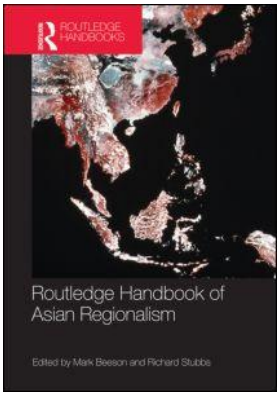

Routledge Handbook of Asian Regionalism

Mark Beeson, Richard Stubbs

Asian Regionalism and Law

Publication details
https://www.routledgehandbooks.com/doi/10.4324/9780203803608.ch18
Michael Dowdle
Published online on: 28 Nov 2011

18

Asian regionalism and law

The continuing contribution of 'legal pluralism'

Michael Dowdle

Introduction

This chapter explores a legal manifestation of Asian regionalism, arguing that such a manifestation does indeed exist, and that it derives from Asia's distinctive *economie-monde*, to use the terminology developed by Fernand Braudel (1992). This *economie-monde* has given rise to a correspondingly distinctive legal experience that M. B. Hooker (1975) famously termed 'legal pluralism' – a condition in which multiple legal systems inhabit a single political space. As we shall see, the experience of legal pluralism continues to resonate throughout Asia to this day, in the form of what Kanishka Jayasuriya (1998) has identified as 'reactionary modernization'.

Identifying the 'Region' of Asian law

In looking at Asian regionalism from a perspective of 'law', one needs to first delineate what 'Asia' refers to in this context. Asia is, of course, a very large, very diverse, and somewhat arbitrary geography. But insofar as Asia's distinctive, regional, legal identity is concerned, the regional core of this identity is Southeast Asia. It is in Southeast Asia that the diversity of Asian cultures come into principal contact with each other. It is here, therefore, where a truly meaningful, regionalist coherence is likely to be found. Southeast Asia's location as the core of a pan-Asian regionalism is also evinced in its distinctive '*economie-monde*.' Famously coined by Braudel (1992: 21–45), *economie-monde* defines a coherent and comprehensive regional economic-world that is organized around a central economic core and is structured by a particular, dominant economic technology. The *economie-monde* of Southeast Asia was historically characterized by a robust trading network organized around the spice trade. It was also the principal point of connection between the European, Arab-Islamic and Indian economies on the one hand and the Chinese economy on the other. (see also Braudel 1992: 523–532.)

The distinctly globalized character of the Southeast Asian *economie-monde* gave rise to a unique legal experience – Hooker's (1975) 'legal pluralism', which describes — at least as Hooker and other Southeast Asian scholars define it –a condition in which multiple legal *systems* operate within a single political entity. The key term here is that of 'system' – meaning, as per Gunther Teubner (1989), a closed and autonomous legal epistemology. Legal pluralism thus is not the product of

one legal system borrowing norms from some other legal system. Rather, it is the simultaneous presence within one polity of two or more distinct and *autonomous* sources of law and of legal reasoning.

Southeast Asia's legal pluralism is the product of four distinct waves of external legal cultures that washed over that region during the last millennium, each propelled by Southeast Asia's uniquely globalized *economie-monde*. The first was Hindu and Buddhist law, which first arrived around the ninth century. The second was Islamic law, which began arriving in the thirteenth century. Then came European (colonialist) law in the seventeenth century. Finally, the last half-century has witnessed a new wave of legal influence that we might call modernism. As we shall see, these successive waves did not result in the displacement of the earlier legal culture. Rather, each worked to lay its own stratum of legal sediment on an accumulating legal formation. And with the coming of the last, modernist wave, we shall also see that the formerly Southeast Asian experience of legal pluralism has begun to colonize the rest of Asia, thus making it a distinguishing attribute of the Asian region as a whole.

