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RESEARCH ARTICLE

Principles of Asian Contract Law at the Crossroads of Standardization and Legal Pluralism

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Abstract

The Principles of Asian Contract Law (PACL) are the most recent addition to the series of uniform laws regarding transnational commercial contracts. This time, the harmonization initiative must address the problem of a great variety of legal traditions, all of which are quite difficult to reconcile. The author focuses on the object and objectives of the PACL by reconsidering the notion of "Asian law" and the alleged cultural neutrality of contract law as a legal discipline. The paper argues that the PACL project lacks clarity. Its ambitious objectives, while apparently intelligible, fail to produce the desired results in their entirety: the Asian regional harmonization of contract law turns out to resemble its occidental forerunners. The study goes beyond the traditional comparative law. It explores the model law (in the making) in a broader context of legal policy, parallel regional private-law-making efforts in the field of contract law as well as in the context of legal globalization.

Keywords: Asian law; transnational law; soft law; contract law; harmonization; legal pluralism

1. Introduction

The story of legal harmonization[1] through private-law-making has its ups and downs.[2] In Europe, the scholarly reflection on the shared legal tradition of the Continent has laid foundations to the creation of a series of model rules. The results are debatable but, in spite of all the obstacles, they have generated moderate optimism[3] among scholars. Is this faith in harmonization of contract law still defensible? This paper's key focus is on the Principles of Asian Contract Law (further referred to as the PACL) in the making. But are the PACL in the making, or is the Asian (contract) law itself just emerging?

[1] "Harmonization" is a complex notion and there is no unanimity with regard to its definition. It is a legal phenomenon that aims at eliminating differences among legal systems. Harmonization may occur spontaneously or in an organized manner. The law and economics doctrine considers harmonization as an advantage in reducing transaction costs, even though scholars appreciate also the advantages of a balanced legal pluralism. Harmonization has other characteristics too: it is highly dependable on the political, legal, or societal contexts. For the sake of this paper, legal harmonization stands for private-law-making initiatives in the form of model rules drafted in order to achieve spontaneous convergence of jurisdictions. For a detailed profile of the notion, see Lasaballett (2019), pp. 73–120.

[2] Some of the private-law-making undertakings were supported by political institutions of the EU, whereas others were not. They went up different paths. For instance, the PICC gained recognition in international arbitration and the Principles of European Contract Law (PECL) remained a scholarly endeavour, albeit with some impact on national law-making. The Draft Common Frame of Reference (DCFR) and the Common European Sales Law (CESL) have failed despite political support. See Jansen (2010), pp. 59–77.

[3] *Ibid.*, pp. 60, 71.

In 1969, the first initiative to write down the content of Asian contract law and to explore its peculiarities was launched by David E. Allan. The objective was to provide information on the enforceability of contracts and remedies for their breach in various jurisdictions of Asia as well as to identify major practical problems in the field of contract law. The world was much less globalized in the 1960s, but even today information on foreign laws is not always easily accessible.[4] The project at the time ended with the publication of a book,[5] but moved no further, remaining purely academic in nature. Fifty years later, in 2009, several East Asian legal academics took a step forward with an attempt to draft a set of new model rules for the sake of bringing together contract law from jurisdictions of the region, by thus minimizing differences between them. The Principles of Asian Contract Law (PACL) project was born, following—at the outset in the name—the Principles of European Contract Law (PECL).[6]

Over ten years after the launch of the PACL, it is interesting to contemplate the success in reaching objectives initially set for this project, as well as the feasibility of its completion. It is particularly important to evaluate the PACL in the context of the diversity of Asian legal panorama—a feature that justifies Uwe Kischel's opinion that Asia "could well be paradise for comparative lawyers."[7] The future of the PACL depends on the proper elaboration of its object and on the positioning of the project's objectives in the context of global policy objectives at a given time. Thus, the idea of transnational[8] Asian contract law alone poses a challenge to the alleged cultural neutrality of this legal area in general—a concept on which Franz Werro already cast doubt:

> Some of the proponents of a unified European—or even global—law of contracts continue to argue that contract law is a technical rather than a cultural matter and that there exist good rules that deserve to be enacted as generally applicable commercial law by virtue of their systemic coherence. They act as if it were possible and desirable to determine the quality of rules without considering the nature of the society in which they are to be applied.[9]

In the present paper, the following two research questions must be crucially addressed:

1. How to define the object of the PACL in light of legal (and legal–cultural) diversities among the jurisdictions involved in the project?

[4] See also Hiscock (2016), p. 355.

[5] Allan (1969).

[6] For a detailed description of this enterprise, see Section 2.1.1. The PACL are modelled and named after their European namesake, as Han (2013), p. 590, explicitly states. The author purposely resigns from describing the experiences of European legal harmonization, which have been already depicted and profoundly analyzed elsewhere in publications that could fill entire libraries. For the recent publication on the harmonization of European contract law, see Schulze & Zoll (2018); De Elizalde (2018); Kischel (2019), Chapter 2, paras 48–52; Saprai (2016), pp. 96–135. The PACL have been preceded by another Asian initiative of this kind by Prof. Zentaro Kitagawa as early as in the mid-1980s. See Han (2013), pp. 589–90.

[7] Kischel, *supra* note 6, Chapter 9, para. 6; cf. Black & Bell (2011a), p. 22. Werner Menski adds: "largely for historical reasons, Asian, African and other non-Western legal systems seem inherently more attuned than Western legal systems and scholars to the intellectual and practical challenges of comparative law and legal pluralism." See Menski (2007), p. 189. In this respect, Masaji Chiba has developed a theory of law suitable for indigenous law that he organizes around three dichotomies in law: official law/unofficial law, indigenous/transplanted law, and legal rules/legal postulates—Chiba (2013), pp. 5–9. The particularity of conducting comparative legal research in Asia requires the abandoning of an old-fashioned formalist approach that will certainly fail in the presence of Asian legal pluralism.

[8] Transnational in the sense of private-law principles and rules, from whatever source, which govern cross-border commercial transactions and are common to every or to a significant number of jurisdictions. Cf. Goode, Kronke, & McKendrick (2007), para. 1.03; Jessup (1956), p. 2.

[9] Werro (2017), p. 168.

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2. How to evaluate the PACL's objectives in the context of legal transnationalization? Will the PACL project manage to reconcile the differences among the national jurisdictions or will it deepen the current fragmentation of laws?

Ultimately, the answers to these research questions should clarify whether the example of the PACL supports the thesis that contract law cannot be deemed culturally neutral.

An attempt to explain these issues requires both a general overview and concrete examples. Therefore, I will begin with an outline of the PACL's history and the project's main characteristics (Section 2.1) and desired outcomes (Section 2.2). This will be followed by considerations regarding the object of the PACL, namely Asian law, its tradition(s), and Asian legal identity (Section 3). I will then try to answer the question of whether the emergence of the PACL is a symptom of legal globalization or, quite to the contrary, goes against this trend (Section 4). Finally, I will recapitulate the results of my study and offer a number of conclusions (Section 5).

This study goes beyond traditional comparative law based on narrowly nation-defined legal systems.[10] It explores a particular model law (in the making) in a broader context of legal policy, parallel regional private-law-making efforts in the field of contract law as well as in the context of legal globalization. Even considered separately, these are all complex topics discussed in boundless literature. Therefore, a caveat has to be made: for the sake of clarity, only a selective splinter of this literature could be made reference to. Another caveat regards the frequently used references to "Asia" and "Asian," which determine interchangeably the Asian continent, the circle of jurisdictions involved in the PACL project, or these jurisdictions as distinguished from the laws of the Occident or from the global level of governance. It might be puzzling. However, the notion of "Asia" is not predetermined. It has not been determined by the authors of the PACL and must remain so for the sake of this study (see Section 3). Its meaning—as provided by the PACL and by comparative legal scholarship as well—will be ascertained in course of this paper.

While writing this paper, I limited my research mainly to publications accessible in English. This explains the mistakes, omissions, and simplifications, all of which are my own and for which I bear full responsibility.

I hypothesized that the PACL—however valuable this initiative may be—cannot succeed in legal harmonization, but will lay the foundation for further development of legal doctrine.

2. An outline of the PACL's history, methodology, and main challenges

2.1 The state of the art

2.1.1 Selected facts

The PACL[11] project was born in 2009 as a result of Naoki Kanayama's (Keio University) paper proposing the drafting of Asian model rules of contract law.[12] The endeavour—a

[10] Siems (2016), p. 360; Michaels (2016), p. 355.

[11] In some publications referred to as the Principles of Asian Civil/Commercial Law.

[12] The paper was given at Tsinghua University during a conference entitled "Harmonization of European Private Law and Its Impact in East Asia" in 2009. His idea has been expressed in writing in: Kanayama (2010), pp. 995–1006; Kanayama (2012), pp. 393–419; Kanayama (2014), pp. 185–96, as well as in a short interview on 10 March 2014, https://www.youtube.com/watch?v=DuVH-B9Bixc (accessed 11 June 2019).

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decentralized private-law-making initiative of academics from East and Southeast Asia—was inaugurated by the Beijing Agreement of a Partnership on PACL.[13]

The idea was well received. In March 2010, the first PACL Forum took place at Keio University, gathering scholars from Cambodia, China, Japan, South Korea, Taiwan, and Vietnam. From then on, groups of scholars from each of the participating jurisdictions prepared national reports, each on a separate topic of contract law discussed during subsequent meetings. The performance and non-performance provisions were drafted with breath-taking speed and were ready for the next PACL Forum in Seoul in December 2010.[14] In the meantime, the participating scholars drafted rules on the formation of contracts in Ho Chi Minh City in August 2010. In May 2011 in Osaka, the fourth Forum took place to discuss the issues of contract validity, whereas, in September 2011 in Beijing, the execution of contract was the subject of the fifth Forum. The following two meetings—in Tokyo (March 2012) and Seoul (December 2012)—were dedicated to the review of provisions on the performance and non-performance of contract. Those were submitted to a broad debate continuing during the fora at Keio University in March 2015, Incheon National University in Seoul (December 2015), again at Keio University in March 2016 and March 2017, and last but not least in Seoul (January 2019). Up to 2014, the study group worked out rules subdivided into five chapters: on the formation of contract, interpretation of contract, validity of contract, and performance and non-performance of contract. By March 2014, the participants had agreed on rules pertaining to the general part of contract law.

2.1.2 The drafting method

The PACL project started with the Japanese report and draft rules submitted by all participants of the project, gathered later during a forum. The fora served as an opportunity to discuss the draft principles and national reports, and to conduct comparisons with French, German, and common law as well as with transnational regulations (Convention on International Sale of Goods (CISG), the PECL, and the Principles of International Commercial Contracts (PICC)).[15] The core participants—pursuant to the "Beijing Agreement"—formed a team consisting of Professors Naoki Kanayama (Japan), Shiyuan Han (PRC), Young Jun Lee (South Korea), and Wang Zejian (Taiwan). The number of participating jurisdictions increased gradually, at the highest point amounting to over 12 countries and a working group of approximately 30 scholars. Interestingly, the composition of the study group evolved over the course of the work. Therefore, for instance, the Draft Principles on Performance and Non-Performance of Contract[16] were prepared on the basis of reports coming from Cambodia, China, Indonesia, Japan, South Korea, Malaysia, Myanmar, Philippines, Singapore, and Vietnam. However, scholars from other jurisdictions—Hong Kong, Laos, Nepal, Taiwan, and Thailand—also participated in the discussion

[13] Han, *supra* note 6, pp. 590–1. The initiative was originally financially supported by the *Fondation pour le droit continental.* Its primary agenda (https://www.fondation-droitcontinental.org/fr/wp-content/uploads/2014/01/agenda.pdf (accessed 20 June 2019)) foresaw a three-year schedule consisting of preparatory works including setting the methodology and creating a work team (2009), editing of a certain block of rules by appointed reporters submitted to a common discussion and after that the editing of a final version (2010), and a second deepened reading leading to the establishment of an official set of rules by a system of voting (2011). The PACL were to be written in French and finally translated into national languages of the respective countries. The Humboldt Foundation, Japanese Ministry of Education, Culture, Spots, Science and Technology as well as the Tsinghua University have also contributed financially to this project.

