

GLOBALISATION AND THE CHALLENGE OF ASIAN LEGAL TRANSPLANTS IN EUROPE

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This article reviews the main patterns of Asian migration to Europe and the ways in which Europe today has become ‘multicultural’ with Afro-Asian legal diversities. It discusses the limited role which Asian states have played in these processes of emigration and settlement. It further examines the status of the laws transplanted by Asian migrants and their descendants in Europe and the ways in which Asian diasporas in Europe are engaging in new hybrid patterns of socio-legal navigation and reconstruction. The article is critical of European legal orders as not having reacted adequately to these patterns of Asian legal reconstruction but also urges Asian legal scholars to investigate this underexplored field in more detail.

I. INTRODUCTION

The choice of the term ‘legal transplants’ in this article, which discusses the laws of Asian diasporic communities in Europe, may seem somewhat strange since Alan Watson famously used the term to the consternation of socio-legal and comparative law scholars.¹ Watson used the notion of legal transplant in the very narrow and limited sense of the transfer of a legal rule from one jurisdiction to another, and did not seem to consider it necessary to acknowledge the strong determining role of culture of the ‘sending’ or ‘receiving’ society when assessing the fate of any such rule. There is no doubt that Watson was working with too abstract an idea of transplantation, and with too narrow an idea of law.² The term ‘legal transplant’ in this article is more consonant with that used by Masaji Chiba who defines it in the wider sense of a “law transplanted by a people from a foreign culture”.³ Very pertinently, Chiba includes the transfer of law through the migration of people from

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¹ Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1974); Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed. (Athens and London: The University of Georgia Press, 1993).

² Watson’s thesis continues to provoke discussion as seen by some essays in David Nelken & Johannes Feest, eds., *Adapting Legal Cultures* (Oxford and Portland, Oregon: Hart Publishing, 2001).

³ Masaji Chiba, *Legal Pluralism: Toward a General Theory Through Japanese Legal Culture* (Tokyo: Tokai University Press, 1989) at 179 [*Legal Pluralism*]. Chiba also recognises a narrower sense to the term which he defines as “the state law of a non-Western country transplanted from Western countries”.

one place to another in his concept, specifically mentioning the immigration of people from the Korean peninsula in the 3rd century AD as having involved “probably the first transplantation of foreign law to Japan”.⁴

The issue of Europe and its relationship with Asia has also to be confronted. In this context, one could mention the connections of ancient times that gave rise to enormous advances in knowledge, science and technology in Europe through Asian influences. Those connections have been repeatedly renewed and led to the further development of Europe, but also to the subjugation of large sections of Asia under colonialism and now under more recent pressures of globalisation according to Western terms. These challenges are being faced by Asians by their own counter measures, reasserting ‘Asian values’ for one, and it is far from clear whether globalisation is necessarily following Western dictates; rather it increasingly appears as if these have been complex processes involving, not one-way, but multiple exchanges and *globalisations*, including those of peoples, laws and legal traditions.⁵

Exchanges of laws and legal traditions probably go back to pre-historic times right up to the interactions of the Greeks with the Egyptian, Anatolian, Mesopotamian, Persian and Indian civilisations. One might also note the importance of the originally West Asian religious traditions of Judaism, Christianity and Islam as having had a tremendous impact on Europe and, at least in the combination of the first two traditions, so much so as to have contributed to a distinct European cultural and legal identity. This identity has been effective enough, especially if we trace it further in its intermixture with Greco-Roman and modernist aspects, to lend to Europe a legal culture which shows strong indications of incompatibility with other legal traditions.

The very concept of ‘Asia’, essentially Western, and defined primarily as Europe’s other (together with other ‘others’ such as Africa), is also linked to this problem in so far as it rests on the assumption of the homogeneity of Europe.⁶ One of the main threads of discussion in this paper is that that assumed homogeneity, in itself unsustainable,⁷ is increasingly called into question in the legal field through the establishment of Asian diaspora communities in Europe. The separation of Europe from Asia is all the more remarkable considering their geographical contiguity, and lends further credence to the view that the differentiation lies not so much on the geographical as on the ideational plane. This sharp apparent difference means that the long process of exchange between Europe and Asia has also seen its fair share of suppression of the same. We know far too little today of the more recent impact of

⁴ Masaji Chiba, *Legal Cultures in Human Society* (Tokyo: Shinzansha International, 2002) at 20-21 [*Legal Cultures*]. Subsequent streams of migrants from the Korean peninsula continued to have a crucial bearing on legal developments, notably with the introduction of Buddhism in the 6th century AD, and also agricultural and artisan techniques over many years.

⁵ See H. Patrick Glenn, *Legal Systems of the World* (Oxford: Oxford University Press, 2000) at 47-50 [*Glenn*]; Werner F. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (London: Platinum Publishing Ltd., 2000) at 1-51 [*Comparative Law*]; Prakash Shah, “Diasporas as Legal Actors: Implications for Established Legal Boundaries” (2005) Vol. 5, No. 2 *Non-State Actors and International Law* 153 [*Shah*].

⁶ K. N. Chaudhuri, *Asia before Europe: Economy and Civilisation of the Indian Ocean from the Rise of Islam to 1750* (Cambridge: Cambridge University Press, 1990) at 22-23.

