STREAM READINGS

LAW, RELIGION, GENDER AND THE STATE IN SOUTHEAST ASIA

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Law, Religion, Gender and the State in Southeast Asia

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Description

This stream will examine past and present legal traditions in Southeast Asia, focusing on their diversity and the reality of legal pluralism in the region. We will consider ideas about law, legal history and the protection of cultural heritage through case studies of Cambodia, Indonesia, Myanmar, Singapore and Thailand. By canvassing these complex social, political and legal systems, the stream will explore the role that law plays in conceptions of religion, gender and the state.

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CHAPTER 8

Selfhood and Archipelago in Indonesia

A Case for Human Polyversality

Vanja Hamzić

Je suis l'espace où je suis

—Noël Arnaud
L'état d'ébauche (1951)[1]

Indonesia is today the world's largest archipelagic state, where more than 260 million people inhabit around 6,000 of the total 17,508 islands.[2] Over 300 different ethnic groups, speaking some 742 languages and dialects, hail from these islands. The turbulent tides of trading, migration and warfare have raged along their shores for centuries, moulding the syncretic 'ethnoscapes',[3] wherein an islandic self is dynamically negotiated between the allegiance to local narratives and the need to adjust to foreign winds, be they of Indic, Arab, colonial European or some other more or less distant origin. The archaeologies of cultural memory in Indonesia, typically fashioned as ethnographic studies, reveal a vast archipelago of locale-specific (and, in many instances, island-specific) cosmologies guiding the community's ethos, hieropraxis, forms of kinship and an individual 'habitus'.[4] While nominally linked to Muslim, Christian or Hindu credos, these epi-narratives resiliently enshrine the islanders' *genius loci*—the spirit of the place imbued with distinct meta-histories and

worldviews. Hence, the anthropologist Clifford Geertz has famously described the Indonesian heterogeneous Muslim communities as 'remarkably malleable, tentative, syncretistic, and, most significantly of all, multivoiced'.[5]

While Indonesian cultural and spiritual plurality is broadly acknowledged, it is less readily and carefully linked to an exceptional diversity of the Indonesians' gender and sexual experience. Instead, the sites of desire and gender/sexual relations are often fiercely contested and ideologically coloured, forcefully homogenized and expurgated of their inherent complexity. It is, in fact, the need for oversimplification that underlies all such regulatory tendencies.

Starting with the first president Sukarno's 'family principle' (*azas kekeluargaan*), later developed into an all-encompassing state 'familist' ideology,[6] the domestic political elite have always been heavily engaged in encouraging and producing the model 'nuclear' hetero-patriarchal family, which would gradually throttle all other abundant forms of kinship or gender/sexual relations and expressions. The benevolent *bapak* (father) and the dutiful, selfless *ibu* (mother) are central to this political imagery,[7] concomitantly signalling how both the public and the private spheres should be managed. Other forms of heteronormative regulation, particularly those purported on behalf of the burgeoning theo-political opposition to the central government, in the aftermath of the 1998 demise of the second president Suharto's autocratic New Order regime and the beginning of so-called *reformasi* (reform) era, endeavoured to reappropriate the familist narrative with a characteristic religious 'twist'. Hence, the early years of the twenty-first century saw the enactment of numerous gender-biased provincial and local regulations, claiming their legitimacy from the selective readings of classical Islamic jurisprudence (*fiqh*).[8] The state elite responded with a competing yet in many ways similar vision of heightened public morality, epitomized in the controversial 2008 Law on Pornography.[9]

These regulatory interventions peculiarly resemble the early para-geographies of the archipelago,[10] such as a twelfth-century map charted by al-Idrisi, which shows the territory of today's Indonesia 'as

a random assortment of blobs'.[11] A similar 'accuracy' is achieved in the contemporary governmental and broader theo-political mapping of the Indonesian gender, sexual and relational archipelago. The need to homogenize and simplify, in order to control and politically employ, produces here a kind of Althusserian effect of '[s]pace without places, time without duration':[12] a totalitarian *tabula rasa* beyond the putative nation-building ethos. While tracing similar currents in what he terms 'dissemiNation'—an evolving cultural difference 'from within' and liminality inscribed in an imagined nation-space—Homi Bhabha recounts 'the incommensurability in the midst of the everyday' that a totalitarian nation-building or, indeed, sexuality-cum-gender-building cannot surpass.[13] It is from such 'common interstices' that one's self-perception and cultural memory are reinvigorated. In this scheme, the liminality of 'Indonesianness'—its archipelagic quality *par excellence*—is juxtaposed to the imagined normative subjectivities of *bapak* and *ibu* as their dire alterity.

Parallel to the familist ideologies engaged in producing specific heteronormative selves, the past several decades have witnessed in Indonesia an ascendance of a liberal discourse, typically drawing on global Northern meta-narratives and taxonomies of sexual liberation, which attempts to explain away and indoctrinate Indonesian sexualities and gender variance so as to fit neatly into the presupposed universal moulds of human sexual/gender experience and orientation. As a relatively new purchase within international liberal governance strategies across the globe, this *homonormative* discourse[14] has triggered significant academic criticism,[15] albeit with sparse ramifications in third sector policy making. In the context of Indonesia, although identified somewhat tacitly by prominent ethnographers of sexuality and gender,[16] homonormative identity politics remains skilfully under the social radar.

This brief piece attempts to shed some light on this grey area of Indonesian sex/gender politics, as a premise toward a broader theoretical framework for 'archipelagic' (Indonesian) selfhood and its inherent complexities.

PERSONHOOD BEYOND RIGHTS

In *Imagined Communities*, Benedict Anderson underscores the difference between an old habit of the European colonizers of naming their overseas settlements as '"new" versions of (thereby) "old" toponyms in their lands of origin' (such as New York, Nueva Leon, Nouvelle Orléans, Nova Lisboa, Nieuw Amsterdam and Nieuw Zeeland) and the Southeast Asian custom of marking certain toponyms with a term for novelty only when the old referential site has either vanished or been enlarged (hence, Chiangmai ['New City'], Kota Bahru ['New Town'] or Pekanbaru ['New Market']).[17] Unlike the Southeast Asian diachronic or utilitarian relationship between 'old' and 'new', European colonial imagery has allowed for the synchronic, parallel existence of the venerable original and its 'new-worldly' counterpart(s).

Precisely this kind of hierarchical parallelism and the zeal to superimpose one's own identitary scripts characterize homonormative regulatory streams in Indonesia and elsewhere. The aetiological complexity of the encountered subjectivities, their sociality and spirituality, their communitarian non-sexual and non-gender needs and roles—all this is subsumed under an impoverished vision of a gendered and sexual being understood through the prism of international identitary taxonomies and the politics of 'emancipation'. Yet, this stark vision is not always disseminated directly, partly because it is not readily welcomed by its target populace. Instead, it often takes an intrinsically biopoweristic shape:[18] it is implicitly contained in donor policies and civil society programmes, it permeates HIV/AIDS prevention strategies and lingo, or it is 'preached' by a community member who endeavours to 'correct' others in their self-expression and self-identification.[19]

The homonormative discourse is 'traditionally' fond of the messianic liberal parlance of human rights, as its legalistic phraseology appeals to the third sector even though it is usually devoid of any substantial locale-specific analysis. As a false heuristic device, liberal rights are conceived as an estoppel to rethinking workable solutions for problems at hand. By claiming tenaciously their *sui generis*

(conceptual) supremacy over all other normative or non-normative considerations, they effectively pre-empt situations which might otherwise result in some novel substantial bargaining power[20] for the underprivileged constituencies concerned. For, if espoused in this peculiar fashion, the abstract humanism behind the idea of rights is reduced to yet another auxiliary normative system of the liberalist empire. It pompously confers upon the 'new', 'overseas' sexual/gender subjectivities, modelled on the image of the original, 'old' global Northern selves, the freedom of personhood, the moral *raison d'être*, thereby enlarging the cognitive map of liberal identitary scripts. Yet it fails to account for the asymmetries, frictions and anxieties of 'new' subject positions; it falls short of disclosing the traumatic consequences of their forceful assimilation. After all, these subjectivities, like those 'new' overseas settlements of the European colonizers, are but an excuse for replicating the base—an egotistic and expansionist idea of the 'Enlightened self' superior to all other forms of humanness.

Intriguingly, however, the liberals' reliance on their shallow vision of human rights in Indonesia has often proven to be in vain. One of the paradigmatic stories concerns a grassroots women's organization Suara Ibu Peduli (SIP [Voice of Concerned Mothers]), which has used one of the New Order's most important ideological tools—that of 'motherism'—against the regime:

> While state practices have intensified women's association with mothering …, women's activism on the basis of motherhood has made a counter-hegemonic use of this trope, as a strategy of resistance to state policies which threatened a fundamental concern of poor women … —their ability to feed their families.[21]

The thrust of the SIP's powerful programme has been on rebuilding community relationships, instead of relying 'on abstract rights'.[22] It contributed significantly to the eventual downfall of the New Order regime.[23] In a similar vein, Indonesian subjectivities outside the dominant heteronormative (and, arguably, homonormative) sexual/gender matrix have been building their mutual relationships on the basis of the understanding that they share the 'same spirit'

(*sama jiwa*)[24] and—oftentimes—their Indonesianness,[25] rather than on a common human rights framework. Furthermore, their often-invoked desire to be accepted (*diterima*) by society at large is seen not as their inherent right, but as a consequence of their sincere contributions to the broader community with their many good deeds and accomplishments (*prestasi*). These subjectivities 'almost never say they should be respected just because [of who] they are … but in terms of good deeds: "We've got prestasi too (*kita punya prestasi juga*)"'.[26] Clearly, liberal rights-based identity politics makes no sense at all in these narratives. Instead, other successful bargaining strategies are being devised and deployed.

How then can the apparent resistance to both the hetero- and homonormativity of the Indonesian non-conforming subject positions be understood? Where does it stem from? What makes these communities so intrinsically resilient, even against the shifting sands of liberal rights discourse? A peculiar spatial occurrence—*islandness*—of these selfhoods seems to account both for their astonishing variance and for their ability to rebuff grand assimilatory schemata. It is, therefore, further analysed as a trait and as a strategy.

ISLANDIC 'SACRAL' AND 'COMMON' SELVES

Numerous subject positions across the archipelago transgress gender binarism and dominant sexual norms. Some of their ethnographers tend to divide them between those who are sexually and gender variant primarily because of specific spiritual/ritualistic reasons—these are, then, said to embody a 'sacred gender'[27]—and others, whose sexual/gender experience has no apparent causal connection with ritual.[28] It seems that the category of 'sacred gender' signals a modality of social relationship that Victor Turner had termed 'normative *communitas*': a ritual-based 'perduring social system' outside an 'area of common living'.[29] It is, however, questionable to what extent a form of sociality (including an assumed gender identity) based on spirituality/ritual can be distinguished from 'common living' wherein, supposedly, other genders inhere.

Firstly, the ritualistic practices in question form an inalienable part of the ethnoscapes in which 'sacred gender' in Indonesia occurs. Secondly, more often than not, members of a 'sacred gender' tend to live it (including through sexual relations thought to be appropriate for it) well beyond their ritually prescribed realm, that is, commonly. These tendencies effectively blur the artificial borderline between 'sacred' and 'common', thus further complicating some of the non-normative selfhoods of the archipelago.

Perhaps the best-known 'sacred gender' is the *bissu* among the Bugis of South Sulawesi, of which the earliest accounts date back to the sixteenth century.[30] While it had been possible for the Bugis youth of all sexes (male, female and intersex) to become *bissu*, it seems that at least since the mid-1800s onwards, there were no longer any female-born *bissu*.[31] According to Bugis cosmology, *bissu* are an earthly manifestation of the primordial unity of all genders,[32] hence their attire, behaviour and religious and social roles uniquely resemble that sacred oneness.

Similarly, among the Ngaju (an offshoot of the Dayak people) in Kalimantan, two gender-variant subject positions known as *basir* and *balian* have been known as ritual practitioners.[33] Both male-born *basir* and female-born *balian* have had attire and mannerisms distinct from other genders.[34] It could even be the case that *basir* and *balian* have shared a single, 'sacred gender'—much like *bissu*—irrespective of their biological sex, and that their imputed 'gender ambiguity'[35] simply attests to the global Northern sex/gender lenses through which these subjectivities are usually viewed.[36]

In the Ponorogo region of East Java, the actors in *reog*, an eight centuries old Javanese drama style, assume subjectivities known as *warok* and *gemblak*. They are traditionally age-stratified, with older *warok* assuming a long-lasting guardianship over young *gemblak*, which may lead to a sexual relationship.[37] During this ritualistic apprenticeship, they are expected to live in close domestic partnerships. While *warok* are today exclusively male-born, there are strong indicators that female-born actors could also have assumed this subjectivity in the past.[38] While the *gemblak* subject position

used to be open only to young boys, shifting public mores dictate that they are gradually being replaced with female-born actresses.

No doubt these sex-based changes in *warok/gemblak* subjectivities —comparable with the disappearance of female-born *bissu* and the gradual 'correction' of 'gender ambiguity' amongst *basir* and *balian*— occur as a dire consequence of an imposed heteronormativization of the society. Yet the relative malleability with which 'sacred gender' is constructed and performed—which is almost invariably mirrored in other non-ritual gendered relationships—signals a deep-rooted cultural memory which resists and transforms major assimilatory schemata, even when it strives to incorporate some of their aspects into a workable social and gender/sexual present *and* continuum. This catalyst ensures coexistence—even though never without a struggle—of social temporalities with varying cultural tropes, whereby gender-variant Indic rites,[39] integrative Sufi metaphysics,[40] and other peregrinating or locale-specific cosmologies merge into an array of islandic spiritual and social selfhoods. Moreover, whilst being socially validated and replicated in the sacral/ritual domain, such gender-constructive cultural transience invariably 'spills over' into 'common' relationships and existence.