The first two stages: the reception of Indian law (beginning *c.*800) and Islamic law (beginning *c.*1200)

The first wave of external legal influence to diffuse through Southeast Asia was that of Hindu-Buddhist law, which began taking root in Southeast Asia in the ninth century (Hooker 1978: 17–47). But the Hindu-Buddhist vision of 'law' differed significantly from modern understandings. Their law was not a device for social engineering; it was not an authoritative articulation of the limits and demands of individual or collective behaviour; it was not a product of or constitutor of the state. Rather, it was a political-religious description of what a perfect (Hindu or Buddhist) society looked like. Its authority lay in its resonance with how a society at the time saw itself to be. Such laws functioned as a kind of idealized template that had to be overlain with the day-to-day workings of actual society in order to be meaningfully understood (Hooker 1978: 98–103).

Indian legal tradition thus operated more on the level of metaphor than at that of command. And this allowed it to survive and integrate itself into the next wave of external legal influence to sweep across Asia, that of Islamic law. Islamic legal influence first arrived in Asia in the thirteenth century, carried to and throughout Southeast Asia on the back of Muslim traders, primarily from India (Bustamam-Ahmad 2009). By the fifteenth century, this influence resulted in the development of what Hooker (1984: 8–30) called 'legal digests'.

The most developed of these digests were those of Aceh and Malacca. The Malaccan Sultanate was one of the first Islamic polities in Southeast Asia, founded in 1409 by the Malayan Prince Parameswara (later to be known as Iskandar Shah). Located at the Western tip of the Strait of Malacca, which connects the Indian Ocean to the East Indies, it was ideally situated to structure global trade between China and Southeast Asia on the one hand, and India and the Arabic middle-east on the other. And for that reason it quickly grew to dominate the economy of Southeast Asia.

The Malaccan Islamic Digests, the *Udang-Udang Mělaka*, date from the middle of the fifteenth century (Winstedt 1953). They consist of four primary texts, each addressing a different area of law. While expressly asserting the supremacy of Islamic legal principles, these texts actually portray an amalgamation of Islamic and local legal principles and practices. Generally, what today we would call public law – (the laws governing the exercise of sovereign authority), legal process and commercial law – tended to follow Islamic legal tradition. (Indeed, passages describing legal process were often written in Arabic rather than Malay.) By contrast, the law related to land tended to be primarily indigenous in origin. Other areas of law – primarily marriage and family law, what today we would analogize to criminal law, and laws relating to mediation – included

both Islamic and local elements. The general principle in the areas of criminal and family law in particular tended to be that, in these areas, Islamic law would apply to Muslims and local law would apply to non-Muslims (see generally Hooker 1984: 9–16).

In Aceh, the ruling family converted to Islam in the middle part of the fifteenth century. It became the focal point of Islamic and Muslim culture in the region in the sixteenth century, after the Portuguese took over Malacca and exiled the Malacca Sultanate. Aceh's legal digests are called the *sarakata*, a collection of Acehnese legal texts that date from the early seventeenth century (see generally Hooker 1984: 16–17). As with the Malaccan legal texts, the Islamic texts of Aceh describe an amalgamation of Islamic legal principles and local custom. And like Malacca, the application of Islamic legal principles tends to focus on the laws governing the exercise of sovereignty. As described recently by Azyumardi Azra, these laws were 'much more a set of idealized guidelines for the Sultans and dignitaries of Aceh rather than practical rules of legal conduct' (Azra 2006: 97–98).

A similar pattern of legal overlaying is found in the Islamic legal texts produced by the Minangkabau in central-west Sumatra. Islam came to the Minangkabau in the sixteenth century. Lacking a strong centralized political authority, the Minangkabau did not produce a single, unifying legal text. Rather, Islamic legal texts were produced locally by many of its individual villages and local subcultures. Nevertheless, these texts tended to evince a common theme and structure. In particular, they focused – 'obsessed' in Hooker's words (1984: 17) – on harmonizing Islamic legal doctrine with seemingly contradictory local practices (called *adat*). This would be done by assigning each to different social spheres (as was done in Malacca and Aceh), or by simply portraying each as being different manifestations of a single moral spectrum (see generally Hooker 1984: 17–19).