⁷ For the methodological problems in the analysis of this diversity, see Pierre Legrand, “How to Compare Now” (1996) Vol. 16, No. 2 *Legal Studies* 232.

Islamic legal ideas on the development of the common law, let alone the impact of other ancient Asian cultures on European thinking about law.⁸

Therefore, having somewhat unwisely set myself the topic of Asian laws in Europe, I also have to acknowledge that I use the notions of 'Asia' and 'Asian' somewhat loosely. Otherwise what should we make of say Islamic law since, although large sections of its following have Asian origins, it ranges across continents today? Should I insist that Asians from Africa or the Caribbean who today live in Europe have no familiarity with and have not been affected by other local legal traditions in those places? I only have to think about the number of Swahili words that are assumed to be part of the normal vocabulary of a Gujarati with East African origins, while Swahili itself draws on a rich resource of Asian vocabulary combined with Bantu syntax.⁹ Why should we suppress these hybridities even as we engage with newer processes of hybridisation in Europe? Indeed, I hope that I would not have to explain this in detail to an Asian readership, whose members come from cultures that are inherently hybrid and can handle plurality—including legal plurality—with ease, unlike the case in Europe. It should be no surprise therefore if you detect some level of slippage between the terms 'Afro-Asian' and 'Asian' in this discussion, as our rough and ready categories often tend to fail us.¹⁰

II. AFRO-ASIAN SETTLEMENT AND THE MULTICULTURALISATION OF EUROPE

The Asian presence in Europe is impossible to date with any exactitude. We also know that one of Europe's oldest Asian minorities, despised wherever they have settled, is the Roma group.¹¹ We also have some writers who record the long South Asian¹² or Muslim¹³ presence in Britain, for instance. This article has the more modest task of examining the more recent developments mainly in the post-Second World War period, during which time the size of Asian populations in Europe seems to have outpaced that in any known previous era.

In the early post-war years, many people from the Southern European belt and much further afield in Africa, Asia, and the Caribbean were recruited as workers by statal industries, or by private firms, often through networking among migrants themselves, while others came as a result of insecurity that followed decolonisation, such as the South Asians from East African countries. The individual patterns in different countries of North West Europe varied depending on historical and cultural ties as well as decisions about the sources of labour supply. While Britain and

⁸ See Glenn, *supra* note 5, at 208-210.

⁹ The world is replete with such examples of hybridity. I was impressed to learn, at the first European conference on African Studies (29 June–2 July 2005) at SOAS, that in Senegal the fascination for Indian cinema has led to Indian film societies being formed, members of which excel in the art of imitating the dances performed in those films, as well as to learn about the activities of Chinese businessmen in Namibia. On Swahili, see Abdulaziz Y. Lodhi, *Oriental Influences in Swahili: A Study in Language and Culture Contacts* (Göteborg, Sweden: Acta Universitatis Gothoburgensis, 2000).

¹⁰ Whereas in Britain we tend to use the word 'Asian' to refer to South Asians, this article takes a much broader perspective also including people with roots in other parts of Asia.

¹¹ For an Indian perspective of Roma in Europe and the USA, including some legal aspects, see S. S. Shashi, *Roma: The Gypsy World* (Delhi, India: Sundeep Prakashan, 1990).

¹² R. Visram, *Asians in Britain: 400 Years of History* (London: Pluto, 2002).

¹³ Humayun Ansari, *The Infidel Within: Muslims in Britain Since 1800* (London: C Hurst & Co, 2004).

France, for example, relied mainly on former or existing colonies, Germany relied on countries in Southern Europe and Turkey. The fairly large-scale movement also set in motion the establishment of translocal connections between Europe and regions in the South facilitated by networks of kinship and friendship, best encapsulated in the Chinese term *guanxi*,¹⁴ which were later built upon to organise the Afro-Asian colonisation of Europe, mainly in the cities.

This process was given a major fillip when recruitment stops occurred, first when the British scaled down work vouchers to a minimum after the Commonwealth Immigrants Act 1962, and in other European countries from 1973/74. The patterns across countries are quite striking and, although they have been fairly well documented,¹⁵ it is worth reviewing some main lines of development here. The consequence of these official recruitment 'stops' was not a limitation of the Afro-Asian presence but a major shift in the *type* of migration: to family reunification and family formation along the translocal networks that were already in place. The immigration of men of working age came to be outnumbered by that of women and children. New spouses were also sought.

These movements, occurring across a range of groups and resulting in the increase in the numbers of Afro-Asian people, involved a more or less conscious process of ethnic consolidation. The migrants transplanted and readapted the economic and social infrastructure that they already knew from 'back home' to the European environment. The Turkish *mahalleler* in Berlin were mirrored, for example, in the South Asian *bastis* of Leicester, Birmingham, Manchester and London.¹⁶ Thus large sections of North West Europe began, certainly from the 1970s, if not already before, to be faced with unprecedented multiculturalisation. I am arguing that this also involved the multiculturalisation of the legal orders in Europe, as legal transplantation became an inevitable part of cultural reconstruction. Geographical concentration has had its own role to play in the salience with which such diasporic legal reconstruction took place.