Paradigmatic for these phenomena are, again, the Bugis of South Sulawesi, famously branded as people of 'five genders':[41] beside *bissu*, male and female, there are *calabai'* and *calalai'*—the latter two being gender-transgressive subject positions. *Calabai'* 'are male-bodied persons who dress like women, perform women's roles, and often have male partners', while *calalai'* 'are female-bodied persons who may live with their women partners and fulfil male roles'.[42] That these two subjectivities exist alongside *bissu* amongst the Bugis is often taken as evidence of social delineation between 'sacred' and 'common genders'.[43] Yet at least *calabai'* are known to perform various functions in marriage ceremonies,[44] much like the contemporary Indonesia-wide gender-transgressive ('male-to-female') subject position *waria*.[45] Whilst *calabai'* perhaps can no longer claim their aetiological connection with ritual, it is curious that they and some other 'common' gender-variant subjectivities usually negotiate their place in society by reassuming roles directly engaged with key social

ceremonies—such as that of marriage. Ritualistic mediation of one's gender variance apparently persists as a salient *modus operandi*, despite historical disconnections.

NEGOTIATING ARCHIPELAGIC SELFHOODS

Whereas the ethno-locality of specific gender-variant and/or sexually diverse subjectivities—usually spanning the territory of a single island—had been more or less preserved in earlier times, the ultimate stages of the Dutch colonial administration, and especially the ascendance of pan-Indonesian political resistance leading to the turbulent formation and independence in 1945 of the new nation-state, challenged their ethno-cultural particularity. The term 'archipelago' (*nusantara*) has thus been heavily politically restyled as a synonym for the new national motto—'unity in diversity' (Old Javanese: *bhinneka tunggal ika*, 'fragmented but one'), whereby 'the notion of archipelagic culture (*kebudayaan nusantara*) has served as a central attribute of the unified nation, as one of the pivotal notions that has enabled the positing of the national subject's continuity across History'.[46] 'Archipelago' has effectively become the state's unique 'personality',[47] through which ethno-localized subjectivities can collectively envision their postcolonial future, including by reimagining their pre-colonial pasts.[48] In Indonesian everyday usage, *nusantara* has, indeed, become a byword for the state (*negara*) and its intricate nationalist ideology.

Yet the *nusantara*'s official sexual/gender politics soon revealed their stringent heteronormative zest. Although enthusiastically 'united in diversity' under the ideological roof of the new state, Indonesian gender-variant and sexually diverse subjectivities have faced sustained efforts to remould them into the model normative 'men' and 'women'. As of the 1980s, these efforts were increasingly complemented with the emergent liberal homonormative discourse,[49] thereby creating the rigid heteronormative versus homonormative poles—the two mutually reinforcing 'otherworlds' bereft of the intrinsic complexity of Indonesian historical and present-day

selfhoods. These hegemonic attempts, however, have not succeeded in depriving the archipelago of its cultural, sexual and gender diversity. Yet they have forced previously by and large islandic non-normative subjectivities to rethink and rework their relationships with the rest of archipelago, as well as to reimagine themselves from a multi-islandic, *nusantara* vantage point.

There are at least two major resistance strategies pursued by non-normative subjectivities—that of 'reappropriation' and that of 'disidentification'. Although seemingly at odds with each other, these approaches are, in fact, often concomitantly used so as to achieve the desired outcomes at two juxtaposed hegemonic ends. Reappropriation, for instance, is employed by *waria* (*banci*, *béncong*, *wandu*, *kedi*, *kawe-kawe*), who often claim that their *waria*-ness (*kewariaan*) is a distinct *nusantara*-wide phenomenon.[50] In doing so, they effectively make use of the nation-building ideology and celebrate the fact that various historical male-bodied gender-variant subjectivities—such as *calabai'*—have been reunited under a 'single vision' (*pandangan satu*) of the *negara nusantara*. *Waria*'s high mobility within the national borderlines, in fact, corroborates this narrative. Some *calabai'*, for example, live today in Kalimantan, amongst the broader *waria* communities.[51]

Disidentification, on the other hand, is chiefly used to resist homonormative encroachments. For instance, *tomboi* in Padang, West Sumatra, a female-born masculine ('men-like') subjectivity, is locally perceived as a part of the so-called '*lesbi* world' (*dunia lesbi*). Importantly, '[b]eing lesbi in Padang is generally understood as an expression of gender rather than a form of sexuality engaged in by two women'.[52] Hence, although local terms such as *tomboi* or *lesbi* sound similar to or even the same as their global Northern cognates, their meaning is often crucially different.[53] However, in their still relatively rare encounters with Jakartan or international activists, *tomboi* from Padang are sometimes told that they cannot be part of *dunia lesbi*, because they are not 'lesbian' but 'transgender'.[54] Some of the *tomboi* resist this dictum from the hegemonic 'centre' through disidentification: they return to their locale and retain their own concept of selfhood and of their 'peripheral' *dunia lesbi* as long and

as resiliently as possible.[55] Moreover, it is from their island experience and cultural viewpoint that they continue to see the rest of the archipelago. This strategic disjunction enables Padang's *tomboi* to contemplate an archipelagic self from their islandic, relocalized *place*.

The anti-racist feminist activist Zillah Eisenstein terms multiple but connectable experiences as 'polyversal'.[56] The intricate elasticity of the Indonesian islandic and archipelagic selves signals their polyversal nature, which enables them to dynamically shape their gender, sexual, cultural and spiritual geographies. In *nusantara*, cultural tropes are connectable but not unconditionally: peripheries and centres can be reshuffled, locales and their subjectivities are partially yet not inseparably merged. Even if the archipelago is united into 'a total organism' of some kind,[57] its real and metaphorical islands will remain 'organs' in their own right.

UNLEARNING DICHOTOMIES

The perennial ambivalence and what Walter Benjamin described as 'the profound perplexity of the living' abound amidst human experience, including that related to sexuality and gender.[58] Yet the societal organization of one's place and modalities of desire require clustering and crude categorization. A distinct binary approach, fuelled by nineteenth-century European worldviews, had coalesced into a rigid set of mutually opposed pairs through which personhood is objectified and researched: 'hetero' versus 'homo', 'male' versus 'female', 'East' versus 'West', and so on. Ontically anchored and steadfastly reproduced, these dichotomies have been orbited into the everyday as its chief heuristic and mnemonic device.

Some of the key common strands of liberal thought—such as egalitarianism, meliorism and universalism[59]—not only fit well but, in fact, require the rigid binary concepts of personhood in order to thrive: equality is best established amongst the two; the very idea of progress seemingly necessitates an inferior entity contrasted with its superior alterity; the universal nature and span of human rights—which justifies foreign intervention, occupation, recolonization—

is most easily achieved if the raster of human subjectivities is kept simple and, of course, globally applicable. Such heightened Manichaean contrasts inform and produce the liberal urge to act and spread, against all odds and disparities. The militancy inscribed into this discourse reflects the actions taken accordingly. It is not there to negotiate its presence, but to offer a total Weltanschauung into which the human experience and cultural memory are forcefully embedded.

Researching the alternatives to the grand dichotomies requires a peculiar unlearning process. Otherwise, for example, one may still be benignly assured that '[t]he most promising discourse on the acceptance of gender variance is the rights discourse'.[60] It is, indeed, exceptionally hard to see beyond the elaborate façade of liberal dichotomies and their localized decorations, into a multitude of hidden social fabrics and construction techniques. One surely stands a better chance if the façade is dilapidated. Yet unlearning these deep-seated truisms is not an easy task. There are, for instance, some mechanisms of forgetting—such as lapsing or superficial rejection[61]—which may not suffice as the remnants of the façade will continue to inform one's analytical directions.[62] Other techniques—such as conversion or epiphany—might simply replace the façade with other totalized systems, without fully comprehending its constitutive elements.[63] Unlearning, in this context, not only involves a critical expulsive phase in which the grand dichotomies are gradually analytically repudiated, but also a relocatory reparative phase in which one is accustomed to seeing from a non-binary place.

CONCLUSION

Beyond their obvious political appeal, geographies of desire and belonging primarily and crucially intersect in an intimate space of human lifeworlds. Hence, studies of affect[64] or of peculiar 'intermediate area[s]' between internal and external—those 'resting-place[s] for the individual engaged in the perpetual human task of keeping

inner and outer reality separate yet inter-related'[65]—offer invaluable insights into the formation of spatially predicated selfhood. This piece attempted to illuminate how human subjectivities and desire extend to a phenomenological site of intimacy[66] located within (and throughout) an interiorized *island* or even *archipelago*, and how this *place*, in turn, provides them with heuristic and mnemonic tools to sustain their (thus attained) selfhood against hostile foreign/exterior winds. That certain topographic extremes—such as highlands—can dramatically influence the cultural and political shape of the peoples that inhabit them is a rather well-established idea.[67] This study was concerned with exploring more intricate (and reflexive) aspects of this phenomenon, imprinted in cultural memory, syncretistic cosmologies and sexual/gender performativity. Ultimately, however, the Indonesian islandic and archipelagic selves are also reaffirmed as a political conduit towards less hegemonic identitary scripts. As such, they provide an excellent incentive to unlearning the liberal worldview's pervasive and abysmal dichotomies.

NOTES

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13. Homi K. Bhabha, 'DissemiNation: Time, Narrative, and the Margins of the Modern Nation', in Homi K. Bhabha (ed.), *Nation and Narration* (London: Routledge, 1990), p. 311; cf. Walter Benjamin, 'The Storyteller', in Walter Benjamin, *Illuminations* (London: Cape, 1970), p. 75.
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15. See, for example, Dennis Altman, 'On Global Queering', *Australian Humanities Review*, 1996, http://www.australianhumanitiesreview.org/archive/Issue-July-1996/altman.html (accessed 2 October 2016); Dennis Altman, 'Rupture or Continuity? The Internationalization of Gay Identities', *Social Text*, vol. 48 (1996), pp. 77–94; Dennis Altman, *Global Sex* (Crows Nest, NSW: Allen and Unwin, 2001); Paola Bacchetta, 'Rescaling Transnational "Queerdom": Lesbian and "Lesbian" Identitary-Positionalities in Delhi in the 1980s', *Antipode: A Radical Journal of Geography*, vol. 34, no. 5 (2002), pp. 947–73; Arnaldo Cruz-Malavé and Martin F. Manalansan IV (eds), *Queer Globalizations: Citizenship and the Afterlife of Colonialism* (New York: New York University Press, 2002); Peter Drucker, '"In the Tropics There Is No Sin": Sexuality and Gay-Lesbian Movements in the Third World', *New Left Review*, no. 218 (1996), pp. 75–101; Peter A. Jackson, 'An Explosion of Thai Identities: Global Queering and Reimagining Queer Theory', *Culture, Health, and Sexuality*, vol. 2, no. 4 (2000), pp. 405–24; Peter A. Jackson, 'Capitalism and Global Queering: National Markets, Parallels among Sexual Cultures, and Multiple Queer Modernities', *GLQ: A Journal of Lesbian and Gay Studies*,

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18. Cf. Michel Foucault, *The History of Sexuality*, vol. 1 (London: Penguin, 1978).
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28. For example, Blackwood, 'Gender Transgression in Colonial and Postcolonial Indonesia'; Blackwood, 'Transnational Sexualities in One Place'.
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31. Blackwood, 'Gender Transgression in Colonial and Postcolonial Indonesia'; James Brooke, *Narrative of Events in Borneo and Celebs down to the Occupation of Labuan, from the Journals of James Brooke, Esq.*, vol. 1 (London: John Murray, 1848).
32. Wieringa, 'Gender Variance in Asia', p. 151.
33. Andaya, 'The Bissu: Study of a Third Gender in Indonesia'; Blackwood 'Gender Transgression in Colonial and Postcolonial Indonesia'; Hans Schärer, *Ngaju Religion: The Conception of God among a South Borneo People* (The Hague: Martinus Nijhoff, 1963); Anne Schiller, *Small Sacrifices: Religious Change and Cultural Identity among the Ngaju of Indonesia* (New York: Oxford University Press, 1997).
34. Schärer, *Ngaju Religion*.
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36. Cf. Blackwood, 'Gender Transgression in Colonial and Postcolonial Indonesia', pp. 854–55.
37. Boellstorff, *The Gay Archipelago*, p. 41.
38. Ibid.; Soejono Hardjomartono, 'Rejog, Warok dan Gemblakan di Ponorogo: Tritunggal Jang Tak Dapat Dipisah-pisahkan', in *Brosur Adat Istiadat dan Tjeritera Rakyat* (Jakarta: Departmen Pendidikan dan Kebudayaan, 1961).
39. Gender variance in Bugis, Ngaju and Javanese tradition (*inter alia*) is often linked to Hindu mythology, in which deities such as Ardhanārīśvara—usually depicted as a half-male and half-female—are thought to provide a convincing script for sacral disessentialization of gender rigidity. See, for example, Wieringa, 'Gender Variance in Asia', p. 152; Blackwood, 'Gender Transgression in Colonial and Postcolonial Indonesia'.
40. Muslim Javanese mysticism is often accredited with preserving cultural memory—including that pertinent to the island's rich Indic past—within an elaborate and delicate religio-social system. See, for example, Geertz, *Islam Observed*; Ronald Lukens-Bull, *A Peaceful Jihad: Negotiating Identity and Modernity in Muslim Java* (New York: Palgrave Macmillan, 2005); Arskal Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia* (Honolulu: University of Hawai'i Press, 2008).

