FAMILY LAW AND CUSTOMARY LAW IN ASIA:

A CONTEMPORARY LEGAL PERSPECTIVE

Editor,
DAVID C. BUXBAUM

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I. CUSTOMARY LAW AND MODERNIZATION IN INDONESIA

In the innumerable, ever changing manifestations of reality, the realm of events, man has a special position as a behaving and acting being. Through the development of his mind, he is able to overcome the static harmony between vegetative and animal behaviour and to interact with the surrounding world in a continuous dynamic dialectical interplay between his behaviour and his environment. The decisive moment in this dialectical interplay occurs when man, with the capacity of his mind to evaluate continuously the things, relations and occurrences in his surroundings, arrives at decisions in terms of his human motivations and goals, i.e., values. What we call cultural behaviour is nothing else than value-oriented behaviour and the totality of culture is nothing more than the realization of a system of values at a certain place and at a certain time.

In the analysis of the evaluating capacity of the human mind, we discern the theoretical and economic values which are related to the progressive aspect of culture, the religious and aesthetic values which are related to the expressive aspect of culture; and the power and solidarity values which determine the social organization of culture. Through the theoretical evaluating process of the mind, i.e., our thought process, the sense images of the empirical world become knowledgeable. It is the economic evaluating process aiming at utility which uses this knowledge of the empirical world and transforms it into useful goods for the maintenance and comfort of life. The religious evaluating process, based on intuitive feeling and contemplation, brings the human mind into direct contact with the reality of the holy, the sacred, or the numinous through the receptivity of the senses. Viewed from this holy reality, the empirical theoretical and economic realities are only a small realization of the all-embracing holy reality, they are only "ash and dust." The aesthetic evaluating process faces the surrounding world which enters through the senses as the manifestation of an aesthetic reality, which like the religious reality speaks directly to the feeling and imagination. The aesthetic value we call beauty. In the social evaluating processes of power and solidarity man faces his fellow man. With the power evaluating process, he faces his fellow man in terms of power, i.e., the

urge for self-assertion, for expanding the self. The solidarity evaluating process faces the fellow man not as the power evaluating process in terms of striving, competition, struggle, rank order of power, but as essentially independent beings, valuable because of their own possibilities for unfolding and development.

The social evaluating processes of power and solidarity, representing the relationship between man and man, form the two axes of the social organization of society. The power evaluating process represents the vertical axis and the solidarity evaluating process the horizontal axis of social organization.

It is against this background of the broad social and cultural process that we will be able to understand the conflict between modern and customary law, and eventually to formulate its solution. If we have accepted the proposition that every culture is basically the realization of the six values described and the differences between cultures are differences in the characteristics and in the pattern of these six values, then all cultural behaviour in the context of a certain culture is determined by the system of values of that culture.

If the values of every social or cultural group are a more or less integrated pattern system, it is clear that in order to achieve this system of values, the relations and behaviour of the members of the group too must form a more or less integrated system. It is through *the norms* of the social group that the members of the group participate in a certain standardized pattern of social relations and social behaviour, and that understanding, and consequently cooperation, is made possible between the members of a social group. Viewed from this standpoint the norms of a social group are standardized generalizations of expected social relations and behaviour, which not only restrain the behaviour of the group members, but also mold, organize and direct them for the achievement of the values of the group.

Thus the system of social norms, which organizes and integrates social relations and social behaviour in a social group, facilitates or even aims at the achievements of the goal, i.e., the values of the social group. In the last analysis the social norms are nothing more than the dynamic manifestation of values and it is the function of the organization of power in society to determine and maintain the norms of society.[1]

[1] For a fuller treatment of the meaning and function of values for individual, social and cultural behaviour, see my *The Place of Values in the Behavioural Sciences*, Malay Studies, University of Malaya, Kuala Lumpur, 1963; further *Values as Integrating Forces in Personality Society and Culture*, to be published by the University of Malaya Press.