From the 1980s onwards, these trends have also been evident in the previously labour sending Southern European belt, and are currently also in motion in some Eastern and Central European states that joined the EU in May 2004. We therefore recently saw squabbles about the establishment of a Chinatown in Rome's central area of Esquilino. Laura Casanelli, a researcher, is quoted as observing:

One thing that irritates the Italians is that the Chinese have not come to serve them. They work for Chinese in Chinese businesses and in Esquilino, sell Chinese goods. They come, they buy up stores, they set up. They work among their own relatives. The whole Italian idea of integration is irrelevant to them.¹⁷

¹⁴ See Ming-Jer Chen, *Inside Chinese Business: A Guide to Managers Worldwide* (Boston: Harvard Business School Press, 2001) at 45-50 [Chen] for a discussion of the concept of *guanxi*.

¹⁵ Stephen Castles & Mark J. Miller, *The Age of Migration: International Population Movements in the Modern World* (Basingstoke, Hampshire: Macmillan, 2003) at 68-93, 220-254.

¹⁶ *Mahalleler* (pl.) can mean neighbourhood in Turkish while *basti* can mean colony in Hindi.

¹⁷ Daniel Williams "Chinatown is a hard sell in Italy. Romans say immigrant area isn't doing as they would do" *The Washington Post* (1 March 2004). For more details on Chinese in Italy, see Bruni, Michelle & Fu Xin, "Chinese Migration to Italy" in Wang Ling-Chi & Wang Gungwu, eds., *The Chinese Diaspora. Selected Essays*, Vol. II. (Singapore: Times Academic Press, 1998) at 153-166; and for Europe, see Frank N. Pieke & Gregor Benton, *The Chinese in Europe* (Basingstoke: Macmillan, 1997).

Clear analysis of these recent trends is, however, occluded by the lack of a positive policy framework, not only because their EU involvement entails pressure on these countries to tighten controls at the EU's southern and eastern wings, but also, as Casanelli hints, because of different concepts of 'integration' at work.¹⁸ That these countries too have been attracting workers, often on an irregular basis, from further south and east is nevertheless quite apparent, while there are already non-European settlements at somewhat advanced stages in countries such as Italy and Spain, of Moroccans, Senegalese, Chinese, Bangladeshis, Sri Lankans and so on.

Much of the above picture is made even more complex when we consider recent asylum migration to all parts of Europe. Effectively these represent new phases of ethnic colonisation from places such as Vietnam, Iran, Sri Lanka, Turkey, Afghanistan, Iraq, China, Nepal, etc. Legal scholars, however, have focused far too much, in my view, on official developments in asylum and refugee law, at the expense of examining in any detail the role of networks and their impact in influencing migration and settlement, and indeed in mitigating the impact of 'strong state' approaches to controlling asylum migration.¹⁹

III. THE ROLE OF SENDING STATES

The role of sending states divides into two main categories. The first involves the general level of interest taken by them in the larger processes of their people relocating and forming colonies abroad. The emigration of Asians to Europe and further afield, as we have noted, dates much further back than the post-war period. Much of Indian settlement abroad took place under colonial auspices leading to settlements in the Caribbean, South and East Africa, Malaysia, etc. Chinese, on the other hand, were also moving already in imperial times, competing for space in territories such as present day Australia, Canada, as well as Europe. There was limited possibility of intervention in such movements in those times, although the Indian colonial government did make some efforts to mitigate restrictionist policies against Indians in various territories, while the Chinese state, especially in the first half of the twentieth century, promoted a more nationalistic vision among the diaspora.²⁰

The migratory movements of the post-war period do not seem to have evoked much response in the sending states, and where there has been, it is relatively ineffectual. Until much more recently, for example, India appears to have neglected much of its diaspora, and interest was generated mainly when some exiles abroad began to pose a threat to national security.²¹ While some states may have facilitated movement abroad through inter-state agreements, as with Turkey, it seems that few took active

¹⁸ Kitty Calavita, *Immigrants at the Margins: Law, Race and Exclusion in Southern Europe* (Cambridge: Cambridge University Press, 2005). Calavita develops these themes for Spain and Italy, pointing out the contradictions inherent in the public discourse of 'integration' and the realities of the migrants' officially sanctioned exclusion.

¹⁹ Prakash Shah, ed., *The Challenge of Asylum to Legal Systems* (London: Cavendish, 2005).

²⁰ On the 'types' of Chinese in the diaspora and the extent of Chinese state interest in them, see Wang Gungwu, *China and the Chinese Overseas* (Singapore: Times Academic Press, 1991). On Indian emigrants during the colonial period, see Hugh Tinker, *A New System of Slavery: the Export of Indian Labour Overseas, 1830-1920* (London: Oxford University Press, 1974).

²¹ K. N. Malik, *India and the United Kingdom: Change and Continuity in the 1980s* (New Delhi et al: Sage Publishing Pvt. Ltd, 1997) at 87-143.

steps to support people once abroad or really understood how to benefit from the presence of a diaspora population in Europe. This seems to be the case even as much capital was being remitted to areas of origin through translocal connections. Part of the explanation might be that for countries such as India, Pakistan, Bangladesh, Sri Lanka, Thailand, Philippines and China, a complex diaspora network was in place, not just in Europe but, to different degrees, within Asia itself and in Africa, Australia and North America.²² It is possible that the difficulty of assessing how advantages might be drawn from this complex dispersal of people prevented any firm stance being taken. Much of the process of emigration and diasporic reconstruction was taking place unofficially through the use of kinship and friendship networks, and the lack of firm interest by sending states may also be explained by the more general Asian preference for self-regulation, and thus minimal state intervention, among the constituent communities. This may be contrasted with European states which often supported the colonisation of overseas territories by their people.