41. Graham Davies, *Challenging Gender Norms*.
42. Wieringa, 'Gender Variance in Asia', p. 154.
43. Blackwood, 'Gender Transgression in Colonial and Postcolonial Indonesia'; Wieringa, 'Gender Variance in Asia'.
44. For example, Christian Pelras, *The Bugis* (Cambridge, MA: Blackwell, 1996).
45. For example, Boellstorff, 'Playing Back the Nation'.
46. Greg Acciaioli, 'What's in a Name? Appropriating Idioms in the South Sulawesi Rice Intensification Program', *Social Analysis*, vol. 35 (1994), pp. 39–60, quoted in Boellstorff, *The Gay Archipelago*, p. 193.
47. Cf. Sukarno's *kepribadian bangsa* in David Bourchier, 'Totalitarianism and the "National Personality": Recent Controversy about the Philosophical Basis for the Indonesian State', in Jim Schiller and Barbara Martin-Schiller (eds), *Imagining Indonesia: Cultural Politics and Political Culture* (Athens: Ohio University Press, 1997), p. 157.
48. Cf. Boellstorff, *The Gay Archipelago*, p. 193.
49. For example, Blackwood, 'Transnational Discourses and Circuits'.
50. Boellstorff, 'Playing Back the Nation'.
51. Ibid., p. 162.
52. Blackwood, 'Transnational Discourses and Circuits', p. 486.
53. Ibid.; Boellstorff, *The Gay Archipelago*; Boellstorff, 'Between Religion and Desire'.
54. Blackwood, 'Transnational Discourses and Circuits', p. 498.
55. Ibid., p. 499.
56. Zillah Eisenstein, *Against Empire: Feminisms, Racism and the West* (London: Zed Books, 2004). A tantamount expression—'pluriversal'—has been coined by the decolonial semiotician Walter Mignolo. Boaventura de Sousa Santos (ed.), *Cognitive Justice in a Global World: Prudent Knowledges for a Decent Life* (Lanham: Lexington Books, 2007); Vanja Hamzić, 'The Case of "Queer Muslims": Sexual Orientation and Gender Identity in International Human Rights Law and Muslim Legal and Social Ethos', *Human Rights Law Review*, vol. 11, no. 2 (2011), pp. 237–74; see p. 266.
57. Michael Van Langenberg, 'The New Order State: Language, Ideology, Hegemony', in Arief Budiman (ed.), *State and Civil Society in Indonesia* (Clayton: Monash University Press, 1990), p. 124.
58. Benjamin, 'The Storyteller', p. 75.
59. Cf. John Gray, *Liberalism* (Oxford: Oxford University Press, 1986), p. 43.
60. Wieringa, 'Gender Variance in Asia', p. 164.
61. This type of rejection has been identified by Sigmund Freud as 'negation' (*Verneinung*): a mental process in which an unconscious wish is negatively formulated; it is rejected 'on the surface' but it retains its uncanny existence. Sigmund Freud, 'Negation', in Sigmund Freud, *On Metapsychology* (Harmondsworth: Penguin Books, 1984 [1925]), pp. 435–42.
62. Cf. ibid.

63. Cf. Trevor Pateman, 'Lifelong Unlearning', in Duncan Barford (ed.), *The Ship of Thought: Essays on Psychoanalysis and Learning* (London: Karnac Books, 2002).
64. For example, Eve Kosofsky Sedgwick, 'Melanie Klein and the Difference Affect Makes', in Janet Halley and Andrew Parker (eds), *After Sex? On Writing since Queer Theory* (Durham: Duke University Press, 2011).
65. Donald Winnicott, 'Transitional Objects and Transitional Phenomena', *International Journal of Psycho-analysis*, vol. 34, no. 2 (1953), pp. 89–97; see p. 91.
66. Cf. Gaston Bachelard, *The Poetics of Space* (Boston: Beacon Press, 1994 [1958]).
67. For one such delightfully meticulous study, analysing the culture and politics of the inhabitants of 'Zomia', see James C. Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (New Haven, CT: Yale University Press, 2009).

CHAPTER 4

The South-East Asian Law Texts: Cultural Borrowing and the Concept of Law

THE PRECEDING outlines of the South-East Asian law texts indicate that they are derivative and form part of a general pattern of cultural borrowing. The older generation of legal historians would even go further and maintain that the use of 'Indian', 'Islamic', and 'Chinese' is not only essential to the understanding of the South-East Asian texts (which is perfectly right) but that the texts are little more than copies of the originals. This can be a dangerous oversimplification, and the purpose of this chapter is to examine the cultural borrowing in order to show the relevance of the Indian, Islamic, and Chinese traditions for the legal historian of South-East Asia.

The South-East Asian texts, and indeed Oriental law texts in general, as well as ancient Middle Eastern and European codes,[1] raise a number of important issues. In general legal history, such texts have been regarded as illustrating stages in the development of law[2] rather than as documents to be studied for their own sake. Moreover, although the Oriental texts generally are assumed to be 'law' in some recognizable sense, it is often denied that they rest upon traditions of legal or jurisprudential analysis.[3] The *Ta Ch'ing Lü Li*, for example, is sometimes classed as a manual for magistrates, instructing them in their duties,[4] as is its Vietnamese 'imitation', the *Gia-Long* Code.[5] Other texts have been interpreted as documents that

[1] There are also the ancient Codes of Hammurabi, the Hittites, and so on (see Driver & Miles (1955–6)). In addition the early European codes of the Visigoths, Burgundians, Saxons and others present important points of departure from modern municipal laws.

[2] See, for example, Diamond (1935), (1951), (1971), and Jackson (1972). The most famous example is the work of Sir Henry Maine; cf. Maine (1861), (1875), (1883), and (1895).

[3] This is not true of the Islamic and Hindu laws.

[4] Cf. Jones (1974: 331).

[5] Cf. Philastre (1876).

merely attempt to legitimize an indigenous form of sovereignty.[6] In any study of the South-East Asian texts, therefore, one has to contend not only with the question of cultural borrowing but also with the interpretation of the texts themselves.[7] Even here fundamental difficulties persist, most often in the definition of law. The texts do not always state actual rules for the conduct of day-to-day affairs: they contain material which is both dynastic and historical, religious and secular; the concept of law is undifferentiated and must therefore be sought in historical fact. Even a historical chronology of law (however such be defined) is not always possible because much manuscript copying has occurred.

The existence of cultural borrowing also involves an assessment of the relationship between law and religion. In the case of Islamic law it is a fact that in many states the dictates of Islam were not followed to the exclusion of other rules in matters as important as family law and property law.[8] Islam has a prescriptive validity for all Muslims but not necessarily a descriptive validity. In the case of the Hindu law texts, Lingat's discussion of *dharma* and custom[9] has demonstrated that the law promulgated in the *śāstras* differs from custom both by origin and by intent. This was a problem that exercised both the earliest commentators on the *śāstras* and the courts of colonial India. The latter decided that custom, when proved, could override the texts.[10] But even before the advent of the colonial power, Hindu commentators noted the conflicts between *dharma* and custom and attempted to reconcile them in a number of different ways.[11] The interpretation and application of the *śāstras* still provide difficulties for the courts in India today.[12]

The Burmese texts, on the other hand, raise yet another difficulty. The Buddhist ethic does not distinguish between law, morality, or custom, and although the British colonial courts

[6] Cf. Hooker (1968: 170). See also Moertono (1963) on Java.

[7] Including the often difficult question of sources, since most, though not all, of the extant texts are known only in later recensions dating from the seventeenth–nineteenth centuries

[8] Cf. J. N. D. Anderson (1959), (1965), (1970), Prins (1954), Hooker (1972).

[9] Cf. Lingat (1973: 176–206).

[10] *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868) 12 M.I.A. 397.

[11] Lingat (1973: 203 ff.).

[12] See the cases cited in Derrett (1968: 299 ff.).

developed a bastard 'Burmese Buddhist law',[13] an assessment of the texts still gives rise to considerable difficulty.[14] The same difficulty arises with the texts of Thai law, especially with the *Thammasat*, a set of basic moral principles to which the ideal monarch was expected to conform.[15] They could not be altered by the king, and the orders and proclamations made by the ruler in the course of his reign were valid only during that reign. This led Robert Lingat to say that 'there was apparently no place for what we call law'.[16]

The issues raised by the texts are twofold: first, the relationship between the texts and actual behaviour, i.e. law and custom; and second, whether the texts can properly be called 'law'. Attempts have been made to interpret some texts, both European and Oriental, on the basis of sociological data; for example, the Roman XII Tables.[17] The relation between codes and indigenous collections of cases has also been examined for the purpose of demonstrating how a code worked in practice.[18] So far as definition is concerned, the 'properly legal' nature of texts owes much to the formulations of the nineteenth-century legal historians. For example, law was equated with the particular faculties and tendencies of a people by Savigny;[19] with the definition of a movement from status to contract by Sir Henry Maine[20]—this was, moreover, demonstrated to be a partly valid progression on data from the courts of British India.[21] The religious elements in the texts caused difficulties in the definition of law, and views on this question still vary widely.[22] Similarly, the nature of the texts themselves raises problems in terms of legal categories; these have been variously described as 'legislation'[23] and as 'Bills of Rights'.[24] The idea of an evolutionary progression is encountered in Sir Paul Vinogradoff's theory of juridicial evolution[25] and in the study of medieval European texts. English scholars, for example, distinguished law as written and

[13] Cf. Mootham (1939).

[14] Lingat (1950).

[15] *Prince* Dhani Nivat (1954: 163).

[16] Lingat (1950: 26).

[17] MacCormack (1971).

[18] Harrison (1964).

[19] Friedrich Karl von Savigny (1814).

[20] Maine (1861).

[21] Mayne (1885), (1887).

[22] Diamond (1935), (1951), (1971).

[23] Ibid. See *contra* Bartholomew (1960).

[24] Darling (1970).

[25] Vinogradoff (1920), (1925).

custom as not written[26] and discussed the law–custom dichotomy in terms of the nineteenth-century distinction between laws of general and laws of special application. Again, German scholars in their histories of German private law[27] attempted to show the similarity of historical entities to nineteenth-century German legal conceptions; in doing so they made use of the modern distinction between the physical person and the legal *persona*.

Law texts thus present a series of problems: in definition, in deciding upon a proper method of description, and so on. There are areas of what one would understand to be law that are not treated in the texts and vice versa. Often it is difficult to decide whether the texts were ever central to the legal life of a people. The South-East Asian texts share these problems and are thus a part of general jurisprudence.

There are perhaps two main issues which occur in all the texts: the indeterminancy of law and ethics, and the definition of the individual and whether the texts are descriptive of legal reality.

I LAW AS AN EXPRESSION OF A NATURAL AND MORAL ORDER

That the texts are assumed without question to be law is probably due to two factors: first, they are written and, second, they deal with the relationship between ruler and ruled and, in so doing, they imply or state forms of political organization. The difficulty, however, is that the idea of law is undifferentiated from religion, dynastic history, the organization of a bureaucracy, and so on. The fact that a text is in writing in itself predisposes Western commentators to regard it as law in some sense. This is understandable, if ethnocentric; however, it does not dispose of the main issue, the legal significance of the texts. Naturally, the precise nature of this will vary from one culture to another, but are there basic features in common which in some way identify law?

The overwhelming impression one gets from even a cursory reading of the texts is that they are descriptive of a natural and social order. The concept of law that the texts present is a regulation of human behaviour that is a part of the nature of things. Law is not just concerned with an individual system of

[26] Pollock (1883). [27] Huebner (1908).

obligation, though all texts contain prescriptions, it is also an irreducible datum of the moral and social world. No individual can escape from law in this sense; it is authoritative by the force of its being.

The Hindu *dharma* is essentially a 'rule of interdependence',[28] founded on a hierarchy corresponding to the nature of things and necessary for the maintenance of the social order. The concept envelops both the moral and the physical world, and in the Indian law texts it refers to the totality of obligations ascribed to an individual in accord with his status (*varṇa*) and place in life. It is a morality addressed to the individual in society, but it is also natural as being in accord with the physical and non-physical worlds. The sources of *dharma* are the Veda, Tradition, and Good Custom. In the form of the *dharma-śāstra*, the Hindu conception of the social and natural orders is given its juridical character. The *śāstra* do not neglect the observance and practice of religion and ritual but they give in detail the rules which should guide the king in the exercise of his duties. The most celebrated is the *Manu-smṛti* or *Manava-dharma-śāstra*, known in English as the Code of Manu, which was not only the major *smṛti* in India[29] but was also one of the most important, perhaps the most important element of Indian civilization translated to the states of South-East Asia.

The *Manu-smṛti* is divided into twelve books. The first relates how the Great Sages approached Manu and asked him to tell them the *dharma* of all the castes. In his reply Manu describes the creation of the world by Brahmā, his own birth as issue of Brahmā, his creation of the Great Sages who had as issue seven other Manus whose task it is to create and re-create the world during the alternate creation and destruction of the cosmos. Book II explains the sources of *dharma*, lists the sacrifices and purificatory ceremonies (*saṃskāra*), and sets out in detail the conduct proper to a Brahminical student. Books III–V are devoted to the second stage of the life of the *dvija* (twice born) in which he takes a wife and becomes a householder. Book III deals with marriage, the duties of spouses, the performance of daily ritual, and the rules relating to hospitality. Book IV is concerned with the way of life permitted to a Brahmin and

[28] Lingat (1973: 211).
[29] For a description of the others see Lingat (1973: 97–106).

concentrates especially on diet, as does the first part of Book V. The latter part of Book V is concerned with pollution and purification, and the last verses speak of the duties of women. Book VI deals with the last two phases of life, that of hermit and that of mendicant monk. These books do not contain anything new by comparison with the earlier *dharma -sūtras*, although the arrangement and development of the rules is often different.