[14] See Myanmar-Law-Library.org (2017).

[15] The CISG differs from the PICC and other model rules as it is an international convention—a set of norms furnished with the political sanction of the participating nation-states. However, as it regards cross-border transactions, the CISG is also an element of the widely conceived transnational contract law. Cf. Siems (2018), pp. 307, 313–7.

[16] Cf. Lee (2016).

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during the fora dedicated to other topics. The national reports are now being published in the Korean special editions of "Asia Private Law Review."

In such a pluralistic legal–cultural environment, the linguistic issue of course emerged as well. English was chosen as the working language because it was perceived as the most neutral option for project participants and because it guaranteed large diffusion of the outcome of the project. The use of other languages, including French or Japanese, was rejected at a very early stage. However, the use of English proved somewhat controversial.[17] On a technical level, it turned out to be difficult to achieve the necessary level of proficiency in scholarly and legal terminology.

The declared outcome of the PACL would be a set of model rules edited in the form of a code.[18] The methodology of the PACL has been depicted by Shiyuan Han. The working style consists of drafting national reports on predefined chapters (e.g. formation of contract). These form a response to a preliminary draft of a given chapter, each entrusted to a reporter from a different jurisdiction. The skeleton of each report consists of a questionnaire regarding information from the legislation, the jurisprudence, and case-law. The project managers have decided to entrust the drafting of each chapter to representatives of different Asian jurisdictions.[19] Up to now, a concise draft version consisting of 30 articles organized in five divisions has been created. It includes general provisions, the formation of contract, contract validity, performance, and non-performance. The structure of the draft project is: (1) draft provision, (2) author's comment, (3) reference texts. The style of the drafting and numbering of sections closely follows the system adopted in the Draft Common Frame of Reference (DCFR). Interestingly, the comments to draft articles all begin by referring to European model laws (*inter alia* the PECL and the DCFR). Then come references to national laws. Usually the statutes and codes of the People's Republic of China (PRC), Taiwan, and Japan are cited, with German law also appearing frequently (see Table 1).

However, the Amendment Draft on Performance of Hiroo Sono[20] proposes changes to the initial version, motivated by solutions found in other jurisdictions (not previously mentioned) such as Cambodia, Indonesia, Malaysia, and Singapore. The volume on performance, published in 2016, contains also national reports of Myanmar and Philippines, but any mentions of them are completely absent from both the draft project and the amendment draft.

Despite frequent references thereto, several solutions are distinct from those originating from the European legal tradition.[21] For instance, the rules on performance and non-performance have been shaped in an "open" way. There is no distinction between delay, impossibility, and imperfect performance. Non-performance regards simply the circumstance in which a party to a contract fails to perform an obligation under this contract, which calls the concept of strict liability into question. But the project reveals that the

[17] Smits (2012b), pp. 146–7; Husa (2018), pp. 153–8. Jaakko Husa emphasizes that English is in fact the best candidate, especially because it is already strongly subjected to globalization. Apart from the case of model laws, English has been chosen as the legal language also for jurisdictions whose population speak other languages, such as Hong Kong, Singapore, Malaysia, or Macau, etc., even though it promotes class divisions. See Powell (2016), pp. 295–318, in particular pp. 297, 300 ("lopsided bilingualism"). Recently, see Bell (2019).

[18] Kanayama (2012), *supra* note 12, p. 396.

[19] See Han, *supra* note 6, p. 594.

[20] Lee, *supra* note 16, pp. 99–140.

[21] The term denotes the vast and variable ensemble of law and its extra-legal context pertaining both to the civil law and to the common law. Thus it builds on a common intellectual heritage of European jurisdictions that consists of Roman law, Christianity, and the Law of Nature, stressing the continuity between the past and the future of law (see Berman (2000), p. 739). However, the European legal tradition goes beyond the geographical notion of Europe, embracing the "offsprings" of European jurisdictions, which historically have always been participants of European intellectual developments, as Giaro (2011), p. 4, points out. The "European legal tradition" is often equated with "Western legal tradition"—a notion coined by Harold J. Berman in his *Law and Revolution: The Formation of Western Legal Tradition* (1983). Cf. Goldman (2008), pp. 4–5; Zimmermann (2001), pp. 111–4.

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Table 1. Jurisdictions of reference in the Draft Principles on Performance and Non-Performance of Contract (a sample)

	National jurisdictions of reference						Model laws of reference		
No. of provision	PRC	Japan	Korea	Taiwan	Vietnam	Germany	PECL	PICC	DCFR
Article 1	✓	✓	✓	✓	✓	✓	✓	✓	✓
Article 2	✓					✓	✓	✓	✓
Article 3	✓	✓	✓	✓	✓	✓	✓		✓
Article 4	✓	✓	✓	✓	✓	✓	✓	✓	✓
Article 5	✓	✓		✓	✓	✓	✓		✓
Article 6	✓	✓		✓		✓	✓		✓
Article 7	✓	✓	✓	✓	✓	✓	✓		✓
Article 8	✓		✓	✓		✓	✓		✓
Article 9	✓	✓	✓	✓	✓	✓	✓		✓
Article 10		✓	✓	✓		✓	✓		✓

CISG or PICC was also a source of inspiration.[22] Further on, the draft rejects the Roman concept of invalidity of initially impossible obligations, differing also from certain major Asian jurisdictions (e.g. Korea, Japan, and Thailand). The amount of compensation depends on the foreseeability of loss (Article 23 PACL). However, such innovations cannot be associated entirely with the regional particularities in business practice. In fact, scarcely any PACL provision is. The drafters claim that these solutions are in tune with civil codes of many Asian countries.[23] Yet it is actually Germanic legal heritage that forms the prevailing part of the legal material, with transnational contract law also playing an important part. Common law, in turn, is incorporated indirectly throughout the model rules. If all solutions of the draft are so well aligned with transnational soft law,[24] then what is the point of creating another set of model rules (the PACL) that closely resembles its forerunners?

Furthermore, objection should be made to the way in which the PACL are being drafted. The preparation of each part of the draft by a different team of national jurisdiction members is unlikely to promote coherence. The choice of legal material and composition of the fora at which the draft is being discussed raises doubts as to the objectivity of the methodology. It ought to be observed that several Asian jurisdictions are reflected in only a

[22] Art. 1:301 PECL; Art. 7.11 PICC; also Art. III.-1:102 DCFR.

[23] Lee (2015).

[24] The soft law is a normativity with no legal force, situated in the "ill-defined and nebulous hinterland" between operating law and "non-law." It has no legal force other than its own authority that may bind the users in their conscience. From the theoretical standpoint, soft law makes use of a network effect to interconnect, standardize, and increase the synchronization value of certain legal solutions, given that it fulfils basic requirements: it is useful, compatible with the expectations of its users, applies to social interactions, and is subject to the free choice of legal actors. Cf. Druzin (2017b), pp. 361–78; Barnes, Gartland, & Stack (2004), pp. 371–7. See also Druzin (2017a), pp. 403–31.

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fraction of the legal material considered in the draft. Among those mentioned, the Chinese, Japanese, Korean, and Taiwanese contract laws play the dominant role, to the detriment of other Asian jurisdictions and their traditions. At first sight, the choice of legal material suggests that the PACL project is par excellence an East Asian initiative. Furthermore, the inspiration drawn from German law as well as from the model rules of the Occident ensures the strong influence of European legal tradition and technique.

2.1.3 Main challenges

The experiences surrounding the PACL project so far have revealed several problems. First, the launch of the project revealed "a glaring gap in the Asian literature," incomparable with the scholarly efforts made by the European scholarship in the years preceding the drafting of the European soft law.[25] The European experiences are unprecedented with regard to the scale of comparative studies, not to mention the political efforts for regional integration that was lacking—and to a certain extent is still lacking—in Asia.[26]

> If such pan-national principles are to be widely accepted, they need to be based on solid comparative research. ... Soft law principles are much more likely to be accepted in a region if, first, they are based on solid comparative work in the relevant laws by representatives of those laws. "Local knowledge" is crucial

reads the first complex study on Asian contract law.[27] However, in spite of the awareness for local contexts, an undertaking such as the PACL necessarily presupposes the prevalence of similarities above the differences in law among the relevant jurisdictions (*praesumptio similitudinis*).[28] This presumption of similarity is justified by the fact that a plea for more harmonization is not purely academic, but practical.[29] To the following, the PACL acknowledge the existence of Asian law, which is common for the Asian jurisdictions and distinct from the colonial heritage as well as from the transnational law, as the latter has been invented and shaped in the Occident. Such assumptions concern the very object of the undertaking, which turns out to be not entirely clear. The authors of the PACL need to consider this fundamental question: what are they working on?

This can be explained by Asia's diversity. Asia comprises almost 50 countries. Some of them belong to the common-law (English) tradition (at least to a degree),[30] others have ties to civil law (mainly German, but also French),[31] and there are some mixed jurisdictions as well.[32] In spite of sharing the label of "Asian tradition," these jurisdictions in fact differ a lot.

2.2 The PACL: yes, but of what kind? The legal policy question

The underlying idea of the project was to give the PACL the position of an influential soft law that might one day fulfil the functions that the PECL once did: as a toolbox for domestic

[25] See Chen-Wishart, Loke, & Ong (2016b), p. 1. The cited volume is itself proof; see Chen-Wishart, Loke, & Ong (2016a), p. VII. See also Chen-Wishart, Loke, & Vogenauer (2018), p. 1; and Harding (2002), pp. 252–4. Similarly, Kischel, *supra* note 6, Chapter 9, para. 6.

[26] Chen-Wishart, Loke, & Ong (2016b), *supra* note 25, p. 1; Han, *supra* note 6, p. 591, para. 1, describes the current complicated relationships among East Asian jurisdictions (China, Japan, and Korea) as "politically cold, but economically warm."

[27] Chen-Wishart, Loke, & Ong (2016a), *supra* note 25, p. VIII.

[28] See also Han, *supra* note 6, p. 598. Generally, on the *praesumptio similitudinis*, see Zweigert & Kötz (1998), p. 36.

[29] Michaels (2018), pp. 1–2.

[30] See the national reports in Black & Bell (2011b).

[31] E.g. Indonesia, Japan, Korea, PRC, Taiwan, and Vietnam.

[32] E.g. Philippines, Malaysia, Thailand, and to some extent the PRC as well.

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legal reform,[33] for conflict resolution in international commercial arbitration as well as for individual use in contract formation (see Article I.-1:101[2-3] PACL).[34] All the three aims are filed under the notion of "legal harmonization." This in turn is defined as methods and techniques that aim at approximating divergent national legislations in a certain area of law.[35] Any other sort of harmonization is currently unthinkable due to the political circumstances and the diverging legal agendas of Asian states.[36] The drafting of model rules is considered among legal theorists to offer a good starting point[37] in order to achieve more legal certainty but also, crucially, to stimulate legal harmonization.

That is the theory. For a closer look, it is worth hearing what the authors of the PACL say. For instance, in the preface to "A Study on Draft Articles of Asian Contract Law: Performance and Non-Performance II," its editor Young Jun Lee writes: "all such efforts aim at unification or harmonization of the East Asian civil and commercial laws as the ultimate goal."[38]

The awareness of the educational role of model laws is evident. Another scholar more modestly states that "the biggest advantages of developing the PACL is that it encourages scholars to look more closely at comparative law issues, and provides a forum for discourse."[39] Jungjoon Ka adds:

> We should also strive further to make the norms of PACL have equal standing with other international model laws, and at the same time, be accessible and practical in commercial transnational practices ... thus presenting the efforts on our part for the establishment of the Principles of World Civil Law.[40]

Support for cross-border arbitration, the standardization of cross-border commercial contracts, reducing transaction costs resulting from the current uncertainty of law, and the necessity to collect information on foreign laws are also mentioned. The economic aspect is particularly visible and emphasized: not only is the ultimate goal the reduction of transaction costs, but the drafting of the PACL is the least burdensome, as it does not need political approval (as e.g. the CISG did), but is based on consensus and proceeds quicker.[41]

[33] Especially for jurisdictions in transition from socialism to democracy—see Kim (2004), p. 9.