In more recent years, we are seeing a change of tone, however, as sending states have begun to accept the possibility of dual nationality or easier relinquishment of nationality, while various sorts of overseas national status are being experimented with. Thus Turkey now allows the possibility of renouncing its citizenship, but with an option for members of the diaspora to retain certain privileges in Turkey.²³ For India, the Person of Indian Origin Card seems to have been only a first step in the establishment of an Indian overseas citizenship status.²⁴ The Philippines, amidst a greater policy profile for overseas migrant workers, have also eased conditions on dual nationality.²⁵ The precise effect of these reforms remains to be evaluated, with diaspora people obviously varying a great deal in their reactions to such developments. But the size and the financial muscle of diaspora communities has had some role in establishing them as serious actors in the process of inward investment, and possible bridge points of influence in Europe.²⁶

The second factor that involves a role for the sending states' legal order for diaspora populations is the field of private international law or conflicts of law. While there is no denying the importance of this aspect of law, which is really a branch of the 'host' national legal order, some critical observations about its limited role need to be outlined. Its usefulness is limited largely to facilitating the recognition of legal acts that occurred in the pre-migration stage although, for those migrants who behave like international commuters, going back and forth between states and ordering their lives accordingly, its importance may be somewhat heightened.²⁷ Conversely, for

²² *Supra* note 15, at 154-177.

²³ Bülent Çiçekli, "Turkish Citizenship Policy Since 1980" (2003) Vol. 17, No. 3 *Immigration, Asylum and Nationality Law* 179.

²⁴ Indian Overseas citizen status is to be conferred under the Citizenship (Amendment) Act 2003 of India.

²⁵ Andre Palacios, "Trends in Philippine Citizenship Law: Relaxing the Rules?" (2005) Vol. 19, No. 2 *Immigration, Asylum and Nationality Law* (forthcoming).

²⁶ For a US focused perspective, see Peter F. Geithner, Paula D. Johnson & Lincoln C. Chen, eds., *Diaspora Philanthropy and Equitable Development in China and India* (Cambridge, Massachusetts: Global Equity Initiative, The Asia Center, Harvard University, 2004).

²⁷ A pattern of international commuting was carried on for a long period of time by Bangladeshi men from Sylhet who are among the last of the large South Asian groups in Britain to have instituted family reunification. Private international law or conflicts of law issues concerning them therefore continue to be relevant in the British courts. See Prakash Shah, *Legal Pluralism in Conflict: Coping with Cultural Diversity in Law* (London: Glass House, 2005) at 123-140 [*Legal Pluralism in Conflict*].

acts that take place in diaspora, the domestic state places limits on recourse to overseas law, while subsequent generations in Europe might find it even less useful to rely upon it.²⁸

In general, and notwithstanding the role of some Afro-Asian sending states in concluding agreements with host European states regarding matters of private international law, European states can also be seen to make the applicability of Asian laws in this field subject to overriding considerations of public interest or *l'ordre public*. Further, the positivist assumptions about law in Europe tend to distort appreciation of Afro-Asian personal laws and therefore often result in their misapplication. Especially when immigration control concerns invade the legal process, we tend to find further possibility of distortion. Asian states tend to adopt a quite passive position when questions of 'their' laws come up in official European legal fora. This picture is quite different to that prevailing when colonising European states tended to push at official level for the extraterritorial application of law to 'their' people, thereby also avoiding recourse to Asian legal principles. In this official gap we find that lawyers from Asian countries will also tend to ratify the positivist assumptions of their European counterparts, blocking from view the socio-legal position of those most directly affected. Shared assumptions of legal modernity among professional lawyers therefore often do more damage by undermining Asian legal principles at this level.²⁹

IV. SOCIO-LEGAL NAVIGATION: ASIAN LAWS IN EUROPE

Besides limited official recognition at the level of private international law, European legal systems have shown little inclination to incorporate, in any significant sense, Asian laws as an integral element of official law. Minor concessions have been made through flexible interpretation of official provisions, but European legal systems are not ready yet to admit that there is a major transplantation of Afro-Asian legal orders which needs to be recognised at the structural level. The increasing influence of Asian entrepreneurs in Europe, and the level of attention paid to such phenomena by the media, has not it seems provoked a major change in the way their legal status is perceived officially. Thus, while it is evident that internationally weighty businessmen such as Laxmi Mittal, the Hindocha brothers or the Pathak family, or the recent takeover battle for Rover car manufacturers in Britain by two Chinese companies, are being watched carefully, it would also be worth investigating whether Asian business units only operate along principles of Western capitalism

²⁸ On these aspects of private international law (chiefly in relation to family relations), see Marie-Claire Foblets, "Conflicts of Law in Cross-Cultural Family Disputes in Europe Today: Who Will Reorient Conflicts Law?" in Marie-Claire Foblets & Fons Strijbosch, eds., *Relations Familiales Interculturelles/Cross Cultural Family Relations*. (Oñati: International Institute for the Sociology of Law, 1999) at 27-45; Marie-Claire Foblets, "Muslim Family Laws Before the Courts in Europe: a Conditional Recognition" in Brigitte Maréchal *et al.*, eds., *Muslims in the Enlarged Europe: Religion and Society* (Leiden and Boston: Brill, 2003) at 255-284.