In Books VII–IX lies the great originality of the *Manu-smṛti*. Book VII deals with the ruler and subject, with punishment, war, the organization of government, taxes, and the policies to be followed toward neighbouring states.[30] It is concerned largely with the politics of power. Books VIII and IX deal with the regulation of disputes in private law in so far as they relate to the justice dispensed by the king. They attempt to enumerate the different types of dispute and to describe the types of litigation that could possibly arise. Book VII reduces all disputes that could be brought to the royal court to eighteen heads,[31] and in Book VIII an attempt is made to set out the rules that the court should apply in deciding on the issues. There are rules as to the composition of the tribunal, as to proof and witnesses, as to debts, weights and measures, and so on. Book IX sets out the duties of husband and wife, rules of inheritance, and a further exposition of the royal administration of justice. The function of the king is compared to that of the gods and the elements (IX.303–12). Book X deals with the mixing of *varṇas*, and Book XI is concerned with gifts to be made to persons in need and with penance and expiation. Book XII, the last, resembles the first book in its philosophical and religious nature.

This summary indicates something of the complexity and richness of the Code. It is not sufficient merely to dismiss it as a 'stage' in the evolution of law;[32] rather, it should be considered as an attempt to explain a normative system based on the facts of moral life within the terms of a cosmological order. The office of the King is regarded as an institution necessary to the maintenance of the social order 'established by the Creator for the good of creatures'.[33] The royal function was instituted by

[30] For a Thai version of this see Wolters (1969).

[31] The classification adopted is not haphazard but is in an order corresponding to the economic conditions of the period. See Jolly (1928: 35).

[32] Diamond (1971: 113). See also Jackson (1975).

[33] Lingat (1973: 207).

the gods, and *kṣatra*, the foundation of all royalty, is associated with *Rāja-dharma*, the totality of duties which constitute the King's function. The latter is founded on the nature of things, and to violate it is to violate one's destiny. The *dharma* of the King is the protection of his subjects and the Code of Manu goes so far as to calculate the portions of merits and sins passing to the King (Bk. VIII.304). The relationship between King and subject is one of mutual interdependence because the spiritual merit of each depends upon the other. The King is subject to *dharma*, and yet particular rules of the *dharma* get their stability only through an exercise of the King's will. The King may intervene to make his subjects respect the rules of conduct prescribed in the *śāstras*; he must see to it that penances enjoined upon men to expiate their sins are carried out; and he acts as supreme arbitrator in disputes under the *śāstras*. In these senses the *Rājadharma* presides over all *dharmas*.

The codes in which these ideas are contained might well seem imperfect to the European lawyer in that much is missing from them. They are not uncommonly thought of as having no relation to day-to-day reality and, because of this, as not being 'really law'.[34] But to take this view is to miss the point of the texts; as Robert Lingat says: 'The Hindu system sustained the unity of the Indian world, thanks to the undisputed authority of the law. That unity was unrealisable at a lower level, but was realised on the higher level in an ideal participation amongst all Hindus. The ideal received the dynamic imparted to it by faith, by Hinduism itself. . . .'[35]

This view of law is not confined to India; it is characteristic also of the Indianized states[36] of South-East Asia. In Cambodia and Champā, the lands of Sanskrit culture, the Hindu doctrines of law were followed in their original purity, although, as the epigraphy shows, some modifications were made.[37] The same is true, to a lesser extent, of Burma. The Burmese *dhammathat* was an attempt to use the Hindu system as a model in an environment entirely given over to the Buddhist faith. The Code of *Wagaru*, for example, retains the *śāstric* classification of

[34] On the issue of custom *vis-à-vis* the texts see below, pp. 109–118.

[35] Lingat (1973: 259).

[36] Cf. Coedès (1968).

[37] Lingat (1949), Sahai (1970).

contentious matters into eighteen heads but the content of the texts is very much a matter of local Burmese rules. The Hindu system was not, as was maintained in the nineteenth century,[38] introduced as such but was used as a guide to form. Although the Buddhist religion did not contain any revelation on the social order, the *dhammathats* were held to originate on the *cakkavāla*, the wall which surrounds the universe, and were given to man by the hermit Manu. This personage has nothing in common with the Manu of the *smṛti* except his name, but the choice of this name emphasizes the separation of the texts from the world of Buddha. The laws of Buddha reveal the conditions of salvation, whilst those of Manu, the bringer of the law from the walls of the world, determine the conditions of social life.[39] However, the law of the *dhammathats*, like that of the *śāstras*, transcends the world which it rules. It is bound to the cosmic order and is free from the will of men. It was a universal law in the Hinayana Buddhist world.

In pre-twentieth-century Thailand we also have a *dhammasattha* dating from the fourteenth century.[40] In many respects it is very close to the Code of *Wagaru* but it does introduce an important new distinction. Contentious matters are no longer reduced to the classical eighteen titles of law but are classified into ten rules of procedure and twenty-nine rules of 'substantive law'. The most important innovation is a new source of law, the rules derived through litigation (*sākha-attha*) from the primary rules which Manu (Manosara) read on the walls of the universe. These secondary rules come from the ruler[41] in the form of decrees arising out of disputes (*Rājasattham*); they were incorporated into the texts and formed part of the whole law. However, they are not, strictly speaking, innovations; the law laid down had authority only when it conformed to *dhammasattha* precepts, i.e. only when it expressed the royal will[42] in accordance with the view of nature expressed in the texts of the law. But it did have the effect of putting the King in the centre of the legal world, and the texts became more immediately a

[38] Cf. Forchhammer (1885). See also Khetarpal (1968).

[39] Lingat (1951).

[40] These are now known mainly in the text, the 'Three Great Seals', of 1805. Cf. Lingat (1929–30). See also Griswold & Prasert Ṇa Nagara (1969).

[41] See Quaritch Wales (1934).

[42] For conflicting theories about the nature of royal power see Chomchai (1965).

foundation for and justification of kingly power than was the case in India proper.[43] This is characteristic also of the Javanese and Malay texts of the Indonesian archipelago. Indeed, the overwhelming impression one gets from such texts is that although they contain rules for the distribution of obligation, their outstanding characteristic is their concern with the nature of royal power and its acquisition.[44] All texts, for example, attempt to link the text patron to preceding dynasties through complicated and often false lines of descent. Such lines, however, do not refer to insignificant predecessors but only to the most powerful and notable; the aim is not to establish a legal inherited legitimacy but a link to a source of power which in a real sense is still in existence. As Benedict Anderson has demonstrated,[45] power in Javanese thought is both concrete and constant in quantity. It follows then that later generations may acquire and utilize the power of long-dead heroes and gods. It means also that power is concentrated at the centre, in the ruler, so that central government is essentially an extension of the ruler's personal household. The ideal form of temporal power is a world-empire in which all entities are combined in a coherent unity. The existence of this unity is itself defined in the proper use of power and through the proper conduct of individuals which must be in accord with *dharma*. It is no accident that the texts refer either through genealogy or by analogy to heroes whose lines illustrate the primacy of natural propriety over personal inclination.[46]

The Malayan texts also devote space to the genealogical and analogical links to power centres, although the development is much simpler than in the Javanese examples. The conception of power and of legitimate authority is, however, the same. In addition, the Malay texts contain large portions of Islamic thought which introduce an element of tension into the structure of the texts.[47] They all show an attempt to arrive at some accommodation between the precepts of Islam and the

[43] This did not of course prevent comparative jurists from 'demonstrating' that the Thai texts were 'basically Hindu law'. See Masao (1905).

[44] See, for example, Pigeaud (1960–2), Slametmuljana (1967), Moertono (1963).

[45] B. R. O'G. Anderson (1972).

[46] Jav. *pamrih*. The well-known episode from the Bratajuda-cycle in which Ardjuna and Kresna (Krishna) discuss duty and sentiment is a classic example.

[47] See Hooker (1973: 495–6).

ideas of legitimacy drawn from non-Islamic sources.[48] This is a constant source of tension throughout the Islamic world.

The religion of Islam is a whole which encompasses a social, a legal, and a political order. Its precepts are found in the Holy Qur'ān, which is the word of God revealed to the Prophet Muhammad in the seventh century A.D., and in the practice of the Prophet—the *sunna*. Muslim legal theory is concerned to reach an understanding (*fiqh*) of the law of Islam—the *Sharī'a*. The law itself, therefore, is both a divinely given law and a jurists' law. The activities of the jurists were necessary because the Qur'ān and the *sunna* in no sense constituted a comprehensive code of law. They contain a collection of rulings on particular issues which, at most, provided modifications of existing customary practices in the lands of Islam. It was open to the individual in the early days of Islam to exercise an opinion (*ra'y*) as to the applicability of divine revelation to particular circumstance. By the eighth century A.D. the tension between revelation and reason in the formulation of legal rules had hardened into a conflict of principle in Islamic jurisprudence.[49] From the tenth century onward the definitive relationship between these two ways of knowing the law became established. In building upon the work of the great ninth-century jurist, Shāfi'i, human reason was made subordinate to the principles established by divine revelation. Its function was to regulate new cases by applying to them the principles upon which divine revelation had regulated similar or parallel cases. This principle is known as reasoning by analogy—*qiyās*. A rule of law must be derived either from the Qur'ān or the *sunna* or by analogical deduction from them. But the notion of law itself is defined as the ordained and comprehensive system of God's commands. Similarly, justice as an ethical quality is identical with the terms of religious law. In the identification of such terms problems did arise, most consistently around what one may describe as the 'letter of the law' as opposed to its spirit. In particular cases, strict analogy could occasion injustice, and it was then permissible to decide an issue on *istiḥsān*, or the search for a just solution. The problem in Islamic law, as in all legal systems, is to decide what the boundaries of this or similar

[48] This is particularly apparent in the Minangkabau texts. See Liaw (1967).

[49] See Coulson (1969: 5 ff.).

principles are going to be, taking into account the requirements of consistency.[50] However, in whatever form reasoning appears, it is always subject to divine will in that its function is to seek the implementation of the purposes of God for Muslims. *Dieu propose et l'homme dispose!*

As indicated above, the *Sharī'a* is both a code of law and a code of morality: a distinction between the two is not clearly drawn as in Western law. In the primary source of the *Sharī'a*, the Qur'ān, there is no clear distinction between a moral and a legal rule. The Qur'ān is concerned to distinguish behaviour proper in the sight of God and to indicate the reward or penalty which such behaviour entails. Sanctions in the legal sense are of course expressed for a number of acts or omissions, such as defamation or theft, but all sanction is non-empirical in its essential effect. All human activity and social institutions are fundamentally of religious significance, and the *Sharī'a* sets out a system of duties owed by man to his Creator and not just to other men. At the same time the *Sharī'a* has developed a distinction between the legally enforceable and the morally desirable. Acts are classified as obligatory (*wājib*), permissible (*mubāḥ*), and prohibited (*ḥarām*). Each class contains acts which the *Sharī'a* courts will enforce as well as actions which are only personal. Between the extremes of binding duty and absolute prohibition are acts which also have a definite value. These are two in kind, those which are recommended or praiseworthy (*mandūb*) and those which are blameworthy (*makrūh*). Neither of these values has a legal sanction. Thus it is praiseworthy for a marriage guardian to act upon the wishes of his ward, but, if he does not do so, any marriage which he concludes on her behalf against her wishes remains perfectly valid. So too, the divorce by triple *talāq* terminates a marriage irrevocably but it is still a blameworthy act. As the Prophet is alleged to have said, 'Of all things legally permissible, *talāq* is the most blameworthy.'

The religion of Islam formulates a value and purpose for all human life, and the law of Islam directs men's behaviour to the purposes of God. Law and religion are not, nor can they ever be, separate. The definition of law is not open to question as to its nature or purpose. Its application has of course varied from time to time and from place to place, but the apparent diversity

[50] Ibid. 17 ff.

of its forms and its relations to customary laws (see below) should not be allowed to blind us to its unique and unitary nature.

We turn now, finally, to the Chinese law texts. The codes of the various dynasties are known either in their original form or through treatises written in the past 1,700 years. No two dynasties had exactly the same laws, and changes appeared in judicial procedure and organization, in the system of punishment and in the compilation of the codes themselves.[51] The last of the Imperial Codes, that of the *Ch'ing*, is perhaps the best example for present purposes of a statement of law which is unique in the legal systems of the world. The *Ta Ch'ing Lü Li* is found in a number of editions and translations,[52] the best-known English translation is that made by Sir George Staunton in 1810. It is, however, incomplete.[53] The *Ta Ch'ing Lü Li* is divided into an introduction and six parts. The introduction is a directive from the Emperor to magistrates instructing them how to act when deciding an issue. The six parts are each labelled with the name of one of the six Boards that constituted the central government in Peking: The Boards of Officials, Revenue, Rites, War, Punishments, and Public Works. The Code was thus a compendium for the administration of the Empire. Its purpose was the preservation of an administrative and social system through the medium of bureaucratic regulation, the various penalties being imposed by the six Boards. Law was an aspect of administration and not something that could be classed separately. The *Ta Ch'ing Lü Li* did not purport to cover all aspects of human life, it dealt only with those matters that were felt to require punishment[54] and was intended to ensure the preservation of order in the Empire. Order was defined to include not just offences such as treason, murder, and so on, but also peculiarly Chinese offences such as parricide, sacrilege, and the wounding of relatives within certain degrees of mourning.

In that part of the Code entitled 'Revenue', attention was directed to the registration of households and the collection of

[51] See generally Ch'ü (1965) and the sources there cited.

[52] Bodde & Morris (1967).

[53] Staunton (1810).

[54] There were five classes of punishment. See Bodde & Morris (1967: 93 ff.) and Alabaster (1899).

various taxes. This part is sometimes translated as 'civil law'[55] because to the European observer it seems to cover what one would consider to be 'civil' as opposed to 'criminal' matters. Through the medium of taxation this part deals with a wide variety of family matters such as adoption (s. 78), succession (ss. 78, 88), marriage (ss. 101–17), as well as duty and excise (ss. 141–8) and markets (ss. 152–6). It is notable that in family law the regulations in the Code are not complete; for example, sections 78, 87, and 88 prohibit the improper appointment of an heir or the improper division of family property, but the actual rules of succession are not indicated. In other words, the rules relating to succession are only law in so far as they are relevant to taxation.

