

Should Law Look East?

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Abstract

How well-equipped is the discipline of law to cope with complex questions arising in the emerging Asian Century? This editorial article reviews how time and space namely, the predominance of European and American power in 19th and 20th centuries have forged an Anglo-American emphasis in traditional disciplines of law, such as comparative law and its more recent cousins of international law and global law. The editorial poses the question of whether this limits the ability of traditional legal disciplines to make sense of complex political, economic and social questions emerging during the Asian Century. It further interrogates whether traditional legal disciplines can be rehabilitated to engage sensibly with Asian legal power or whether a new discipline of 'Asian Law' is warranted.

Keywords: Asian law; Comparative law; International law; Global law; Asian Century

Introduction

Time and space have long constrained legal debate. Careful legal scholarship takes time to craft; publication in book and journals are at the mercy of selection and review processes and production schedules; and delivery of scholarship requires a further wait for the publication to reach library book shelves in hard copy form or become digitally available in online databases. Despite the globalisation of law, libraries prioritise research relevant to the regions in which they are located, and online databases even comprehensive repositories such as Westlaw, Lexis Nexis and Hein Online privilege research published in certain geographical jurisdictions, notably the United States, over others. Time fetters; space shackles; and legal debate, in the process, suffer.

The debut of the Journal of Civil and Legal Sciences confronts these constraints head on. Freely accessible and with a fast-track review system, the journal removes the choke imposed by temporal and geographical blocks. As such, the journal can ensure that debates are closely linked to current events and swiftly available to interested stakeholders anywhere in the world. As a new forum for legal researchers, judges and practitioners to debate issues of law and civil justice, the Journal of Civil and Legal Sciences is a welcome development in breathing new life into legal debate.

The European/Asian Centuries

Time and space have impacted the discipline of law more profoundly than just the accessibility and availability of its scholarship. The 19th and 20th centuries were the European and American centuries respectively. In terms of economic might, military strength and diplomatic influence, the European states and, later, the United States of America exercised international domination [1]. This historical context means that key legal disciplines namely, comparative law, international law and, more recently, global law have been forged in the furnace of the European and American centuries. The study of law, as such, has "Anglo-American moorings" [2].

The evidence for this is striking. Upham, for example, conducted an empirical study of the Anglo-American bias in English writing on comparative law [3]. Examining 46 years of issues of the American Journal of Comparative Law which, he submitted, was representative of mainstream comparative law scholarship, Upham found that 2.41% of the articles were about China, 2.37% Japan and 8.67% Asia as a region. Of course, in the 15 years since Upham published this article, there has

been a marked increase in Asian law research, especially Chinese law. But this does not reduce the power of his point: Eurocentrism is a core tradition of comparative law.

It is easy to see why this is so. As Fauvarque-Cosson argues, the major goal of comparative law is to "eradicate pluralism and diversity by unifying or at least harmonizing major field of the law" [4]. The focus on Europe and the United States, therefore, makes sense since their shared heritage in politics, economics and culture facilitates such a project. The neglect of Asia, by contrast, results from its greater intra-regional diversity politically, economically, philosophically and even culturally [1].

Yet some comparative law work goes beyond merely seeking to eradicate difference: it denies difference altogether. Thus, an emerging line of comparative law scholarship goes as far as to argue that the "Americanisation" of law renders non-Western legal traditions increasingly irrelevant. This is particularly evident in some comparative law work on Japan. According to this scholarship, Japanese law is inching inexorably to American standards of legal regulation. Keleman and Sibbitt, for example, submit that Japan is witnessing a more pronounced American flavour to its corporate and commercial laws due to accelerating economic liberalization and political fragmentation [5]. Milhaupt, too, sees evidence of Japanese corporate governance assuming a more American shape, despite the "stickiness" of its traditional corporate governance norms [6]. Other legal scholars pursue similar reasoning but boldly extend the thesis beyond Japanese law. Hansmann and Kraakman, law professors from Yale and Harvard respectively, prophesise the "end of history for corporate law", predicting the inevitable convergence by other legal systems on Anglo-American principles of shareholder-oriented corporate governance [7]. Competition law scholars have similarly forecast the "end of anti-trust history" [8]. More broadly, Chesterman points to the Americanisation of legal education and research [9].