From this point of view the interaction and conflicts of modern positive law and customary law, which took place in the countries of Asia during the colonial period, were in their very essence cultural conflicts par excellence. The European nations, which during the Renaissance were emancipated from the religious oriented culture of the Middle Ages during the Enlightenment and especially during the 19th century, developed more and more secularized cultures. Already in the 15th, 16th and 17th centuries, they started to develop an empirical science; a technology developed, which was parallel to a continuous expansion of economic life and which gave to the European nations a tremendous physical power over other races through the development of greater and more manageable ships, and especially through the development of more effective arms. Driven by an insatiable urge for material gain and adventure, they roamed the seas and oceans, bringing their goods to the remotest parts of the world and taking home the products of other countries. It was through this seafare and trade that they gradually acquired political power over large parts of Africa, Asia and America. In the competition among themselves in their trade with the countries of Africa, Asia and America, gradually they accumulated more and more political power over distant countries, since it was through political power that they assured themselves of trade with these countries. It was especially during the 19th century, when the European countries experienced the greatest expansion in their science and technology which paralleled the tremendous upsurge in industrialization and commerce, that these modern European cultures, in which the theoretical and the economic values are the dominant and determining values, had a direct impact on the native cultures in the political context which we call colonialism. The colonial political organization attempted everywhere to change and influence the native social and cultural order to further facilitate the aims of their traders, planters, industrialists, etc., in their goals, which were determined by their secular culture.

In order to have an idea of the impact of the colonial government on the native society and culture in South East Asia, we need a short characterization of this native society and culture at the time of the first encounter. In general it can be said that in the whole of South East Asia, the native society and culture can be discerned in two aspects: first the society and culture of the upper strata, centered around the king and the court. This society was the result of a mixture of an earlier culture of the people of South East Asia with the high cultures of India

and Islam. In their political structure, they have been characterized by what we may loosely term feudalism, in which the king was an absolute monarch. The power of the king was closely related to the religious system. In the Indian system, he was a direct incarnation of God, while in the Islamic system, he was the *chalifah*. In this atmosphere of feudalism and religion, the court was the center of a refined culture, manifesting itself in refined arts and a refined system of ceremonies and etiquette. Through the power of the king the capital also was the economic center of the country with a more or less extensive industry and trade.

The second aspect of native society and culture was represented by the villages. In contrast to the feudal culture, with its bureaucratic hierarchy and its splendid arts, ceremonies and etiquette, the culture of the village was that of simple, economically more or less autarkic peasant communities, with a strong attachment to the soil and a strong bond of solidarity between its members. The religion of these village communities has been only superficially affected by the great religions and is dominated by the concepts of animism, dynamism and magic, which also form the basis of their economic thinking, their attachment to the soil and their group solidarity. In the arts, this culture was much less sophisticated than that of the court.

However great the difference was between the high culture of the courts influenced by the Indian and the Islamic cultures, and the still primitive culture of the village communities, as compared to the culture of the Europeans during the 19th century in Africa, Asia and America, both aspects of the native culture were in one very important way akin to each other. The religious value of the holy dominated both cultures; feeling and imagination played an important role in group life and the religious myth was the guiding and moving concept in the life of the people. It is clear that rational life and economic sophistication had developed further in the culture around the court, but compared with modern Western secularized culture, even this was still pre-Renaissance, pre-Enlightenment and pre-industrial.

The decisive event in the political contact between the Western colonial powers and the colonized countries was that the Western powers at an early date took the positions of the former feudal rulers, who were shunted aside or became mere Western puppets. It is interesting to see, for example, how in Indonesia the Dutch government became master of all the land through the Domeinverklaring, which was based on the assumption that monarchs are absolute owners of the land.

Through the defeat of these native potentates, the colonizing power automatically took over all their power and rights. The laws deriving from the former native kingdoms were gradually replaced by new laws made by the colonizing power. The colonial structure was formulated by these new laws, the colonial penal law kept order in the conquered areas, protecting the achievements of colonial ambitions. The civil law, the law of contracts, the law of commerce, etc., which were related to the colonial economic and trade interest, were also of importance.

It is in this new social and cultural order, administered and maintained by the colonial civil service, courts and police, and favourable to the policies of economic exploitation, that the colonial government had to decide to what extent it wished to proceed towards change of the total social and cultural order of the colonial territories. In this respect two trends were clearly discernible, one aiming at a radical change of the culture of the colonial subjects, the other restraining itself to the most necessary measures for the achievement of the colonial political and economic aims.

The first trend manifested itself with missionary zeal, aiming at the conversion of the natives to the Christian religion. Its interest was more religious than economic. This attitude was more dominant in the Spanish colonial empire, where early efforts were made to convert the natives. Thus the values and norms of the native culture were to be replaced by the values and norms of a Christian European culture.