The third Part, that of the 'Board of Rites', provided for the punishment of those charged with supervising the rites if this duty was not carried out properly. Its provisions included punishments for the improper performance of rites associated with funerals, the care of imperial tombs, and for dishonouring celestial spirits by unlicensed forms of worship. It might well be regarded as an article enforcing the Confucian obligations (*hsiao*), primarily the five proper relationships[56] and the duties associated with each of them.

The fifth Part, that of the 'Board of Punishments', was the largest in the Code. While it dealt with the punishment for crimes that are universal in nature, such as murder, rape, and so on, it had some features peculiar to Chinese social structure. Crimes were distinguished according to the social or familial relations of the parties. It is more serious to assault an older relative than an equal.[57] Further, a good deal of this part of the Code, while concerned with offences against government, relates directly to the Confucian ethic which regarded as essential the maintenance of government and the preservation of the social order. Offences against the state and offences against the family order were, in a very real sense, connected parts of the same legal continuum. The legal relationships in which an individual was enmeshed were not dependent upon

[55] See Staunton (1810: 49), Bodde & Morris (1967: 60).

[56] Superior–Inferior; Father–Son; Husband–Wife; Older Brother–Younger Brother; Friend–Friend.

[57] See the different penalties in ss. 302, 318, 319.

the exercise of will but were derived from the basic principles of the Code: the preservation of a moral order which called for the administration of the individual as a part of that order.

The nature of this order is often said to be 'Confucian', by which is meant the formalization of differences between individuals in terms of their status and roles. This formalization is essentially summed up in the concept of *li*, the rules of behaviour which vary in accordance with one's status and position. *Li* implies differentiation,[58] a concept which came to 'dominate all Chinese legislation'[59] after Han times. The legislation was directed toward encouraging and enforcing the doctrines of *li*, including distinctions between superior and inferior, in giving effect to the Confucian view of the family and to filial piety. Thus: 'What is left by *li* is covered by punishment. To go beyond *li* means to enter punishment. The two are but the outside and the inside of the same thing.'[60]

Law, therefore, was primarily regulative and punitive; it was an instrument for implementing *li*. The nature of law was thus equated to punishment invoked when the doctrines of *li* were violated. Right and wrong, though defined in a system of ethics, were not absolute but relative, dependent upon one's status. Law was not thought of as general but as a highly particularized body of rules applicable on the basis just described.

The texts discussed in this brief survey—and its brevity must be emphasized—illustrate something of the range and complexity of South-East Asian law. They show the variety of reference which the term 'law' bears in South-East Asian cultures, but despite this variety the texts as a group have a number of features in common. First, they all describe both a social system and an ideal moral or ethical order conceived as a unitary whole. Second, the foundation of these orders is not the principle of legality but rather the implementation of an ethical order. Third, all texts omit a number of areas of legal obligation in whole or in part. These omissions have led some commentators to the view that the texts are not 'really law'. But to take such a view is to misunderstand the texts described above; their function is to state a set of absolute principles within which

[58] See Ch'ü (1965: 231 ff.).
[59] Escarra (1933: 251).
[60] Ch'ên Ch'ung cited in Ch'ü (1965: 279).

a system of obligation can be formulated. Large areas of the texts do contain rules directly applicable but this is not their primary function.

II THE TEXTS AND THE REALITY OF LAW

The texts are documents descriptive of reality in the sense that they posit a relationship between man and a cosmological and natural order. They therefore explain law as an aspect of this relationship, and to deny the reality of such an explanation is to deny the texts any relevance for comparative law. Such an extreme position is unusual; more common is the objection that personal obligation is inadequately dealt with. The existence of customary laws and textually unvalidated legal institutions is often cited in support of this objection. But it does not follow that such bodies of regulation are necessarily *sui generis* or that they constitute the sole legal reality. They each have definite relations with the texts and, most important, such institutions are formulated in the light of the texts themselves.

The relationship between the Hindu *dharma* and legal reality can best be approached by asking, what is *dharma*? For the authors of the *smṛti-s*, the answer was to be found in consulting the written law as expounded with the learning of the *śāstrī-s*. The authority of the text could not be replaced by rules of any individual's invention.[61] But the texts themselves[62] often state that when one looks for the *dharma* appropriate to a particular problem, one must look outside the texts. Custom (*caritra*) is defined in *Kātyāyana* as 'all that a person practises, whether or not it conforms to *dharma*, simply because it is the constant usage of the country'. This implies some opposition between *dharma* and custom in that each may constitute a source of law for the solution of a particular problem. In the earlier *Bṛhaspati* text, again with reference to the solution of dispute, custom is but one of four sources of law, the others being royal ordinance, practice, and the *dharma* itself. On this point, Robert Lingat describes custom as a social phenomenon owing its authority to its inveterate character, whereas the laws of the *śāstras* are preconditions for the realization of the social order itself.[63] In

[61] Derrett (1968: 153–4) and the sources there cited.
[62] Especially the text of *Kātyāyana*; cf. Lingat (1973: 176 ff.).
[63] Lingat (1973: 176–7).

actions conceived of as threatening the structure of society. The reality of the law was plural in nature but the values that it enforced were absolute and consistent. The system promoted stability within the framework of the Confucian ethic, the validity of which was accepted at all levels of society and within all groups. The texts of the *Ch'ing* and the earlier dynasties were 'really law' in this sense.

III CONCLUSION

This survey of the law texts demonstrates that they are 'texts of law' but that their nature is quite distinct from the legal texts of the modern industrial state in the nineteenth and twentieth centuries. What is the nature of the distinction? It is, as suggested in the body of this chapter, that the function of the texts is different from that of the written laws of Western culture. They provide a framework for the idea of obligation and, in so doing, they deny the distinction, common to the law of modern industrial states, between 'positive' and 'living' law as found in the work of such jurists as Ehrlich.[92] As we have seen, the texts relate to reality in a number of ways but they all posit a continuum between written law and actual practice. The key to understanding this continuum is that the individual appears in the law not as a member of the class 'individual subject to law' but as a person of certain status (of class, caste, inferior, and so on), the significance of which varies according to the implications of the status in question. This does not mean to say that the criterion for the application of law is necessarily relativist; it may of course be so, but equally the absence of positive law in an extreme sense does not of necessity imply relativism. Relevant criteria are more properly to be found in such concepts as *dharma*, the Confucian ethic, or the will of God. It is within these that the facts of particular cases take on the appropriate legal significance.

In all the codes described above, the notion of status[93] is primary; the propriety of any action which an individual may undertake is determined by reference to a natural system of obligation. 'Natural' here means principles which are self-

[92] Ehrlich (1936: 493 ff.).

[93] In the sense established by Sir Henry Maine but without emphasizing his will theory.

evident in the ecologies, social systems, and religions. They are, so to speak, given in the facts of life. The *varṇa* of the Hindu, the word of Allah, and the five proper relationships of Confucius are not just normative, they are also real descriptions of the natural order.[94] Propriety, therefore, means acting in accord with the reality of human (and extra-human) existence. The individual accepts the obligations arising out of this state of affairs, and it is only in this sense that sanctions such as outcasting, expulsion from the *tsu*, and the denial of entry to God's presence become fully explicable.

The codes contain laws which in all cases have a determinate and absolute content. Such cannot be compromised if the society is to exist. Radical change in fact means the destruction of that society. In cases of dispute, mediation was the preferred process simply because divergent interpretations of the legal complex were not possible. Even variant interpretation was limited by the propriety of the natural (and hence legal) order itself.

The South-East Asian law texts derived these characteristics from their respective models and at the same time preserved indigenous South-East Asian features. Room for the latter was found in the interstices of the imported written texts, i.e. in those areas in which the original rules were either inoperable or non-existent. These gaps were filled in with indigenous matter (most often in connection with family and property) which, when combined with the imported matter, often results in texts that are internally inconsistent. But the inconsistency is itself a part of the process of adaptation and each textual model either assumes or explicitly states a place for local rules. In no case is a multiple *source* for regulation denied in any text, although of course the idea of law itself is both absolute and immutable. The tension between an absolute conception, derived from India, China, or Islam, and local regulation gives the South-East Asian texts their unique character.

[94] See, for example, the comments of Reale (1968) and McKeon (1968).

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Excerpts for Session 2.2 [footnotes omitted]

Lucas Lixinski, 'Heritage Listing as a Tool for Advocacy: The Possibilities for Dissent, Contestation and Emancipation in International Law through International Cultural Heritage Law', 5(2) *Asian Journal of International Law* 387-409 (2015).

Cultural heritage is a fairly discrete area of international law, and, as such, it seldom attracts widespread attention. It is, however, an important theater for articulation and contestation of the broader politics of international law, and the interaction between the domestic and the international, possibly precisely because it is discrete and "under the radar". Even though cultural identity is immensely contested as an international law topic, cultural heritage, as the embodiment of that same identity, is far less so. Listing processes (a typical protection mechanism under international treaties on cultural heritage) tend to simply showcase heritage as the result of a process through which States and experts come together to choose the world's wonders, and not to enact or reenact identity politics. As a result, oftentimes topics that would be too politically charged in a wider forum can be discussed, in a fashion, as a cultural heritage issue, such as self-determination and territorial disputes.

This article explores the theme of international heritage law as the forum through which broader legal and political claims are articulated, negotiated and contested. More specifically, it looks at how one specific regime under UNESCO has been used for such purposes. In 2003, UNESCO approved the Convention for the Safeguarding of the Intangible Cultural Heritage. Just under eleven years after its approval at the time of writing, it has been ratified by over 160 States. One of the safeguarding mechanisms under the Convention is the Representative List of the Intangible Heritage of Humanity.

One of these manifestations of intangible heritage is the "Buddhist Chanting of Ladakh: recitation of sacred Buddhist texts in the trans-Himalayan Ladakh region, Jammu and Kashmir, India", inscribed on the list in 2012. Standing for Tibetan culture in this region of India, this manifestation of heritage works as a means to showcase issues related to Tibetan autonomy—both within India and more broadly—the relationships between Tibetan and Muslim cultures, and regional autonomy and accommodation of cultural minorities in the Indian State.

This example of intangible heritage will be used to discuss the role of heritage listing as a means to bring these issues to the fore in a supposedly "apolitical" and almost "scientific" body. The article discusses the many uses of the listing of Ladakhi heritage, ranging from listing as a means for autonomy of the Ladakhi, to listing as a means of domination of the same Ladakhi, or the exclusion of other minorities in the region. Listing could also be seen as a means to exert broader control over the minority group and even the geographical area, given its function as a symbolic flag being planted in Ladakh. It could finally work as an important tool in managing the Kashmir conflict because of the conflict's connection to cultural identity, at least to the extent that it affects Buddhists and the Ladakhi region.

Overall, it is important to stress that community aspirations on the ground are political, and I argue that some of these politics makes its way up to UNESCO, and the listing creates a moment in which the heritage and its meanings are subject to change in control. The control can shift either towards governments and the State, or to communities and heritage holders themselves. Heritage then serves as a tool of conformity or contestation, of taming or fueling dissent, of reinforcing, expanding or restricting accommodation for cultural minorities within a very multicultural State.

[…]

IV. THE USES OF HERITAGE

Cultural heritage law is one possible means through which cultural identity or culture more generally gets to be protected. Cultural heritage in a sense embodies a cultural identity, and makes it graspable, within the reach and comprehension of the casual bystander. It is a means to give "culture"—amorphous, ever-changing and all-encompassing—an element that can be more easily subject to legal protection—as cultural heritage is definable and more limited. Of course, there are many risks to reliance on cultural heritage as a proxy for culture: the biggest one is that it commodifies culture, turning it into "bites" for the comprehension, appreciation and eventual consumption by outsiders.

There is a sense in which cultural heritage, at least that which is protected under UNESCO, "belongs" to the whole of humanity, or, at least, that all of humanity has a stake in its protection. While the internationalization of heritage helps promote UNESCO's goals of cultural cooperation among nations for peace, and a sense of pride can be derived from the international recognition of one's heritage (as discussed above), one of the negative effects of this internationalization (and the giving of a stake in heritage to everyone in the world) is that it disembodies heritage. And, as Karen Engle put it:

> That heritage can be alienated from the groups from which it is seen to emanate provides the basis for another possibly unintended consequence of this understanding of culture. It permits [S]tates and even international institutions to pick and choose the parts of the heritage they believe are worth protecting, and to suppress those of which they do not approve.

There is often a mismatch between what communities hope they will achieve by having their heritage listed under UNESCO, what States—and often NGOs—promise these communities, and what heritage instruments under UNESCO actually allow for the benefit of communities. The following subsections explore some of those expectations, promises and mismatches, inquiring into the possible uses of heritage listing before UNESCO for the communities from which the listed heritage comes, the other communities and groups around these communities, and the State in which the listed heritage is practiced.

A. *Listing as Minority Emancipation*

The listing of Buddhist chanting before UNESCO can be perceived, in a more optimistic sense, as a means for the emancipation of Ladakhis. After all, the inclusion on an international list certainly increases visibility beyond the Indian State, and in a way represents Ladakhis on the international plane as a distinctive entity from India, or even the state of Jammu and Kashmir. Heritage listing, in many ways, produces cosmopolitanism, which can be welcome to a minority trying to articulate a position for itself outside the Indian nation-State.

The idea of heritage listing also resonates on some level with the process of international human rights adjudication: heritage listing is, in a certain way, about bringing your claims (your culture) before an international forum (UNESCO) to have your heritage "adjudicated on" (listed or not) despite the State. The process of heritage listing before UNESCO can thus be seen in itself as a means to contest the State, and emancipate the community from which the heritage stems. In effect, repeated calls for the further democratization of international law-making would enhance this capacity of contestation under international law.