²⁹ See *Shah*, *supra* note 5, on examples in which Indian and Pakistani laws, among others, are interpreted by often ignoring the capacity offered under those legal systems for private ordering of family relations without state intervention, thereby reading into them Western or modernist postulates.

and the law that supports it, or whether Asian legal principles also govern their activities.³⁰

A number of elements play a role in limiting the range of analytical focus here. A significant aspect is the positivist orientation of European law and legal thinking which means that Asian laws, which are normally transplanted as a result of migration and settlement of people at the socio-legal level, are not seen as being properly 'legal' phenomena. Rather they are seen more properly as 'customs', 'cultures' and 'religions', and therefore as extra-legal matter. That Asian laws can operate independently of state sanction seems a hard principle for many European lawyers and official authorities to accept.³¹ There are also problems of according Asian laws a respected position within European legal orders, the latter being seen as applying a more developed form of law, while the former are required to conform to European laws as a condition of acceptance. In a book on *Islam and European Legal Systems*, its co-editor Silvio Ferrari,³² puts the matter of recognition of non-European principles thus:

... the fundamental principles of the European model of relationships between religion, politics and law cannot be altered. But their concrete translations should be examined in order to evaluate their compatibility with those principles. In other words, Europe is not an empty space, a desolate land without history or culture, nor is it a new Paraguay where 'holy experiments' of any kind can be conducted. A European juridical identity exists and this is expressed, to use the words of the Treaty of Maastricht, in a 'common constitutional tradition' which constitutes a 'general principle of community law'. The right to religious freedom is a part of this, and it is understood not only as the right to profess and manifest one's own faith or conviction, but also as the right not to suffer any discrimination as a result. To connect penal or civil consequences to the choice to abandon a religion or to provide a system of rights and duties that are differentiated according to the religious creed professed would be incompatible with this fundamental principle of European law.

This passage evokes the problem that we mentioned above about the perception of homogeneity of European identity and therefore also of law. Essentially, Asian laws would have to fit within the predetermined contours set by European legal structures to gain official recognition. While this allows European legal systems to pick and choose aspects of Asian law that they see fit to recognise, it also means their considerable distortion at official level, as we already see with European private international laws. Indeed, the last sentence in the passage quoted seems to rule out the Asian model of different personal laws being officially recognised.

³⁰ See *Chen*, *supra* note 14. Chen in his analysis, mainly concerning businesses run by overseas Chinese families in South East Asia, is in no doubt that Chinese principles have a critical bearing on their functioning.

³¹ This sums up the perspective taken by Sebastian Poulter in his major works on ethnic minorities under English law. Sebastian Poulter, *English Law and Ethnic Minority Customs* (London: Butterworths, 1986); Sebastian Poulter, *Ethnicity, Law and Human Rights: The English Experience* (Oxford: Clarendon Press, 1998).

³² S. Ferrari, "Introduction" in S. Ferrari & A. Bradney, eds., *Islam and European Legal Systems* (Aldershot: Ashgate, 2000) at 5.

Nevertheless, in jurisprudential writing there are signs that the principle of general legal uniformity in Western law is increasingly being questioned. Cotterrell writes of the growing “jurisprudence of difference” in Anglo-American law,³³ while on France, Freedman writes, somewhat more pessimistically, about *le droit à la différence*, the right to be different.³⁴ Menski has recently pointed out that European legal systems have not managed to keep non-European laws at bay by a simple refusal to recognise them. Rather they too acknowledge, as Ferrari does above, that certain principles, such as the freedom of religion, would have to entail some concessions.³⁵ Precise patterns at the level of various national legal orders and the level of the EU of course vary depending on a range of factors. Thus the absolutist refusal to countenance a compromise of the principle of uniformity of law has to be attenuated, despite many misgivings.

From discussions on the status of Muslims and Islamic law in European countries, which have dominated the agenda on ethnic minority laws in recent years, it seems that a pattern is emerging among states to look for ways to incorporate minority norms. As Ferrari advocates, these should be premised on a predetermined and somewhat fixed notion of the relationships between religion, politics and law. However, these established relationships have more or less generally relegated religion to the ‘private’ sphere and made politics the exclusive agent of law making. Furthermore, official measures tend to start with the assumption that other minority groups will conform to the modes of organisation of Christianity which are in some way already accorded a measure of official recognition.³⁶ Although Islamic structures do not conform to such expectations, new institutions have been established, or representative spokespersons have been sought from within the Muslim fold, to communicate with the state. However, such drives often distort legal structures within Muslim communities and confer legitimacy to religious spokespersons that they may well not enjoy under other circumstances.³⁷ Much less well founded is the assumption, again reflected by Ferrari above, that it is solely upon ‘religion’ or ‘creed’ that minorities in Europe will base their legal relationships. This leaves out large chunks of legal experience among ethnic minorities of all backgrounds.³⁸

³³ Roger Cotterrell, *The Politics of Jurisprudence* (London: LexisNexis, 2003) at 209-236.

³⁴ Jane Freedman, *Immigration and Insecurity in France* (Aldershot: Ashgate, 2004) at 127-141.