We shall limit our concern to the second trend, since the conflict of European positive law and native customary law is primarily a conflict between a secularized, rational, individualistic and economic culture, on the one hand, and a communal and religious-oriented culture on the other. After occupying the political and administrative position of the native rulers, and promulgating the laws necessary to secure the achievement of its political and economic interest, the colonial government faced the question of how far it wanted to mix with the social and cultural life of the village masses in shaping its colonial empire. In general it can be said that there were areas where the colonial values and norms were in conflict with the native values and norms, and other areas where the two systems had very little to do with each other.

One school of thought, which consequently pursued the rational and economic logic of Western culture, attempted to resolve the conflict by contending that the whole of Western law of commerce, of contract, of land title, etc., should be imposed on the population, so that modern economic institutions and enterprises would have the greatest possi-

bility of expansion. In this unification of law, the whole native population gradually would become a part of the new social order under the regulation of modern European laws, which as we know have been influenced by the abstract and individualistic Roman law.

It was clear, however, that the backward native village population would be greatly disadvantaged in the competition with the more sophisticated urban people. In a minimum of time their valuable land would fall into the hands of economically stronger groups, consisting mostly of foreigners. Such a radical change in the possession of land would not only make real paupers of the village population, but would also uproot them from their traditional culture, creating a host of new problems for the colonial government, which neither had the will nor the energy to elevate the colonized people to their own standard of living.

It was in this context that a variation of the above scheme presented itself as a logical solution. The colonial government imposed its laws according to its needs, and left the population to its own norms where there was no contradiction in interests with colonial governmental policies. Thus the concept of maintenance of customary law was born and acquired an official status and sanction in the legal system of the colonial government. This idea of different types of law for different classes of residents was considered the liberal attitude toward the cultural heritage of alien peoples, and received strong support from a legal theory popular in Europe in the 19th century. As expressed by F. K. von Savigny, the central concept of this "historical school" was that law is the evolutionary product of a nation's growth; it is part and parcel of a national culture and cannot be imposed from outside the culture. Seen as a general historical phenomenon, this theory of course is invariably true: it is easy to look back into history, and find the functional position of law in a culture.

The chief analyst and proponent of this theory which celebrated its highest triumph in the Dutch East Indies was C. van Vollenhoven, whose ideas have dominated both Dutch and Indonesian legal thinking on the kind of law to be put into practice for the Indonesian people over the last 50 years. By using ethnological concepts and comparing the existing customary law in the various regions of Indonesia, van Vollenhoven demonstrated with great skill that there were certain common elements in all. He found, *inter alia*, (1) a preponderance of communal over individual interests, (2) a close relationship between man and the soil, (3) an all-pervasive "magical" and religious pattern of thought, and (4) a strongly family-oriented atmosphere in which

every effort was made to compose disputes through conciliation and mutual consideration. With these basic common elements, the great variegation of Indonesian customary law could be seen as expressing a fundamental unity, which had in various places through the accidents of history undergone certain changes—through the intervention of Indonesian-Indian, Indonesian-Islamic and later Dutch governmental and legal structures. By the masterly quality of his writing, van Vollenhoven was so successful in revealing the peculiar beauty of this customary law that a whole new generation of Indonesian jurists, who wanted their people to rise as rapidly as possible to the level of other progressive nations, grew up willing to accept his ideas of customary or *adat* law as essentially the most satisfactory basis for a national legal system.

In the broadest sense van Vollenhoven found in Indonesia only what he himself, as a European reacting against the individualism and formalism of European law (especially its Romanized civil law), was looking for, namely, certain primordial elements in ancient European customary law, such as had existed among the Germanic tribes before they were conquered by the Romans. In this light one can see that the exaggerations in his analysis and his picture of Indonesian customary law were the results of his own personal ideals and sentiments, which in turn were simply the manifestations of certain currents within one legal school flourishing in Europe at that time. But one can also say that in Indonesia this was the beginning of a sort of romanticism of customary law. It was adulated for its "wholeness" and its subtle refinement in satisfying the community's sense of justice and feeling of mutual responsibility.