With specific regard to Ladakhi Buddhists, the listing of the chanting was not the first recognition UNESCO has given to their heritage. In 2007, the UNESCO Bangkok Office bestowed upon the Maitreya Temples Complex the "Award of Excellence" in the "UNESCO Asia-Pacific Awards for Cultural Heritage Conservation". This award recognized the work of the Namgyal Institute for Research on Ladakhi Art and

Culture (NIRLAC) and the Basgo Welfare Committee on the restoration of a group of three temples in Basgo—an ancient capital of the Ladakhi kingdom, before Leh became the capital in 1555. One of the temples was actually built by a Balti Muslim queen, and may have initially been a mosque that was later transformed into a Buddhist temple.

[…]

The process for the restoration of the temples highlights the distinctiveness of the Buddhist culture in Jammu and Kashmir, and reflects the community's yearning for more recognition. It also represents a first step in using UNESCO heritage protection mechanisms to achieve that recognition. The award by UNESCO is in this sense a first step in what is now a much broader strategy with respect to Buddhist heritage in Ladakh. WMF is still partnered with NIRLAC for the restoration of other Buddhist sites in Ladakh, and another award from UNESCO Bangkok has followed in 2011, as well as an award from a travel magazine (*Travel + Leisure*) in 2012.

The use of other UNESCO mechanisms then naturally follows, given the success of projects for the restoration of Buddhist temples. And the nomination of Buddhist Chanting in Ladakh, with its focus on a holistic strategy for the preservation of Ladakhi culture, centred on the livelihood of monks, the *Gonpa* system, awareness campaigns, funding and the fostering of craft centres achieves a comparable level of international prestige and recognition of Ladakhi heritage.

In many ways, the funding that is promised via the listing process addresses historical inequities during partition, in which *Gonpas* received no financial aid under the administration of either Muslims or Hindus in the years surrounding and following partition. This neglect, which has come a long way to fuel Ladakhi nationalism, is thereby addressed through a new line of funding created by the Indian government.

This listing, much like the Maitreya Temples project, also plays off the notion of Ladakh's "uniqueness" in the region, and its neglect by the state of Jammu and Kashmir, and India more generally. One of the effects of the listing is that it directs funding to Ladakh. Even though the state of Jammu and Kashmir has long received significant funding from the Indian government, including specific funds for promotion of culture, heritage and tourism, these funds have invariably been deflected to Kashmir in particular, as a more problematic zone, rather than impoverished Ladakh or Jammu.

This listing can therefore be seen as highlighting the distinctiveness of Ladakhi identity, and finally funneling some of the long-promised funds for the economic and social development of Buddhist communities in Ladakh. It is thus a means of emancipating Ladakhis in their own State, at least to a certain extent. But this same listing, while emancipating Ladakhis and highlighting their existence and importance, seems to downplay the existence and importance of other groups in the region, thereby oppressing them.

B. *Listing as Minority Oppression*

To be more specific, the listing process, and the programs around Ladakhi Buddhist heritage, claim Ladakh as "Buddhist", and ignore the Muslim population of Ladakh—which is over 45% of the total population of the area. Heritage listing, therefore, can work also to alienate and exclude one minority for the sake of the promotion of another.

Muslims are an important part of Ladakhi culture, and seem to be neglected by a listing of Buddhist heritage alone. The game of polo, for instance, important in Ladakhi social life, was brought by the settlement of Shia Muslims, even though it is now practiced by Muslims and Buddhists alike. Similarly, various elements of the Ladakhi language come from the interaction with Muslim culture and languages. Because Ladakhi separatism worked along a Buddhist-Muslim divide, it triggered divisions that seem to be exploited and reinforced by the listing process. This divide is largely artificial, though, especially seen as the Shias of Leh are predominantly Baltis, and ethnically similar to Ladakhi Buddhists. Intermarriages are also fairly common among Buddhists and Muslims, but this "melting pot" feature of contemporary Ladakhi society is largely ignored by the labels required by listing.

Despite the artificiality of this divide, it has been successfully exploited in fostering division and dissidence among Buddhists and Muslims in Ladakh. Even though ultimately they came together in the push towards the creation of the Autonomous Hill Councils, Muslims in Kargil at the time felt that Leh overshadowed their identity, and resented the "Leh-centric" conception of Ladakh. The listing process, essentially claiming Ladakh as "Buddhist" reinforces this resentment, calling into question the role of heritage listing, and the protection of culture, as promoting inter-cultural dialogue, enshrined in the UNESCO Constitution. It would seem that, at least in this case, listing has deepened differences, by privileging a construction of Ladakhi identity that essentially obscures the importance of Muslims for the functioning of that society.

Listing also lends credence to notions of a "pure" Ladakhi (Buddhist) identity. In the formation of Bhutan, a self-proclaimed Buddhist State, ethnic Nepalis and Hindus were traditionally seen as a threat to the "northern Bhutanese, Buddhist descendants of early Tibetan settlers". Consequently, a national "One Nation One People" policy was put into place, viciously discriminating against non-Buddhists in Bhutan. Under the banner of "cultural protection laws", these provisions have been used to worsen the living conditions of cultural and ethnic minorities in Bhutan. Conditions are not at that stage in Ladakh, but it is a slippery slope, especially when the listing of Ladakhi Buddhist heritage happens under the guise of "cultural protection".

Privileging one minority over another is a basic colonial trope, and one that appears to be employed in this context as well. The consequent oppression of the Muslim community in Ladakh by this process of privileging Buddhist heritage, and of claiming Ladakh as Buddhist, seems to flatter Buddhists, which is a means of more easily subjecting them to control by the Indian State. The next subsection explores some of these facets.

C. *Listing as Control*

Listing can work as a means of (partial) emancipation of a minority group, and it has the unintended consequence of harming communities that are not covered by the scope of listing. But there is also an important unintended consequence that can come from listing, and that can negatively affect the communities that are, on the surface, being "emancipated" by having their heritage listed by UNESCO.

Part of it rests simply on how the emancipatory potentials of heritage are often over-promised. Heritage listing will not serve as a means for self-determination, at least not in the State-creating sense, which would be the main goal of the Ladakhi nationalist movement discussed above. Moreover, even if one focuses on a thinner version of self-determination instead, one that would require cultural accommodation for minority communities, that does not seem to be on the horizon either.

With respect to nationalism and separatism in Ladakh, several communities in Ladakh have received tribal recognition under the Indian Constitution. But this tribal recognition does not require the Indian State to create a separate political entity for those peoples. One of the measures that have resulted is the creation of the Autonomous Hill Development Councils, which is a means to promote some form of political autonomy. But that is detached from the core of Ladakhi heritage, as characterized before UNESCO. More specifically, one of the downsides of tribal recognition is that political life has moved away from *Gonpas* (the centre of the listing process) to the Hill Councils. Even though this move

detaches politics from religion, which is an important secular and liberal goal, it also more fundamentally moves Ladakhi heritage out of the political process. Ladakhi identity becomes a detached manifestation of culture, which is to be gazed upon and exoticized by the outsider, but not one that is a basis for political contestation of the majoritarian State structure—at least not to the same extent.

Heritage recognition therefore lies in the construction of "controlled" difference. Difference will be permissible, as long as it conforms to the boundaries of the political process as set by the State. And cultural practices will be deemed "authentic" or "inauthentic", which is a means to essentially shift control over their meanings. The Jammu and Kashmir cultural heritage act […] clearly indicates that there is such a thing as "authentic" intangible cultural heritage in the view of those authorities. And that it is up to the State to determine whether heritage is, in fact, "authentic". These two factors, controlled difference and the quest for "authenticity", form what Elizabeth Povinelli has called "the cunning of recognition". For her, "[t]he cunning of recognition lies exactly in this play of the parentheticals: Be (not) Real; Be (not) Alterior." Therefore, the meanings and possibilities of heritage are tightly controlled by the State, thus reducing to a minimum the potentials of heritage (in this context, at any rate) for the exercise of self-determination.

Also relevant in this context, "policies based on intangible heritage […] generally do not require the State to make significant political power-sharing arrangements." That is not only because intangible cultural heritage listing requires that cultural manifestations "conform" to a certain mold, so they can fit under UNESCO's protective umbrella. That is only part of the answer. More generally, heritage listing shifts control over heritage away from the community, and towards the State listing it. The State has the monopoly of listing heritage before UNESCO, and, in the process, it determines what heritage is, why it is worth protecting, and in what terms it will be safeguarded.

[…]

The use of development funding for the control of parts of Jammu and Kashmir is not novel to the heritage context, and has been used in a number of contexts by the Indian central government as a means to control the region via what are on their face autonomy-granting measures. These measures have been particularly valuable with respect to conflict management in the long run, which is certainly one way in which heritage listing can be seen as part of conflict management, but not the only one.

D. *Listing as Conflict Management*

Heritage is often an important element in conflict management, capable of creating conflict, but also helpful in its resolution. As a matter of fact, historically, conflicts over relics from certain shrines have spurred violence across the Kashmir Valley as far back as 1963. And part of the conflict in Jammu and Kashmir in the 21st century part of it, is attributable to the transfer of land to the Amarnath shrine for the purposes of facilitating the pilgrimage of Hindus to a Muslim-majority area of Jammu and Kashmir (in Kashmir). This transfer of lands, however, was seen as "part of a plan to settle Hindus from outside to change the demography of the state, reducing its Muslim majority to a minority", and was quickly reversed by the government. Despite the reversal, this incident, based on heritage, stands for the "resurfacing" of secessionist movements in the Kashmir valley. That reversal did not come without its price for the affected communities, in the form of violent repression of peaceful protests in both the Jammu and Kashmir areas of the state, even though there was a larger than usual turnout in local elections, which is unusual in a region where electoral boycott is seen as a means to contest the authority of the Indian central government.

Hence, one final major use of heritage in the Ladakh Buddhist chanting context has to do with where Ladakh is, and who its neighbors are. The Ladakh region shares contested borders with both China and Pakistan, and is therefore embroiled in larger conflicts involving India and each of the two nations, which India is eager to resolve in some fashion. For the Indian government to be able to claim Ladakhi heritage as India's heritage means, at least symbolically, that the territory of Ladakh is part of India, and that Ladakhi identity is part of multicultural Indian identity as well.

Listing under UNESCO enables just that. After all, when one looks up Buddhist Chanting of Ladakh on the Representative List of the Intangible Cultural Heritage of Humanity, it clearly appears under "India", as the nominating State, which also controls that culture, involving a claim that India is where that manifestation of heritage rightfully belongs.

In this way, heritage listing serves a "flag-planting" function, in order to ascertain and clarify claims over contested territory. This type of maneuver is not unique to India, though: China is openly using underwater cultural heritage as a means to reinforce its claims over vast parts of the South China Seas. China is using the existence of shipwrecks in certain areas of the South China Seas as proof of Chinese occupation of the areas predating occupation by, say, Vietnam or the Philippines, to name two examples of disputes. That way, Chinese government officials suggest, China can effectively claim sovereignty over those contested areas, based on historical title.

And India can arguably do just the same, should the opportunity present itself: because the culture practiced in Ladakh is Indian culture—or is at least claimed as such and recognized as such by UNESCO—India is the sovereign over the area, over any competing claims. The use of UNESCO for the recognition of international legal claims, also, is not unique to the heritage field, if one thinks of the example of Palestine, which (successfully) applied for membership at UNESCO as a means to strengthen its statehood claims.

Heritage listing, therefore, serves as a means to claim a tradition, and with it territory, which can be used to manage—or exacerbate—conflict in a turbulent region, at least to the extent it can galvanize support for belonging to the Indian State, but also through UNESCO recognition of the culture (and attached territory) belonging to the country that has listed that manifestation of heritage. But how do those different uses of heritage come together, and interact in the broader universe of international law and relations?

V. CONCLUDING REMARKS

There are many possible uses of heritage listing, which mirror broader discussions in international law. A forum apparently as innocuous and "neutral" as UNESCO, where experts decide upon the listing of heritage for the benefit of humankind, can become the theater for the articulation of claims that contest national and international legal processes. With respect to the struggles of international law, Mohsen al Attar and Rebekah Thompson have said that "[o]n one hand is an ethics of expertise, exclusion and plutocracy—international law as fiefdom. On the other is an ethics of subsidiarity, inclusion and democracy—international law as self-determination."

The situation of Ladakhi Buddhist chanting, and its listing as representative of the intangible cultural heritage of humankind, echoes that tension. On the one hand, there is the expertise behind which States can claim to control the meanings of heritage, the exclusion of Muslims from the international representation of Ladakh, and the fiefdom that is the Indian State planting a symbolic flag in the region as an aid to the resolution of its boundary disputes. International cultural heritage law enables all of that. The same can be said about other UNESCO instruments, most notably listing under the World Heritage Convention, but also claims over underwater cultural heritage under other instruments.

Certainly, movable heritage objects under the definition of the 1970 UNESCO Convention have also been used as a means to articulate these tensions.

But, on the other hand, there is also a glimmer of hope in international law becoming the vehicle for the emancipation of communities, for their inclusion in domestic and international legal processes that determine their status, for the correction of past wrongs. International law can work as a means to facilitate Ladakhi self-determination, in some form. But, for that to be possible, more attention is needed in the field of heritage by international lawyers. Heritage listing, as it stands, is a "quiet" means for the State to perform acts of control. It has the potential to become a means for communities (and States alike) to perform acts of contestation, dissent and emancipation.

Culture, and heritage as culture, can serve as a means for self-determination. It just needs to work in a way that shifts control to the actual holders of that heritage, as opposed to being left in the hands of the nation-State as the unreliable steward of identity.

Anne Laura Kraak, 'The absence of human rights in heritage practice at Bagan in Myanmar', 24(2) Human Rights Defender 19-20 (2015).

Human rights are increasingly considered relevant to cultural heritage. Cultural and religious rights can be at stake when cultural heritage is exploited, destroyed or when access to that heritage is denied. Yet, the conservation of cultural heritage sites may also have a negative impact on economic and development rights of communities when, for example, building restrictions are put in place.