Farther west, the Islamic content of Islamic legal texts becomes increasingly ethereal. The Islamic legal text of the Demak Sultanate, the first Islamic sultanate in Java (*c.*1475–1548) was the *Surya Alam*. But while claiming to derive from and reflect Islamic law, it much more resembled in substance the Hindu law of the previous Majapahit Empire (Azra 2006: 99–100). A similar observation applies to the Islamic legal texts produced by the Mataram Sultanate, the principal Javanese political entity to emerge after the collapse of Demak. These texts, according to Hooker, 'have no Islamic element at all. Indeed, in describing the structure of kingship and the nature of sovereignty in Mataram, it is possible to ignore the existence of Islam almost entirely' (Hooker 1984: 9).

All in all, the reason why Islamic law co-existed with, rather than supplanted, the earlier generally Indian legal systems is because each served a different socio-legal function. As noted above, the earlier law served principally as a description of a traditional society's largely organic understanding of itself. Islamic law, by contrast, was concerned with the conscious construction of a very new form of international political organization – i.e. the new political structures known as sultanates. It functioned as what Hans Kelson (1994) would call 'constitutions' – i.e. as legal constructs that formally *constituted* 'the state' as a distinct and coherent political entity (Kelsen 1994).

The third stage: The reception of European law (beginning *c.*1500)

The next foreign legal influence to sweep though Asia was that of Europe, whose influence came via two vehicles, the principal of which was colonization. But even for regions that were not colonized, European legal influence was often propagated via threat of colonization or threat of a particular European practice in public international law called extraterritoriality. Each left a somewhat different mark on Asian legal consciousness. We will examine each in turn.

Direct reception through colonialism

The principal European colonizers of Asia were the Portuguese (Malacca, Timor, Macau), the Spanish (the Philippines), the French (Vietnam), the Dutch (Indonesia) and the British (Burma and the Malay Peninsula). But of these, it was primarily in the Dutch colonization of Indonesia and the British colonization of the Malay Peninsula that Asia's region-wide experience with legal pluralism was most coherently articulated.

Both the Dutch and the English were in many ways accidental colonialists. Their interests in Asia were initially commercial and mercantilist rather than sovereign and territorial. In both cases, these interests were initially developed and administered through corporate rather than political entities – the English (later British) East India Company, established in 1600, and the Dutch *Vereenigde Oost-Indische Compagnie*, or 'VOC', established in 1602. And just as the distinctly 'constitutional' functionality of Islamic law caused it to overlay rather than displace more organic legal systems of local society, so too did the distinctly mercantilist emphasis of Dutch and British colonialism give their colonial legal systems a distinct functionality that caused them to overlay rather than displace pre-existing local legal systems.

Of these two, it was in the colonial system of the Dutch where legal pluralism developed its most evolved constitutional shape. The Dutch began trading in Asia in the 1590s. In 1619, the VOC founded a new city on the north side of Java on the site of the recently razed Javanese trading port called Jayakarta. They named this city Batavia, and it would serve as the administrative centre of the Asian activities of the VOC and later the colonial state for the next 350 years. (Renamed Djakarta by the Japanese in 1942 during their occupation, it acquired its present name, Jakarta, with the ending of that occupation in 1945, and would become the Indonesian capital in 1950.)

As a commercial entity, the VOC did not have formal sovereign legislative authority. Consistent with its corporate form of organization, it administered its Asian operations, including Batavia, by issuing corporate proclamations and orders to company personnel. Because native populations were not a part of this company, these populations existed outside the direct scope of these orders (of course, these orders would still effect native populations, by directing VOC personnel to interact with and try to control these populations in particular ways). Once again, this allowed this new colonial 'law' – or its functional equivalent – to overlay native legal systems rather than to supplant them.

The VOC was nationalized in 1796 and dissolved in 1800. In 1814, the Netherlands formally established the Dutch East Indies (present-day Indonesia) as a colonial possession. But they retained the bifurcated legal structure established by the VOC, in which the Dutch colonial legal system governed the European (and Japanese) residents of the colony, and a local native legal system – which the Dutch, following Islamic law terminology, referred to as '*adat*' – governed the native Indonesians. Each system had it own laws, its own court structure and its own judicial procedures. Appeals from the colonial system went to the Supreme Court in Batavia, while appeals from *adat* courts, called *landraad*, went to the *raad van justitie* in Amsterdam. (The Dutch also set up a third independent legal and judicial system for non-Indonesian Asians.) (Lev 1965: 174–176.)