But the attempts to put this theory into practice once again revealed the paradoxical dualistic quality of colonial society. Although it was repeatedly stressed that for the Indonesians law was to be a natural outgrowth of their own society, it was yet inconceivable that in a dualistic society where one group dominated another the concrete task of giving form and content to this customary law would be performed by the native people living in rural village communities. In the general framework of colonial relationships it was inevitable that the final word on the form and content of customary law would lie with van Vollenhoven and other jurists of similar views. This meant, essentially, that customary law could only be applied where it did not conflict with the interests and policies of the colonial system. Nevertheless, the colonial government could now congratulate itself, not only for not undermining, but even for protecting the cultural life of its colonial subjects.

In Dutch colonial history, this "customary law" school goes indeed by the name of the "ethical" group. It differed from the "reactionary, capitalistic liberal" group which sought to impose written European law on the Indonesian people in order to facilitate the smooth running of its plantations and various industrial and commercial enterprises.

The facts of modern economic life demanded a clearly articulated written law allowing the entrepreneur to make accurate calculations as to the consequences of business agreements over a long period. Giant economic organizations (often with branches in other parts of the world) were helpless in the face of an unwritten customary law, familial in character and adapted to the small-scale community, where each individual was known personally to his fellow, and where law could be adjusted to varying circumstances.

Should we, however, be surprised at the ease with which the "customary law" group, with its strong "ethical" position, succeeded in winning the hearts of the younger Indonesian jurists, thirsty for praise of the values of their society and culture, which had suffered so many humiliations in the last centuries? Their new awareness of the values of this legal system, handed down from generation to generation, so idyllically depicted by van Vollenhoven, gave them a great feeling of confidence in themselves and in their people. We should, therefore, not be surprised to find paeans of praise for this customary law, flowing (on more than one occasion) from the pen of romantics like the late Muhammad Yamin. It was full of poetry; and within its framework, man's spirit was as yet unfragmented, unlike in the modern world. Art and religion could still be united within the forms of law.

And even apart from this, the traditional customary law had created a legal structure which protected the land rights of economically unsophisticated, poverty-stricken Indonesians from the depravations of rich, world-wise foreigners who were eager to buy up their land. If we also remember that those who wanted the introduction of modern European law into Indonesian life were precisely those European entrepreneurs who are usually called "capitalists," and who represented to Indonesian eyes the worst possible aspects of colonialism, it is not hard to see why most educated Indonesians supported the champions of customary law—van Vollenhoven and his followers.

In consequence, a group of Indonesian jurists rose to prominence who were fully persuaded that customary law was the legal system most truly "in harmony" with the Indonesian idea of justice. They were the products of the teachings of van Vollenhoven at Leyden and later of

Ter Haar and Supomo at Jakarta. They never really understood that the peculiar synthesis of nationalist sentiment and ideals of Indonesian progress within the modern world, expressed by their whole concern for customary law, soon brought the development of Indonesian law and Indonesian legal thinking to a hopelessly confused and tangled impasse. All clearly defined goals were lost sight of; and any rational understanding of the problems of law, as faced by Indonesia in the 20th century, completely vanished.

This Indonesian case shows clearly to what confused legal thinking the doctrine of customary law has led. The Dutch East Indies is the place where the concept of customary law has been developed most consequentially and in the most sophisticated manner, due to the great personality and scholarship of van Vollenhoven and to the vigour of customary law among the Indonesian people. Thus in the Dutch East Indies customary law was, and is, not only validated as to the rules for marriage and inheritance, but also for landrights, and for various political and economic activities within the village community. In some cases it also has the character of administrative and penal law. Traces of this trend are of course also discernible in other ex-colonies in South East Asia, where at least the laws of marriage, of inheritance, etc., of the native population were left untouched. These and other religious problems were too complicated and subtle to be handled by a foreign government, while at the same time they were of very little relevance to the colonial political and economic interests.

In order to understand the *cul-de-sacs* to which the doctrine of *adat* law can lead, it is very instructive to analyze the Indonesian case further in the contexts of the ideals of an independent modern Indonesia.