³⁵ Werner F. Menski, “Rethinking Legal Theory in Light of South-North Migration” in Prakash Shah & Werner Menski, eds., *Migration, Diasporas and Legal Systems in Europe* (London: Cavendish, 2006) (forthcoming) [Shah & Menski].

³⁶ S. Ferrari & A. Bradney, eds., *Islam and European Legal Systems* (Aldershot: Ashgate, 2000); Brigitte Maréchal, “Institutionalisation of Islam and Representative Organisations for Dealing with European States” in Brigitte Maréchal et al., eds., *Muslims in the Enlarged Europe: Religion and Society* (Leiden and Boston: Brill, 2003) at 151-182; S. Ferrari, “The Legal Dimension” in Maréchal et al., at 219-254.

³⁷ In the aftermath of the 7 July 2005 bombings in London, one can see the British state grasping for persons among the Muslim communities who can be called upon to answer for and control such events, but their representativeness among Muslims is doubtful, although this is rarely communicated through the media and is possibly not understood well enough by officials themselves.

³⁸ On a related matter, Stanley Tambiah, *Magic, Science, Religion and the Scope of Rationality* (Cambridge: Cambridge University Press, 1990); Frits Staal, *Ritual and Mantras: Rules Without Meaning* (Delhi: Motilal Banarsidass Publishers, 1996). Both Tambiah and Staal provide strong critiques of the concept of religion as essentially centred on Western, predominantly Protestant, assumptions which are not applicable to Asian realities.

My colleagues in London and I have found the theoretical work by Masaji Chiba,³⁹ formulated initially through comparative work among Afro-Asian legal systems, to be immensely valuable in conceptualising the new patterns of legal pluralism being experienced in Europe. We draw upon Chiba's concept of 'unofficial law' to denote the place of ethnic minority laws in Europe, which exist in creative tension with 'official law', but operate according to their own values, which Chiba would term 'legal postulates'—in our case a sort of Europeanised version of 'Asian values'. More recently, Chiba wrote about the problem of "legal pluralism in conflict" which exists especially when a choice of law is presented and one or other of opposing alternatives is preferred because of its value in cultural terms.⁴⁰ This scenario is offered by Chiba partly as a means of balancing the general presentation of legal pluralism as one of a harmonious working together of the different levels of law.

The most fascinating and vibrant aspect of Asian laws (and for that matter all ethnic minority laws) in Europe is their reconstruction in the socio-legal sphere. Partly, this occurs as a result of the above-mentioned relative inflexibility of official legal orders in according any significant measure of recognition to Asian laws in Europe. Evidence from Britain, highlighted initially by Menski, shows that South Asians⁴¹ and Muslims⁴² have responded to official positions by developing processes of hybridisation whereby reconstruction of Asian laws takes place by a constant taking-into-account of the official law. Menski therefore writes about hybrid South Asian laws that readapt legal knowledge by building in the requirements of official laws when thought necessary or expedient.⁴³ Essentially, this is a form of legal pluralism with the dynamic adaptive processes taking place, not at official level, but in the socio-legal sphere. Thus there is a whole range of intermixtures between kinship and societal structures, religion and state as new accommodations are found.

The case of Afro-Asian minority laws in Europe, as Chiba envisages for cases of legal pluralism more generally, also certainly reveals a multitude of conflicts and tensions that arise often as a result of the problem of reconciling the values or legal postulates that underpin the minority laws on the one hand and official state laws on the other. This is the effective corollary, at the socio-legal level, of the problem that state laws also experience in according recognition to Asian legal principles, although the penalty for not doing so may be more often experienced subjectively by the individual acting under conditions of legal pluralism in conflict.⁴⁴

³⁹ See especially the following: Masaji Chiba, *Asian Indigenous Law in Interaction With Received Law* (London and New York: KPI, 1986); *Legal Pluralism*, *supra* note 3; Masaji Chiba, "Other Phases of Legal Pluralism in the Contemporary World" in (1998) Vol. 11, No. 3 *Ratio Juris* 228 [*Phases*]; *Legal Cultures*, *supra* note 4.

⁴⁰ *Phases*, *ibid.*

⁴¹ Werner F. Menski, "Asian Laws in Britain and the Question of Adaptation to a New Legal Order: Asian Laws in Britain?" in M. Israel & N. K. Wagle, eds., *Ethnicity, Identity, Migration: The South Asian Context* (Toronto: Centre for South Asian Studies, University of Toronto, 1993) at 238-268 [*Menski*].

⁴² David Pearl & Werner F. Menski, *Muslim Family Law*, 3rd ed. (London: Sweet and Maxwell, 1998) [*Pearl and Menski*]; Werner F. Menski, "Muslim Law in Britain", No. 62 *Journal of Asian and African Studies* 127 [*Muslim Law in Britain*]; Ihsan Yilmaz, *Muslim Laws, Politics and Society in Modern Nation-States* (Aldershot: Ashgate, 2005).

⁴³ *Menski*, *supra* note 41.

⁴⁴ I have recently used Chiba's concept of "legal pluralism in conflict" to develop a framework for the analysis of ethnic minority laws in Britain. See *Legal Pluralism in Conflict*, *supra* note 27.