Despite being 'local' in terms of alleged legal culture, the actual courts of this native, *adat* legal system, the *landraad*, were historically staffed by Dutch civil servants, not Indonesians. Most also lacked legal training. This in turn created a strong need to codify *adat* law – to reduce it and simplify it into written doctrine, in Dutch, so as to make it accessible to Dutch *landraad* judges. This caused *adat* law to develop its own academic jurisprudence, the *Adat* School associated with Lieden University, and in particular with the legal scholar, Cornelis van Vollenhoven (see generally Ball 1982: 197–225). These *Adat* School jurists saw in the *adat* system a reification of

the humanist appreciation that Indonesian culture was every bit the equal of that of Europe, and deserved to be treated as such.

Many others, however, saw the colonial maintenance of a separate *adat* legal system, at least as it was actually practised, as a tool of oppression. The lax judicial processes of *adat* criminal law, and *adat* restrictions on land alienation to persons outside the local village, exposed local indigenous populations to pronounced political vulnerabilities and commercially debilitating economic constraints. Reformers therefore pushed for the universalization and codification of Dutch law within the colony. Their argument was that codifying colonial law and applying it universally to the entirety of the population would introduce a much-needed modernity and political equality into the colonial system. Ultimately, however, these efforts to establish a single, universal and codified legal system for the Dutch East Indies failed: in part because the *adat* system, and in particular its claim of respecting the autonomy of Indonesian culture as being equal to that of Europe, fit the larger ethical sensibilities of the period; and in part because the *adat* system did indeed facilitate Dutch domination of the Indonesian economy (see generally Ball 1982: 197–225).

The English colonization of Burma and the Malay Peninsula presents a broadly similar story. Like the Dutch, Britain's colonial engagement with Asia was largely accidental, a by-product of English mercantilism. Also, like the Dutch, the English contracted-out their early colonial administration and development to a private corporation, in this case the English (later British) East India Company, which was established in 1600, and which was the model for the Dutch VOC, founded two years later.

British colonialism actually came fairly late to Southeast Asia. Until 1873, its (non-Indian) Asian 'colonies' consisted of individual settlements that the British had either founded themselves – Bencoolen (now Bengkulu), established on the west coast of Sumatra in 1685; George Town, established on Penang Island in 1786; Singapore, established on Singapore Island in 1816; and Victoria City (later Hong Kong), established on Hong Kong Island in 1841 – or in one case traded for, Malacca, traded to England by the Dutch in exchange for Bencoolen in 1824. The Malayan settlements of Singapore, Georgetown and Malacca in particular were populated using substantial numbers of Chinese and Indian immigrants. Known collectively as the Straits Settlements, they constituted the heart of England's presence in East Asia prior to the 1870s, and sported a pronounced multicultural character (see generally Tarling 1992: 28–34). Correspondingly, the English developed and applied distinct sets of legal principles, called personal laws, for each of the dominant ethnicities (English, Indian, Chinese, Malayan) residing in these settlements. These personal laws related primarily to family and religion matters (such as those involving marriage, divorce, inheritance), yet while they were said to derive from the indigenous legal systems of the respective ethnicity, in fact they were often more the product of English orientalism than of Indian, Chinese, or Malay culture. Unlike the *adat* law of the Dutch, however, these personal laws were administered by a single legal system, and they only governed family and religious matters.

A similar system was set up in Burma when it was brought under British colonial control in 1886. Administered as part of the British Raj in India, colonial law allowed 'Burmese customary law' to prevail in cases involving succession, inheritance, marriage or any religious usage where the parties were Buddhists (Thinn 2006). In general, however, British administration was much less familiar with the local, Buddhist laws and customs of the Burmese than it was with (largely invented) Indian, Islamic or Chinese legal traditions found in the rest of its Asian Empire. As a result, the English occupation of Burma was much more violently contested by the local population than was its colonization of the Malay Peninsula.

