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# Where Is Asia? When Is Asia? Theorizing Comparative Law and International Law

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Ever since Henry Luce pronounced the twentieth century an American one, numerous critical observers have predicted that Asia will preside over the twenty-first one.<sup>1</sup> Yet even in 2010, that prediction still confronts us as a question: “Asian Century?” I want to approach the question by disaggregating the way it conflates space and

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<sup>1</sup> See generally Henry R. Luce, *The American Century*, LIFE, Feb. 17, 1941, at 61.

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time. I want to ask, separately, “Where is Asia?” and “When is Asia?” I will seek to answer the first question in terms of cultural geography and the second one in terms of historiography. Effectively, I will suggest that the “problem” of Asia is an epistemological one.<sup>2</sup>

I will also consider what it means for comparative lawyers and international lawyers to take that problem seriously. I will so do by using the so-called “Asian Values” debate as a point of entry to consider the relationship between comparative law and international law as disciplines. Both the Asian Values debate and the two legal disciplines are structured around a dialectic opposition between universal and particular values. Rather than positing pre-constituted objects of legal knowledge and seeking to classify them as either universal or particular, I urge that we examine the worldview that gives rise to such binaries and makes them intelligible: how do the entities we analyze come to be seen as distinctive and oppositional to each other in the first place?

At the outset, it is important to note that international lawyers and comparative lawyers do not talk to each other nearly as much as one might expect. To disrupt this status quo, a few years ago the American Society of Comparative Law decided to bring both groups together at its annual meeting at the University of Michigan.<sup>3</sup> I was invited to join a panel entitled, “Asian Values: A Counterpoint to Human Rights?” The very first thing to note about the title is that it was in effect a set-up — roughly in the same category as questions such as, “Have you stopped beating your wife?”<sup>4</sup> It should be obvious that Asian Values are *not* a counterpoint to human rights. To accept the silent premise of the query would be to concede that Asians are somehow not already included in the category “human.” Indeed, there was no panel at the meeting posing the question, “European Enlightenment: A Counterpoint to Human Rights?” Self-evidently it is not a counterpoint; we all know that it is the thing itself.

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<sup>2</sup> That is to say, part of the problem of China is that it is posited as a problem to be solved in the first place. For a notable instance of this formulation, see BERTRAND RUSSELL, *THE PROBLEM OF CHINA* (1923).

<sup>3</sup> To be sure, while the event was sufficiently rare to be of note, by no means was it unprecedented. A 1997 Symposium on “New Approaches to Comparative Law” at the University of Utah was another important recent effort to stage a conversation between comparative lawyers and international lawyers. See *generally* Symposium, *New Approaches to Comparative Law*, 1997 UTAH L. REV. 255.

<sup>4</sup> I do not mean to imply that the organizers of the conference were not aware of the problematic nature of the panel’s title. It was obviously intended as a characterization of one dominant understanding of the nature of “Asian Values,” and it performed that function well: I took up the provocation it offered.

Before proceeding further, let me hasten to add that it is not just the false universalism of a humanitarian will to empire that I find disturbing in the Asian Values debate. From the opposite perspective, I am equally troubled by the notion of Asian Values as well, at least when the term is taken to refer to some stable, pre-political set of norms that ought to be valued positively simply because of their (putative) cultural particularity and authenticity. Carl Schmitt notoriously observed, “Whoever invokes humanity wants to cheat.”<sup>5</sup> The same goes for Asian Values. It is unclear what, or even where, is “Asia,” and who has the authority to speak in its name.<sup>6</sup>

#### I. WHERE IS ASIA? NOT IN EUROPE

Dividing the landmass of the Earth into continents is a commonsense way of understanding the world. It is hardly limited to lawyers, although it so happens that one of the most important founders of a continental analysis of the world is a comparative lawyer: Charles de Secondat, baron de Montesquieu. His *Spirit of the Laws* remains the *locus classicus* of a social and legal analysis that proceeds by continents.<sup>7</sup> (Indeed, owing in large part to Montesquieu, historically the phrase “Oriental despotism” has bordered on tautology.)<sup>8</sup> However, continents are not simply natural units but metageographical concepts, premised on an implicit but unexamined assumption that natural and human features correspond to each other in space.<sup>9</sup> As Martin W. Lewis and Karen E. Wigen observe in their study, *The Myth of Continents*, the way in which we ordinarily use continental terms assumes that continents are at once physical as well as cultural units.<sup>10</sup> Yet this assumption is simply not true: civilizational and continental boundaries need not coincide.

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<sup>5</sup> CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 54 (1996).

<sup>6</sup> On the multiplicity of Asias, see generally GAYATRI CHAKRAVORTY SPIVAK, *OTHER ASIAs* (2008).

<sup>7</sup> MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989).

<sup>8</sup> Montesquieu grounded his analysis on a distinction between monarchies and republics, on the one hand, and despotism, on the other. Although each form of government operates according to a distinct principle (honor, virtue, and fear, respectively), only the first two forms constitute legitimate forms of government. Despotism, in contrast, is fundamentally illegitimate. As Andrew March observes, it is most “at home” in Asia, most notably, as well as the Americas and Africa. ANDREW L. MARCH, *THE IDEA OF CHINA: MYTH AND THEORY IN GEOGRAPHIC THOUGHT* 46-47 (1974).

<sup>9</sup> MARTIN W. LEWIS & KAREN E. WIGEN, *THE MYTH OF CONTINENTS: A CRITIQUE OF METAGEOGRAPHY* 42 (1997).

<sup>10</sup> *Id.* at 42.