First of all the acceptance of the doctrine of customary law tends to split Indonesia up into various customary law areas, since customary law, despite van Vollenhoven's discovery of its basic unity, is in fact nothing other than the norms of social behaviour of small, isolated communities. Customary law is thus a great handicap to the development of a unified Indonesian civil law, attuned to modern needs and conditions, since it is deeply rooted in the sacred tradition of a culture which has vanished or is in the process of vanishing. In facing the necessities of progress in modern times customary law favours an irrational, familial, unbusinesslike and conservative attitude. It tends to keep the village in its old isolation and prevents the village man from participating in modern intellectual and economic progress. In colonial

times customary law was in part defended as protecting the landrights of ignorant and poverty-stricken Indonesians, but after independence it gradually but obviously became a barrier to economic development along modern lines.

Let us take for example the land-law in the Minangkabau territory. In this area with a powerful and highly articulated customary law on property rights, the entire land, including mountains and jungles, has usually long been divided up among numerous clans and families. It would probably be fair to say that there is no land there now which does not already belong to some group. Anyone not belonging to one of the Minangkabau clans or families has absolutely no chance of acquiring a plot for himself (although there may be plenty of untilled land) unless he becomes a member of one of these clans or families by a special customary law ceremony. The fact is that while it is often easy for Minangkabauers to buy land in other parts of Indonesia (in Java, for example), it is almost impossible for an outsider to do the same in the Minangkabau territory. The central government itself has run into this obstacle in its various efforts to stimulate a transmigration program. It has become quite obvious that people who come from other areas of Indonesia are going to find it very difficult to acquire and open up land in this area, whether for agriculture, cattle-breeding or industrial purposes. Thus large areas of useful and perhaps necessary land remain untilled and unusable.

Another impediment, which has long been felt, is the vast number and variety of laws governing inheritance in the customary system. As intercourse and interassociation between Indonesians have grown steadily over the years, this legal heterogeneity has caused great legal complications. Eventually inter-regional customary law either becomes hopelessly confused, or loses its use and validity for ordinary purposes.

We can thus see that, though it was not suspected at the time, the real interests of a progressive independent Indonesia demanded a style of legal thinking which differed radically from van Vollenhoven's but could have been quite in harmony with the capitalist entrepreneurs, who were seeking to establish throughout the world a clear written legal system based on the general assumptions of modern business enterprise. The development and growth of a modern Indonesian state required a clearly articulated legal system which as far as possible would reflect the unity of Indonesia, and yet also adapt itself where possible to the models of other modern nations. And for this purpose, a customary

law based on small isolated village-cultures was of very little use.[1]

It is clear from this Indonesian case that a piecemeal change of the *adat* law will only result in a complicated patch-work, which will not be to the advantage of systematic modernization of the law, nor to the social and cultural integration of the country. Moreover it is the very spirit of *adat* law which is unfavourable to efforts toward modernization—now the most urgent problem in the countries of Asia. If we still sometimes hear some modern Asian intellectual praising customary law, it must be considered the expression of a confused mind in the face of the tremendous spiritual and material change which is taking place in Asia and elsewhere. If he is a man of the modern world, very often his adulation of *adat* law is the expression of the nostalgia of a tired modern man for a more peaceful archaic society. Or it can also be the reaction of a modern nationalist who, with the realization of the political and economic defeat of his culture during the last centuries, attempts to acquire some self-confidence and self-satisfaction in the thought that customary law is the manifestation of higher spiritual values than those of the individualistic, abstract and materialistic laws of modern culture. But this kind of appreciation of traditional law as a part of the traditional spiritual culture is the illusion of a negligible number of people, as is witnessed by the fact that so very little of this concern has been crystallized in the modern constitutions of the newly independent nations of Asia. Even in the modern educational system of the Asian countries we discern very little of the great religious and aesthetic values of the region, not to speak of the concepts and ideas of traditional customary law.

Indeed the cultural change which has taken place in the Asian countries is greater and more radical than we usually profess to accept. The norms of customary law are relics of a time forever past, for modern, secularized culture has penetrated even into the holiest of our holy religions. The time is already long past when we can speak of a controversy between the cultures of the Western and Eastern nations. Our constitutions and our systems of education clearly reveal that we have already accepted the modern way of thought and life, dominated by modern political, theoretical and economic values. Whereas formerly it was the colonial government which imposed the concept of modern positive law, now after independence it is the modern Asian leaders

[1] For the description of the conflicts in Indonesian *adat*-law, I have drawn heavily on the chapter "Confusion in Legal Thinking" in my work *Indonesia in the Modern World*, published by the Congress for Cultural Freedom, New Delhi, 1961.

themselves who decide to create the modern laws which are necessary for the modernization of their countries.