In 1858, the East India Company was relieved of its colonial responsibilities and the governance of the colonies was transferred to the Crown. The Crown then developed a more

constitutionally articulated system of legal pluralism, the British Resident system. Beginning in 1873, this was set up in various Malay sultanates as part of the 'protected state system', which the British used to spread their influence throughout the Malay Peninsula during the last quarter of the nineteenth century. Under that system, the Crown agreed to recognize and protect the sovereignty of a particular sultanate in exchange for being allowed to set up a 'British Resident' in that sultanate, with the effective power to veto any political action by the Sultan with which that Resident disagreed. This, in effect, made the Resident the de facto head of the sultanate, although the Sultan remained its nominal head.

But the Resident's veto power did not extend to matters involving native Malay traditions or Islamic affairs. In these areas – but only these areas – the Sultan retained authority (Ahmad, Leong and Andrews undated: 7). The resulting bifurcated sovereignty arrangement resulted in a corresponding bifurcation of the legal system not unlike that of the Dutch East Indies. Originally, the judiciary in these protected states remained under the nominal control of the Sultan. In 1895, the four sultanates that had been originally brought into this protected-state sytem – Negeri Sembilan (in 1873), Perak (in 1874), Selangor (in 1875) and Pahang (in 1888) – were administratively joined together to create the Federated Malay States, administered through a new federal court system (consisting of both inferior federal courts and courts of appeal), with appeals from those courts going to the Privy Council in London. At the same time, however, it also preserved the now very limited juridical authority of the sultans by allowing them to maintain their own independent systems of sultanate courts – called the Courts of Kathis, the Courts of Assistant Kathis and the Penghulu's Court – with jurisdiction over 'matters concerning Muhammadan religion, marriage, and divorce, and all matters regulated by Muhammadan Law' (Ahmad Leong and Andrew undated: 9, citing Section 65 of Federal Malay States Enactment No 14 of 1918). (Appeals from the decisions of these sultanate courts went to the inferior federal courts.)

In one sense, the constitutional structure of the Federated Malay States superficially resembles the federal constitutional system of the United States. But what distinguishes the former as distinctly 'legal-pluralist' (in contrast to the simpler 'divided sovereignty' of the latter) is the fact that the two court systems in Malay were each governed not simply by different administrative apparatuses, but by very different legal epistemologies – i.e. the common law with regards to the Malay federal court system versus Islamic law with regards to the sultanate courts (cf. Hallaq 2007). This includes not simply differences in substantive legal norms, but differences in functionality. The new colonial law was secular and state-centric, while the law of the sultanate was religious and community-centric.

(In the early twentieth century, Britain expanded its 'protected state system' to include five other Malayan sultanates. These became known as the Unfederated Malay States. These sultanates were administered through a modified form of the British Resident system called the British Advisors system, with the principal difference being that each sultanate in the Unfederated Malay States was administered exclusively through the Sultan's own judicial and administrative system, albeit with all decisions of those systems being nevertheless subject to possible veto from the resident British 'Advisor', the functional equivalent of the British Resident in the Federated system. (Ahmad Leong and Andrew undated: 9–10).)

Indirect reception through extraterritoriality

European law was also able to influence the legal experiences of Asian polities that were able to escape the direct grasp of colonization: principally Japan, China and Thailand. These countries were subject to an indirect form of European legal domination known as 'extraterritoriality' (see generally Hooker 1986; Kayaoğlu 2010). Often imposed by compulsion through the 'unequal

treaty system' of the nineteenth and early twentieth centuries, the principle of extraterritoriality exempted Europeans from local law and local courts (subjecting them instead to European laws administered by European entities in that jurisdiction, such as consulates or trading posts). The claimed rationale for this exemption was that European states had an obligation to protect their citizens from the miscarriages of justice that could stem from being compelled to appear before the supposedly primitive and despotic legal system of the host state. In removing alien residents from the state's own legal system, the unequal treaties effectively created a particular, albeit relatively limited, form of legal pluralism.

