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GLOBALISATION AND THE CHALLENGE
OF ASIAN LEGAL TRANSPLANTS IN EUROPE

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

The choice of the term of ‘legal transplants’ in this article, which discusses the laws of Asian diasporic communities in Europe, may seem somewhat strange since Alan Watson (1974, 1993) famously used the term to the consternation of socio-legal and comparative law scholars. Watson used the notion of legal transplant in the very narrow and limited sense of the transfer of a legal rule from one jurisdiction to another, and did not seem to consider it necessary to acknowledge the strong determining role of culture of the ‘sending’ or ‘receiving’ society when assessing the fate of any such rule. There is no doubt that Watson was working with too abstract an idea of transplantation, and with too narrow an idea of law.¹ The term ‘legal transplant’ in this article is more consonant with that used by Masaji Chiba (1989: 179) who defines it in the wider sense of a ‘law transplanted by a people from a foreign culture’.² Very pertinently, Chiba (2002: 20-21) includes the transfer of law through the migration of people from one place to another in his concept, specifically mentioning the immigration of people from the Korean peninsula as having involved ‘probably the first transplantation of foreign law to Japan’ (ibid.: 21).

The issue of Europe and its relationship with Asia has also to be confronted. In this context, one could mention the connections of ancient times that gave rise to enormous advances in knowledge, science and technology in Europe through Asian influences. Those connections have been repeatedly renewed and led to the further development of Europe, but also to the subjugation of large sections of Asia under colonialism and now under more recent pressures of globalisation according to Western terms. These challenges are being faced by Asians by their own counter measures it seems, and it is far from clear whether globalisation is necessarily following Western dictates; rather it increasingly appears as if these have been complex processes involving, not one-way, but multiple exchanges and *globalisations*, including those of peoples, laws and legal traditions (Glenn 2000: 47-50, Menski 2000: 1-5, Shah 2005a).

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¹ Watson’s thesis continues to provoke discussion as seen by some essays in Nelken and Feest (2001).

² Chiba (1989: 179) also recognises a narrower sense to the term which he defines as ‘the state law of a non-Western country transplanted from Western countries’.

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

The very concept of 'Asia', essentially Western, and defined primarily as Europe's other (together with other 'others' such as Africa), is also linked to this problem in so far it rests on the assumption of the homogeneity of Europe (Chaudhuri 1990: 22-23). One of the main threads of discussion in this paper is that that assumed homogeneity, in itself unsustainable (Legrand 1996), is increasingly called into question in the legal field through the establishment of Asian diaspora communities in Europe. The separation of Europe from Asia is all the more remarkable considering their geographical contiguity, and lends further credence to the view that the differentiation lays not so much on the geographical as on the ideational plane. This sharp apparent difference means that the long process of exchange between Europe and Asia has also seen its fair share of suppression of the same. Let alone the impact of other ancient Asian cultures on European thinking about law, we even know far too little today of the more recent impact of Islamic legal ideas on the development of the common law (see Glenn 2000: 208-210).

Therefore, having somewhat unwisely set myself the topic of Asian laws in Europe I also have to acknowledge that I use the notions of 'Asia' and 'Asian' somewhat loosely. Otherwise what should we make of say Islamic law since, although large sections of its following have Asian origins, it ranges across continents today? Should I insist that Asians from Africa or the Caribbean who today live in Europe have no familiarity with and have not been affected by other local legal traditions in those places? I only have to think about the number of Swahili words that are assumed to be part of the normal vocabulary of a Gujarati with East African origins, while Swahili itself draws on a rich resource of Asian vocabulary combined with Bantu syntax.³ Why should we suppress these hybridities even as we engage with newer processes of hybridisation in Europe? Indeed, I hope that I would not have to explain this in detail to an Asian readership, whose members come from cultures that are inherently hybrid and can handle plurality - including legal plurality - with ease, unlike the case in Europe. It should be no surprise therefore if you detect some level of slippage between the terms 'Afro-Asian' and 'Asian' in this discussion, as our rough and ready categories often tend to fail us.