[34] Kanayama (2010), *supra* note 12, p. 996; Kanayama (2012), *supra* note 12, p. 396; Chen-Wishart, Loke, & Ong (2016a), *supra* note 25, p. VIII.

[35] See *supra* note 1.

[36] For instance, Vietnam adopted a new Civil Code not so long ago (in 2015). The PRC has recently adopted its own Civil Code, which entered into force in January 2021. Interestingly, Vietnam has already borrowed the PACL's regulation on performance in case of change of circumstances to the new Civil Code (Art. 420 VCC) on the one hand. Yet on the other hand it tries to promote Vietnamese codification in the drafting of the PACL. See Lee, *supra* note 16, pp. 838–9. Japan has been working on the amendment of its law of obligations since 2009, which resulted in a statute of 2017 (in force since 2020).

[37] Druzin (2017b), *supra* note 24, pp. 362, 364–6. The author draws attention to the communication model of a "network effect." The fact that a certain tool gains in popularity and increases its value is due to its usefulness and popularity, which in turn generates feedback. The soft law as a legal phenomenon benefits from the network effect, meaning that the value of a standard to a user increases as the number of users of this standard, and thus social acceptance, grows ("snowball effect"). In other words, the *raison d'être* of the soft law depends on its practicability. See *ibid.*, pp. 361–78; Druzin (2009), pp. 131–76.

[38] Lee, *supra* note 16, p. II. Cf. Lee, *supra* note 16, pp. 1–2.

[39] Kim (2016), p. 1.

[40] Ka (2014), pp. 55, 65.

[41] On the costs of legal fragmentation and the harmonization of law, see Deffains (2016), pp. 39–60. This approach does not take into account that establishing the PACL still leaves space for national alterations of the common rules, especially by general clauses like those of "public interests in the society" (e.g. Art. 52(5) of the repealed Chinese Contract Law of 1999; since January 2021, cf. Arts 132, 243, or 534 of the Civil Code of the PRC of 2020).

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The "social need," *un défi urgent*, and similar expressions are also to be found in the pertinent legal literature.[42]

Moreover, Naoki Kanayama explicitly proclaims that the PACL should "furnish rational rules, written in a simple and clear manner" and adds, rather astonishingly: "[y]ou will not easily find anything which would reflect Asian culture or tradition ... I believe that such Asian characteristics are of mere illusion."[43] Shiyuan Han's answer provides in turn that: "[s]o long as the PACL is a product of comparative law study and is built on the basis of the existing Asian laws, there is no need to worry that there is not any distinguishing Asian feature."[44]

The juxtaposition of both opinions shows that there is no basic unanimity among the scholars involved in the PACL project—which might be seen both as an obstacle and as intellectual fuel for pragmatic discussions.

The PACL are full of paradoxes; possibly by their very nature, they are a paradox themselves. Despite the transnational rhetoric, the work on the project seems much more nation-centred in character than the comparable efforts in Europe. Naoki Kanayama's attitude reveals strong mistrust towards the benefits of globalization (*l'État-nation est menacé par un typhon de globalisation*).[45] For instance, in sharp contrast to the European model, no single working team was founded. Instead, scholars work on national reports.[46] Certainly, the PACL project is an expression of legal identity, similarly to the national civil codes, which fulfil the function of nationwide unifying factors and symbols (e.g. the French *Code Napoléon*, the German *Bürgerliches Gesetzbuch*).[47] The project promotes also the idea of codification as such and, as a matter of fact, rejects the common law.[48] In what way are the PACL a point of pride? Is it pride in creating the newest, most modern soft law? Pride in drafting a non-occidental[49] set of model rules?[50] Jungjoon Ka argues:

> while we do not believe such ideological and cultural differences will dominate in the contract law area if then is any such cultural uniqueness that should be reflected in PACL, it should be so reflected. Therefore, ideological and cultural diversity are not a hindrance, but an enrichment to PACL.[51]

The debate around the harmonization of contract law in Asia follows a pattern similar to the debate on Asian legal tradition (see Section 3). We have already seen that the roles

[42] Kanayama (2010), *supra* note 12, p. 996. Cf. also Kim, *supra* note 33, p. 2; Bell (2005), pp. 362–72.

[43] Naoki Kanayama, *Principles of Asian Contract Law*, http://www.law.uchicago.edu/files/file/naoki_kanayama-principles_of_asian_contract_law.pdf, as reported by Hiscock, *supra* note 4, p. 363.

[44] Han, *supra* note 6, p. 598.

[45] Kanayama (2010), *supra* note 12, p. 995; Kanayama (2014), *supra* note 12, p. 185. Cf. Lee, *supra* note 16, pp. 1–2. For the non-Western part of the globe, globalization is equated with occidental cultural, economic, and political domination, and serving only as a new scene of colonialism. See Muir Watt (2019), pp. 600–1, 613–7.

[46] Michaels, *supra* note 29, p. 4.

[47] On the formative dimension of modern codes, see Kroppenberg & Linder (2014), pp. 79–80. Cf. Kim, *supra* note 33, p. 2; Kanayama (2012), *supra* note 12, p. 397.

[48] Kanayama (2012), *supra* note 12, p. 406.

[49] By the adjective "occidental" I mean relating to the Western part of the world, to either Europe or America. Traditionally, according to the European viewpoint and established linguistic usage pattern, Europe with its culture and legal tradition lays in the West (Occident) of the East (Orient). Legal norms, legal institutions, or codes are occidental, because they result from a certain social, political, and legal culture that has been at once shaped by the Greek philosophy, Roman law, Christianity, and Enlightenment in Europe and then also in America, whereas the laws and legal cultures of Asia are stereotypically called "Oriental." Cf. Ruskola (2002), pp. 192–6.

[50] Ralf Michaels argues that the PACL project, invented and led by Naoki Kanayama, is—even if unconsciously—an expression of typically Japanese pan-Asianism. See Michaels, *supra* note 29, pp. 15–23. See Miyazawa (2013), pp. 113–40.

[51] Ka, *supra* note 40, p. 63.

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ascribed to the future PACL are diverse. But there also seems to be no consensus about the exact object of research and thus the desired outcome of the project.

The omnipresence of the adjective "Asian" in the legal discourse leads to the most obvious question: to what extent will the PACL differ from European and global principles and model rules?

This uncertainty is clearly visible in the above-mentioned exchange of opinions between Professors Han and Kanayama. It is paradigmatic for the whole controversy over the existence of Asian law. It resembles to some extent the famous German Thibaut–Savigny debate of 1814 over the feasibility and desirability of writing down a code (Anton Fr. J. Thibaut) and preceding the codification with scholarly elaboration of law (Friedrich C. von Savigny), and with good reason.[52]

Shiyuan Han argues that the PACL should be essentially different from the CISG, the PICC, and the PECL, because the latter three represent the occidental legal experiences and values, whereas the former should become "an Asian voice" in legal scholarship.[53] Many scholars argue that there are specific Asian features of law, not necessarily resulting from formal written law, thus "the Far Eastern legal order must not merely be regarded as a partial imitation of Western legal concepts."[54] Young Jun Lee goes even further to claim that "Principles of Asian Contract Law should not stop at reflecting the particularities of the Asian jurisdictions, but should strive to become part of the world's civil-law order,"[55] by contributing to the amendment of CISG as well. Putting emphasis on the differences raises the question as to whether Asians should at all recognize laws imprinted by occidental legal scholarship not to mention their own (or maybe not own?) codes inspired by the European legal tradition or their own kind of the *ius gentium*.[56] In his general overview of the PACL project, Shiyuan Han avoids mentioning the strong occidental imprints on Asian laws currently in force.[57]

In contrast, these occidental influences are emphasized by Naoki Kanayama, according to whom the law in Asia is European in essence, with only minor differences, which, however, are less culturally and more economically ascertained.[58] Therefore, neither the Japanese nor the Korean civil codes can be described as Asian.[59] But this is not an obstacle; to the contrary: Kanayama's pragmatic approach sees the law as practical instrument fulfilling social needs. He writes about creating a modern law, based on rationality and universality, which could

[52] Zimmermann, *supra* note 21, pp. 14–5.

[53] Han, *supra* note 6, pp. 591, 593. It is also acknowledged that the legal globalization we have known since the nineteenth century is equated with the spread of occidental legal patterns. This adjective indicates that according to some scholars, the distinction between civil-law and common-law traditions is to a large extent artificial and that "it may therefore be justified to speak of a comprehensive Western legal tradition, being different from the laws of religion and tribal countries and dysfunctional states." Especially "in commercial contract law they [the civil-law and common-law traditions] can even be considered as one legal tradition" or to put it in simpler terms —subtraditions. See Mattei (1997), p. 175; Zimmermann, *supra* note 21, p. 167.

[54] Wang & Chiu (2014), p. 16.

[55] Lee (2010), p. 3. See also Ka, *supra* note 40, p. 56.

[56] Han, *supra* note 6, p. 593. See also Ka, *supra* note 40, p. 65.

[57] Astonishingly, the same Shiyuan Han in his other paper of 2012 claims that the same Chinese contract law has "a hybrid character due to its reception of foreign and international influences such as German civil law, the common law, and the UN Convention on Contracts for the International Sale of Goods, among others." See Han (2012), pp. 235–55, at 235, also 247; Husa (2015), p. 140. Han's account of the history of Chinese contract law also begins only in the twentieth century and by no means mentions the PACL initiative. So does Chen (2010a), pp. 159–81; Chen & DiMatteo (2018), pp. 3–26, especially p. 25 (here the authors only mention the Tang codification, but emphasize the large influence by foreign and international legal models—the CISG, not excluding the PICC, DCFR, and CESL). An account on pre-modern Chinese contract law can be found in Zhang (2006), pp. 25–8.

[58] But even these economic differences turn out to be significant. As an example, the freedom-of-contract principle, well established in Asian market economies such as Japan, Korea, and Hong Kong, is still emerging in jurisdictions such as China and Vietnam. Obviously, the need for some more "drops of social oil" in the Occident is somewhat contradictory to the need for more contractual freedom in socialist China. See Han (2014), p. 204.

[59] Kanayama (2014), *supra* note 12, pp. 192–4; Lee, *supra* note 23.

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be therefore shared by multiple jurisdictions.[60] The debate on recodification of civil law in South Korea also takes the CISG as well as the soft law of the Occident into consideration: the PICC, PECL, and DCFR. Therefore, his comparisons involve global soft law and strive towards the creation of "better law." He goes much further than Han in claiming modernization to be prevalent over the Asian characteristics of the project:

> [i]f some Asian countries have a problem of modernisation, it is because they are concerned to keep too much of their own traditions. The traditional values founded on Buddhism and Confucianism have faded away. But PACL is made in Asia by Asians. This means the West has faded away.[61]

The two approaches discussed above differ: the bottom-up approach of Han faces the top-down approach of Kanayama. In consequence, the style of drafting a national report is different. These divergences in the opinions of scholars reflect to an extent the political atmosphere of their homelands: China struggling for political and cultural hegemony in opposition to civilization of the Occident; Japan being (politically and economically perceived as) a part of it.[62]

Kanayama's approach is also somewhat idealistic, echoing the slogans of the first Congress of Comparative Law of 1900 in Paris. He writes *inter alia*:

> *Le développement de la loi modèle, compris entre les différentes cultures juridiques asiatiques et les systémes juridiques extistants (pays de droit civil, Common Law), source de richesses culturelles, contribuera à la paix, à l'harmonisation et même au développement de la qualité de la vie de tous les peuples en Asie.*[63]

In opposition to both of these approaches, the Korean scholar Song Yong Kim observes dispassionately that the harmonization of law in Asia is maybe rather a tale about reconciling law of the Occident with Asian values than reconciling Asian jurisdictions alone.[64]

According to the already-cited Ralf Michaels, the dispute between Han and Kanayama reveals deeper attitudes towards the Asian law. In particular, he depicts the Sino-centrist approach, determined by a long history of Chinese political and cultural domination in the region. But this approach cannot be equated with imperialism—it is rather a confusion of Confucian hierarchy with political reality driving towards a creation of legal plurality under China's leadership. In the past, China considered itself a country more powerful, in political and military terms, than any other, but at the same time recognized states that received Confucian ideas and were open to Chinese cultural influences. In the political realm, these states were required to pay tribute but retained sovereignty. This approach was strengthened in the twentieth century by the rise of Communism, which additionally promoted revolutionary brotherhood between nations, even though under the condition of receiving socialist state order and law. The Sino-centrist ideas promote co-operation rather than unification.[65] Nowadays, the "Belt and Road" project is an expression for this kind of soft power, or rather soft domination.[66]

[60] Kanayama (2012), *supra* note 12, p. 397.