In the latter part of the nineteenth century, this practice of extraterritoriality encouraged both Japan and Thailand to effectively replace their local legal systems with European legal systems. And Europeans did indeed show a willingness to discontinue extraterritoriality in these countries once these more familiar legal elements were in place there. After Westernizing its law in the aftermath of the Meiji Restoration in 1868, Japan was able to abolish extraterritorial jurisdiction in 1894 with the signing of the Anglo-Japanese Treaty of Commerce and Navigation (Kayaoğlu 2010: 66–103). Thailand also began 'Westernizing' its legal system in the latter part of the nineteenth century, and 1908 in particular saw the drafting and enactment of a Civil Procedure Code, a Criminal Code and reorganization of the court system, all derived from European models (while nevertheless retaining some Thai and Islamic practices). As a consequence, European practices of extraterritoriality were largely eliminated by the late 1920s (Sayre 1928: 70), although some vestigial elements of this system remained until 1938 (see also Harding and Leyland 2011: 10).

It would be wrong, however, to attribute the Westernization of Japanese law and Thai law solely to the coercive impositions of extraterritoriality. Exposure to the superior wealth and military organization of Europe instilled in many Asians a suspicion or fear of cultural obsolescence. (Of course, this suspicion/fear was often amplified by the prejudices of the Europeans themselves, and extraterritoriality thus contributed to this as well by serving to institutionally articulate these prejudices.) Some Asians saw European law as a doorway to European modernity, and most importantly to the power and wealth that modernity seemed to promise (Kayaoğlu 2010; see also Hooker 1986). This was particularly the case in China, which in the aftermath of republican overthrow of its ancient, Confucian dynastic system, completely replaced its traditional law and legal system with principles, doctrine and structures imported from now modern Japan and from Germany. While the experience of extraterritoriality was a factor in all this, the dominant factor was clearly a belief that doing so would contribute to a necessary modernization, and hence the restoration of a powerful state power in a polity that had been deeply humiliated by European power in the nineteenth and early decades of the twentieth century (see Chen 1995: 7–32).

The present stage: postcolonialism, reactionary modernization and the (continuing) search for modernity

Across Asia, the experiences of colonization, unequal treaties, and extraterritoriality triggered feelings or suspicions of deep cultural vulnerability among native populations. As already discussed, to many in these populations, a Europeanized legal system was seen to be a key to modernity, to the domestic and international replication of European wealth and power (Hooker 1988: 22–26).

But legal reform was not the only perceived pathway to such a goal. Another European conceptual import was making a similar promise of sovereign autonomy and power, but through very different means. This was the import of nationalism. The two were in deep systemic and epistemic conflict: whereas legalism offered such autonomy and power by means of cultural borrowing and convergence, nationalism offered autonomy and power by means of cultural distinction.

The innate tensions between these two very different legal paths to the promised land of modernity would become perhaps the defining feature of Asian law in the postcolonial era. It is a tension that manifests itself in a distinctive 'reactionary modernization' that Kanishka Jayasuriya (1998) identified early on in the context of the ongoing Asian values debate:

> [T]he argument is that modernity is a general process that is inevitably associated with the strength of liberal ideology; by contrast, Herf's [1984] basic thesis is that there is no modernity in general, but that there are different paths to modernity. Applying this argument to the ideology of Asian values we can go beyond the proposition that Asian values are indigenous normative systems to be counterpoised to 'Western' values, to recognize that this cultural language is itself an artifact of modernity. In other words, it reflects a different trajectory of modernity….
>
> (*Jayasuriya 1998: 83*)

> The essence of reactionary modernism… is the paradoxical conjunction of radical reaction and modernity. This image of the future may be an existing society or economy but, more frequently, images of the future are coded in the name of a past cultural or national heritage. A good example of this would be Malaysia where the ideology of Mahathirism rests on the constitution of a future on the basis of a return to a mythical period of Malay cultural and political dominance… In other words, the past is recoded in the image of the future.
>
> (*Jayasuriya 1998: 84*)