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Received February 03, 2012; Accepted February 06, 2012; Published February 10, 2012

Citation: Wolff L (2012) Should Law Look East? J Civil Legal Sci 1:e101. doi: [10.4172/2169-0170.1000e101](http://dx.doi.org/10.4172/2169-0170.1000e101)

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Of course, critics have cast doubt on the triumph of American legalism [10]. Mattei, for example, dismisses the thesis as little more than “a spectacular process of exaggeration, aimed at building consent for the purpose of hegemonic domination” [11]. Australian corporate law scholars, such as von Nessen [12] and Cheffins [13], argue that law reforms draw on some US inspiration but, ultimately, are adapted to suit local circumstances. Nevertheless, the “Americanisation” thesis is a strong presence in the comparative law literature and reinforces the historical ethno-centrism of the discipline.

Comparative law, however, is not the only legal discipline to suffer from a Western bias. International law, its sister discipline [14], does too. Gaubatz and MacArthur provocatively question the extent to which international law is truly international [15]. Despite the rhetoric that international law embodies universal norms; the authors conclude that, in truth, its values are largely the bastion of a small number of powerful Western states. The emerging discipline of global law has a similar normative orientation [16]. The core tension in global law revolves around the role of the nation-state in global governance: some believe global law is about transnational market regulation; others think that global law is about geopolitical integrity and state sovereignty. For Darian-Smith, however, this is a sterile debate. Either way, she argues, global law is fundamentally Eurocentric because it represents “modernist understandings of sovereignty, constitutionalism, nationalism, and Western superiority” [16].

The Asian Century

The 21st century finds the world in a new time and space. At the beginning of the century, the European Union lies significantly weakened by its sovereign debt crisis and the United States is economically debilitated after two exacting wars in Iraq and Afghanistan. By contrast, Asia is enjoying an economic and political renaissance. The Chinese economy is booming; the Indian economy is not far behind; the tiger economies in Southeast Asia remain dynamic; and Japan, despite insipid growth as a maturing capitalist state, is close behind China as the third largest economy in the world. “Billions of Asians are marching to modernity.” [17] Does this make the 21st century the ‘Asian Century’?

For nearly twenty-five years, scholars have been predicting the dawn of the Asian Century [18-22]. Some have been bold in their predictions. Mahbubani is typical. “The rise of the West,” he writes, “transformed the world. The rise of Asia will bring about an equally significant transformation” [17] others are more cautious. Krugman, for example, is only prepared to admit that “the prospect for an Asian century may not look quite as distant” [23]. Fidler believes that an Asian century could be on the cards [1].

In terms of time, centuries happen. In terms of history, centuries are made. The mere passage of time will not make the 21st century the Asian century in the history of international relations and international law. Enough indicators now point to ‘Asia rising’, such that one can sense a historical moment for this region dawning. Such moments are simultaneously opportunities and burdens because those thrust onto these ‘tipping points’ of history cannot escape the responsibilities created and must, for better or worse, shape the future. At these moments, what futures are imaginable and possible?

Fidler explains that it is unlikely that Asia especially China and India will dominate in the same way as the European states did in the 19th century and the United States has in the 20th century. First, it is unlikely that US hegemony will completely disappear. Nor is it likely that EU power will dissipate to the extent that it is vulnerable to Chi-

nese and Indian power. Second, Asian powers have significant internal economic and political problems to resolve before they can project their power outwards. Third, they lack a common ideological position that can seriously threaten the current liberal orthodoxy [1]. The minority position is to reject the idea of an Asian century. For Baruma, the idea is “absurd” [24]

However, it is clear that political leaders are preparing for an Asian Century. In an address to the Australian House of Representatives on 17 November 2011, President Barak Obama, for example, declared that the Asia-Pacific region is the “future” [25].

As the world’s fastest growing region and home to more than half of the global economy, the Asia-Pacific is critical. With most of the world’s nuclear power and some half of humanity, Asia will largely define whether the century ahead will be marked by conflict or cooperation, needless suffering or human progress. As President, I have therefore made a deliberate and strategic decision: as a Pacific nation, the United States will play a larger and long-term role in shaping this region and its future.

What are the implications of an Asian century or at least a fast-rising Asian region for the discipline of law? In “The Future of Law in a Global Economy”, Applebaum argues that the ascendance of Asian power will transform global legal practice. The US template premised on precise rules, adversarial dispute resolution and formal business structures will give way to a more Asian (or, more accurately, Chinese) model of informal relationships, cooperative dispute resolution and flexible organization [26]. Applebaum’s thesis is a direct attack on theories of legal convergence popular in much comparative law scholarship.