That continents as units of analysis are socially constructed is perhaps not a particularly surprising observation. However, it is important to take note of just *how* they are constructed. Despite their apparent symmetry, Europe and Asia, for example, are far from equivalent concepts. Historically, the very terms “Europe” and “Asia” are of European origin. What we witness today is essentially the globalization of Greek geographic categories.<sup>11</sup> (In fact, for most of their history today’s so-called Asians had no idea that they were living in Asia. They first discovered this fact when European travelers told them so.) As a result, conceptually Europe completely overwhelms Asia. Yet spatially the opposite is true: it is Asia that overwhelms Europe. Although for Greeks Asia referred to what is today the northwestern corner of Turkey, today it extends all the way to the Pacific. By comparison to other continents, Asia is in fact a kind of supercontinent,<sup>12</sup> while Europe is only “a little promontory” on the far Western edge of a vast Asian continent.<sup>13</sup>

At the same time, although the term Europe does not have a single, fixed referent, it is at least defensible as a historical and cultural notion — but even then only so long as we keep in mind the crucial point that “there is no corresponding ‘Eastern’ or ‘Asian’ tradition.”<sup>14</sup> Asia, as a concept, stands for little more than *not* being Europe.<sup>15</sup> Indeed, until the discovery of the New World, the Orient was Europe’s first and primary Other against which it defined itself.<sup>16</sup> We see the indeterminacy of Asia in this Symposium as well. For some, Asia refers primarily to (what we call today) South Asia, which is represented metonymically by India.<sup>17</sup> For others, the primary referent is East Asia,

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<sup>11</sup> *Id.* at 16.

<sup>12</sup> *Id.* at 143-44.

<sup>13</sup> JACQUES DERRIDA, *THE OTHER HEADING: REFLECTIONS ON TODAY’S EUROPE* 21 (1992).

<sup>14</sup> LEWIS & WIGEN, *supra* note 9, at 16-17.

<sup>15</sup> *Cf.* MARCH, *supra* note 8, at 45 (“[E]ven if ‘Europe’ is more than an idea, Asia is not; it is simply a negative category without concrete basis, imposed from outside, for ulterior reasons, on a huge and heterogeneous area.”).

<sup>16</sup> I use the terms Asia and Orient more or less interchangeably in this Essay. Historically, the term Orient has a wider geographic scope, referring to a cultural area that includes part of North Africa and the Middle East, while Asia has at least a somewhat more precise geographic meaning.

<sup>17</sup> *See, e.g.,* Afra Afsharipour, *Rising Multinationals: Law and the Evolution of Outbound Acquisitions by Indian Companies*, 44 UC DAVIS L. REV. 1029 (2011); Martha Nussbaum, *Democracy, Education, and the Liberal Arts: Two Asian Models*, 44 UC DAVIS L. REV. 735 (2011); and Lisa R. Pruitt, *Human Rights and Development for India’s Rural Remnant: A Capabilities-Based Assessment*, 44 UC DAVIS L. REV. 803 (2011).

which in turn is represented metonymically by China.<sup>18</sup> In fact, in terms of the diversity of their physical, cultural, and historical attributes, both India and China are best compared to the European landmass as a whole, rather than to a single European country.<sup>19</sup>

In sum, the short answer to the question, “Where is Asia?” is: not in Europe. The definition of Asia is essentially negative and geographically indeterminate. A more precise definition is a matter of cultural geography, and its specific content depends on which Asia one is talking about, and when. Much of the remainder of this Essay focuses on the Asian Values debate. Although the debate is framed expansively in terms of Asian Values more generally, it is in fact a debate primarily about East Asia. As I have noted, one of the key myths about East Asia is that it is epitomized by China. Where is China, then, in cultural space?<sup>20</sup> In much of European political thought, China, in particular, has stood for the opposite of law. For thinkers as diverse as Montesquieu and Hegel, it is a paradigmatic instance of “Oriental despotism,” exemplified by a cultural emphasis on the collective over the individual, duties over rights, and more generally custom and morality over law.<sup>21</sup>

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<sup>18</sup> See, e.g., Tom Ginsburg, *Eastphalia and Asian Regionalism*, 44 UC DAVIS L. REV. 859 (2011); Holning Lau, *Grounding Conversations on Sexuality and Asian Law*, 44 UC DAVIS L. REV. 773 (2011); and Peter K. Yu, *Sinic Trade Agreements*, 44 UC DAVIS L. REV. 953 (2011).

<sup>19</sup> LEWIS & WIGEN, *supra* note 9, at 9-10. Alternatively, we might view Europe more accurately as an Asian subcontinent. *Cf. id.*, at 36 (“Europe is in actuality but one of half a dozen Eurasian subcontinents, better contrasted to a region such as South Asia.”).

<sup>20</sup> As a child growing up in Finland, on the outer edges of cultural Europe, I was told early on that if I were to dig a hole in the earth and keep on digging, I would eventually come out on the opposite side of the earth — namely, in China. I have since learned that children in the Western hemisphere are apparently told exactly the same thing. Evidently China’s mythic location “on the other side of the world” is a matter of the geopolitics of knowledge, not of geographic space. Indeed, as Andrew March observes, “it is China that is most extremely Asian and un-Euro-American, at the opposite ends of the earth.” MARCH, *supra* note 8, at 23. For studies of the indeterminacy and multiplicity of China(s), see, for example, WILLIAM A. CALLAHAN, *CONTINGENT STATES: GREATER CHINA AND TRANSNATIONAL RELATIONS* (2004); DRU C. GLADNEY, *DISLOCATING CHINA: MUSLIMS, MINORITIES, AND OTHER SUBALTERN SUBJECTS* (2004); and RALPH A. LITZINGER, *OTHER CHINAS: THE YAO AND THE POLITICS OF NATIONAL BELONGING* (2000).

<sup>21</sup> See Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 214 (2002).

