Asian countries.¹¹⁰ As concerns democracy, Asian values were invoked in favor of a governance structure that is strong on development but relatively weak on individual rights, a structure that Bui Ngoc Son calls Confucian Constitutionalism and Mark Tushnet has recently called authoritarian constitutionalism.¹¹¹ Such systems rest on powerful executive branches to deliver stability and internal security and invoke a strong rule of law as concerns commercial interests, in particular the protection of property rights, the enforcement of contracts. They are weak, by contrast, on democratic participation, which is, like individual human rights, viewed as being in the way of both economic development and an Asian sense of harmony.

The idea of Asian values has not, to my knowledge, been linked to the project of contract harmonization, or indeed commercial law more generally. Sundaresh Menon, speaking about legal unification, invokes diversity of national laws as a potential impediment; a cultural unity of Asia is not mentioned.¹¹² Even Han, when he promotes an Asian character for the PACL, names only specific doctrinal peculiarities of Asian laws, without invoking deeper underlying Asian values.

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https://www.hurights.or.jp/archives/other_documents/section1/1993/04/final-declaration-of-the-regional-meeting-for-asia-of-the-world-conference-on-human-rights.html

¹¹⁰ See, e.g., Randall Peerenboom, Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates about Values in Asia*, 14 *Ind. Int'l & Comp. L. Rev.* 1 (2003).

¹¹¹ Bui Ngoc Son, *Confucian Constitutionalism in East Asia* (2016); Mark Tushnet, *Authoritarian Constitutionalism*, (2015) *Cornell Law Review* 391-461.

¹¹² Sundaresh Menon, *Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence*, (2013) *Singapore Journal of Legal Studies* 231, at 246:

“Furthermore, even where harmonisation is desirable and practicable, the exercise must be approached with sensitivity towards the national legal systems which will have to implement these laws. Harmonisation without due regard to the idiosyncrasies of national legal systems will produce superficially uniform laws, which leave fundamentally unchanged the undulating legal terrain that results from differences in the national legal systems underpinning these laws.”

One reason for the absence of a reference to Asian values may be that they play no role in this area.¹¹³ But another reason is the decline of the idea of Asian values in general. The international appeal of the idea of Asian values lost force in view of the Asian financial crisis in the late 1990s. Domestically, it retained strength for some time in supporting autocratic regimes' defenses against democracy movement.¹¹⁴ Today, however, it is mostly rejected as another artificial construct. Worse, the idea of Asian values essentializes an idea that is at the same time incompatible with the internal diversity of Asia and retains, through its opposition, the focus on Europe. Indeed, forceful arguments have been made that the discourse on Asian values was also used strategically: that it was primarily used not against the West, but instead against local opposition. Amartya Sen argued that the idea of democracy is universal, even if the particular way in which it is incorporated is not.¹¹⁵ Similar arguments have been made with regard to human rights; the ASEAN Human Rights Declaration of 2012, despite its shortcomings, no longer invokes Asian values.¹¹⁶ Seen like this, Asian values represent less a fight of East versus West, and more one of authoritarianism versus democracy.¹¹⁷ Thus, it may be the case that many people in Asia reject Western-style democracy based on the values they hold,¹¹⁸ but this would not be different from discussions in the West.

¹¹³ But see Gary F. Bell, *New Challenges for the Uniformisation of Laws: How the CISG is Challenged by "Asian Values" and Islamic Law*, in Ingeborg Schwenzer & Lisa Spagnolo (eds.), *TOWARDS UNIFORMITY: THE 2ND ANNUAL MAA SCHLECHTRIEM CISG CONFERENCE 11* (2011), 1, 15-20; more generally, see Ulrich Schroeter, *Does the 1980 Vienna Sales Convention Reflect Universal Values? The Use of the CISG as a Model for Law Reform and Regional Specificities*, 41 *Loy. L.A. Int'l & Comp. L. Rev.* 1-50 (2018); Bruno Zeller, *Regional Harmonisation of Contract Law: Is it Feasible?*, 3 *Journal of Law, Society and Development* (2016).

¹¹⁴ Mark R. Thompson, *Pacific Asia after 'Asian values': authoritarianism, democracy, and 'good governance'*, *Third World Quarterly*, Vol. 25, No. 6 (2004), pp. 1079-1095.

¹¹⁵ Amartya K. Sen, *Democracy as a Universal Value*, (1999) 10 *Journal of Democracy* 3-17.

¹¹⁶ Tommaso Visone *The "ASEAN Way". A decolonial path beyond "Asian values"?*, *Perspectives on Federalism*, Vol. 9, issue 1, 2017.