[61] See Kanayama, *supra* note 43, p. 366.

[62] Jacques (2012); McGregor (2017); Skylar Mastro (2019), pp. 34–9. For contrasting opinion, see Michaels, *supra* note 29, pp. 6–7; Theo (2019).

[63] See Kanayama, *supra* note 43, p. 366.

[64] Kim, *supra* note 33, pp. 11–2.

[65] Michaels, *supra* note 29, p. 15.

[66] Skylar Mastro, *supra* note 62, pp. 31–4. Generally, on the "Belt and Road" issue, see Shan, Nuotio, & Zhang (2018) and Frankopan (2018).

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The other approach can be described as "Panasian,"[67] but could paradoxically be called Euro-Asian as well. It consists of a combination of domestic and imported elements, and it internalizes the law received from the Occident and treats it as one's own. It might be explained by the fact that Japan itself played the role of a colonial empire, transplanting its own "Westernized" law to Korea and Taiwan (secondary reception) and today by offering legal aid.[68] The internalization of law of the Occident is due to the history of reception that took place for the sake of modernization of Japan and in order to prevent the colonial powers from jeopardizing Japan's sovereignty. Pan-Asianism is at once European and anti-European. Moreover, it presupposes a kind of cultural and legal unity, which might be seen as a kind of Japanese orientalism.[69] Kanayama's style reflects his strong ties to the French law, which is visible in Japanese drafts of the PACL. He has openly remarked that the scope of his project is to enhance the civil-law style of law-making and make it prevail over the common-law style, not to mention the leading position of Japan in regional political unification.[70]

The third approach, being a mixture of the former two, refers to "Asian values." It sees the legal identity of the region as based on Confucianism[71] as well as other value systems (Buddhism, Confucianism, Hinduism, etc.), distinguished from the Occident (self-orientalism[72]). It stresses the specificity of Asian circumstances. To what extent this approach could be in tune with harmonization projects is not entirely clear.[73] This issue has not been mentioned by PACL participants, albeit the internal difference within "Asian values" may be significant (see also Section 3.2).[74]

In each of these legal-political thoughts, the heritage of colonialism is still very strong.[75] Europe remains the point of reference[76] and Asia provides only a response: a good metaphor would be playing a game in which the rules were predetermined by the European legal tradition. Perhaps only a focus on the method of juristic thinking might eventually get rid of the Occident and concentrate on the Asian approach to normativity as it always was.[77] There will perhaps never be a consensus as to what "law" is,[78] so there will be no certainty as to what the object of harmonization should be. However, it seems that no

[67] Saaler & Koschmann (2007); Acharya (2010), pp. 1003–4.

[68] Giraudou (2009), pp. 47–67.

[69] Michaels, *supra* note 29, p. 19; Duara (2010), p. 970; McGregor, *supra* note 62, pp. 12, 139.

[70] Despite the burdensome legacy of World War II in Asia. Cf. Kanayama (2010), *supra* note 12, p. 996; Antons (2016), pp. 216–48. See also Kim, *supra* note 33, p. 6.

[71] This is not the time and place to discuss the exact meaning of the term "Confucianism." Suffice it to say that the notion is a simplification born in the Occident. It embraces the worldview, philosophy, social ethics, the way of life, scholarly tradition, and political theory that originated in the thought of Confucius and developed throughout centuries in China and spread in its environments. See Tu (2019).

[72] Ruskola (2011), p. 889.

[73] Michaels, *supra* note 29, p. 24.

[74] Typically, they include: hard work, thrift, an emphasis on education, consensus, rejection of radical individualism, national teamwork and pride, respect for authority, and filial piety. On the discussion over Asian values, see Ruskola, *supra* note 72, pp. 885–9. See also Duara, *supra* note 69, p. 972; Acharya, *supra* note 67, pp. 1010–1; McGregor, *supra* note 62, pp. 139–40. A general overview is to be found in Cauquelin, Lim, & Mayer-König (2013).

[75] Michaels, *supra* note 29, pp. 7–11.

[76] Ruskola, *supra* note 72, p. 882.

[77] This approach proposed by Yoshimi Takeuchi overcomes the internal plurality of the Asian legal panorama. According to this author, legal comparisons should focus on Asian jurisdictions exclusively, instead of reconsidering the clash of oriental and occidental laws and values. See Takeuchi (2005), pp. 149–66. See also Chen (2010b); Kim, *supra* note 33, pp. 1–19. On the concept of internal legal pluralism, see De Sousa Santos (2000), pp. 95–6.

[78] Menski, *supra* note 7, p. 192. Cf. Markesinis & Fedtke (2009), pp. 46–8. As Werner Menski puts it, there is no globally agreed definition of law and there will perhaps never be (Menski (2006), pp. 595, 597). It turned out to be too simplistic an approach that in effect classifies the legal systems of Africa and Asia "more as cultural constructs than proper legal systems" (*ibid.*, p. 605). An inclusive approach, which the author calls "global legal realism," perceives law as a differentiated and viable normativity embracing social-cultural, moral, and religious norms of conduct—a "living law" (*ibid.*, p. 598).

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matter which of the above-mentioned approaches ultimately prevails, the functioning of the new regional uniform model rules will grossly depend on how these model rules will be applied locally.

In practice, the principles drafted so far suggest that the European and Asian elements merge to a certain extent, albeit with clear prevalence of the latter. For instance, it is true that, on the one hand, the rules for contract interpretation reflect the French and German approach, combining the emphasis of parties' intent with the effort to find out a reasonable meaning of a contract (cf. Article II.-3:101 PACL).[79] On the other hand, the Asian particularities are also to be found: for instance, Article II.-3:101 (2) PACL of the contract interpretation provides that, in the case of failure to establish the parties' true intention, reasonable meaning can be construed in accordance with explicitly enumerated factors, *inter alia* "the interests of parties and society." However, as to the rule, the PACL come into being with hardly any direct connection to the local, unofficial law or societal code. The fundamental principles of contracts (Article II.-1:101 PACL) contain no reference to Asian values that would somehow differ from the European model rules: justice, freedom, and social responsibility are equally to be found, for example, in Article 1:101 PECL, and Article 1.1 and 1.7 PICC. The PACL provide also no clause that would allow invalidating an agreement due to its contrariety with any moral or social standards (see Articles II.-4:113 to II.-4:206 PACL). It seems that the PACL—as far as the accessible provisional draft principles are concerned[80]—consist of a corpus of rules that, despite the Asian "label," do not differ much from the existing European model rules.

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The examination of the current efforts made by the participants of the PACL project as well as the analysis of their statements about this initiative have given rise to twofold doubts. First, despite many comments made, or rather due to the contradictions between them, it still remains unclear what the desired object of the PACL is—namely, what is the "Asian (contract) law" as perceived by project participants? Examples taken from the provisional draft provide no convincing material. Therefore, a survey of opinions and attitudes of comparative-law scholarship should provide material for a more objective assessment of the project (see Section 3). Conclusions resulting therefrom will allow an evaluation of the position of the PACL in the transnational legal environment (see Section 4).

3. The complexity of comparisons in Asia

3.1 The other point(s) of view

The evaluation of the current state of art of the PACL project and its deficiencies should be carried out in context. At first, the above-mentioned discussions will be compared with the current state of the art of the comparative law with regard to the applied taxonomy of normativities in the world. Second, the analysis will be deepened so as to assess the particularities of the laws of Asia as well, in order to assess the extent to which the PACL take them into consideration.

An overview of Asian jurisdictions renders an image of an area highly pluralistic in the geographical, political, economic, cultural, or religious sense ("Asia is not one"),[81] and also with regard to the sources of law, which need to be studied cautiously, on their own merits, thus setting the methodology anew, in a way that is incomparable with the law of the Occident.[82] The Eurocentric view, irrespective of how perfectly normalized it might

[79] Kanayama (2010), *supra* note 12, p. 1003.

[80] Actually, the only accessible full text of the provision PACL draft is attached to Kanayama (2012), *supra* note 12, pp. 408–19.

[81] Acharya, *supra* note 67, pp. 1001–13. Cf. Glenn (2014), pp. 366–8.

[82] Menski, *supra* note 7, p. 189; Harding, *supra* note 25, p. 252.

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be,[83] fails to provide reasonable answers. This has an impact on the choice and justification of comparative taxonomy as applied in this study. Albeit applied comparative law usually has little interest for macro-comparisons,[84] the taxonomies tell a lot about the ability to define "Asianness" in law. To put it briefly, the taxonomical ideal types[85] should be nuanced as to allow preliminary comprehension of the internal legal pluralism within the Asian continent, especially the fact that diversities arise not always from the law as such, but from its context. Older taxonomies have neglected the extra-legal aspects. Hence they focused on Western-like legal criteria and neglected the fact that normative phenomena often overlap.[86] Eventually the transition from the focus on "legal systems" and "legal families," promoting the law of America and Europe, to "legal traditions" or "legal contexts," being broad enough to entail all normativities of the universe, stressing the role of legal culture, religion, and various interconnections and interactions between examined jurisdictions,[87] has moved comparatists closer to the reality of the legal phenomena that they try to describe. This diversity is profoundly rooted in millennia of conduct and belief, thus constituting a vertical dimension of legal pluralism.[88] All the three taxonomies are to some extent interrelated (legal systems form legal families that in turn form legal traditions). However, legal systems usually fit the boundaries of nation-states and reflect their formal (positive) laws (legal technique, education, or legal style of a system), like the classifications of René David or Konrad Zweigert and Hein Kötz do.[89] Legal families merely group legal systems sharing the same characteristics. They are static. In contrast, the highly contextual legal tradition is something more than merely law: rather, it denotes culturally conditioned dynamic attitudes towards legal rules and the role of law in the polity and society. According to H. Patrick Glenn, the legal tradition is normative (!) information—a kind of "common law" for those who share its topicality. The "theory of tradition" additionally stresses the viability of legal reality and doctrines, in space and in time, through ongoing changes of the past across the present and towards the future.[90]

In practice, whereas in Europe, especially after Brexit, the civil-law tradition prevails, in Asia, the relation of civil- and common-law traditions is more balanced. Hong Kong, Singapore, Malaysia, and Myanmar represent jurisdictions influenced by the heritage of British colonialism.[91] Continental China, Macau, Taiwan, Japan, Thailand, Cambodia, Indonesia, Vietnam, and Korea all represent civil-law borrowings.[92] Some other jurisdictions, such as Nepal, have legal systems considered to be hybrid in nature.[93] This classification is obviously an oversimplification, though even the status of the PRC, widely

[83] Glenn (2019), pp. 433–5.

[84] Husa, *supra* note 57, p. 237.

[85] Like Weberian conceptual macro-constructs successively compared with legal reality. Cf. *ibid.*, pp. 220–2.

[86] Glenn, *supra* note 83, pp. 427–8, 432, 438.

[87] *Ibid.*, pp. 436–7.

[88] Cf. Glenn (2017), p. 40.

[89] Müller-Chen, Müller, & Widmer-Lüchinger (2015), N 202–8.

[90] Cf. Glenn (2005), p. 1. Generally, on the time in the concept of legal tradition, see Glenn, *supra* note 81, pp. 3–12; Duve (2018), pp. 15–33.

[91] On the legal dimension of colonialism, see Baxi (2003), pp. 46–75; Darian-Smith & Fitzpatrick (1999). Cf. Allan, *supra* note 5, pp. 15–31. Note that decolonization in the second half of the twentieth century has not set aside the effects of colonial legal transfers (!).

[92] Some of them were European colonies (e.g. Macau, Cambodia) whereas others were not (Thailand). Additionally, some of these countries (e.g. Korea and Taiwan) received occidental codes via Japan. See Wang (2014), pp. 233–42. Japanese law was also influential in Siam (Thailand), Cambodia, and Vietnam. See Nottage (2019), pp. 205–6.