## II. WHEN IS ASIA? NOT NOW

Let me next consider briefly the second, and related, question: When is Asia? The short answer is: not now. A slightly more specific answer is: not any more. That is, Asia may have had its moment, but that moment lies far in the past. Focusing again provisionally on East Asia in general and China in particular, whatever views European observers have historically held about Chinese civilization — and it is important to recognize that, especially in early modern Europe, many held it in high regard — almost all also agreed that China's Golden Age was over and its greatest glories were already past. In an increasingly widely held view, China was either in decline, or at best stagnant.<sup>22</sup> As Marx put it in an utterly dismissive metaphor, China was “vegetating in the teeth of time.”<sup>23</sup>

There is also a modified version of this view: China's greatest glories may be past, but it is coming back. Since at least the eighteenth century, this has been an especially prominent trope with regard to China, which has long been viewed as a sleeping giant,<sup>24</sup> endlessly on the brink of a final breakthrough that will restore its greatness and allow it to join the West as an equal — if not even more powerful — participant in the modern world system.<sup>25</sup> Today, this view seems more ubiquitous than ever. Yet whether China, or Asia, is located in the past (“not any more”) or in the future (“not yet”), the crucial point is that its time never seems to have been *now*: Whether declining or caught in an unending process of becoming, its moment is either already over or forever deferred.<sup>26</sup> Europe's time, in contrast, is an endless succession of pure *nows*.<sup>27</sup> Indeed, ever since Europe freed

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<sup>22</sup> See generally D.E. MUNGELLO, *THE GREAT ENCOUNTER OF CHINA AND THE WEST, 1500-1800* (1999).

<sup>23</sup> KARL MARX ON COLONIALISM AND MODERNIZATION: HIS DESPATCHES AND OTHER WRITINGS ON CHINA, INDIA, MEXICO, THE MIDDLE EAST AND NORTH AFRICA 323 (Shlomo Avineri ed., 1968).

<sup>24</sup> See, e.g., JOHN FITZGERALD, *AWAKENING CHINA: POLITICS, CULTURE, AND CLASS IN THE NATIONALIST REVOLUTION* (1996).

<sup>25</sup> See, e.g., GIOVANNI ARRIGHI, *ADAM SMITH IN BEIJING: LINEAGES OF THE TWENTY-FIRST CENTURY* (2007); Wang Xiaoming, *China on the Brink of a “Momentous Era,”* 11 *POSITIONS* 585 (2003).

<sup>26</sup> To be sure, even as I write this, there is an increasing belief that China's global status is finally, really changing. But as I have already observed, even in this Symposium the arrival of an “Asian Century” confronts as a question that awaits a final, definitive answer.

<sup>27</sup> I owe the phrase to Heidegger, who refers to “[t]he vulgar characterization of time as an endless, irreversible succession of *nows* passing away” — namely, the secular time of modernity. MARTIN HEIDEGGER, *BEING AND TIME* 390 (Joan Stambaugh trans., 1996).

itself from the shackles of its feudal past, Europe does not simply happen to be modern: it owns modernity itself. Hence, it lives in a perennial present, free to invent and re-invent itself from moment to moment.

In the end, whether Asia is located in the past or in the future, both propositions anoint Europe as the global time-keeper of political, cultural, and economic development. Together, they deny Asia's coevalness with Europe.<sup>28</sup>

### III. ASIAN VALUES: HERE AND NOW

With these preliminary considerations about Asia's location in time and space, let me return to the topic with which I began this essay: the so-called Asian Values debate. This debate operates on multiple levels and can be analyzed in numerous different ways. For present purposes, I will analyze it as an epistemological challenge to the West, and I use it as an opportunity to theorize Asia as a concept and to consider related methodological questions of comparative law and international law.

From one perspective, the Asian Values challenge to Western human rights norms can be viewed as an attempt to provide different answers to the questions "Where is Asia?" and "When is Asia?" — answers on Asia's own terms, as it were. I will summarize the terms of the Asian Values debate briefly. For one thing, the debate is already quite familiar, as it has received a great deal of journalistic coverage over the years. More pertinently, its terms are in fact quite simplistic.<sup>29</sup> The basic premise is that there is indeed an indigenous Asian tradition with its own, culturally distinct notions of rights, duties, and sovereignty, which differ from those of Western liberalism. This claim was articulated by several states in the early 1990s. Its most prominent proponents were a group of Southeast Asian countries (led by Singapore and including Malaysia and Indonesia) as well as China.<sup>30</sup> It was hardly coincidental that the claim emerged in its cultural form at that time. With the end of the Cold War, a discourse of political East-

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<sup>28</sup> The notion of "denial of coevalness" is Johannes Fabian's. See generally JOHANNES FABIAN, *TIME AND THE OTHER: HOW ANTHROPOLOGY MAKES ITS OBJECT* (1983).

<sup>29</sup> As Marina Svensson notes, Asian Values are typically analyzed only in general terms, without trying to define their specific content. MARINA SVENSSON, *DEBATING HUMAN RIGHTS IN CHINA: A CONCEPTUAL AND POLITICAL HISTORY* 59 (2002).

<sup>30</sup> Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT'L L. & POL. 291, 311 (2000).