¹¹⁷ Mark R. Thompson, *Whatever Happened to "Asian Values"?*, (2001) 12 *Journal of Democracy*, 154-165, 158ff.

¹¹⁸ See Doh Chull Shin: *Confucianism and Democratization in East Asia* (2012) and the review by Albert Y. Chen, (2013) 75 *Review of Politics* 673-76.

VI. Beyond Essence: Asia as Method?

What follows from this overview? My conclusions are tentative, as they must be.

First, even if Asia and Asian law are constructs, the question for an Asian identity of Asian law does not appear entirely useless. Granted, a cultural Asian law that would be structurally comparable to European law does not exist. It is not possible to speak of Asian law in the same way in which it is possible to speak of European law. Such ideas are European projections. But that does not mean that the search for an Asian identity is fruitless, and the fact that scholars within Asia invoke some kind of Asian identity suggests as much. I have suggested three models of such an Asian identity: pan-Asian law, sinocentric law, Asian values. None of these models resembles the European model of cultural identity. Asian values were adopted in explicit rejection of European ideas of universalism. The sinocentric model is more one of a specific type of Empire than of the nation state. Even Japanese Pan-Asianism, in the way in which it appropriated Western ideas of statehood, cannot be explained fully in those terms. Moreover, all of these concepts are inherently problematic. But this does not make them unworthy of study, quite to the contrary.

Second, all these concepts stand in a certain relation to Western expansion and must be understood, at least in part, as responses to the West. To cite Wang Hui again, “the idea [of Asia] is at once colonialist and anticolonialist, conservative and revolutionary, nationalist and internationalist, originating in Europe and, alternatively, shaping Europe’s image of itself”¹¹⁹ On the one hand, Japanese pan-Asianism is a transplant from the West at the macro level, in the same way in which specific legal doctrines in Japanese law are such transplants at the micro level. What we have learned at the micro level should also help us at the macro level: the transplant does not leave the nature of the transplanted object intact; it changes it and adapts it to local circumstances. Therefore, the similarity of Japanese and Japanese-influenced law with European law is only superficial, as is the similarity of an Asian identity of law with a European identity of law. On the other hand, not only the idea of Asian values is formulated as an explicit rejection of Western law and Western values. The same is true for sinocentric law, which invokes ancient (precolonial ideas) today in explicit rejection of Western concepts. Their origins may be ancient, but their use is modern.

Third, however, despite this importance of relations to the West, to analyze the concepts only in this relation, or, worse, to essentialize them, would recapture the mistake of European orientalism. All these concepts are problematic insofar as they remain, like the European projection, focused on Europe as the yardstick and the perspective. If anything characterizes Asia as a region, it is its plurality – of views, of traditions, of governance structures, of cultures and laws. There are many Asian legal traditions not one; there are many Asian laws not one. Any homogeneous concept of

¹¹⁹ Wang Hui, *The Idea of Asia and its Ambiguities*, (2010) 69 *Journal of Asian Studies* 985-989, 987.

Asia, and thus of Asian law, seems inadequate in view of this plurality. All three concepts discussed here have, in the past, been used for either hegemonic or antidemocratic purposes. And all of these concepts are contested internally—in fact, although I attributed the different concepts of law loosely to specific countries, such different concepts can be found within each country. In short, concepts of an Asian legal identity must be seen as positions within internal political struggles and must also be understood with regard to those. European comparative lawyers are aware of this from the European context; we should not be surprised to find this elsewhere.

There is, in fact, a concept of Asia that may help such a perspective. It was first formulated by Yoshimi Takeuchi, a Japanese literary scholar who edited the first collection of writings on Asianism in the 1960 and provided an influential analysis of the concept.¹²⁰ Takeuchi called his concept “Asia as method,”¹²¹ and although he modestly suggested that “it is impossible to definitively state what this might mean,”¹²² some elements become clear. Takeuchi differentiated two kinds of modernization in Asia—the Japanese one, which superficially imposed foreign (Western) achievements on a deeper societal structure left largely intact, and the Chinese one, begun later (1919), but deeper, because it emerged from society itself. This perspective enabled an inner-Asian comparison that went beyond the focus on Europe. The West remained an element of such an idea of Asia, but not more than that, and it lost its logical and epistemological priority:

The concept of Asia as method was later taken up by Taiwanese scholar Kuan-hsing Chen.¹²³ Following Stuart Hall,¹²⁴ Chen strongly opposed a perspective in which the West provided the universal standard and Asia was viewed as a particular, and he opposes ideas of Asia that, in one way or another, Europe as a reference point.¹²⁵ This means also, for him, to view Asia as a locus of the local and the global alike: analyses of Asia are also analyses of the world, and vice versa. The West is neither dominant over nor absent from Asia. Instead, Chen “posits the West as bits and fragments that

¹²⁰ Christian Uhl, Takeuchi Yoshimi: “Japan’s Asianism,” 1963, in Saaler/Szpilman (n. __) Vol. 2, 317 ff. (introduction and excerpt); full German translation in German in Toshimi Takeuchi, *Japan in Asien: Geschichtsdanken und Kulturkritik nach 1945* (2005).