[93] Heckendorn Urscheler (2010), pp. 55–72. In fact, any jurisdictional entity is complex enough to claim its hybridity: there are no "pure" legal systems—hybridity is a rule, not an exception. See Duve, *supra* note 90, pp. 27, 32.

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recognized as a civil-law jurisdiction, is—according to some scholars—debatable.[94] Shiyuan Han teaches that, since the collapse of Imperial China at the beginning of the twentieth century, the "Middle Country" has undergone "a hybrid reception" by drawing from different jurisdictions.[95]

Finally, and argument can be made—following David E. Allan's opinion—that all Asian countries have been to some extent Westernized by the law (that would be of course a radical position).[96] What does it exactly—in terms of the discussed Asian dimension—mean? Is the European law, transplanted to Japan over a century ago, already a part of the Japanese tradition? Or the custom or ethics?[97] This explains to an extent that there is the feeling of living someone else's law. But—Allan adds—the substantially foreign or inherited law is the formal one, whereas "the underlying community attitudes towards the law" are local and, in contrast to the formal laws, very divergent.[98] Their relevance is significant insofar as they set limits to Eurocentrist classification of the Asian legal systems along the lines drawn by past civil-law and common-law influences.

Even if we scrap the foreign layers of legal influence, Asia is a nebulous and dynamic area: systems of ideas and values underlying the legal suprastructure include Confucianism, Hinduism, and Islam, not to mention some customary (chthonic) layers (*adat* in Malaysia and Indonesia). In effect, the plurality of legal mentalities and techniques is perhaps much more present in Asia than is the case in other parts of the world. It is a challenge for the drafters of the PACL and a laboratory of legal globalization because, so far, as we can see, the highly formalized method of proceeding adopted by the PACL authors neglects the issue of legal tradition and pays no attention to the initial selection of relevant jurisdictions in accordance with any established taxonomy.

For the sake of legal studies within Asia only, Sang Yong Kim proposes to divide the continent into five families sharing underlying values: North-Eastern influenced by Confucianism; Southeastern influenced by Christianity, Buddhism, and Islam; Islamic Southwestern; the Central; and Hindu Mid-Eastern Asia.[99] The reasoning is that each of the Asian countries has been influenced by the law of the Occident, which therefore should not be a distinguishing factor.

A reservation must be made to the macro-comparisons here, namely that any taxonomic attempt to classify the world's jurisdictions must necessarily be characterized by a high degree of superficiality.[100] Any change in the scale of comparison, such as a comparison not of entire traditions, but of single legal institutions, might radically alter the outcome. There is also, of course, the nearly eternal discussion about the proper criteria of comparison.[101] The notion of legal tradition differs from other kinds of classification,

[94] Li (2017), pp. 184–6; Husa, *supra* note 57, p. 140. The Chinese legal system consists not only of mainland jurisdiction, which may be itself considered hybrid, but also of common law's Hong Kong and civil law's Macau. They in turn also are not "pure" systems. See Castellucci (2012), pp. 665–720.

[95] Han, *supra* note 57, p. 248.

[96] Allan, *supra* note 5, p. 4. As Menski, *supra* note 78, p. 362, argues, the state law of these jurisdictions is basically European, whereas social relations are governed by different legal traditions. See also Hiscock, *supra* note 4, p. 362; Han, *supra* note 57, pp. 235, 244. For the genealogies of East and Southeast Asian jurisdictions, see Chen-Wishart (2016), pp. 400–6. The author observes however that some of them have then diverged from the received models (Chen-Wishart (2016), pp. 414, 426–8; Chen-Wishart (2013), pp. 1–4, 10–11).

[97] Ruskola, *supra* note 72, p. 887, puts it shortly and in a decisive manner: "[l]aw is not the opposite of Asia."

[98] Allan, *supra* note 5, p. 224.

[99] Kim, *supra* note 33, pp. 1–19.

[100] The attempt might seem purposeless especially with regard to Asia. Cf. Müller-Chen, Müller, & Widmer-Lüchinger, *supra* note 89, N 809. In the context of Asia, Kim's taxonomy will certainly be useful in abandoning Eurocentrism and in drawing lines between different jurisdictions, but contributes by no means to a better understanding of Asian law.

[101] Glenn, *supra* note 83, p. 436.

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whose normativity is formal, because it represents a persuasive authority.[102] Its use in the present research has a specific purpose: one of the objectives of the PACL project consists, *inter alia*, of reconciling the diversity of normativities of the jurisdictions at hand. Therefore, a broader, historically underpinned view ought to be sketched, as the current shape of jurisdictions worldwide owes much to the diffusion of European models.[103]

3.2 The identity of Asian law and its tradition(s)

The question of whether there is any essence to umbrella terms for Asian jurisdictions—such as, for instance, "(East) Asian legal tradition"—or whether the concept is empty stirs up debate among legal comparatists.[104]

Finding or identifying the essence of Asian law and its tradition is not without significance. It would serve to provide an ideological foundation for the PACL project. If the principles are considered to be a remedy for the fragmentation of Asian contract laws, as declared, then there must be a crucial underlying value called "Asia," the same as the concept of "Europe" was crucial for the justification of European integration after World War II[105] or even the academic debate around the harmonization of private law. An important prerequisite for the creation of a uniform concept of "Asia" out of the ambiguous Asian identities is the overcoming of the nation-state concept that would enable the proper understanding of Asian heterogeneity.[106] Following Guido Comparato's considerations about the legal policies in Europe, one could say that Asia needs "an Asian legal nationalism" as opposed to "Euronationalism" (without suggesting any futurological vision of an Asian super state emerging one day).[107] A number of journals and books[108] on Asian law can be found on the bookshelves of libraries today. An ongoing project on Asian law has resulted in a publication series "Studies in the Contract Law of Asia" by Oxford University Press. But even if Asian law were a mere academic construct, as *ius commune* once was and now the European private law is,[109] it may nevertheless prove to be a fruitful starting point.

A majority of studies accentuate that "Asia" is merely a geographical category, not a legal one.[110] The vast space of the continent comprises jurisdictions of immensely varied religious,

[102] Cf. Glenn (1987), pp. 261–98.

[103] Wang & Chiu, *supra* note 54, pp. 4–7; Durovic (2018b), p. 223; Kitagawa (2008), pp. 237, 242–4 (the second edition of the handbook no longer contains the chapter on legal developments in East Asia, but it has been replaced by separate chapters on Japan and modern China and their legal developments, respectively).

[104] Glenn, *supra* note 81, pp. 319–56; Kitagawa, *supra* note 103, pp. 237–60; Ruskola (2012), pp. 257–77; Huxley (2006), pp. 158–64; Antons (2017b), pp. 3–27.

[105] Davies (1996), pp. 42–6; Michaels, *supra* note 29, p. 26.

[106] Wang (2010), pp. 987–8. The author points out that Asia is a product of European ideologies and the nineteenth- to twentieth-century nation-state idea. This presupposes that any discussion over Asian identity refers by necessity to the Occident, whereas it should focus on inner Asian relations and complexities. Cf. also Millner & Johnson (2001) and Delanty (2006).

[107] Cf. Comparato (2014), pp. 229–67.

[108] E.g. *The Australian Journal of Asian Law*; *Columbia Journal of Asian Law*; *Asian Law Journal*; *East Asia Law Review* (selected are only those titles that expressly proclaim the existence of Asian law; the fact that a journal is "Asian" is not decisive). With regard to books, see e.g. Roseth, Cheng, & Woo (2003); Antons (2017a); Bell (2017).

[109] The historical *ius commune* (twelfth to nineteenth centuries) was a learned law founded on the teaching of Roman and Canon texts in medieval universities. Due to the uniform academic curriculum, it has developed throughout Europe and ultimately has led to national codifications (nineteenth to twentieth centuries). Further to this experience, some legal scholars try to renew the legal scholarship and to harmonize the private laws of European jurisdictions by fostering common legal education and methodology. Their undertakings are non-normative and non-centralist. Cf. Smits, *supra* note 17, pp. 149–51; Smits (2002), pp. 1–6, 42–57. See also Reyes (2010).

[110] Kischel, *supra* note 6, Chapter 9, N 1; Igarashi (2003), p. 428. There never was a taxonomy invented in which Asia stood for a single legal phenomenon. Cf. the tabular overview in Siems, *supra* note 15, p. 89.

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social, economic, and political characteristics in a way that makes it impossible to find a common denominator (beyond the geographical one). "East Asia has no unifying legal tradition or experience. Indeed, geographically and culturally East Asia is almost too diverse to attempt to describe it as a single region."[111] Therefore, "Asia" should be principally equated with South and East Asia, from India to Japan, Indonesia included.[112] Some scholars propose a division into North-East Asia dominated by the Chinese culture and Southeast Asia sharing common anthropological constants.[113] These differences regard not only jurisdictions, but also other normativities that play a significant role in shaping legal systems—they cannot be ignored there, where mutual relations between law and society are hard to establish. Some of the scholars talk even of "legal traditions of Asia."[114] But despite the geography and other extra-legal factors, the legal panorama is still much confused given the additional influences of occidental law and its legal scholarship (this is assuming that they do not form a part of the Asian legal tradition, which is far from a given).[115] If the answer to the key question at hand was nevertheless positive, the notion of "Asian law" would necessarily have to be internally highly variable ("internal legal pluralism").

Mathias Siems writes that "the idea of a distinctly different legal family can lead to a stereotyped view of these legal systems;"[116] this stereotyped view is described by some scholars, following Teemu Ruskola, as "legal orientalism."[117] Legal orientalism is a post-colonial approach that perceives non-occidental legal traditions through an exclusively occidental lens. And though the importance of Asian jurisdictions worldwide—especially of the PRC—has grown, legal orientalism (with its shortcomings) persists.

In the Occident, it is often believed that there might be one factor shared to a various extent by the majority of Asian jurisdictions (East Asian, in fact): namely, Confucianism. Originating in China between the sixth and fifth centuries BC (the life and teaching of Confucius) and third to second centuries BC (when it became the official ideology of China), the system of values based on Confucius's heritage has spread across East Asia and influenced numerous fields of human living, the law, and administration of justice included. The initial harmony reliant on the hegemony of Confucian secular philosophy of life,[118] dominating since the third century BC up to the Chinese Revolution, has been inevitably lost during the course of European colonialism, which introduced a way of thinking based on the system of formal law and which has dominated the legal discourse

[111] Merryman, Clark, & Haley (1994), p. 399. This is indeed the majority opinion. Cf. *inter alia* Zweigert & Kötz, *supra* note 28, pp. 287–8; Legeais (2008), p. 214; Cuniberti (2011), p. 196. Against this view opposes Igarashi, *supra* note 110, p. 419; Wang, *supra* note 106, p. 988; Ruskola, *supra* note 72, pp. 881–3.

[112] Cf. UN Statistics Division (2020). Cf. Black & Bell, *supra* note 7, pp. 2–4; Michaels, *supra* note 29, p. 7. Remarkably, the PACL project was initially a Sino–Japanese–Korean undertaking. Other jurisdictions began to be represented and joined the initiative at later stages. Albeit originally East Asian, now the project has a broader basis. Mateja Durovic names 16 countries of the region: Vietnam, Cambodia, Thailand, Brunei, Malaysia, Indonesia, Singapore, Laos, Myanmar, Philippines, China, Taiwan, Macau SAR, Hong Kong SAR, South Korea, and Japan. See Durovic (2018a), p. 191. Naoki Kanayama counts also Mongolia with the group of East and Southeast Asian jurisdictions. See Kanayama (2010), *supra* note 12, p. 997.

[113] See e.g. Durovic, *supra* note 103, p. 208; Ruskola, *supra* note 104, p. 258, 266–7.

[114] Reyes, *supra* note 109, p. 805. Cf. Igarashi, *supra* note 110, p. 421.

[115] Husa, *supra* note 57, pp. 166–8; Millner & Johnson, *supra* note 106.

[116] Siems, *supra* note 15, p. 96.

[117] Ruskola, *supra* note 49, p. 182; Ruskola (2013).