The historical and religious site Bagan in Myanmar is an example of a place where these rights are at stake. However, after five months of doctoral fieldwork at this site in the past year, it became apparent that in the context of the current preparation of a World Heritage nomination of Bagan, human rights language remains virtually absent. In this article I elaborate on the relevance of human rights for heritage conservation practice in Bagan and consider some explanations for the absence of this language.

The rights at stake in the precarious context of Bagan

Bagan can be found along a bend of the Ayeryawaddy River in the dry zone of Myanmar. Over 3,000 ancient Buddhist pagodas are scattered on a plain of about 110 square kilometres. Most of the monuments were built during the height of the Bagan kingdom, between the eleventh and thirteenth centuries. Some are largely abandoned and are not much more than ruins, while others remain active places of worship. Today, around 198,000 people live in the villages and towns around Bagan. It is a poor rural area characterised by unsealed roads and daily electricity cuts, but it is also a pilgrimage site and an increasingly popular tourist destination.

Myanmar is currently at a historically important moment. Since 2011, the country has been undergoing reforms and is moving from an authoritarian military system to a more democratic form of governance. There is an increasing re-engagement with the international community and its standards. This includes the establishment of a national human rights commission and the re-engagement with the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage and, as noted above, preparations are presently being made for a World Heritage nomination of Bagan. This nomination is considered particularly challenging because of the many different stakeholders at the site, including the tourist industry, religious communities, farmers, and archaeologists. Moreover, Myanmar's future is uncertain with new national elections coming up this year. All stakeholders will have to grapple with a significant increase in tourism and development, but future World Heritage status will also have consequences for the spatial governance of the site and the way in which people engage with it on a daily basis.

In this precarious context, several rights are at stake. For example, development, land and economic rights are at stake when a new type of governance restricts where and what people can build and where and how they can run their businesses. In an area where 70 per cent of the population lives in poverty, these are important concerns and sensitive issues. Depending on its implementation, a World Heritage designation could have a direct impact on the livelihoods of many. Furthermore, religious and cultural rights are at stake in Bagan when the conservation and protection of monuments excludes people from their cultural heritage and spiritual practices. The site is thriving with popular religious practices. These practices range from paying obeisance to Buddha images, to regilding ancient monuments and attending pagoda festivals. Although some of the practices may be considered harmless, others can form a risk to, or have an impact on, the material of the ancient monuments. This could be a reason for conservationists to attempt to prevent these activities from taking place.

The absence of human rights language

The challenges to heritage conservation in Bagan are not addressed using human rights language. There are various explanations for this. Locally, the way Bagan is valued plays a role. In collaboration with the Burmese government, UNESCO organises capacity building workshops and contracts international experts and consultants to advise on Bagan's World Heritage nomination. The majority of these experts and consultants are architects and archaeologists and this reinforces an understanding of Bagan as a site of architectural and archaeological interest. This understanding makes human rights seem less relevant than when Bagan is put in the larger picture of development pressures, poverty, spirituality, living heritage, ritual and tradition. Although there is often sympathy towards the rights at stake in Bagan, international consultants consider it beyond the scope of their work and expertise to engage with or advice on human rights issues.

Another reason international consultants may decide against advising on the human rights situation of Bagan is because of the sensitivity of human rights language in Myanmar in general. Until the government initiated reforms in 2011, Myanmar's human rights record was among the worst in the world. Since 2011, the situation marginally improved, although there have been concerns about the stalling of the reforms. A recent and continuous history of accusations and denials make human rights a sensitive topic in Myanmar. Moreover, even with a good will towards respecting human rights around cultural heritage sites, Myanmar faces many challenges related to human rights that may be considered more urgent than cultural and religious rights in one of the more peaceful areas of the country.

Although Myanmar's recent human rights record is worse than that of its neighbours, most Southeast Asian nations continue to have their reservations about the international human rights regime. They often resent any impingements on their sovereignty and suspect human rights as tools of Western imperialism. Moreover, human rights are sometimes seen as potentially threatening unity and stability. These concerns are not limited to Southeast Asia. Human rights are contested internationally.

Contestation is particularly the case for the category of cultural rights, which is most obviously linked to cultural heritage. Depending on which interpretation of culture or cultural heritage one takes, a right to culture in Bagan could mean a right to the conservation of the ancient monuments and artefacts or a right to popular religious practices. However, the popular religious practices could have an undesired impact on the monuments. Linking human rights to cultural heritage does not clarify how to address such conflicts. Furthermore, the "right to freely participate in the cultural life of the community" raises the question of who or what constitutes the community? Community members will have different roles and different types of knowledge. This makes it difficult to discern who represents the community. Conflicting interests may take place within a community. For example, while some locals in Bagan expressed a desire to beautify and repaint ancient pagodas, others strongly disapproved of such renovations and reconstructions.

Discussion

Absence of a right commonly makes that right seem more valuable. Human rights scholar Jack Donnelly calls this the *possession paradox.* A call for human rights is often the result of the absence of enforceable legal rights. Human rights often aim to challenge institutions, practices or norms to

establish a parallel legal right. Therefore, even if human rights language is currently not explicitly adopted, it may still have some relevance in Bagan. Debates about human rights and cultural heritage could be useful to enhance a broader dialogue about the ethics of cultural heritage conservation. And perhaps it is too early to explicitly engage with human rights in Bagan. Bagan may well be valued differently and more inclusively in time, making human rights more relevant to those involved in its management and protection. Furthermore, the 2012 ASEAN Human Rights Declaration could be a sign that human rights are starting to become less contentious in Myanmar and the wider Southeast Asia. Similarly, the conceptual challenges related to cultural rights are important to be aware of, but not necessarily impossible to overcome.

Lucas Lixinski, Fernando Lusa Bordin and Maite de Souza Schmitz, 'Identity Beyond Borders: International Cultural Heritage Law and the Temple of Preah Vihear Dispute', 20:1 *ILSA Quarterly* 30-37 (2011).

The international management and protection of cultural heritage is a rapidly growing area of international law. At one time, whether international law applied to and protected cultural heritage was a matter of dispute. This dispute was best articulated in the 1985 article titled "Thinking about the Elgin Marbles" by John Merryman, a professor at Stanford University. Professor Merryman advocated for what was then perceived as a radical move towards the internationalization of cultural heritage law, which at the time was considered a purely domestic matter. Since then, the field of cultural heritage law has gone global, with numerous international conventions now regulating and applying to both artistic objects and intangible aspects of culture. As such, a 2011 article in the *European Journal of International Law* by renowned law professor Francesco Francioni asserts that international concern over cultural heritage is a given. Moreover, because of the important role of cultural heritage in society, the law in this area involves issues of identity, territory, human rights, and the conduct of warfare, among many others.

A modern-day legal dispute over an ancient religious site, the Temple of Preah Vihear, exemplifies the wide scope of issues implicated when the ownership of a cultural icon is questioned. Both Cambodia and Thailand claim sovereignty over the land surrounding the Temple of Preah Vihear, a Hindu temple built in the 11th century situated near the Thai-Cambodian border. Conflict about the position of the border between the two countries (and about sovereignty over the Temple) continues to this day. We will use this dispute to talk about the evolution of cultural heritage law, and how the development of this area of law contributes to one of international law's greatest promises, that of upholding peace among nations.

[…]

2. The *Temple of Preah Vihear* Dispute

In 1962, the International Court of Justice decided the merits of the *Case Concerning the Temple of Preah Vihear* (Cambodia v. Thailand). The Court was asked to settle a sovereignty dispute between the two countries over the Temple of Preah Vihear area, which stood at the very center of the Thailand-Cambodia border. . The Temple of Preah Vihear, built in the 11th century, is situated atop a hill between the two countries. It overlooks the Cambodian plains to the south, and Thailand to the north. The southern face of the hill that looks onto Cambodia is a precipice, which makes access from the Cambodian side very difficult; but from the north, it is a fairly easy climb up a slope, and then a stairway. The Temple is a testament to Khmer architecture and to the Khmer civilization more generally, which plays an important role in the historical and cultural formation of the region.

The Court reached its decision by interpreting a 1904 boundary settlement between Siam (as Thailand was then known) and France (Cambodia was a French protectorate) , that included maps produced by French geographers giving the disputed area to Cambodia. The Court held that because Thailand never protested the maps, despite having knowledge of their existence and demarcations, (having received several official copies from the French government), Thailand could not now contest their validity.

The case became a textbook example of the application of the doctrines of acquiescence and estoppel, because, according to the judgment of the ICJ, Thailand's lack of protest until the case was initiated in 1962 amounted to an endorsement of the boundary as set therein. As a consequence, sovereignty over the territory where the Temple stands remained with Cambodia.

Immediately after the ICJ's judgment, there was a wave of violent protests in Thailand, during which the Thai population accused Cambodia and the ICJ of stealing the country's territory and cultural landmark. Some weeks later, the Thai government issued a statement recognizing Cambodian sovereignty over the Temple and reiterating the government's intent to comply with the ICJ's judgement. Nevertheless, from 1962-2008, there were intermittent boundary skirmishes and confrontations between Thai and Cambodian military forces, resulting in several deaths during the 46-year period.

In 2003, a Thai actress that was very famous in Cambodia (known as "Morning Star" after her role in a popular soap opera) allegedly said that she would never come to Cambodia to perform unless the Angkor Wat Temple (another important Khmer temple and World Cultural Heritage site) was returned to Thailand. She also said, allegedly, that if she was ever reincarnated she would rather be a dog than a Khmer national. Despite the fact that this slander turned out to be a fabrication, it was enough to spur a wave of violent protests which culminated with the burning of the Thai Embassy in Phnom Penh. The rumour added fuel to a fire that had already been stoked by nationalism, domestic politics, and cultural disputes.

In 2007, the World Heritage Committee issued a decision on the status of the Temple of Preah Vihear, quoting a statement endorsed by both Cambodia and Thailand in which the two countries agreed to cooperate towards a nomination by Cambodia of the Temple to the World Heritage List. In Thailand, this joint statement was received very negatively, and the political backlash led to a change in the Foreign Ministry and a formal withdrawal of Thailand's support for the nomination.

In 2008, Cambodia submitted the nomination file to the World Heritage Committee. The nomination was approved, though the Committee sternly encouraged negotiations to be reinitiated with Thailand for the management of the site and the creation of a buffer zone around the Temple (and eventually even a joint nomination by Cambodia and Thailand, to include the surrounding natural area). According to the International Council on Monuments and Sites (ICOMOS), an important NGO in the field of heritage protection and an active advisor to the World Heritage Committee, the importance of the Temple of Preah Vihear, especially if compared to Angkor Wat (which has been on the World Heritage List since 1992), is the interaction between the Temple of Preah Vihear itself and the natural environment surrounding it. Without the natural environment--a significant portion of which is in Thai territory--the significance of the Preah Vihear site is greatly diminished.

The World Heritage Committee has since issued annual decisions urging Cambodia and Thailand to agree on a joint management plan for the site. However, cooperation seems a distant goal. When the Temple's inclusion on the World Heritage List was announced in 2008, another wave of protests erupted across Thailand, renewing anti-Cambodian sentiments and creating a sense of urgency that escalated into additional border skirmishes and military confrontation in and around the Temple of Preah Vihear, causing damage to architectural features of the Temple.

These skirmishes prompted Cambodia to file an application with the ICJ in April 2011 requesting an interpretation of the Court's 1962 judgment in the *Temple of Preah Vihear* case. According to Cambodia's application, "in seeking to minimize the legal effects of the 1962 Judgment, Thailand accepts Cambodia's sovereignty over the Temple, but denies that this has effects beyond a limited perimeter confined strictly to the Temple itself." In other words, according to Cambodia's application, Thailand claims that the 1962 judgment did not actually set a boundary between the two States, as it only decided the matter of sovereignty over the Temple

In July 2011, the ICJ issued an order of provisional measures requiring, *inter alia*, that troops from both Cambodia and Thailand be removed from the Temple area. The Court determined that there was urgency and the risk of irreparable injury unless provisional measures were ordered, including further damage to the Temple itself. It also established a "provisional demilitarized zone" around the Temple until the Court reaches a final decision on Cambodia's request for an interpretation of the Court's 1962 judgment.

But what does the most recent legal action on this situation mean for international cultural heritage law? What role has cultural heritage law played in this dispute that now spans half-of-a-century?

3. International Cultural Heritage Law and the *Temple of Preah Vihear* Cases

Cultural heritage considerations played no role in the Court's 1962 judgment. The ICJ judgment dismisses the application of cultural heritage law in one sentence: "The Parties have also relied on other arguments of a physical, historical, religious and archaeological character, but the Court is unable to regard them as legally decisive." No other reason is given as to why these types of arguments are dismissed, despite the Court's own recognition of the importance of the Temple, saying that "[a]lthough now partially in ruins, this Temple has considerable artistic and archaeological interest, and is still used as a place of pilgrimage."

Judge Gerald Fitzmaurice, in his separate opinion in the *Temple of Preah Vihear* case, did shed light on why the Court dismissed evidence related to the historical, cultural and archaeological importance of the Temple. According to Judge Fitzmaurice, because there was a Treaty to serve as the legal basis for the dispute, "extraneous factors which might have weighed...in making that settlement, and more particularly in determining how the line of the frontier was to run, can only have an incidental relevance in determining where today, as a matter of law, it does run." By making this statement, Judge Fitzmaurice suggests that history and culture are of secondary importance in determining who has a legitimate claim over a historical and cultural site. He goes on to say that "for these factors to have any serious influence, it would at least be necessary that they should all point in the same direction, and furnish unambiguous indications." This line of thinking could be excused as the product of a different era. But, if taken seriously today, it is a promotion of some sort of strategic essentialism, a neat package of culture and history that tells a coherent and compelling story, without nuance or internal dissidence, and neatly fits legal categories and claims. Regrettably, strategic essentialism prevails to this day, even for anthropologists testifying before international tribunals on the determination of indigenous claims (most notably at the Inter-American Court of Human Rights).