¹²¹ Yoshimi Takeuchi, *Asia as Method*, in Richard F. Calichman (ed.), *What Is Modernity?: Writings of Takeuchi Yoshimi* (Columbia University Press 2005) 149 (the text stems from 1960).

¹²² *Id.* at 165.

¹²³ Kuan-Hsing Chen, *Asia as Method—Toward Deimperialization*. Chen himself relies strongly on Yüzō Mizoguchi *China as Method* (in Japanese, 1989). See *ibid.* 245-255.

¹²⁴ Stuart Hall, *The West and the Rest: Discourse and Power*, in Stuart Hall & Bram Gieben, *Formations of Modernity* (Cambridge: Polity 1992) 275-332.

¹²⁵ *Ibid.* at 216-224.

intervene in local social formations in a systematic, but never totalizing, way.”¹²⁶ The consequence is a possibility to move beyond a focus on the West, and at the same time to overcome ideas of Asian homogeneity:

“using the idea of Asia as an imaginary anchoring point, societies in Asia can become each other’s points of reference, so that the understanding of the self may be transformed, and subjectively rebuilt. On this basis, the diverse historical experiences and rich social practices of Asia may be mobilized to provide alternative horizons and perspectives.”¹²⁷

I am not aware of applications of this idea in legal unification.¹²⁸ This chapter is not the one to develop the idea in full. If anything, the analysis has demonstrated how easily the Western comparative lawyer can go astray by assuming that questions have the same meaning in foreign areas as they do at home. Even the use of the term convergence, as opposed to harmonisation or unification, may represent a non-European twist that the comparatists is bound to miss.¹²⁹ There is, in fact, a debate about the question of how Asian law should be, inherent in convergence discussion though not always in these terms. But it is a debate that looks very different from the debate of how European law is.

Asia as method would suggest less focus on comparison with the West and more comparison within Asia.¹³⁰ The focus would no longer be on the clash between Western and local law as such, it would not merely measure the mere difference between Asian and European law, and instead decenter both East and West¹³¹. It would undermine the tacit assumption, found not only in Western comparatists, that Western law is universal and Asian law is particular.¹³² Developments in Asian law would no longer be reduced to degrees of Westernization and instead be seen on their own terms.¹³³ The debate between Han and Kanayama reference above would not be reduced to a debate about the European versus Asian character of the PACL and

¹²⁶ Ibid. at 223.

¹²⁷ Id. at 212.

¹²⁸ But see the reference to Chen in Ruskola, *supra* n __ at 896 n 66.

¹²⁹ Simon Chesterman, *Asia’s Ambivalence about International Law and Institutions: Past, Present and Futures*, (2016) 27 EJIL 945, 977-78.

¹³⁰ See, besides authors cited before, also Sang Yong Kim, *The Necessity and the Methodology of Studies on Asian Law*, (2004) 1 Asia Law Review 1-19.

¹³¹ Ruskola, *Where is Asia* (n) 893ff; see also Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton 2008)

¹³² Ruskola, *Where is Asia* (n.).

¹³³ Holning Lau, *The Language of Westernization in Legal Commentary*, (2013) 61 Am. J. Comp. L. 507-537 (finding the concept of westernization descriptively and analytically inadequate, and normatively unattractive).

instead would enable an intra-Asian comparison of different concepts of Asian law, in which the West is one of multiple elements. And an emerging Asian law would in turn be fruitful for the Western observer, not merely as an object, but as a perspective on the West itself, and on modernity. As Takeuchi formulates,

Rather the Orient must re-embrace the West, it must change the West itself in order to realize the latter's outstanding cultural values on a greater scale. Such a rollback of culture or values would create universality. The Orient must change the West in order to further elevate those universal values that the West itself produced. This is the main problem facing East-West relations today, and it is at once a political and cultural issue¹³⁴

At this stage, the question asked at the beginning of this chapter – how Asian should Asian law be – has led in perhaps unexpected directions. It has generated a fruitful discussion—it is not a useless question. But the question has, through the analysis, changed its character: Asia is no longer object or subject but method, no longer one but many parts that are in dialogue with each other, no longer recipient or opponent of Western law and instead co-producer of modernity and of modern law. In this, the West has at least as much to learn from Asia as Asia did from the West.

¹³⁴ Id. at 165.