West division was displaced by a new discourse of cultural East-West division.<sup>31</sup>

Before summarizing some of the key political elements of Asian Values, it is notable that from the beginning they were linked closely to claims about distinctive Asian forms of capitalism. In fact, assertions of Asian Values have derived their legitimacy almost entirely from their ability to sustain economic development in East and Southeast Asia. Ironically, so-called Confucian capitalism has been taken quite seriously as an *economic* phenomenon — as a major competitor and even a possible model for the West to emulate (or so it seemed at least until the Asian Crash on the eve of the millennium)<sup>32</sup> — yet *political* claims about Asian Values have never gained broad acceptance in the West.<sup>33</sup>

It bears emphasizing that the very notion of Asian Values as such is groundless insofar as it purports to represent the values of all of Asia — a category that has no coherent historical or cultural referent, as I have already noted.<sup>34</sup> Rather, what is typically referred to as Asian

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<sup>31</sup> Indeed, the Asian Values debate can be viewed as part of a larger debate about a post-Cold War “clash of civilizations,” predicted by Samuel P. Huntington. Samuel P. Huntington, *The Clash of Civilizations*, 72 FOREIGN AFF. 22 (1993). For more detailed accounts of the Asian Values debate, see, for example, Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109 (1998); Engle, *supra* note 30; and Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates About “Values in Asia,”* 14 IND. INT’L & COMP. L. REV. 1 (2003).

<sup>32</sup> There is an entire cottage industry on various forms of “Confucian capitalism,” seeking to overturn Max Weber’s thesis about the unique relationship between capitalism and the Protestant ethic. Prominent examples include S. GORDON REDDING, *THE SPIRIT OF CHINESE CAPITALISM* (1990) and SOUCHOU YAO, *CONFUCIAN CAPITALISM* (2002).

<sup>33</sup> It is useful to make a further distinction between political and philosophical claims about Asian Values. There is a respectable — if not mainstream — philosophical position that is often phrased in terms of “Confucian” values. While a Confucian philosophical position can be, and has been, used to buttress political Asian Values claims, it exists in several versions, some of which are openly critical of authoritarian aspects of political Asian Values claims, and others less so. Prominent examples include ROGER T. AMES & DAVID L. HALL, *THE DEMOCRACY OF THE DEAD: DEWEY, CONFUCIUS, AND THE HOPE FOR DEMOCRACY IN CHINA* (1999); DANIEL BELL, *BEYOND LIBERAL DEMOCRACY: POLITICAL THINKING FOR AN EAST ASIAN CONTEXT* (2006); DANIEL BELL, *EAST MEETS WEST: HUMAN RIGHTS AND DEMOCRACY IN EAST ASIA* (2000); CONFUCIANISM AND HUMAN RIGHTS (William Theodore de Bary & Tu Weiming eds., 1998); WILLIAM THEODORE DE BARY, *ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE* (1998); *HUMAN RIGHTS AND CHINESE VALUES* (Michael C. Davis ed., 1995); TU WEIMING, *A CONFUCIAN PERSPECTIVE ON HUMAN RIGHTS: THE INAUGURAL WU TEH YAO MEMORIAL LECTURES 1995* (1996).

<sup>34</sup> For a forceful statement of this position, see, for example, Amartya Sen, *Human*

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Values is a loose set of claims by more or less autocratic East and Southeast Asian states about the nature of their political culture. These values were expressed in the 1993 Bangkok Declaration made at the Asian Regional Meeting in preparation for the World Conference on Human Rights in Vienna that year.<sup>35</sup> Collectively, advocates of Asian Values tend to emphasize the priority of collective notions of responsibility over individual rights, the priority of economic rights over political rights, the parity — if not priority — that duties enjoy with regard to rights, and a cultural preference for the cultivation of social consensus rather than toleration of dissent.

These rather general premises can generate different positions when they are applied in specific contexts by specific states. Yet analyzed from the perspective outlined above, proponents of Asian Values make two central claims. First, they assert that as a matter of cultural geography, Asia has its own traditions of law and legality. Law is not the opposite of Asia. On the contrary, law is Asian, too. It may be different from the liberal legal tradition, but it most certainly is not mere Oriental despotism. Second, by discovering (or purporting to discover) an indigenous version of human rights, Asian Values advocates insist that Asia's time is *now*, and always has been. Asia need not wait for the full realization of a teleological European schema of political development, Hegelian or otherwise. It does not need Europe in order to emancipate itself into full membership in humanity at some future point. There are and always have been alternative modernities in Asia.

It is notable that the phrase Asian Values has been invoked much less frequently after the 1997 Asian financial crisis. Why, then, focus on the Asian Values debate today? For one thing, it is important to acknowledge that the debate was quite stale from the beginning. It was hardly a debate at all, but simply the assertion of opposing claims that did not really address each other. It is precisely the stylized nature of that debate that makes it a useful object of analysis. In the end, the so-called Asian Values are little more than transvalued Orientalist stereotypes: originally negative prejudices that have been turned into positive ones. Because of their history, at a moment's notice their coding can switch again from positive to negative, and back to positive

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*Rights and Asian Values*, NEW REPUBLIC, July 14–21, 1996, at 13. Veronica Taylor makes a parallel statement about the category of "Asian law," observing that no such unified phenomenon exists. See generally Veronica Taylor, *Beyond Legal Orientalism*, in *ASIAN LAWS THROUGH AUSTRALIAN EYES* 47, 47 (Veronica Taylor ed., 1997).

<sup>35</sup> The claims were prefigured in provocative statements made by Lee Kuan Yew and Mahathir Mohamad as well as China's White Paper on Human Rights in 1991. Peerenboom, *supra* note 31, at 2.

once more. For example, an emphasis on family can be coded either as a positive ethic of care, or as clannish nepotism; an emphasis on relationships more generally can be construed as a concern for collective welfare, or as cronyism; an emphasis on consensus can be valued as either a striving for harmony or as corruption and the stifling of dissent; an emphasis on tradition can be held as a wise regard for precedent, or a symptom of rigidity and lack of creativity; an emphasis on morality over law may signify either an admirable lack of litigiousness or a disregard for the values of rule of law; and so on. Conceptually, these values are so flat that they are easy to flip — hence their instability and endless oscillation.<sup>36</sup> In short, the Asian Values debate is staged in terms of binary oppositions that are grounded inextricably in an Orientalist epistemology of Asia.<sup>37</sup>