[118] Black & Bell, *supra* note 7, p. 5; Glenn, *supra* note 81, pp. 326, 334–5; Zhang, *supra* note 57, pp. 27–8. The expansion of Confucianism accelerated with the Chinese migrations into Southeast Asia. Cf. Hooker (2002), pp. 1–31, who points out the diversity of laws of the Chinese diaspora, conditioned by the local sociopolitical circumstances of the era of colonialism (Hooker, 2002, p. 9).

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since then[119] as well as during the following turbulences of the Empire's end, World War II, and the subsequent Communist Revolution.[120]

However, Asia cannot be deemed an exclusive sphere of Buddhist or Confucian influence.[121] Rather, it is a heterogeneous mixture of Chthonic, Confucian, Buddhist, Shintoist, Islamic, Chinese, Marxist (or Sino-Marxist[122]), and civil-law and common-law traditions, full of internal similarities (e.g. import of foreign codification ideas) and differences (e.g. Chinese and Japanese law[123]): a hybrid, fragmented, and mixed sphere of legal tradition, adaptation, and innovation as a result.[124]

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As it turns out, the particularity of "Asian legal tradition" cannot be pinpointed simply with the formal law. It cannot be pinpointed by the geographic classifier either. The predominant criterion justifying its uniqueness is the "law in action," norms reflecting "Asian values" as a generic term, which plays the role of *differentia specifica* of the Asian legal landscape.

The controversy over "Asian values"[125] remains a vivid topic of debate.[126] However, hardly any concrete examples of such values as applied in the domain of contract law have been individuated in the literature. A closer look at Singapore, Hong Kong, and the PRC reveals however that individualization of such practical examples is feasible.

For instance, the Confucian world view plays an important factor in shaping the Singaporese "law in action," whereas the "law in books" remains English.[127] As Mindy Chen-Wishart has demonstrated in her case-study, the transplant of the English doctrine of undue influence into the legal system of Singapore has resulted in upside-down interpretation of adjudicated cases due to the dominant Confucian view of family relationships that was playing a role in commercial personal securities. Traditional social ethics, adapted to the circumstances of a highly developed urban culture, is reflected in the high value placed on interpersonal relations, collectivism, and social hierarchy. It is also supported by the public policy of the state.[128]

In contrast, in Hong Kong, which is regarded as a part of the common-law world, the unanimous voice of scholars denies any major deviations from English contract law.[129] Browsing commentaries in search of examples of traditional Chinese law provides only scarce information about the Chinese style of mediation that allows the intermediary to exercise persuasive power over the parties in order to push them to compromise.[130]

[119] Ruskola, *supra* note 104, p. 275; Merryman, Clark, & Haley, *supra* note 111, pp. 405–7; Von Senger (2012), paras 194, 202.

[120] Kischel, *supra* note 6, Chapter 9, para. 100–1. The legal heritage of Confucianism has not been completely eradicated. See also Ho (2020); Menski, *supra* note 78, p. 590.

[121] See Ruskola, *supra* note 104, pp. 258–60, 262–7.

[122] Von Senger, *supra* note 119, para. 220–51, in particular paras 222–36 (sinization of Marxism), 230 (Sinomarxism and Confucianism).

[123] Zweigert & Kötz, *supra* note 28, p. 287. Mathias Siems draws attention to the fact that the apparent cultural affinity of some East Asian countries, e.g. China and North and South Korea, based on Confucian thinking, sounds incredible given all the economical, legal, and political differences between all three jurisdictions. See Siems, *supra* note 15, p. 99; see also Gerkens (2007), pp. 240–1.

[124] See Ruskola, *supra* note 117, pp. 207–8, 215–6; Black & Bell, *supra* note 7, p. 22; Igarashi, *supra* note 110, pp. 422–4; in particular Tai (2011), pp. 62–90, showing the attachment of Hong Kong's society to the rule of law and to the traditional "obligations precede rights" model simultaneously.

[125] See Michaels, *supra* note 29, p. 24.

[126] Tan (1997), para. 8.8.3.

[127] Chen-Wishart (2013), *supra* note 96, p. 3. Cf. Phang Boon Leong (2012), para. 02.011: "The foundation of Singapore law in general and its contract law in particular is *English* law" (emphasis added).

[128] Chen-Wishart (2013), *supra* note 96, pp. 1–30, in particular pp. 5–10, 12–24.

[129] E.g. Andrews & Yang (2016), para. 1.01.

[130] Ma Tao-li & Kaplan (2017), s. 5.031.

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In Hong Kong, the Chinese customary law of the Qing Dynasty has formally never been abolished and the British were allowed to practise it whenever it was not contrary to the English law. Nonetheless the Chinese custom is shrinking rather than developing, overridden first by the British in 1843–1997 and now by the Special Administrative Region (SAR)'s legislation—a process clearly confirmed in Hong Kong's case-law.[131] Additionally, the uncertainty as to the content of Chinese customary law (so referred to in Hong Kong's literature) diminishes its practical scope of application.[132]

With regard to Mainland China, a historical survey leads to similar conclusions. Up to the twentieth century, custom was everything—there was no system of legal rules governing commercial transactions,[133] and social relations shaped the "law in action." The modernization of law has led to systematic erasure of the legal system existing until then. The main change occurred during the Qing legal reforms and later under the Republic, which tried to modernize rather than Westernize China.[134] The establishment of the PRC in 1949 had not such a devastating impact on the legal system as is often supposed. The role of *guanxi*, a cultural practice,[135] or "social connection" (like Pierre Bourdieu's "social capital"[136]) having its source in one's position in the social hierarchy, was particularly significant in the period after China has begun Deng Xiaoping's reforms, but before the legal vacuum was filled with new content.[137] There is no doubt that, since the times of economic and legal transition characterized by a lack of legal regulations, its crucial role has diminished with new legislation and also with the disintegration of social communities and mass migrations.[138] More controversial is its impact on the enforceability of law: is *guanxi* overruling/substituting legal norms ("surface law") or reinforcing them? Compliance depends on the range over which legal norms respond to social and cultural needs. Scholars have tended recently to emphasize the complementarity of *guanxi* and contract law rather than the clash of those notions.[139] For instance, Article 60(2) of the repealed Chinese

[131] "Such of Chinese customary law as incorporated into the law of Hong Kong has been gradually eroded by the constant changes in a living Chinese society .... Much of its archaic manifestations has thus been whittled down"—see *Lee Lan v. Henry Ho* (unrep., HCA 3441/1978, 15 March 1980), per Mr Commissioner Liu Q.C.; see also *Re Tse Lai Chiu, deceased [1969] HKLR 159*, Full Court; *Wu Koon Tai v. Wu Yau Loi* [1996] 3 HKC 599, (PC); *Wong Ying Kuen v. Wong Yu Shi* (unrep., HCMP 19/1956, 25 July 1969), *Liu Ying Lan v. Liu Tung Yiu* [2003] 3 HKLRD 249.

[132] See Johnston & Harris (2017), s. 7.067. Customary law had been applied predominantly in family, property, and succession laws up to the 1970s, when it was abolished. The Basic Law of the Hong Kong Special Administrative Region provides in Art. 8 that "the laws previously in force in Hong Kong, that is, ... customary laws, shall be maintained." Nowadays only isolated rules govern the land conveyance and Chinese trusts as well as intestate successions (ibid., s. 7.069–81; see e.g. *Kwok Cheuk Kin v. Director of Lands* [2019] HKCFI 867, 8 April 2019, and many others). Also in labour law anti-discrimination rules are difficult to reconcile with Chinese customs. The ascertainment of the content of customary law requires cultural expertise. See Bourgon (2020), pp. 85–97.

[133] Chen & DiMatteo, *supra* note 57, pp. 3–26; Zou (2018), paras 1–5, 1–8; Fu (2011), pp. 12–3; Ling (2002), para. 1.013 (provides some exceptions to this statement showing rather that contracts were supplementary to informal social norms than the contrary). Interestingly, Mo Zhang explains that despite the lack of formal legal technique, there was contract law in Imperial China, based on customs and common usages. There existed even the notion of a "contract" (*He Tong*) even though in practice the honouring of promises, strongly interwoven with social ethics, was a decisive factor for the stability of the contractual system. See Zhang, *supra* note 57, pp. 25–8.

[134] Chen (2009), pp. 92–100.

[135] On the *guanxi*, see the volume of Gold, Guthrie, & Wank (2002b). The influential social practices (alternatives to law) are described in Kaufmann Winn (1994), pp. 225–8.

[136] Bourdieu (1986), pp. 241–58, in particular pp. 248–52.

[137] Potter (2001), p. 2.

[138] Gold, Guthrie, & Wank (2002a), p. 15.

[139] Potter (2002), pp. 179–95; Trebilcock & Leng (2006), p. 1558–9. See also Ling, *supra* note 133, N 2.018.

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Contract Law (CL) of 1999[140] and nowadays Article 509(2) of the Civil Code of the PRC of 2020[141] emphasize that the specific duties imposed on parties by the operation of the good-faith principle are shaped by factors contributing to social stability such as the transactional, moral, social, and commercial standards of virtue.[142] Moreover, according to the Civil Code of the PRC, juridical acts should be interpreted in light of customary usages (Article 142). The role of social practices in China is additionally enhanced by the general and abstract style of legislative drafting as well as of jurisprudence, which leaves just enough space for the unwritten law to slip into complementary application.[143] Still custom gives content to general clauses that, first, are a product of social norms and, second, involve social forms for the sake of law's flexibility, like Articles 6 (principle of fairness[144]) and 7 (principle of good faith[145]) of the Civil Code of the PRC. Further, Article 8 of the Code requires that the parties shall respect social ethics.[146]

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As discussed above, Asia is not a legal monolith, but then—which jurisdiction is? On a theoretical level, this is not an obstacle.[147] In practice, the law's complexities burden the PACL project insofar as it lacks a definite object. The historical heritage defines the Asian legal panorama as a field in which the written law and socioethical norms interact. Yet their relations differ from jurisdiction to jurisdiction. There is no "Asian *ius gentium*."[148] As a result, construing model rules on the presumption of a heterogeneous and undefined notion of "Asianness" would likely be a misstep. This is especially true given that the PACL project does not recognize the unwritten law, irrespective of the extent of its practical application. The belief in the convergence of laws and in the advancement of a common Asian legal identity alone cannot produce a satisfactory effect. The rules drafted so far are transnational, but definitely not "Asian," because there is no consensus towards what "Asian law" actually means. The legacy of colonialism makes the potential claim that the official law suffices unconvincing. Eventually, the inclusion of unwritten law representing the "Asian values" might solve the problem. As a consequence, the drafted rules will certainly

[140] "A party shall perform his own obligations specified in the contract. A party shall observe the principles of honesty and faithfulness to fulfil the obligations of notification, assistance, and confidentiality according to the nature and purpose of contract and business practice." Cf. Art. 1.7 of the PICC; Art. 7 of the CISG. All quotations from Contract Law of the People's Republic of China of 15 March 1999 are based on Luo (1999).

[141] "The parties shall comply with the principle of good faith, and perform such obligations as sending notices, rendering assistances, and keeping confidentiality in accordance with the nature and purpose of the contract and the course of dealing. When conducting a civil activity, a person of the civil law shall, in compliance with the principle of good faith, uphold honesty and honor commitments." All quotations from the Civil Code of the PRC have been borrowed from the Civil Code of the PRC (2020).

[142] Ling, *supra* note 133, paras 2.018, 5.012. Note that the moral doctrines of Confucianism are constantly evolving. Cf. MacCormack (1996), pp. 55, 62–3.

[143] Ling, *supra* note 133, p. LXX.

[144] "When conducting a civil activity, a person of the civil law shall, in compliance with the principle of fairness, reasonably clarify the rights and obligations of each party."

[145] "When conducting a civil activity, a person of the civil law shall, in compliance with the principle of good faith, uphold honesty and honor commitments."

[146] "When conducting a civil activity, no person of the civil law shall violate the law, or offend public order or good morals."

[147] Glenn, *supra* note 81, pp. 368–72, 374–85.