Towards ‘Asian Law’?

Even if we do not accept Applebaum’s thesis, Asia’s surge is convincing enough to make the time ripe for law to look east. At issue, however, is whether the traditional disciplines of law especially comparative law can be rehabilitated to ensure sensible engagement with Asian legal systems. Or, as some argue, is it time for a new discipline of ‘Asian law’? [27]

For Glenn, comparative law is robust enough to embrace Asian law [28]. This is because there are underlying common attitudes towards law in Asia where law is used as a tool of persuasion rather than coercion that allow for comparative analysis. These shared attitudes, however, do not disguise, but rather are compatible with, local, intellectual and spiritual diversity in the region. Glenn, however, assumes that law is less important in Asia than it is in Europe and North America. He is not the only one to make this claim; others [29,30] similarly contend that Asians have an “allergy” to legalization [31] or, in the words of Noda, “do not like law” [32].

Alvarez is sharply critical of this premise [31]. The thesis of under-legalization, Alvarez writes, is an over-simplification. In the international arena, for example, Asian countries are not averse to adversarial dispute resolution; the prevalence of informal regional groups does not undermine Asian states’ commitment to global legal institutions such as the United Nations or the World Trade Organisation; and formal statutory or judicial law provide an inaccurate guide of legal development given the important role of tribunals, private parties, municipal officials, bureaucrats and the market in shaping, interpreting and enforcing legal norms. In the domestic realm, under-legalization is similarly unconvincing. For over thirty years, for example, Japanese law scholars have attacked the assumption that law is marginal in Japanese society. Deploying a wide range of empirical approaches and analytical

techniques, including institutional history [33], rational choice theory and regression analysis [34], ethnography [35], narrative analysis [36], communitarianism [37] and neo-institutionalism [38], successive generations of Japanese and non-Japanese experts have demonstrated that legal rules, legal processes, legal professionals and legal actors play important roles in structuring and ordering society. After thirty years of debate, a consensus seems to have been reached: law “matters” in Japan [39]. A new century finds Japan very much changed. Administrative law statutes have tightened procedural rules; legal training has been re-fashioned into US-style graduate legal education with more generous bar pass rates; public participation in the criminal justice system has been introduced; and a new corporate law code has been drafted. The Japanese government proclaims this as the ‘legalization’ of Japanese society. Scholars nod their agreement. Not only does law “matter”, they now write; it matters “even more” [5, 40,41].

Enter Asian law. Given the ethno-centrism of comparative law and the unpersuasive premise of under-legalization as a technique for bringing Asian legal systems within its analytical fold, Antons makes the case for a new field, arguing that researchers and practitioners alike need to identify a ‘general concept’ of Asian law [27]. While Antons duly respects the diversity of legal experiences in the Asia-Pacific area, he nonetheless identifies a common tradition: the legal colonisation of Asia by European and American powers and the blending of imposed laws with indigenous Asian legal traditions. This tradition, in Antons’s view, suggests a set of core analytical questions and a methodology that can be employed to make sense of the Asian legal experience.

Taylor is less sure [42]. On the one hand, moves to create a unified Asian law discipline represent a welcome move to find a replacement discipline for conventional comparative law that no longer serves a useful purpose and, indeed, seems to be self-imploding. On the other, Taylor fears that the new discipline could paper over diversity in the region and, as such, serve a neo-Orientalist agenda of Western control over Asian legal knowledge. Jayasuriya rebuts Taylor’s neo-Orientalism thesis [43,44]. Taylor, in Jayasuriya’s view, seems to foreclose any possibility of sensible engagement with the Asian region. The keyword here is “sensible”: in Jayasuriya’s view, comparative research into the rule of law in East Asia is possible and therefore sensible because of (i) shared understandings of governance and power in Asia and (ii) an economic tradition of managed capitalism. Jayasuriya, in short, seems to back up Antons’s call for an Asian law discipline, but has recast the core commonalities that make this possible.

The question I posed in this editorial essay “Should law look east?” has both an answer and a follow up question. The rise of Asia certainly makes it compelling to take seriously Asian legal experience. That traditional disciplines of law have marginalized Asian law can no longer be sustained given the current historical moment. But how to do so whether in a re-cast comparative law or in a new legal tradition altogether remain an unsettled question. This is the subject for ongoing debate. And the debut of the Journal of Civil and Legal Sciences provides the perfect time and space for this debate as well as many others on civil law and legal systems to take place.

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