The legal-epistemic architecture set out by Asia's long experience with legal pluralism is perfectly suited to the discourse of reactionary modernization. The paradoxical discourses that Jayasuriya identifies as definitive of reactionary modernity were first encoded in the process of constructing Asia's pluralist legal systems. And they were able to survive the initial, heady rush to modernization precisely because the distinctly dualist legal frameworks created by these systems was able to encode both strands of the reactionary modernist discourse – i.e. the modern and the historical – in terms of law, i.e. state (modern) law versus *adat* law. (As wonderfully demonstrated by the great legal historian Frederic Maitland (1911) in his inaugural lecture as the first Chair in Legal History at Cambridge, the law is a vocabulary that is simultaneously historicist – as reflected in vocabularies of 'customary law', 'legal traditions', even '*modern* law' (see e.g. Glenn 2004), and ahistorical – as reflected in vocabularies of legal positivism, 'universal law' and 'rule of law' (see e.g. Pistor and Wellons 1999) This allows for the distinctive and paradoxically historicist coding and recoding of modernity that reactionary modernization uses to respond to new and evolving needs.

All this is most overtly visible in the ongoing legal evolutions of Indonesia and Malaysia. Both polities have long traditions of subaltern historical-nationalist discourses associated with Islamic law. In both polities, long reign of authoritarian leaders (Suharto and Mahathir) with very modernist developmental agendas had worked to suppress ethnic nationalism in favour of more technocratic visions of 'development'. When these leaders passed from power, however, this ethnic-nationalist discourse re-emerged and identified itself strongly with the subaltern legal systems that had been allowed to develop under the legal pluralism of the colonial era – namely, *adat* law in Indonesia (Henley and Davidson 2007) and sultanate-Islamic law in Malaysia (Harding 2002; Neo 2006). In Malaysia, for example, the colonial association of the indigenous sultans' autonomous authority with 'matters regulated by 'Muhammadan' law has also resulted in a conflation of Muslim and Malay-ethnic identity, and one of the focal issues surrounding Malaysia's largely interethnic political struggles (particularly between Malays and Chinese) involves the expansion and strengthening of the reach of Malaysia's Islamic court system (Neo 2006).

Note that this tension is not necessarily dysfunctional. Perhaps paradoxically, many parts of Asia have been able to harness it into a device for promoting a certain degree of social-psychological stability and security during the innately disruptive pursuit of modernization. In Indonesia, like Malaysia, local ethnic mobilization after the fall of Suharto was associated with discourses of *adat*. But since this legal ideology of *adat* (which in true pluralist fashion includes both Islamic and non-Islamic norms and discourses) is shared across local ethnicities, it has also proved effective (at least sometimes) at facilitating peace-building in the wake of intersectarian and interethnic violence (see e.g. Thorburn 2008; Braithwaite *et al.* 2010). Even with regards to Malaysia, it bears noting that the Malaysian state has enjoyed more than half a century of relative peace and constitutional stability; it currently sports the oldest constitution in Asia. Despite being a very religiously and ethnically fragmented society, it has been able to avoid the ethnic and sectarian violence that continually erupted elsewhere throughout South and Southeast Asia over the past 60 years. It does not seem too far-fetched to suspect that Malaysia's paradoxical legal pluralism, despite its recent dramas, could well have contributed to this impressive accomplishment.

A similar observation can be made about the ongoing constitutionalization of Thailand. Many have noted in Thailand a long-standing tension between the authority of the King and that of constitutionalism: the King's persisting charismatic authority, which is fundamentally nationalist and religious in character, is seen as resting in deep systemic tension with modernizing forces of constitutionalization. Nevertheless, it is also clear that the power of the King has played a critical role in the surprising stability of deeper Thai society, a stability that formal constitutionalism has by itself been so far unable to achieve. The transition to constitutionalism is inherently destabilizing. The seemingly oppositional forces of the King on the one hand and constitutionalism on the other may actually be operating as homeostatic symbionts governing and stabilizing the contradicting pulls of constitutional modernity and social-cultural security and identity (see generally Harding and Leyland 2011).