[148] For the notion, see Ruskola, *supra* note 104, pp. 257, 268: "Although the notion of a Chinese world order is misleading insofar as it is presented as a complete and accurate reflection of all political organization in East Asia, ... it can be usefully thought of as a kind of transnational East Asian legal order, a Confucian *ius gentium* that provided a normative standard of civilization for political recognition, a set of constitutional norms for a properly administered polity, and guidelines for interactions among states. The analogy to the European tradition of *ius gentium* is hardly definitive, but it is instructive. Both traditions claimed universality." Note that for Ruskola *ius gentium* is a synonym of international law, whereas its original meaning is the body of rules governing private persons' transactions across political borders—at least that is how Roman jurists explain us this notion, in particular Gaius in his Institutes 1.1.

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contribute to the debate on a transnational contract law of the future, given that the creation of soft law is normally the first step towards further harmonization.[149] However, their legitimacy as a regional non-legislative codification of "Asian contract law" will be seriously questioned.

4. Between the global and the local

Intermediate conclusions, as drawn from the previous section (see Section 3), cast doubt upon the apparent regionalization of the transnational contract law in Asia. It has been evidenced that the PACL so far do not reflect the particularities of "Asianness." This in turn touches upon the very core of the project: its justification as a regional harmonization programme. Can the PACL be seen as a departure from global standards? In other words, the question is: how global or how local is the content of the PACL likely to be?

Since the 1990s, legal developments in the field of commercial contracts have been marked by the emergence of soft-law model rules, whose codification has been enhanced by the globalization of the world's economy. The creation of soft law occurred on a double track: as a truly global occurrence (PICC, edn 1994/2004/2010/2016)[150] and as a series of regional private-law-making in Europe (PECL 1994, 2002; European Contract Code 2001, 2004; DCFR, 2009; Common European Sales Law, 2011), Africa (*Acte uniforme portant sur le droit commercial général OHADA*, 2010), and Latin America (OHADAC PICC, 2015; Principles of Latin American Contract Law, 2017). Since 2009 the drafting of the PACL has been moving forward the first Asian non-legislative codification of a "soft" contract law. The transnational legal norms "reflect the more progressive *opinio juris*, which is the direction in which the law is to develop according to the cutting-edge opinion makers."[151] While the drafted principles and model rules may not be feasible enough for legal unification, they nonetheless provide a useful set of norms aimed at legal reform, facilitating contracting, or teaching law across political borders (i.e. legal harmonization). One of the agendas of harmonization can be the research on common principles and model rules or the search for the best rules.[152] Their practicability depends upon several factors influencing the persuasive authority of the soft law: the strength of the institution backing these model rules, the personal authority of the drafters, the credibility of the methodology applied, and finally the quality of the resulting provisions.[153] The success of model rules is marked by the feedback that they have received in national jurisdictions. With regard to legal developments in Asia, it has been even observed that the most modern borrowings actually use the soft law as the source.[154]

Transnational law's influence on Asian law should not be underestimated. The PICC in particular, but the CISG as well, has played an important role. With regard to the Chinese CL of 1999, scholars evaluate the influence of the PICC as significant, albeit that, from a methodological point of view, this influence was in the form of cherrypicking rather than an extensive wholesale reception. The borrowings from CISG were more extensive,[155] with

[149] Smits (2017), p. 33.

[150] Also the Convention on the International Sale of Goods (1980), which, technically speaking, is not soft law, but an international convention, enjoyed as part of the same endeavour to achieve global unification of laws a wide recognition.

[151] Smits, *supra* note 149, p. 33.

[152] Lasaballett, *supra* note 1, pp. 110–3.

[153] Vogenauer (2010), pp. 157–8.

[154] Chen, *supra* note 134, pp. 107–8 (at least for China).

[155] Among the Asian jurisdictions that participate in the CISG, there are: PRC, Japan, South Korea, Mongolia, Singapore, and Vietnam, according to UNCITRAL (2020).

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these rules accessed by the PRC already in 1988.[156] The influences are particularly visible in the general principles (equality, party autonomy, fairness, good faith, etc.), offers, and acceptance as means to contract formation, standard terms, *culpa in contrahendo*, or performance of implied obligations. It is important to note that deviations from the soft law as present in the PICC are not substantial[157] because every jurisdiction supplements its contract law with general clauses, thus giving the courts the room for manoeuvre to adapt the law to the socioeconomic circumstances and to make it more flexible.

In light of the presence of transnational contract-law model rules in Asia, the question arises: why have a region-specific set of model rules?[158] The answers vary. Scholars argue that regional endeavours to harmonize contract law would lead to fragmentation and would make international contracting even more complicated. Further regionalization of law may have a negative impact on the number of cases resolved, and hence the predictability of legal development. On the other hand, the current global soft law does not cover all the practice-relevant topics.[159] The PACL project challenges the success of the global soft law, yet at the same time recognizes it by adopting the same legislative technique. The unificatory appeal of soft law has always been considered a symptom of legal globalization, namely the worldwide implementation of certain legal patterns, ways of conduct, normativities, etc. Since the second half of the twentieth century, the shrinkage of the globe has been accompanied by a decline in the importance of the contemporary state. This has also been the case with state law.[160] However, comparative studies have shown that globalization understood as legal uniformization is in fact an attempt to impose one's vision of the law onto others.[161] Globalization feeds the perception of the qualitative superiority of certain solutions over others—the apparent need to progressively pursue the better, higher forms of human organization.[162] The solutions spread naturally, as the legal systems are networked,[163] thus the reduction in differences seems to be a self-driven mechanism. However, the endeavour towards unity should be underpinned by the realistic assumption that legal pluralism best describes the current state of legal developments and the polycentric forms of normativity in the world.[164] Moreover, legal pluralism is traceable not only in the interstate fragmentation of law, but also in the opposition of the state and non-state law and, further, in the threefold "local–regional–global" dimension.

In the past, the drafting of the PICC was intended to provide globally uniform norms for enhancing trade between Euro-American and remaining parts of the globe, albeit in practice the civil- and common-law traditions, namely formal law, were the key sources of

[156] Janssen & Chau (2018), pp. 447–65, in particular p. 464, and DiMatteo & Wang (2018), pp. 466–500, in the same volume. Generally, on legal reform in the area of modern Chinese contract law, see Potter, *supra* note 137, pp. 38–55, in particular pp. 50–2 (influence of international models).

[157] André Janssen & Samuel C. K. Chau mention alone the clause on the protection of "lawful rights and interests of contracting parties, maintaining social and economic order and promoting socialist modernisation." See Janssen & Chau, *supra* note 156, p. 456.

[158] The question has been explicitly raised by Kap-You (Kevin) Kim, president of the Korean International Trade Law Association; see Kim, *supra* note 39, p. 3.

[159] Schwenzer (2014), pp. 45, 50.

[160] Van Creveld (1999), pp. 416–9.

[161] Deffains, *supra* note 41, p. 43: "[d]espite its overall desirability at the global level, advantages brought by reduced legal diversity produce winners and losers both at the domestic and the international levels, which triggers opposition to harmonization."

[162] Menski, *supra* note 78, p. 596. On the other hand, there is an incentive in international commerce to borrow law from highly developed systems of the Occident, because it guarantees prestige, ease of access to legal material, and shared language. Cf. Chiba, *supra* note 7, p. 2; Chen-Wishart (2013), *supra* note 96, p. 10.

[163] Siems, *supra* note 15, p. 262. Cf. Druzin (2017b), *supra* note 24, p. 366. This networking enhances competition between legal orders. Cf. Janssen & Chau, *supra* note 156, pp. 450–1.

[164] Robertson (1995), p. 29, puts it concisely: "there can be no cosmopolitans without locals."

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inspiration.[165] In the introduction to the first edition of the PICC (1994), the Governing Council of the UNIDROIT emphasized that:

> [f]or the most part the UNIDROIT Principles reflect concepts to be found in many, if not all, legal systems. ... The objective of the UNIDROIT Principles is to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied.[166]

Apparently, in the eyes of the PACL initiators, the PICC were not close enough to the regional specificity of contract law. This was not a problem as long as legal harmonization stayed within the boundaries of Europe. Nevertheless, it did not prevent the drafters of the PACL from adopting some of the PICC/CISG rules. Does the latter occurrence signal compatibility of the legal rules across the globe, or is it merely the consequence of the previous legal colonization of Asia? Can we assume that such provisions might express the legal tradition(s) of Asia, given that the past European influences form a part of the present Asian law?

If the PACL stay in tune with the global soft-law rules, then it seems that we should interpret the PACL as an element of global processes leading to more uniformization rather than to greater legal pluralism.

In the context of global–local dialectics, the PACL occupy a twofold position. They belong to the realm of transnational contract law as they take part in the widespread process of harmonization through soft law. Generally speaking, the PACL's objectives stay in line with the features shared by other soft-law instruments, like those of a "toolbox" for legal reform, of an "optional instrument" for drafting commercial contracts between parties, aid to the interpretation and supplementation of national laws, as well as a teaching instrument. They are rather typical and topical for any soft law and do not raise problems or doubts towards their justifiability. This approach works well with the idea of the educational function of law as well as with the idea of the persuasive force of law.[167] In this sense, Confucianism might have had a favourable impact on the attempts to draw a state-independent set of contract-law rules governing questions adjudicated in international arbitration.[168] Simultaneously, their authors declare to occupy the position of the "local" in the sense of being defined by Asian particularities that make them distinct from the experiences of the Transatlantic bringing-together of the systems of contract law. An unspoken argument following from the PACL project is that globalization must take a historical perspective into account in order to better suit the current economic and legal needs. The preliminary observation is that the practicability of the PACL will largely depend upon the way in which the model rules are going to be applied locally. The more general the shaping of the norms, the better they fit the local circumstances and cultural

[165] See Bell, *supra* note 42, pp. 363–4.

[166] See UNIDROIT (2020), p. XXIX. Cf. pp. XXVII ("all five continents"), XXVIII ("representatives of all the major legal systems of the world"). It ought to be mentioned that the East and Southeast Asian members of International Institute for the Unification of Law UNIDROIT include the PRC, India, Indonesia, Japan, and South Korea.

[167] See MacCormack, *supra* note 142, pp. 11, 133; Glenn, *supra* note 81, p. 320.

[168] In principle, contracts in the Chinese legal tradition were not subjected to state regulation, or rather the Chinese imperial codes and statutory law covered matters indispensable to protect and promote state interests. Even today, China relies on mediation and arbitration, which can be seen as a channel for the incorporation of traditional solution of contract enforcement into the legal framework. See Leng & Shen (2016), p. 92; Zin (2018), pp. 197–8. For a general overview, cf. Lee (1997).

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patterns.[169] Their high level of technicality will set them apart from the soft-law codes of the Occident, but at the same time may prove to be a disadvantage.

Experience suggests that no matter how strong the drive towards globalization, the model rules cannot deviate too far from legal realism; this would render them practically inapplicable.[170] Scholars emphasize that globalization tends to be a dialectical process involving contrasting elements that are in continuous movement: the international or even supranational elements dialogue with national ones like a "whirlwind of continuum and interruption, a kind of legal supernova."[171]

The ambiguity of those processes is called glocalization.[172] The glocal dialectic operates on various levels. Wen-Yeu Wang accentuates the relation of legal and ethical elements:

> Though many paths seem viable for further improving law and order in the Far East, much will depend on what kind of legal and political compromises will be negotiated between influential actors and stakeholders. Simultaneously, human and ethical values constitute powerful driving forces that will shape transnational legal orders, especially when considering the densely populated regions of East Asia. In this present era of globalization, building bridges between traditional Eastern cultures and Western legal concepts will certainly remain a continuous challenge and a rewarding task for generations to come.[173]

Moreover, with regard to the practicability of the PACL in the future, another argument should be raised,[174] namely that the creation of new model rules would result in corroding the advantages of globalization achieved by the CISG and the PICC. There could be a split between the regime of commercial transactions concluded among Asians and commercial transactions involving entrepreneurs from other continents. This might make trade more complicated and costly.[175] The success of the PACL may be enhanced by compliance with existing model rules that already enjoy wide recognition (given that the PACL are modelled on the example of international contract regulations such as the CISG or the model rules of the PICC). This may be true in particular in the case of the parallel ongoing codification of private law in the PRC, which is considerably influenced by occidental law and supranational soft law.[176] In 2010—in parallel with the PACL initiative, in fact—a new draft Civil Code of the PRC[177] was published and transformed into a law that entered into force in January 2021. How could these two legal regimes operate alongside each other? There is also a need for better co-operation in cross-border transactions in the so-called "Greater China Region" (PRC, Hong Kong, Macau, and Taiwan).[178] There is clearly little political leaning towards regional integration and an absence

[169] Jan M. Smits proposes an alternative organization of contract law, limiting its range solely to the national mandatory rules, thus avoiding the problem of collision between future PACL and future Civil Code of the PRC, because the principles will be general enough not to interfere with Chinese contract law. See Smits (2012a), pp. 266–9. Besides, that might be a perfect mechanism guaranteeing sustainability of national jurisdictions with a common regional instrument harmonizing the contract law in Asia.