Yet the debate remains of analytic interest, despite its largely rhetorical nature. The mere utterance of the phrase Asian Values no longer has the talismanic force it once did, yet versions of Asian Values claims continue to be made even today.<sup>38</sup> At this moment, the leading articulations emanate not from Singapore but from China. Although Asian Values as a slogan suffered major damage in the aftermath of the Asian financial crisis, with the speedy recovery of Asian economies the so-called Beijing Consensus has come to stand in for a new East Asian model, distinct from its 1990s namesake, the Washington Consensus.<sup>39</sup> Much like Asian Values, the Beijing

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<sup>36</sup> As I have observed elsewhere, this oscillation has a long history. I discuss briefly the transformation of early modern Sinophilia into Sinophobia and the unstable relationship between the two in Teemu Ruskola, *Raping Like a State*, 57 *UCLA L. REV.* 1477, 1504 (2010).

<sup>37</sup> This strategy is by no means novel. As Stefan Tanaka observes in his study of the invention of history as a modern discipline in post-Meiji Japan, Japan's claims to historic uniqueness "incorporated many elements used by Westerners to explain Oriental inferiority but turned them into positive characteristics that accounted for Japan's development." STEFAN TANAKA, *JAPAN'S ORIENT: RENDERING PASTS INTO HISTORY* 274 (1993).

<sup>38</sup> In 2003, Peerenboom described two rounds of evolving debates on Asian Values and identified the beginning of a third one. Peerenboom, *supra* note 31, at 2-4. Moreover, while the term Asian Values may be less salient in political discourse today, it remains an object of a great deal of scholarly attention. See, for example, recent titles such as MICHAEL C. BRANNIGAN, *STRIKING A BALANCE: A PRIMER IN TRADITIONAL ASIAN VALUES* (2010); EMANUELE FORNARI, *MODERNITY OUT OF JOINT: GLOBAL DEMOCRACY AND ASIAN VALUES IN JÜRGEN HABERMAS AND AMARTYA K. SEN* (2007); HUMAN RIGHTS IN ASIA: A REASSESSMENT OF THE ASIAN VALUES DEBATE (Leena Avonius & Damien Kingsbury eds., 2008); and RODA MUSHKAT, *INTERNATIONAL ENVIRONMENTAL LAW AND ASIAN VALUES: LEGAL NORMS AND CULTURAL INFLUENCES* (2004).

<sup>39</sup> For diametrically opposed analyses of the Beijing consensus, compare STEFAN HALPER, *THE BEIJING CONSENSUS: HOW CHINA'S AUTHORITARIAN MODEL WILL DOMINATE*

Consensus prescribes economic development without democracy, offering China as a global model. Indeed, the Chinese government's increasingly urgent calls to build and maintain a "harmonious society" draw in a remarkable manner on a once reviled but now selectively cultivated Confucian tradition.<sup>40</sup> Moreover, not only are the political premises of the Asian Values debate alive in development discourse, but the oppositions in terms of which the debate was structured are also at the heart of certain fundamental methodological concerns of both comparative law and international law. In effect, the Asian Values debate sets out in a highly articulated form the dynamic by which claims of cultural specificity continue to be made today, and it illustrates how such claims are understood by comparative and international lawyers.

#### IV. THE WORLD AS AN EXHIBITION

The Asian Values debate revolves around a conceptual opposition between universal human rights and particular cultural values. As I have suggested, Asian Values have been constructed in self-conscious opposition to certain Western liberal values. As such, they can be viewed as a kind of self-Orientalizing response, insisting both on Asia's difference *and* asserting that Asia, too, is located in law and law in Asia, and that Asia's time, too, is now. Hence, Asia already inhabits modernity, albeit an alternative one.

As Karen Engle has noted, most analyses of the Asian Values debate either dismiss it as mere political posturing or, if they engage with it, they treat it as a debate about the merits of universalism-versus-

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THE TWENTY-FIRST CENTURY 31 (2010) (viewing China with alarm as "an inherent challenge to the Enlightenment values and principles that have guided Western progress for over two centuries"), with JOSHUA COOPER RAMO, THE BEIJING CONSENSUS 60 (2004) (arguing that the new model provided by the Beijing Consensus "offers hope for the world"). For a more balanced analysis of what Randall Peerenboom calls "the East Asian Model," see RANDALL PEERENBOOM, CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST? (2007). As Peerenboom characterizes the Asian Values gambit, it "seems more like a marginal critique of liberalism than a credible, full-fledged alternative able to stand on its own." *Id.* at 267.

<sup>40</sup> The Beijing Consensus is evidently a Sinocentric reaction to the so-called Washington Consensus of the West. It is worth acknowledging, however, that East Asia's most recent claims to already being "here" and "now" are being taken more seriously — and fearfully — than those made in the 1990s expressly in terms of Asian Values: there is a growing sense that China's time may really, finally have arrived and that the world's geopolitical center of gravity may be truly shifting to Asia. Yet the operative word is "may": although China's rise appears imminent and even inevitable, it remains an object of heated debate, not quite an established *fact*.

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relativism.<sup>41</sup> Rather than adopting either of these two stances, it may be better simply to refuse the opposition between universal and particular values that underlies so much of the debate.<sup>42</sup> It seems evident that both absolute universality *and* absolute particularity are ontologically impossible and, indeed, normatively undesirable as well. Absolute universality would imply a complete unity of all existence and absence of boundaries, while absolute particularity would entail equally complete existential fragmentation.