Present-day China and Vietnam present interesting variations on this theme. Both responded to the experience of European dominance by pursuing a process of what James Scott (1998) has referred to as 'high modernism' – a complete rejection of a past culture in favour of modernist pursuit of national strength. In both China and Vietnam, the vehicle for this hypermodernity was state communism and its distinctly 'socialist' vision of law (see Gillespie 2005; Zhu 2009), which completely excised their traditional and pre-modern Confucian legal traditions (as well as the subsequent, colonial French legal tradition in Vietnam) from the polity. As in authoritarian Indonesia under Suharto, and Malaysia under Mahathir, nationalism and modernity have seemingly been fused and held together by strong authoritarian forces. In this sense, Asia's high-modern vision of socialism, it would seem, at least when backed by heavy authoritarian weight, appears to contradict a claim that Asia's distinct experience of legal pluralism continues to be reflected in a distinctive fragmentation of legal traditionalism versus legal modernity (cf. Scott 1998: 87–102).

However, this is not really the case. In Vietnam, the split between the ahistorical modern and the reactionary historicism is reflected vertically, in local and historically framed patterns of socio-legal organization – i.e. soft law – that counteracts modernizing, central level laws. In mobilizing this soft law, localities have been relying on traditional modes of law that predate the modern reform movement (*doi moi*). Moreover, central level officials consciously tolerate these alternative legal practices as necessary counterweights to, and buffers against, the forces of a potentially overwhelming reformist modernity (see generally Gillespie 2009).

In China, the dynamics of reactionary modernization have been more complicated. Cleavages between modernist and traditional/nationalist legal visions are being reflected more *within* rather than across communities. Within the commanding heights of the Communist Party, for example,

observers have identified the emergence of two distinct factions, each with a distinct vision of the role that law plays in the modernization process. These include a technocratic faction advocating a more modernist legal approach to national development and modernization, and a populist faction pursuing a more traditional mass-mobilization-based legal approach (Li 2005, 2009; compare McCormick 1997: 206–248). A similar factional and conceptual split can be found within China's growing political resistance and reform communities. One of these factions, associated with what is sometimes called the *weiquan* (or 'rights-defence') movement, identifies itself as favouring reforms that follow the universal principles of European legal-liberalism, and another identifies itself as favouring reforms derived from distinctly Chinese experiences and legal sources (Soong 2009, compare Wang 2009 with Feng 2010). In China, it is particularly interesting that the legal references for these more tradition-minded arguments, both within the elite and within the resistance communities, is not the Confucianism of Chinese antiquity, but the much more recent experience of Chinese socialism (see, e.g. Zhu 2009), showing how even one generation's history-denying pursuit of high-modernity can itself be mined for historicist material by the next (see e.g. Hu 2006; Lee 2007; Wang 2009: 140–146).

In sum, it is precisely in the subaltern, local legal systems encoded in legal pluralism that the critical source material for the continually recoded past of reactionary modernization is found – be it Chinese 'Confucianism' in the context of Asian values, *adat* in the context of Indonesian state-building, a distinctly Malayan Islam in the context of Malaysian constitutionalism, or the Buddhist divinity and wisdom of the Thai monarch in the context of Thai constitutionalization. Seen in this light, the discourse of reactionary modernization is simply the latest variation on a distinctly Asian experience of legal pluralism that stretches back over a millennium.

Conclusion: Asian past as global future – the globalization of legal pluralism

Today, perhaps, the distinctiveness of Asia's experience with legal pluralism is fading. The dynamics of globalization means that most of the countries of the world now have to find ways of accommodating multiple legal systems within their domestic borders. This is the phenomenon that is frequently referred to as the 'hollowing-out' of the state (Jessop 2004), and the related transition from the centralized regulatory state of Weberian modernism to the post-regulatory state of a pluralist 'meta-regulation' – i.e. the regulation of multiple regulatory systems (Coglianese and Mendelson 2010). But while this is a new path for the rest of the world, it is, as we have seen, a very old path for Asia. In this sense, it is in Asia's legal past that our own legal future may in some part lie. This, alone, should recommend it to our attention.