³ The world is replete with such examples of hybridity. I was impressed to learn, at the first European conference on African Studies 29 June – 2 July 2005 at SOAS, that in Senegal the fascination for Indian cinema has led to Indian film societies being formed members of which excel in the art of imitating the dances performed in those films, as well as to learn about the activities of Chinese businessmen in Namibia. On Swahili see Lodhi (2000).

AFRO-ASIAN SETTLEMENT AND THE MULTICULTURALISATION OF EUROPE

The Asian presence in Europe is impossible to date with any exactitude. We also know that one of Europe's oldest Asian minorities, despised wherever they have settled, is the Roma group. We also have some writers who record the long South Asian (Visram 2002) or Muslim (Ansari 2004) presence in Britain, for instance. This article has the more modest task of examining the rather recent developments mainly in the post-Second World War period, during which time the size of Asian populations in Europe seems to have outpaced that in any known previous era.

In the early post-war years many people from the Southern European belt and much further afield in Africa, Asia, and the Caribbean were recruited as workers by state industries, or by private firms often through networking among migrants themselves, while others came as a result of insecurity that followed decolonisation, such as the South Asians from East African countries. The individual patterns in different countries of North West Europe varied depending on historical and cultural ties as well as decisions about the sources of labour supply. While Britain and France, for example, relied mainly on former or existing colonies, Germany relied on countries in Southern Europe and Turkey. The fairly large-scale movement also set in motion the establishment of translocal connections between Europe and regions in the South facilitated by networks of kinship and friendship, best encapsulated in the Chinese term *guanxi* (Chen 2001: 45-50), which were later built upon to organise the Afro-Asian colonisation of Europe, mainly in the cities.

This process was given a major fillip when recruitment stops occurred, first when the British scaled down work vouchers to a minimum after the Commonwealth Immigrants Act 1962, and in other European countries from 1973/74. The patterns across countries are quite striking and, although they have been fairly well documented (for an overview see Castles and Miller 2003: 68-93, 220-254), it is worth reviewing some main lines of development here. The consequence of these official recruitment 'stops' was not a limitation of the Afro-Asian presence but a major shift in the *type* of migration: to family reunification and family formation along the translocal networks that were already in place. The immigration of men of working age came to be outnumbered by that of women and children. New spouses were also sought.

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

From the 1980s onwards, these trends have also been evident in the previously labour sending Southern European belt, and are currently also in motion in some Eastern and Central European states that joined the EU in May 2004. We therefore

recently saw squabbles about the establishment of a Chinatown in Rome's central area of Esquilino. Laura Casanelli, a researcher is quoted (by Williams 2004) as observing:

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

Clear analysis of these recent trends is, however, occluded by the lack of a positive policy framework not only because their EU involvement entails pressure on these countries to tighten controls at the EU's southern and eastern wings but also, as Casanelli hints, because of different concepts of 'integration' at work.⁴ That these countries too have been attracting workers, often on an irregular basis, from further south and east is, however, quite apparent, while there are already non-European settlements at somewhat advanced stages in countries such as Italy and Spain, of Moroccans, Senegalese, Chinese, Bangladeshis, Sri Lankans and so on.

Much of the above picture is made even more complex when we consider recent asylum migration to all parts of Europe. Effectively these represent new phases of ethnic colonisation from places such as Vietnam, Iran, Sri Lanka, Turkey, Afghanistan, Iraq, China, Nepal, etc. Legal scholars on the other hand have focused far too much, in my view, on official developments in asylum and refugee law, at the expense of examining in any detail the role of networks and their impact in influencing migration and settlement, and indeed in mitigating the impact of a 'strong state' approach to controlling asylum migration (Shah 2005b).