From the perspective of law, to refuse an absolute opposition between the universal and the particular is also to reject a certain disciplinary opposition between international law and comparative law. At least according to some conventional wisdom, international law tends to focus on the universal, the supranational, while comparativists attend to the local, the particular.<sup>43</sup> Yet it seems more accurate to observe that, in a perhaps obvious but important sense, the universality of international law and cultural particularity of comparative law are each other's condition of possibility. Universal norms can never be considered only in the abstract: they must always be ultimately translated to and understood in the particular idiom of some local actors. Without the mediation of comparative law, international law would be simply unintelligible. At the same time, comparative lawyers' descriptions of the particular and the local are, by definition, exercises of translation, and translatability in turn assumes the possibility of communication across local differences. Both conceptually as well as practically, the universal and particular form part of a single dialectic, to use the Marxian (or Hegelian) vocabulary. Or in the parlance of poststructuralist theory, the disciplines are in a relation of supplementarity to each other.

It is precisely this constitutive opposition between the universal and the particular — which can also be analyzed in terms of human rights

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<sup>41</sup> Engle, *supra* note 30, at 331.

<sup>42</sup> See Peerenboom, *supra* note 31, at 1.

<sup>43</sup> As David Kennedy, for example, describes the self-understanding of international lawyers and comparative lawyers, the former seek to establish a supranational regime of order above states while the latter endeavor to understand cultural diversity among states. David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT'L L. 9, 82 (1999). This characterization here applies most of all to a liberal conception of international law and to a "nationalist concept" of comparative law (described further in footnote 50, *infra*). Although there are in fact multiple approaches to both international and comparative law, with varying degrees of attention to the universal and the particular, the theoretical point — elaborated below — is that it is not *possible* for either tradition to focus solely on the universal or the particular, even if it so desired.

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and comparative law — that makes the Asian Values debate predictable and ultimately irresolvable. On the one hand, we are firmly committed to the notion that there are *some* norms of justice that have universal application. At the same time, we believe deeply in the values of cultural autonomy and local self-determination — so long as those local values are “good” ones, i.e., Western and liberal.

There are many culturalist critiques of the false universalism of human rights. It is hardly coincidental that there are equally numerous human rights critiques of comparativists’ exoticization of local difference.<sup>44</sup> Both types of critiques can surely be legitimate and useful, but unless one believes in the categorical priority of either the universal or the particular, the two critiques must be performed simultaneously and in relation to one another. One way out of the unproductive universal/particular dialectic is to deconstruct *both* of the opposing terms. There is simply no intelligible way to choose between them. The positive potential of the assertions of Asian Values is indeed their capacity to expose various aspects of contemporary notions of human rights as *Western* human rights, historically and politically. At the same time, the claims of Asian Values themselves are often but crass cultural essentialism — typically made by autocratic political leaders, to boot. The positive potential of international human rights law in turn lies in its capacity to contest the political monopoly of states and to draw attention to how Asian Values are used by *states* to suppress domestic dissent.

It bears repeating that a refusal to choose between universalism and relativism is not simply another way of dooming oneself even further into relativism. In today’s world, liberal rights — including human rights — are something that we simply “cannot not want.”<sup>45</sup> Whatever the historical and conceptual limitations of liberal humanism may be,<sup>46</sup> it is impossible for anyone today *not* to want to be considered

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<sup>44</sup> An area of human rights law where the differing perspectives are especially visible is the issue of female circumcision — or, alternatively, female genital cutting — where the very characterization of the practice is an indication of the nature of the observer’s critique. Compare Elisabette Grande, *Hegemonic Human Rights and African Resistance: Female Circumcision in a Broader Cultural Perspective*, 4 GLOBAL JURIST, no. 2, 2004 at art. 3 (analyzing female circumcision from culturally specific perspectives), with Alexi Nicole Wood, *A Cultural Rite of Passage or a Form of Torture? Female Genital Mutilation from an International Law Perspective*, 12 HASTINGS WOMEN’S L.J. 347 (2001) (analyzing female genital cutting as the violation of a universal norm).

<sup>45</sup> See GAYATRI CHAKRAVORTY SPIVAK, *OUTSIDE IN THE TEACHING MACHINE* 45 (1993).

<sup>46</sup> For analyses of liberalism’s historical as well as conceptual relationship with European imperialism, see, for example, UDAY SINGH MEHTA, *LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT* (1999); SANKAR MUTHU, *ENLIGHTENMENT AGAINST EMPIRE* (2003); and JENNIFER PITTS, *A TURN TO EMPIRE: THE*

human, nor is such a yearning an illegitimate one. As Arjun Appadurai characterizes the “self-fulfilling and self-justifying” nature of modernity, “Whatever else [it] may have created, it aspired to create persons who would, after the fact, have wished to have become modern.”<sup>47</sup> In the world in which we live today, there is no radical outside of modernity and no simple recourse to an untainted alterity outside the West — Asian or otherwise.<sup>48</sup>

In effect, however different their perspectives may seem, today international law and comparative law are structurally fully complementary rather than oppositional. They are part of a joint cultural and epistemological project that has turned the entire world into a juridical formation consisting of nation-states.<sup>49</sup> In so doing they help create the very dialectic of universality and particularity that both enables as well as ultimately limits the field of operation of each, leaving little if any room for radical otherness. The joint international law and comparative law enterprise labels certain differences as culture and then nationalizes and privatizes those differences by consigning them to the domestic sphere of each state, leaving international law in an ostensibly a-cultural or supra-cultural sphere. Within this schema, comparative law and international law are fully in cooperation in displacing, all too often, what are properly political differences onto the site of culture. It is a dialectic where the (political) universal always recoups the (culturally) particular within a liberal logic.

In short, this is a style of political and conceptual organization that imagines the world as an exhibition, to borrow sociologist Timothy Mitchell’s evocative characterization.<sup>50</sup> By focusing on the relations

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RISE OF IMPERIAL LIBERALISM IN BRITAIN AND FRANCE (2005).