[170] Legrand (1997), p. 61. See Menski, *supra* note 78, p. 16.

[171] Cf. Husa, *supra* note 57, p. 106. Cf. Robertson, *supra* note 164, pp. 29–37; De Sousa Santos, *supra* note 77, pp. 177–82, in particular p. 179.

[172] Glocalization means the simultaneous occurrence of both universalizing and particularizing tendencies in a certain system. Cf. Robertson, *supra* note 164, pp. 25–44.

[173] Wang & Chiu, *supra* note 54, p. 16.

[174] As Bell, *supra* note 42, p. 368, already did.

[175] Jaakko Husa, on the contrary, argues that "contract models are not based on competing legal globalities." See Husa, *supra* note 17, p. 82.

[176] Han, *supra* note 58, pp. 209–12; Han, *supra* note 57, pp. 252–4. On the foreign influence on China's Contract Law, see Leng & Shen, *supra* note 168, pp. 67–9.

[177] Liang (2010).

[178] Andrews & Yang, *supra* note 129, N 1.21–22, p. 13.

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of a common political framework comparable to the European Treaties. Therefore, a disillusioned *standarization graduelle*[179] is likely to take place.

During the past debate on the justifiability of the DCFR, Stefan Vogenauer wondered whether the creation of a new optional instrument would result in "over-standardization" in the area of contract law.[180] According to his observations, the existing model rules (*in casu* the PICC) are applied so infrequently[181] that it should discourage the drafters of a new "toolbox" from providing similar legal solutions. The similarities between various soft-law model rules tend to be numerous, as is demonstrated for instance by a comparison between the PECL and the PICC (approximately two-thirds of the provisions provided by PECL are same as those of the PICC).[182] Therefore, in opposition to Stefan Vogenauer, and in light of the allegedly Asian character of the PACL, I doubt whether their success might lead to "over-standardization." A degree of legal pluralism and polycentricity is a value in and of itself[183] because it guarantees competition between legal standards. What will the relations be between the PACL and the pre-existent soft law, namely the PECL, DCFR, and PICC? The completion of the PACL would serve to reinforce the global character of the PICC and other transnational model rules,[184] and differences between the PACL and their forerunners would not be significant.

***

One dilemma has persisted since the contact between East Asia and Europe first intensified in the nineteenth century: the dilemma between the adoption of a European system in the interest of maintaining a strong position in international commercial relations on the one hand and the risk of incompatibility with the local circumstances or development of local standards to the detriment of cross-border transactions on the other. The same hopes and doubts accompany the drafting of the PACL. If the project aims at the creation of peculiar model rules for Asian contract law, then it is going against the declared aims as a soft-law codification. If it follows the goals set by the process of globalization, then the principles will lose touch with the Asian legal particularities. Asian scholars believe that Asia has a need to harmonize contract-law rules, just as the US, Latin America, and Europe once had. However, their belief is at odds with the reality.

5. Conclusions

I have dedicated this paper to the evaluation and critique of the PACL, namely one of the major recent initiatives for the harmonization of contract law in Asia, from the theoretical

[179] See Kanayama, *supra* note 43, p. 366.

[180] Vogenauer, *supra* note 153, pp. 143–83.

[181] *Ibid.*, pp. 151–2; Vogenauer (2015), para. 48–9; see also Schwenzer, *supra* note 159, p. 47. Statistics show a relatively limited role of soft law as the foundation of cross-border legal disputes. According to the International Chamber of Commerce for the year 2019, in 88% of the disputes parties have chosen the law, 99% of them national law (English, Swiss, US, and French law), only 1% provided application of CISG or transnational soft law (2% in the year 2018). See ICC (2019). See also Webster & Bühler (2018), paras 21–3, 21–7. The market continues to prefer English law as the choice of law. According to a study of the Singapore Academy of Law on cross-border transactions in Asia, out of more than 500 cases, English law was chosen in 48% of cases, Singapore law in 25% of cases, with New York and Hong Kong laws selected in respectively 7% and 3% of cases. This shows a clear dominance of common law among the cross-border transactions in the region. See Singapore Academy of Law (2020). Cf. Durovic, *supra* note 112, p. 196; Durovic, *supra* note 103, p. 220. The strong presence of English common law is clearly visible also in the citations in the case-law of Asian common-law jurisdictions. See Han NG & Jacobson (2017), pp. 209–32.

[182] Vogenauer, *supra* note 153, p. 159. Cf. Kötz (2017), p. 4.

[183] Druzin (2017b), *supra* note 24, p. 377.

[184] Bell, *supra* note 42, pp. 362–72.

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point of view. I have also tried to individuate and discuss certain core issues defining the nature and perspectives of the PACL. The conclusions are perhaps a bit more puzzling than I expected at the outset of this research project, but several critical points can be individuated.

Critique of the project focuses on two main issues that seem crucial for the proper assessment of the PACL.

First, the paper argues that the project lacks clarity with regard to its own object.

Second, it discusses the ambitious objectives of the project that, while apparently intelligible, do not appear entirely viable.

In drawing conclusions to this study, I would like to emphasize the following points:

1. The fundamental controversy in the debates among the participants of the project, by which the discussions begin and unfortunately come to an end, is: what is the object of this undertaking? While the objectives are quite clear and easy to acknowledge ("standard" for a reason), no convincing answer as to what "Asian contract law" exactly is has been provided by the project participants. To make things even worse, the question of whether the ultimate goal is to harmonize the legal doctrine ("law in books") or the social ethics, customs and moral norms practised ("law in action") remains unaddressed. This is extremely important because—after all—the context is everything! The ambiguity as to the object makes it difficult to judge the uniqueness of the project in terms of the rules diverging from the global concepts of contract, its formation, contents, and performance, as outlined in transnational law so far. The current shape of the PACL, as it emerges from the published draft versions, is not a reflection of legal practice, but rather of legal academia. To put it concisely, the failure (or even omission) to precisely determine the object of research ("what is Asia?"), the character of law being restated ("law in books or in action?"), or the unclear selection of relevant jurisdictions result in the project lacking solid methodological foundations. Its authors build on sand. Serious doubts as to the Asian character of the PACL erode the authority of the draft.[185]
2. On the other hand, not only the participants of the project, but also the broader comparative-law community have consistently found it difficult to ascertain the meaning of the notion of "Asian contract law." It ought to be stressed that Asian law as such does not exists as a positive legal system. It is currently only an idea, barely a concept in the making, not a proper body of law. No other perspective seems to be appropriate here, though not even the "Asian legal tradition" has a clear-cut meaning. The internal legal pluralism within Asia suggests the possibility of the existence of several "Asian traditions." The concept of "Asian contract law" is the least well established of these terms and calls for scholarly elaboration.[186] The awareness of legal pluralism does not exempt the drafters from discussing the taxonomical issues. They should have been more seriously considered at the very early stage of the PACL project.
3. The PACL project is an outpost of legal globalization in the region, shaped to reflect the Asian perspective. With respect to the framework of transnational law, the idea of the PACL, similarly to other regional model rules, reflects a global migration of patterns that contributes to the harmonization of legal rules on a

[185] Soft law is a legal regime parallel to national laws. It will therefore perhaps not interfere with mandatory rules of respective countries, but its practicability depends grossly upon its authority. See Durovic, *supra* note 112, p. 203.

[186] See *supra* note 28.

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regional scale, yet at the same time is deemed to be contradictory to globalization, because it concerns norms that are distinct from the global ones. The entire debate about the harmonization of Asian law is structured as a contraposition of the particular and the universal.[187] The authors of the PACL would like the project to respond to globalization by securing a place for so-called Asian values (see Section 3.2) in international commercial transactions, and by retaining particularities while harmonizing the rules with the globalized standards.[188] It is doubtful whether the PACL project really "is not the result of cherry picking" and "takes different approach from the international model laws" as Young Jun Lee argues.[189] Especially the statement that "Principles of Asian Contract Law should not stop at reflecting the particularities of the Asian jurisdictions, but should strive to become part of the world's civil law codes"[190] sounds unconvincing. The pursuit towards the development of Asian contract law relates to the often-ignored issue of the alleged cultural neutrality of contract law. While it still remains the legal discipline most likely to undergo harmonization, the very idea of regional model rules calls the neutrality dogma into question. But answers are rarely simple: although the PACL drafters strive towards creating a distinct body of contractual principles, a survey of the contents of the PACL reveals the authors' strong familiarity with the model rules of the PECL and the PICC. The PACL are nothing more than an academic attempt to provide regional soft law for contractual relations—a restatement of the "law in books." As such, and due to the past occidental influences, the content of this undertaking hardly differs from the principles and model rules drafted so far in the Occident. The dialectics of globalization is merciless: you cannot have your cake and eat it too! Yet the doubts as to whether the PACL indeed reflect Asian legal particularity (see Section 2.1.3) lead to the conclusion that formal fragmentation does not have to be equated with substantial deviation from global contract-law rules.

In view of the above-mentioned remarks, the PACL project needs reconsideration or possibly even a hard course reset. Instead of exposing itself to charges and debates about the vague notion of Asia, it needs to be given clear-cut edges. Drafting contract-law rules for the whole of Asia is admirably ambitious, but is simply unrealistic. As a consequence, the project should focus on a goal that is more precise, even if less ambitious. Otherwise, the awareness of comparative legal scholars about the complexity of the Asian legal landscape will never let them trust in the PACL project. Foremost, the project needs to go beyond written law and doctrine, and embrace unofficial law. Selection of relevant jurisdictions should be limited to Asian subregion(s) (e.g. East Asia and Southeast Asia) defined not by their geographical names or the structure of official law, but by the extra-legal contexts (see Section 3.2). The contextualization would enhance the feasibility of the PACL project, strengthen its authority, and ultimately lead to success. A less visionary attempt finds justification in the practical purposes immanent in the harmonization of law. Its feasibility depends on realistic initial assumptions. A fixed list of research objects together with regular use of the already established working method (see Section 2.1.2) would provide a solid foundation for the project. Theoretical discussions on the meaning of "Asia" would be left aside to eventually enrich comments on the outcome of the project, not on its prerequisites.

[187] Glenn, *supra* note 90, pp. 12, 95–6.

[188] For instance, Chinese contract law is strongly modelled after the CISG. See Leng & Shen, *supra* note 168, pp. 67–9.

[189] Lee, *supra* note 23, p. 8.

[190] *Ibid.*, p. 3.

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Last but not least, it bears repeating that the PACL project is a private-law-making academic initiative. Its potential applicability in legal practice depends thus mainly on scientific—rather than political—circumstances. This seems to be an advantage, since the political factors will not influence the endeavour. However, the results of restating the contract law of the Asian jurisdictions may eventually influence the future political initiatives. The comparison made by Shiyuan Han between the PACL and the PECL[191] seems therefore to be prophetic: the lack of regional political integration cannot burden the initiative, but it cannot enhance it either. Therefore, it is unlikely that the PACL project will ever become anything more than a purely academic enterprise. Without reconsideration of its prerequisites, prompt results of the overambitious PACL project should not be expected. However, it does not mean that the PACL are not welcomed. On the contrary, the European experience shows the importance of scholarly co-operation for the promotion of mutual understanding among jurisdictions. Despite all the obstacles and objections, the PACL should definitively be perceived as beneficial to the elaboration of a consensus among scholars, and may foster the development of Asian legal science and identity.[192]

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[191] Han, *supra* note 6, p. 590. Cf. Jansen, *supra* note 2, p. 77.

[192] Cf. Comparato, *supra* note 107, p. 132.

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