THE ROLE OF SENDING STATES

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

The more recent movements of the post-war period do not seem to have evoked much response in the sending states, and where there has been, it is relatively ineffectual. Until much more recently, for example, India appears to have neglected much of its diaspora, and interest was generated mainly when some exiles abroad began to pose a threat to national security (Malik 1997: 87-143). While some states may have facilitated movement abroad through inter-state agreements, as with Turkey, it seems that few took active steps to support people once abroad or really understood how to benefit from the presence of a diaspora population in Europe. This

⁴ Calavita (2005) excellently develops these themes for Spain and Italy pointing out the contradictions inherent in the public discourse of 'integration' and the realities of the migrants' officially sanctioned exclusion.

seems to be the case even as much capital was being remitted to areas of origin through translocal connections. Part of the explanation might be that, for countries such as India, Pakistan, Bangladesh, Sri Lanka, Thailand, Philippines and China, a complex diaspora network was in place, not just in Europe but, to different degrees, within Asia itself and in Africa, Australia and North America (see Castles and Miller 2003: 154-177). It is possible that the difficulty of assessing how advantages might be drawn from it prevented any firm stance being taken. Much of the process of emigration and diasporic reconstruction was taking place unofficially through the use of kinship and friendship networks, and the lack of firm interest by sending states may also be explained by the more general Asian preference for self-regulation, and thus minimal state intervention, among the constituent communities. This may be contrasted with European states who often supported the colonisation of overseas territories by their people.

In more recent years, we are seeing a change of tone, however, as sending states have begun to accept the possibility of dual nationality or easier relinquishment of nationality, while various sorts of overseas national status are being experimented with. Thus Turks and Kurds abroad are granted the possibility of renouncing their Turkish citizenship, but with an option to retain certain privileges in Turkey (Çiçekli 2003). For India, the Person of Indian Origin Card seems to have been only a first step in the establishment of an Indian Overseas citizenship status. The Philippines, amidst a greater policy profile for overseas migrant workers, have also eased conditions on dual nationality. The precise effect of these reforms remains to be evaluated, with diaspora people obviously varying a great deal in their reactions to such developments. But the size and the financial muscle of diaspora communities has had some role in establishing them as serious actors in the process of inward investment, and possible bridge points of influence in Europe.

The second factor that involves a role for the sending states' legal order for diaspora populations is the field of private international law or conflicts of law (Foblets 1999, Foblets 2003). While there is no denying the importance of this aspect of law, which is really a branch of the 'host' national legal order, some critical observations about its limited role need to be outlined. Its usefulness is limited largely to facilitating the recognition of legal acts that occurred in the pre-migration stage although, for those migrants who behave like international commuters, going back and forth between states and ordering their lives accordingly, its importance may be somewhat heightened. Conversely, for acts that take place in diaspora, the domestic state places severe limits on recourse to overseas law, while subsequent generations in Europe might find it even less useful.

In general, and notwithstanding the role of some Afro-Asian sending states in concluding agreements with host European states regarding matters of private international law, European states can be seen to make applicability of Asian laws in this field also subject to overriding considerations of public interest or *l'ordre public*. Further, the positivist assumptions about law in Europe tend to distort appreciation of Afro-Asian personal laws and therefore often result in their misapplication. Especially when immigration control concerns invade the legal process, we tend to find further possibility of distortion.

Asian states tend to adopt a quite passive position when questions of 'their' laws come up in official European legal fora. This picture is quite different to that prevailing when colonising European states tended to push at official level for the extraterritorial application of law to 'their' people, thereby also avoiding recourse to Asian legal principles. In this official gap we find that lawyers from Asian countries

will also tend to ratify the positivist assumptions of their European counterparts, blocking from view the socio-legal position of those most directly affected. Shared assumptions of legal modernity among professional lawyers therefore often do more damage by undermining Asian legal principles at this level (Shah 2005a).