<sup>47</sup> ARJUN APPADURAI, *MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION I* (1996).

<sup>48</sup> See generally BRUNO LATOUR, *WE HAVE NEVER BEEN MODERN* (1993) (arguing that modern distinctions between society and nature do not hold even in the practice of Western science).

<sup>49</sup> The observation that international law and comparative law are disciplinarily complementary is not an original one, although it is frequently unappreciated. For discussions of the two fields’ mutually supportive relationship, see, for example, George A. Bermann, *Le droit comparé et le droit international: Alliés ou ennemis?*, 55 *REVUE INTERNATIONALE DE DROIT COMPARÉ* 519 (2003) (describing the traditionally complementary relationship between international law and comparative law); David Kennedy, *The Methods and the Politics*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 345 (Pierre Legrand & Roderick Munday eds., 2003) (describing comparative law as part of larger projects of governance, akin to international law).

<sup>50</sup> Timothy Mitchell, *The World as Exhibition*, 31 *COMP. STUD. SOC’Y & HIST.* 217 (1989).

among states, international law provides the frames for the pictures at this global exhibition, while comparative lawyers are assigned the task of curating the more or less exotic portraits of each national jurisdiction within these frames.<sup>51</sup>

#### V. DECENTERING EAST AND WEST

What might be some alternative ways of framing the world — if that is indeed the frame we want to start with? In a real sense, international law is not a singular category. There are in fact several international legal understandings that exist in tension with each other. We might think of them as competing notions of regional organization, indeed competing universalities, rather than debates between a (truly) universal and a (truly) particular position.<sup>52</sup> When viewed as such, they are best studied in terms of what could be called comparative international law: a study of international law that does not assume or privilege a single model and a single understanding of what international law is, but instead analyzes the existing regional understandings *in relation* to each other.

It bears noting that this does not mean taking the Asian Values debate, for example, at face value. Even if we displace the nation-state as the privileged object of our inquiry and recognize its dialectic constitution, we should not replace it with a notion of global regions that is equally static and reified. What is put forth as Asian Values are frequently the values of a handful of leaders of autocratic East and Southeast Asian states. As such, they are only one articulation of a regional perspective; they do not exhaust it. A relational analysis that goes beyond simplistic East-West contrasts allows us to analyze Asian Values in a dialectic frame as well. A productive response to what are

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<sup>51</sup> It bears emphasizing that I am referring here primarily to a liberal tradition of international law and to a particular tradition of comparative law that is dominant today, described variously as a “Country and Western tradition” or a “nationalist concept” of comparative law. For critiques of the limitations of this style of comparative law, see, for example, William Twining, *Comparative Law and Legal Theory: The Country and Western Tradition*, in *COMPARATIVE LAW IN GLOBAL PERSPECTIVE* 21, 21-31 (Ian Edge ed., 2000); Mathias Reimann, *Beyond National Systems: A Comparative Law for the International Age*, 75 *TUL. L. REV.* 1103, 1111 (2001). Along the same lines, Pierre Legrand describes the leading European comparative law treatise evocatively as “the ‘Baedeker’ of comparative legal studies.” Pierre Legrand, *Paradoxically, Derrida: For a Comparative Legal Studies*, 27 *CARDOZO L. REV.* 631, 635 (2005).

<sup>52</sup> On the notion of competing universalisms, see LYDIA LIU, *The Question of Meaning-Value in the Political Economy of the Sign*, in *TOKENS OF EXCHANGE* 13 (Lydia Liu ed., 1999).

all too often Eurocentric values in international law is not simply to assert Sinocentric values against them, although that is the essentially self-Orientalizing response offered by proponents of Asian Values, as I have suggested — culture as a trump, to paraphrase Ronald Dworkin.<sup>53</sup>

For an example of analysis of Chinese law and of the values that inform it, in a relational mode that does not imagine its objects of comparison as discrete entities, I will consider briefly the recent monograph *Death by a Thousand Cuts*, by Timothy Brook, Jérôme Bourgon, and Gregory Blue.<sup>54</sup> Stated narrowly, the book is a historical examination of a penalty known in Chinese as *lingchi chusi*, translated variously into English as “death by slicing,” “death by a thousand cuts,” and “lingering death.”<sup>55</sup> More broadly, however, the book is a history of punishment in late imperial China. By considering the exemplary status of Chinese cruelty in Western discourses, it situates its subject expressly in a comparative and international context. As the authors observe, their reason for doing so is simple: “China as a historical subject cannot be studied without critical regard for the Western epistemological constructions by which it has been made known since the eighteenth century to those outside China, and since the twentieth to those inside as well.”<sup>56</sup> Effectively, this is a study of punishment in China from the perspective of cultural geography, as it examines China itself both as a historical subject and a problem of knowledge, rather than taking it as a given, already-framed object.

Indeed, the book exemplifies general methodological trends in Chinese studies, many of which hold appeal for legal scholarship as well.<sup>57</sup> At the risk of being overly schematic, the field of Chinese history, for example, has undergone three relatively distinct phases in the recent past. It has largely moved beyond the first stage:

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<sup>53</sup> Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984).

<sup>54</sup> TIMOTHY BROOK, JÉRÔME BOURGON & GREGORY BLUE, *DEATH BY A THOUSAND CUTS* (2008). This is by no means the only work that one could cite for the purpose of illuminating methods of comparative history, but it is especially salient for legal scholars because of its subject matter.

<sup>55</sup> *Id.* at 2.

<sup>56</sup> *Id.* at 243-44.