Existence in a constant state of conflict and non-acceptance reinforces certain processes at the socio-legal and religious levels as known legal capital is redeployed in competition with official law to provide self-help legal solutions. It will hardly be news to those familiar with the working of Asian laws that they have in-built know-how on self-regulation so that much legal activity, for example in the form of dispute resolution or social healing, can take place away from official fora altogether.⁴⁵ This of course does not solve the problem of cross-cultural legal communication in interaction with official law, but can be seen as self-preservation strategies that may gain more importance as privatisation of justice moves apace. The most prominent example in the British case is the establishment of 'shari'a councils' among Muslim communities that come in to fill some gaps in official legal protection, possibly where the more immediate fora within family or kinship structures have failed. Similar structures are also established in London among Kurds from Turkey. No policy has yet been worked out as to their relationship with official structures, however: perhaps yet another case of British muddling through.

So far I have written in quite general terms of Asian law and Afro-Asian laws being reconstructed in creative interaction with official laws. However, there are also limits to the extent we can generalise about such developments since each case of diasporic legal reconstruction occurs in a culture specific way. As noted above, Asia is defined in opposition to Europe, but this opposition postulates homogeneity in Europe, while ignoring Asian diversities. The deployment of Asian laws in Europe, in the socio-legal, unofficial sphere at any rate, undermines the fiction of European homogeneity of values and laws further, but also calls for analysis of Asian legal diversities. Menski finds that there is no globally agreed definition of law, and finds it necessary to work through culture-specific conceptualisations of law for successful comparison.⁴⁶ This applies as much in the case of Asians living in diaspora, where each legal community builds on its own inherited assumptions of law and builds in requirements of the state legal order. Thus Muslims are busy reconstructing an *angrezi shariat*, a British Muslim law,⁴⁷ while Hindus are said to be living by *angrezi dharma* in the British context.⁴⁸ Perhaps we need also to discuss principles of European *li* for Chinese communities, and so on for other Asian diasporas, as aspects of the globalisation of Asian laws. This is one of the critical challenges to

⁴⁵ Menski, *supra* note 41; Günter Bierbrauer, "Toward an Understanding of Legal Culture: Variations in Individualism and Collectivism between Kurds, Lebanese, and Germans", Vol. 28, No. 2 *Law and Society Review* 243; Roger Ballard, "Ethnic Diversity and the Delivery of Justice: The Challenge of Plurality" in Shah & Menski, *supra* note 35.

⁴⁶ *Comparative Law*, *supra* note 5.

⁴⁷ Pearl and Menski, *supra* note 42; *Muslim Law in Britain*, *supra* note 42.

⁴⁸ Werner F. Menski, *Hindu Law: Beyond Tradition and Modernity* (New Delhi: Oxford University Press, 2003) at 592. On Hindus in Europe, see Martin Baumann, "The Hindu Diasporas in Europe and an Analysis of Key Diasporic Patterns" in T. S. Rukmani, ed., *Hindu Diaspora, Global Perspectives* (Montreal: Chair in Hindu Studies, Department of Religions, Concordia, 1999) at 59-79. Note, however, that anthropologist Roger Ballard, *supra*, note 45, highlights the role of *rivaj*, the South Asian equivalent of *adat*, because, as he argues, this aspect of unofficial law, rather than the religious law of *shari'a*, has greater salience as a mechanism of order maintenance among Muslims. For further discussion of the complexity of *adat* and its uses in unofficial and official fora, see Wazir Jahan Karim, *Women and Culture: Between Malay Adat and Islam* (Boulder et al.: Westview Press, 1992) on Malaysia; and John R. Bowen, *Islam, Law and Equality in Indonesia: An Anthropology of Public Reasoning* (Cambridge: Cambridge University Press, 2003) on Indonesia. These discussions will, one hopes, assume a greater salience in Europe too as we try to sharpen our analytical tools.

the analysis of Asian laws in Europe. If Asian legal principles, in all their variety and culture specificity, are being readapted to the European environment, in what manner is this being done and what changes take place as a consequence? We are only just very near the start of the process of understanding such developments and huge challenges have to be faced in so doing.

V. A HYPOTHETICAL CASE

We can now take an example to illustrate some of the foregoing issues. Although a hypothetical situation, it nonetheless has some resemblances to cases that have recently come before the English courts.⁴⁹ It is not so relevant what the precise details are, nor what the precise outcome is, and we can keep the range of protagonists minimal for the purposes of the illustration. Let us say that we have a family—the particular background is not so critical—our family might be Chinese, Hindu or Muslim, but let us say for argument's sake that we are dealing with a Hindu family. The 'grand old man' of the family and his widow have now passed away. Their children, four brothers and three sisters, all worked in the family business at some point in their lives, including prior to their migration to the UK, but the sisters all stopped doing so after they got married and have since spent their time helping in businesses run by their husbands besides their mothering and housekeeping roles. Three of the brothers have since divided up the joint family business and various properties among themselves, while the fourth brother and his wife did not ask for a share, having run a business on their own for many years now.