SOCIO-LEGAL NAVIGATION: ASIAN LAWS IN EUROPE

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

A number of elements play a role in limiting the range of analytical focus here. A significant aspect is the positivist orientation of European law and legal thinking which means that Asian laws, which are normally transplanted as a result of migration and settlement of people at the socio-legal level, are not seen as being properly 'legal' phenomena. Rather they are seen more properly as 'customs', 'cultures' and 'religions', and therefore as extra-legal matter. That Asian laws can operate independently of state sanction seems a hard principle for many European lawyers and official authorities to accept.

There are also problems of according Asian laws a respected position within European legal orders, the latter being seen as applying a more developed form of law, while the former are required to conform to European laws as a condition of acceptance. In a book on *Islam and European legal systems*, its co-editor Silvio Ferrari (2000: 5), put the matter of recognition of non-European principles thus:

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

creed professed would be incompatible with this fundamental principle of European law.

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

Nevertheless, in jurisprudential writing there are signs that the principle of general legal uniformity in Western law is increasingly questioned. Cotterrell (2003: 209-236) writes of the growing 'jurisprudence of difference' in Anglo-American law, while on France, Freedman (2004: 127-141) writes, somewhat more pessimistically, about *le droit à la différence*, the right to be different. Menski (2005) has recently pointed out that European legal systems have not managed to keep non-European laws at bay by a simple refusal to recognise them. Rather they too acknowledge, as Ferrari does above, that certain principles, such as the freedom of religion, would have to entail some concessions. Precise patterns at the level of various national legal orders and the level of the EU of course vary depending on a range of factors. Thus the absolutist refusal to countenance a compromise of the principle of uniformity of law has to be attenuated, despite many misgivings.

From discussions on the status of Muslims and Islamic law in European countries, which have dominated the agenda on ethnic minority laws in recent years, it seems that a pattern is emerging among states to look for ways to incorporate minority norms. As Ferrari advocates, these should be premised on a predetermined and somewhat fixed notion of the relationships between religion, politics and law. However, these established relationships have more or less generally relegated religion to the 'private' sphere and made politics the exclusive agent of law making. Furthermore, official measures furthermore tend to start with the assumption that other minority groups will conform to the modes of organisation of Christianity which are in some way already accorded a measure of official recognition (Ferrari and Bradney 2000, Maréchal 2003, Ferrari 2003). Although Islamic structures do not conform to such expectations, new institutions have been established, or representative spokespersons have been sought from within the Muslim fold, to communicate with the state. However, such drives often distort legal structures within Muslim communities and confer legitimacy to religious spokespersons that they may well not enjoy under other circumstances.⁵ Much less well founded is the assumption, again reflected by Ferrari above, that it is solely upon 'religion' or 'creed' that minorities in Europe will base their legal relationships. This leaves out large chunks of legal experience among ethnic minorities of all backgrounds.⁶

My colleagues in London and I have found the theoretical work by Masaji Chiba (1986, 1989, 1998, 2002), formulated initially through comparative work

⁵ In the aftermath of the 7 July 2005 bombings in London one can see the British state grasping for persons among the Muslim communities who can be called upon to answer for and control such events, but their representativeness among Muslims is doubtful, although this is rarely communicated through the media and is possibly not understood well enough by officials themselves.

⁶ On a related matter, Staal (1996) provides a powerful critique of the concept of religion as essentially centred on Western, predominantly protestant assumptions which are not applicable to Asian realities.

among Afro-Asian legal systems, to be immensely valuable in conceptualising the new patterns of legal pluralism being experienced in Europe. We draw upon Chiba's concept of 'unofficial law' to denote the place of ethnic minority laws in Europe, which exist in creative tension with 'official law', but operate according to their own values, which Chiba would term 'legal postulates'. More recently, Chiba (1998) wrote about the problem of 'legal pluralism in conflict' which exists especially when a choice of law is presented and one or other of opposing alternatives is preferred because of its value in cultural terms. This scenario is offered by Chiba partly as a means of balancing the general presentation of legal pluralism as one of a harmonious working together of the different levels of law.