<sup>57</sup> Although my focus here is on Chinese history, similar methodological moves have been made in comparative literature as well. See, e.g., ERIC HAYOT, *THE HYPOTHETICAL MANDARIN: SYMPATHY, MODERNITY, AND CHINESE PAIN* (2009); LYDIA LIU, *THE CLASH OF EMPIRES: THE INVENTION OF CHINA IN MODERN WORLD-MAKING* (2004); HAUN SAUSSY, *GREAT WALLS OF DISCOURSE AND OTHER ADVENTURES IN CULTURAL CHINA* (2001); SHU-MEI SHIH, *VISUALITY AND IDENTITY: SINOPHONE ARTICULATIONS ACROSS THE PACIFIC* (2007).

methodologically unconscious Eurocentric histories of China. Such histories were followed by an efflorescence of what historian Paul Cohen, notably, has called “China-centered” histories.<sup>58</sup> This shift was certainly a productive one, as it generated numerous local, detailed, regional histories that sought to understand China “in its own terms.”<sup>59</sup> However, the latest self-consciously comparative histories move the field to a third, more dialectic location. In addition to *Death by a Thousand Cuts*, this turn is exemplified by the recent stream of studies focusing on the margins and borderlands of the imperial state.<sup>60</sup> At their best, these studies are neither Eurocentric nor China-centered, but tell a story of how the objects of their analysis become intelligible units of analysis in the first place. Studies such as *Death by a Thousand Cuts* are in effect doubly de-centered as they simultaneously abandon the notion of a centered Europe and a centered China. Rather than positing pre-constituted objects of knowledge, these studies examine how entities of the political and historical imagination come to be seen as oppositional to one another, in part through differing understandings of law and punishment.<sup>61</sup>

It is significant that *Death by a Thousand Cuts* discusses China also in terms of international law. In the nineteenth century, characterizations of Chinese law as cruel and arbitrary were used as a justification for the Opium War, which was followed by a century of Unequal Treaties that collectively reduced China to a semi-colonial international legal status.<sup>62</sup> When *lingchi* was finally abolished

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<sup>58</sup> PAUL A. COHEN, *DISCOVERING HISTORY IN CHINA: AMERICAN HISTORICAL WRITING ON THE RECENT CHINESE PAST 149-98* (1984).

<sup>59</sup> *Id.* at 195.

<sup>60</sup> Such historical studies are far too numerous to list comprehensively. For notable examples, see generally JAMES HEVIA, *ENGLISH LESSONS* (2003); JAMES MILLWARD, *BEYOND THE PASS* (1998); and PETER PERDUE, *CHINA MARCHES WEST* (2005). Along similar lines, historian Christopher Beckwith’s recent study analyzes both Europe and Asia as the peripheries of historic empires of Central Asia, challenging conventional Eurocentric and Sinocentric views that regard Central Asia with its more or less nomadic “barbarians” as the periphery of both Europe and Asia. See generally CHRISTOPHER BECKWITH, *EMPIRES OF THE SILK ROAD: A HISTORY OF CENTRAL ASIA FROM THE BRONZE AGE TO THE PRESENT* (2009). For recent comparative studies of political economy, see generally VICTORIA TIN-BOR HUI, *WAR AND STATE-FORMATION IN ANCIENT CHINA AND EARLY MODERN EUROPE* (2005); KENNETH POMERANTZ, *THE GREAT DIVERGENCE: CHINA, EUROPE, AND THE MAKING OF THE MODERN WORLD ECONOMY* (2001); R. BIN WONG, *CHINA TRANSFORMED: HISTORICAL CHANGE AND THE LIMITS OF EUROPEAN EXPERIENCE* (2000).

<sup>61</sup> I elaborate on this method in David L. Eng & Teemu Ruskola, *China*, 100 *SOC. TEXT* 63 (2009).

<sup>62</sup> See generally DONG WANG, *CHINA’S UNEQUAL TREATIES: NARRATING NATIONAL HISTORY* (2008). On China’s status as a subject of international law in the nineteenth

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officially in 1905, the Qing dynasty did so in part to conform to international (i.e., Western) legal standards.<sup>63</sup> Yet, at the same time, as the authors point out emphatically, this abolition was the culmination of centuries of *Chinese* critiques as well. In fact, many Chinese critics had objected to the practice for centuries precisely because they viewed it as *un-Chinese*.<sup>64</sup>

In short, *Death by a Thousand Cuts* examines the history of punishment and torture in China as part of a larger history of the modern world, in a general as well as a specifically legal sense: it is informed by a comparative understanding of international law as a transnational cultural form that imagines and organizes differences in the world in a particular way.

#### VI. QUESTIONS OF FUTURE

An approach that de-centers both East and West is obviously a useful method for avoiding the us-versus-them binary of the Asian Values debate. At the same time, it is an equally useful way for international law and comparative law to examine their objects — and subjects — of study. Admittedly, such an approach may not yield an unequivocal answer to the question of whether the twenty-first century will be an Asian century. What it can do is to give us a way of analyzing both space and time as belonging to *all* of us — not only here or there, but everywhere, always. At a minimum, it will give us a way of reconsidering the question, and perhaps refusing it as overdetermined.

In the end, Asia will ultimately always elude definition, but we should welcome that fact as a theoretical opportunity — a way of asking new and different questions in several different fields of inquiry, including international law and comparative law.<sup>65</sup> Where such questions take us may not be foreseeable, but that is the political risk in any intellectual inquiry that is not limited to asking questions the answers to which are already known.

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century, see also Ruskola, *supra* note 36, at 1512-13.

<sup>63</sup> BROOK et al., *supra* note 54, at 5.

<sup>64</sup> *Id.* at 77-82.

<sup>65</sup> Kuan-Hsing Chen issues a similar methodological call — viewing “Asia as method” — in a study that came out shortly after this Symposium was held. See generally KUAN-HSING CHEN, *ASIA AS METHOD: TOWARD DEIMPERIALIZATION* (2010).