Two of the sisters now claim that they, at one point, were promised their share of the family assets by their father and should, in any case, have had a portion of the original business or its proceeds given to them. One of the brothers in turn claims that he should have obtained a larger share, from which he would give a portion to the two sisters, arguing that the division of property among the three brothers was made at a time when the property that his two brothers obtained, since sold for a healthy price with the money ploughed back into their respective businesses, was undervalued, while the shop that he received was in an area that had not appreciated and had in fact seen a dramatic decline in its takings. The division was made, he argues, on the basis of minimising tax liabilities and that it was always understood that a fair division between all siblings would be ensured. Despite attempts by some elder uncles to bring the matter to some sort of amicable and mutually satisfactory solution, all sides have dug their heels in, so that the disgruntled sisters and brother instruct solicitors to bring a case in court to claim what they see as their fair share.

We thus have a case of an Asian family popping over from the unofficial to the official sphere, showing how arrangements arrived at within a family become undone by disagreement among its members. This might not appear to be remarkable or controversial from a Western point of view, but from the perspective of Asian legal postulates or values, this is very much a sign of discord and disharmony, a failure

⁴⁹ See *Mehra v Shah and others* [2003] All ER (D) 15 (Aug) and, on appeal, [2004] EWCA Civ 632. Also the Pathak litigation involving makers of the famous spices not yet concluded but with preliminary 'satellite' litigation in some reported cases: *Anila Shastri v Shantagauri Laxmishanker Pathak*, *Kirit Kumar Pathak, Worldwing Investments Limited*, No: HC01CO2562; *Alpha Credit Bank AE v Stephenson Harwood (a firm)* [2002] EWHC 726 (Ch).

of self-regulation at more than one level. Firstly, there is the obvious aspect of the dispute breaking out among some of the siblings and a failure to amicably resolve the matter in accordance with Hindu legal postulates. At another level, the dispute is then referred, with the assistance of lawyers, to the official system, thereby bringing in an outside agency to ostensibly facilitate resolution or, most likely, to impose its own solution. Press reporting on our hypothetical case takes different forms. The 'mainstream' media is focused on the businesses of the 'successful' brothers with an element of barely disguised glee that an Asian family is seen publicly disputing, while highlighting Hindu property rules that ostensibly discriminate against daughters and sisters. The Asian press, somewhat on the defensive, cover the matter by reference to equality principles in the modernised Hindu law of India (which is barely applicable in a case of this kind in the English courts).

In most such cases, our Western trained lawyers will not refer to any Asian value system to configure their legal arguments before a court. While the court may have (as is the case more frequently in England now) ways to encourage settlement of the problem prior to the hearing, if the parties do not 'see sense' and do so, then most likely during the hearing and in deciding its outcome, besides the odd reference to the ethnicity of the parties, there would not be recourse to the Asian values that lay behind the property arrangements which subsequently broke down nor the bearing of such values upon the resolution of the matter; neither would any notion of joint property ownership and the respective obligations of the parties in light of their gender and life position really matter to the court. Most likely the court will give an account of the rights of the parties within the framework of 'possessive individualism'—formal ownership, partnership or company law within the confines of English law. There is ample scope within the court structure for the appointment of an expert, who now frequently acts as the court's and not either party's expert, and a good expert can guide the court through the Asian context of the case, the relevant principles and the key issues at stake. It is very much up to the court, however, whether and to what extent the expert's views are accepted.

Therefore, while from the perspective of the official order its 'solution' might seem fitting and proper, it is most probable that when faced with any outcome, one, both or all sides in the dispute will not end it there but it will go on to rankle. The matter may of course go on to appeal or the parties may simply tire from the legal costs and time delays. There is not much possibility of a win-win situation that might satisfy all or most, but a court decision may be used as a bargaining counter among the parties, at the socio-legal level, probably still leaving the discordant feelings that gave rise to the dispute largely not assuaged.

A cumulation of such experiences of the official order among Asian communities has the possible effect of court avoidance. Conversely, those who feel they can secure advantages by benefiting from the courts' widespread ignorance or dismissal of the Asian context of a case, may try to maximise them precisely by resorting to court action. So, on the one hand, we might find a reassertion of self-regulatory tendency among Asians and, on the other hand, a simultaneous willingness by some parties to resort to the official order when expedient. In both cases, the parties concerned act under conditions of legal pluralism in diaspora that I have discussed above, taking into account the possibilities offered by their 'own' as well as the official law. The illustration above reveals the kind of treatment Asian cases receive when they come

into contact with the official system. Such court cases at best provide partial evidence of the development of a hybrid 'mix' of normative orders in Europe, but ones which seem not to merit incorporation as part of the official corpus, with very mixed results at the level of socio-legal reality. By no means are the majority of disputes of this type referred to official fora, and these much more widespread socio-legal processes require more academic attention.

VI. CONCLUSION

So I bring to a close this brief discussion where I have merely sketched some outlines of current legal debates concerning Asian diasporas in Europe. It remains vital for more research to be conducted about Asian laws in Europe, but not simply as detached entities floating around under the auspices of strong state systems in Europe where they remain largely unrecognised and ignored. While such aspects of marginalisation are critical problems for discussion in themselves, there is much more exciting evidence on the ground where we find complex processes of legal navigation as strategies of sustainable hybridisation of law are taking place. In this sense I see Asian laws in Europe (or for that matter elsewhere in the world) as globalised extensions of 'parent' legal cultures that also need to be analysed from Asian points of view. Exchange of data among Asian lawyers should not neglect the diasporic picture, since it remains a vibrant and ever more important aspect of globalisation if current trends are anything to go by.