The most fascinating and vibrant aspect of Asian laws (and for that matter all ethnic minority laws) in Europe is their reconstruction in the socio-legal sphere. Partly, this occurs as a result of the above-mentioned relative inflexibility of official legal orders to according any significant measure of recognition to Asian laws in Europe. Evidence from Britain, highlighted initially by Menski, shows that South Asians (Menski 1993) and Muslims (Pearl and Menski 1998, Menski 2001, Yilmaz 2005) have responded to official positions by developing processes of hybridisation whereby reconstruction of Asian laws takes place by a constant taking-into-account of the official law. Menski (1993) therefore writes about hybrid South Asian laws that readapt legal knowledge by building in the requirements of official laws when thought necessary or expedient. Essentially this is a form of legal pluralism with the dynamic adaptive processes taking place, not at official level, but in the socio-legal sphere. Thus there is a whole range of intermixtures between kinship and societal structures, religion and state as new accommodations are found.

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

Existence in a constant state of conflict and non-acceptance reinforces certain processes at the socio-legal and religious levels as known legal capital is redeployed in competition with official law to provide self-help legal solutions. It will hardly be news to those familiar with the working of Asian laws that they have in-built know how on self-regulation so that much legal activity, for example in the form of dispute resolution or social healing, can take place away from official fora altogether (Menski 1993, Bierbrauer 1994, Ballard 2005). This of course does not solve the problem of cross-cultural legal communication in interaction with official law, but can be seen as self-preservation strategies that may gain more importance as privatisation of justice moves apace. The most prominent example in the British case is the establishment of '*shari'a* councils' among Muslim communities that come in to fill some gaps in official legal protection, possibly where the more immediate fora within family or kinship structures have failed. Similar structures are also established in London among Kurds from Turkey. No policy has yet been worked out as to their relationship with official structures, however, perhaps yet another case of British muddling through.

So far I have written in quite general terms of Asian law and Afro-Asian laws being reconstructed in creative interaction with official laws. However, there are also

limits to the extent we can generalise about such developments since each case of diasporic legal reconstruction occurs in a culture specific way. As noted above, Asia is defined in opposition to Europe, but this opposition postulates homogeneity in Europe, while ignoring Asian diversities. The deployment of Asian laws in Europe, in the socio-legal, unofficial sphere at any rate, undermines the fiction of European homogeneity of values and laws further, but also calls for analysis of Asian legal diversities. Menski (2000) finds that there is no globally agreed definition of law, and finds it necessary to work through culture-specific conceptualisations of law for successful comparison. This applies as much in the case of Asians living in diaspora, where each legal community builds on its own inherited assumptions of law and builds in requirements of the state legal order. Thus Muslims are busy reconstructing an *angrezi shariat*, a British Muslim law (Pearl and Menski 1998, Menski 2001), while Hindus are said to be living by *angrezi dharma* (Menski 2003: 592) in the British context.⁷ Should we not also discuss principles of European *li* for Chinese communities, and so on for other Asian diasporas, as aspects of the globalisation of Asian laws? This is one of the critical challenges to the analysis of Asian laws in Europe. If Asian legal principles, in all their variety and culture specificity are being readapted to the European environment, in what manner is this being done and what changes take place as a consequence? We are only just very near the start of the process of understanding such developments and huge challenges have to be faced in so doing.

CONCLUSION

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

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⁷ Note, however, that anthropologist Roger Ballard (2005) highlights the role of *rivaj*, the South Asian equivalent of *adat*, because, as he argues, this aspect of unofficial law, rather than the religious law of *shari'a*, has greater salience as a mechanism of order maintenance among Muslims. For further discussion of the complexity of *adat* and its uses in unofficial and official fora, see Karim (1992) on Malaysia and Bowen (2003) on Indonesia. These discussions will, one hopes, assume a greater salience in Europe too as we try to sharpen our analytical tools.

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