With the concept of the six cultural processes (which can be combined into three processes, namely: the progressive cultural processes, determined by the theoretical and economic values; the expressive processes determined by the religious and aesthetic values; and the social organization processes, determined by the power and solidarity values), not only can the tremendous complexity of any culture be reduced to its simplest common denominator, but we can analyze and understand the confusing criss-crossing of currents and countercurrents, the complicated conflicts and tensions, as well as the failures and successes in the great transformation of Asian cultural life. In the final analysis the kaleidoscopic confusion in the Asian cultural scene of today can be considered as a short recapitulation of the development of Europe after the Renaissance. European culture, which during the Middle Ages was dominated by religion and the value of the holy, gradually made way for a more secular culture in which science, technology and economics play a most important role. This process of secularization and rationalization has brought Western culture to an unprecedented vitality and activity, resulting not only in the development of science, technology and economics, but also in the conquest of a large part of the world by European nations.

In the most general sense, we can say that at the time of early contact of the Asian people with European sailors and merchants, the Asian culture, dominated by religious beliefs and tradition, was more or less in a stagnant position. It was in the unpleasant contact between the colonizer and the colonized during the last century that Asian people came to realize that in the superiority and productivity of the European secular culture in science, technology and economics lay the very basis of their defeat and humiliation by Western conquerors. And when the Western colonizers opened the possibility for a small number of Asians to learn science, technology and modern business, neither the Europeans nor the Asians expected that this decision would have the most devastating consequences for the power position of the Europeans in Asia, as well as for the continuation of the traditional, religious oriented culture of Asia.

We now know that these few Western-educated Asians opened the struggle against Western colonialism in the form of nationalism, resulting in so many new free nations in the Asia of our day. On the other hand, it was also this Western-educated minority which struggled

against the stagnation, apathy and backwardness of the old society and culture. With all its power and knowledge, it attempted to change its own society and culture in the direction of the culture of post-Renaissance Europe. From a cultural point of view, Western-educated Asians became allies of the European in the creation of what we call modern culture, i.e., secular, progressive culture, dominated by science, technology and economics.

It is clear that in this great modernization process in Asia static customary law acquires another coloration. Primary interest is now in the change of society and culture, not in the conservation of the old. A progressive secularized culture is replacing the static, expressive, religious-oriented culture. And it is logical that in this cultural attitude, law has a more dynamic function than that formulated in the theory of von Savigny's historical school. Law is not just the outgrowth of a developing society, but it has a more important role in stimulating and guiding a society's growth. In this sense law is the twin of education, each helping the other to shape the new society and its culture. And it is in this sense that we can fully understand the building of great legal structures such as the modern constitutions of the new nations of Asia, out of which emerged a host of other laws regulating the growth of the new order in economic life, in education, in land reform, social relations, etc.

Does all this mean that religion and other higher spiritual values are vanishing in the new nations of Asia? Undoubtedly not, since it is clear that science, technology and economics will not be able to solve all human problems. For a full understanding of this complex cultural change, it is necessary to refer also to the crisis which has taken place during the last century within the modern culture of Europe and America, as described by writers like Spengler, Toynbee, Sorokin, Schweitzer and others. The complaints in modern countries about the demoralization of the youth, the increasing emptiness of life, the debasing of moral and aesthetic standards in mass culture, the various kinds of fear, anxiety, frustration, neurosis and psychosis resulting from a loss of the ethical integrating force in the personality, urge many Asians to consider their own eagerness for modernization in the light of a broader concept of their culture, in which the progressive and expressive aspects should come to a fuller synthesis.

It is out of this consciousness of the crisis of modern culture with its successes as well as its failures and aberrations that personalities like Tagore, Iqbal, Buber and many others arise who attempt to provide the

modern Asian with a deeper anchorage in his awareness of the religious foundations of life, and a deeper enjoyment through the unfolding of aesthetic creativity. It is interesting to see how through their broadened concept of the modernization of their cultures these Asian cultural thinkers come to an early alliance with the great cultural thinkers of the Western world, men like Schweitzer, Teilhard de Chardin and others. From this point of view, the struggle between the progressive and the expressive aspects of the cultures of Europe and America and the conflicts in Asian cultures are gradually coming to resemble each other.