In his opinion, Judge Fitzmaurice does also note that the Khmer origins of the Temple were a "neutral" factor in the Court's decision, "since it seems to be admitted that there are and were, in these regions, populations of Khmer origin on both sides of the frontier." This much is true, as the Khmer geographical presence in the region shifted a lot over the centuries. However, there is a dangerous undertone that culture should be unambiguous and simplified to have any legal weight, a suggestion that seems to have been at least partially endorsed in subsequent international practice but which must be questioned. If parties, attorneys, expert witnesses and judges alike simplify group identity to fit a legal standard rather than present accurate, complex facts that challenge the imperfect legal doctrine at work in the case, the law is unlikely to change. Cultural heritage law has evolved so as to accommodate cultural diversity, and "general" international law should reflect this evolution, too.

Judge Moreno Quintana's dissenting opinion in the 1962 case uses the same line of reasoning as Judge Fitzmaurice to dismiss historical and cultural considerations, even though he reaches the opposite conclusion to the majority of the Court. He says that "[a]n analysis of these acts [performed by Cambodia and Thailand in exercising sovereignty over the Temple] need not go back to the historical origins of the building of the temple of Preah Vihear nor need it take account of the religious role which the temple is said to have played for both the Siamese and the Cambodian peoples." He argues that instead only territory and geography should be factors, in this sense agreeing with both the majority of the Court and Judge Fitzmaurice's expansion of that reasoning.

Turning now to the 2011 case: In the context of the present proceedings, in which the sole basis for the Court´s jurisdiction is Article 60 of its Statute, the opportunity for the ICJ to revisit the historical and cultural aspects of the original case will be limited by the 1962 judgment. The judgment on the merits of the dispute cannot be revised by the Court at this stage, and even the Court's interpretation of the Judgment from 1962 will probably have to be restricted to its operative clauses and the reasons that were inseparable from it, as stated by the ICJ in its Order of July 2011.

Yet hypothetically, were one to take on the matter of who the Temple of Preah Vihear should belong to on cultural grounds (which could manifest in individual opinions of Judges when the Court delivers a judgment in the present proceedings), one would be faced with a very difficult question. As Judge Fitzmaurice pointed out in 1962, the Khmers have inhabited territory that is part of both Cambodia and Thailand for many centuries, and Khmer culture is a part of the history of the territory of both countries. In Thailand, however, ancient temples and other buildings and sites of historical and cultural significance are often referred to as being "Khmer-inspired", in a clear attempt to differentiate "Thai" and "Khmer" culture. In this sense, it seems that "Khmer" culture would belong to Cambodia. Nevertheless, historical studies also point out that the acceptance of Khmer identity in Cambodia is not an organic process of historical continuity. Much to the contrary, the Khmer civilization had disappeared for several centuries before it was rediscovered in Cambodia and reintegrated in Cambodian life. The Khmer identity was reintroduced in Cambodia by French colonizers in an attempt to create the "colonial other", and to "package" their identity in a means that could make them understandable and less threatening. Thus, the Khmer identity Cambodians hold on to could be considered in its origins an artificial product of Orientalism, not an actual historically continuous cultural connection.

[…]

4. Concluding Remarks: the Global Law and Politics of Identity through the Lenses of Heritage

Where does this all leave us? Since the *Temple of Preah Vihear* decision was issued in 1962 international law has become more welcoming to culture and heritage. International cultural heritage law is still heavily influenced by sovereignty-based arrangements, but it has come a long way towards a more humanized version. The human dimension of international cultural heritage law incorporates culture and connections between culture, territory and populations and puts these connections at the very center of legal understandings of heritage. These understandings may change the way some international law principles are regarded, including that of territorial sovereignty, which lies at the heart of the Temple of Preah Vihear case before the International Court of Justice.

However, culture is not single-faceted but nuanced and complex, and to suggest that international law requires culture to be presented in a single, neatly packaged way is unhelpful and a dangerous simplification. Fifty years ago, the ICJ dismissed culture from the case with a single sentence. That decision did not stop culture being used as the grounds for conflict; actually, if anything, it may have even sharpened cultural chasms between Cambodians and Thais. Now, despite the jurisdictional difficulties of using cultural heritage arguments in a request for the interpretation of a judgment that disregarded cultural heritage considerations, the ICJ has another opportunity to assess the cultural importance of the Temple. The Court´s judgment on the present proceedings may elevate the role of cultural heritage in international law, thus staying true to the promise of both legal regimes: to promote peace through understanding among peoples who can find unity in difference.

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Policing Religion: Discursive Excursions into Singapore's Maintenance of Religious Harmony Act

JOTHIE RAJAH

I INTRODUCTION: APPROACHING 'LAW' THROUGH DISCOURSE THEORY

This chapter applies discourse theory to a study of Singapore's *Maintenance of Religious Harmony Act* ('*MRHA*').[1] The *MRHA* was formulated at a time that, in the Singapore state's discursive construction of national security, 'religion' was a tool that might be improperly used against the 'nation', requiring anticipatory and preventative action by the state, so as to ensure containment of this threat. The *MRHA* creates a new range of measures by which state power might be exercised in order to contain newly defined abuses of 'religion'.[2]

The most significant feature of the *MRHA* lies perhaps in the way its key terms, 'religious' and 'political'[3] — terms which go to the heart of the conduct sought to be controlled — are left undefined by the Act.[4] In the *MRHA*, the state has not defined 'religious harmony' in the explicit manner legislation conventionally presents definitions; instead, the definitional function of the *MRHA* has been shifted onto the larger terrain of non-legal discourse. This paper traces the vital role played by language as social practice in this process of incorporating public discourse into legal text, such that 'religious harmony' now has a very particular, un-pin-downable but extensive Singapore meaning — a meaning explicated, not in the *MRHA*, but in the broader discursive contexts surrounding the positive text of the Act.

1 (Cap. 167A, 2001 Rev. Ed. Sing.) ('*MRHA*').

2 Laws already in existence at the time the *MRHA* was passed addressed a range of abuses of religion, and threats to the state. In the *Penal Code* (Cap. 224, 1985 Rev. Ed. Sing.), ss. 295–298 address offences relating to religion, such as "injuring or defiling a place of worship with intent to insult the religion of any class" (s. 295). Section 3(1)(e) of the *Sedition Act* (Cap. 290, 1985 Rev. Ed. Sing.) defines a "seditious tendency" as "a tendency to promote feelings of ill-will and hostility between different races or classes of the population of Singapore". This section of the *Sedition Act* has been relied upon to prosecute bloggers accused of racially and religiously offensive blog content. The *Internal Security Act* (Cap. 143, 1985 Rev. Ed. Sing.) does not explicitly address 'religion' or 'race' in the way the *Penal Code* and the *Sedition Act* do, but its catch-all clause enabling the government to order preventive detention as long as "the President is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Singapore" (*Internal Security Act*, s. 8) has been relied upon to detain individuals accused of religiously-motivated threatening activity, most recently in the case of the January 2007 detentions of a lawyer characterised as "self-radicalised" and four men alleged to be Jema'ah Islamiyah activists.

3 *MRHA*, s. 8(1).

4 The lack of a definition of 'politics' has been noted in an early comment on the *MRHA*: Valentine Winslow, 'The Separation of Religion and Politics: The *Maintenance of Religious Harmony Act*' (1990) 32 *Malaya Law Review* pp. 327–331, at p. 331.

III SINGAPORE IN CONTEXT

A *Singapore Discourse*

Discourse in Singapore, legal and otherwise, is marked by the recurrence of certain categories of social identity, in particular, 'race', 'language' and 'religion', framed by the category 'nation'.[38] Social categories, like the semantics that capture the "meaningfulness of the universes of ... societies", are some of the "deeper classification schemes that ... organise experience, perception and interpretation, ... structure communication and are reflected upon, articulated, brought to awareness and made into objects of conflict by discourse".[39] In Singapore, as in other former colonies, social categories such as 'race', 'religion', 'law' and 'nation', are strongly imbued with concepts and belief systems "authored and authorised by colonialism and Western domination"[40] but adopted and renewed by the nation state.[41]

With reference to Singapore, I use the term 'state' to mean the political state, acting through the agency of state institutions such as the Executive, Parliament, and the bureaucracy. But I also mean the wider social presence of the state.[42] In Singapore, there is a particular potency to the presence and power of the state because the same political party, the People's Action Party ('PAP'), has been in power since 1959.[43] Not only has the PAP been in continuous power, it has also been in almost absolute power.[44] It is impossible to overstate the pervasive nature of state power in Singapore, a power to which Singapore's extraordinary economic success can be attributed.[45]

The following discussion of a state-scripted text illustrates the operation of social categories and the very authoritative nature of state discourse in Singapore. It also

38 Nirmala PuruShotam, *Negotiating Language, Constructing Race: Disciplining Difference in Singapore* (Mouton de Gruyter, Berlin and New York, 1998), at pp. 30–55; John Clammer, *Race and State in Independent Singapore 1965–1990: The Cultural Politics of Pluralism in a Multi-Ethnic Society* (Ashgate, Aldershot, 1998).

39 Strydom, *supra* note 8, at p. 10.

40 Gyan Prakash, 'Subaltern Studies as Postcolonial Criticism' (1994) 99 *American Historical Review* pp. 1475–1490.

41 See Geoffrey Benjamin, 'The Cultural Logic of Singapore's Multiculturalism' in Riaz Hassan (ed.), *Singapore: Society in Transition* (Oxford University Press, Kuala Lumpur, 1976), pp. 115–133; PuruShotam, *supra* note 38.

42 Tremewan, *supra* note 23, at p. 2.

43 Singapore was granted self rule in 1959, with the British continuing to take responsibility for defence and foreign relations. In 1963, Singapore became independent of the British as part of the Federation of Malaysia. In August 1965, Malaysia ejected Singapore from the Federation, and Singapore reluctantly became an independent republic.

44 Jon S.T. Quah, 'The 1980s: A Review of Significant Political Developments' in Ernest Chew and Edwin Lee (eds.), *A History of Singapore* (Oxford University Press, Singapore, 1991), pp. 385–400, at p. 386.

45 Much has been written on Singapore's economic success. For a general survey of the complex of factors that have made this success possible, see Kernial Singh Sandhu and Paul Wheatley (eds.), *Management of Success: The Moulding of Modern Singapore* (Institute of Southeast Asian Studies, Singapore, 1989).

IV The 'Marxist Conspiracy': When Hidden Dangers Are Visible Only to the State

In May 1987, a group of young, English educated professionals[55] were accused of being part of a Marxist conspiracy to overthrow the state. Over 1987 and 1988, a total of 22 people were accused of involvement in this 'conspiracy' and were consequently detained without trial. In brief, the state's position was that the individuals it arrested and detained had been part of an international conspiracy, based in London, to overthrow the Government and establish a communist state. Because the arrests took place in stages, the 'Marxist Conspiracy' was in the public domain and received a great deal of media coverage for an extended period. About ten of the detained people were associated with the Catholic Church and were actively involved with the social work arm of the church.[56] A lot of state and media attention focussed on this group of Catholic social workers and the institution of the Catholic Church. The 'Marxist Conspiracy' was very probably the precipitating event for the *MRHA*.[57]

In December 1989, a white paper was tabled in Parliament setting out the government's reasons for wanting a law on 'religious harmony'.[58] Appended to the white paper was an Internal Security Department report entitled 'Religious Trends — A Security Perspective'. This report details ways in which three forms of behaviour threatened public order and religious and racial harmony of Singapore: first, 'Aggressive and Insensitive Proselytisation'; secondly, 'Mixing Religion and Politics'; and thirdly, 'Religion and Subversion'.[59] The conduct of certain Catholic priests at the time of the 'Marxist Conspiracy' is detailed under 'Mixing Religion and Politics'. The conduct and intentions of certain detainees are detailed under 'Religion and Subversion'. When the Bill was debated in Parliament, members addressed the popular perception that the proposed Bill was a reaction to the

[55] In the parliamentary debates on the detentions, there was repeated reference to the need to abandon the stereotype of 'communist', for example: "As against the old communist/Marxist who could be identified by his Chinese education background, hiding in the jungles, the modern day Marxist is primarily English educated with impeccable behaviour". See Singapore, *Parliamentary Debates*, vol. 49, 29 July 1987, col. 1452 (Bernard Chen).

[56] Michael D. Barr, 'Singapore's Catholic Social Activists: Alleged "Marxist Conspirators"' in Michael D. Barr and Carl A. Trocki (eds.), *Paths Not Taken: Political Pluralism in Postwar Singapore* (NUS Press, Singapore, 2008) (forthcoming).

[57] See Li-ann Thio, 'Control, Co-optation and Co-operation: Managing Religious Harmony in Singapore's Multi-Ethnic, Quasi-Secular State' (2005–2006) 33 *Hastings Constitutional Law Quarterly* pp. 197–254; Joseph Tamney, *The Struggle over Singapore's Soul: Western Modernization and Asian Culture* (Walter de Gruyter, Berlin and New York, 1996); Tremewan, *supra* note 23, at p. 145; Barr, *supra* note 56; Michael Hill, 'Conversion and Subversion: Religion and the Management of Moral Panics in Singapore' (Asian Studies Institute, Working Paper No. 8), <http://www.victoria.ac.nz/asianstudies/publications/working/08ConversionandSubversion.pdf>. Hill arrives at similar conclusions to some made in this paper, but makes his analysis through the lens of moral panics. For a reading of the 'Marxist Conspracy' and the *MRHA* that is uncritical of state discourse, see Khun Eng Kuah, 'Maintaining Ethno-Religious Harmony in Singapore' (1998) 28 *Journal of Contemporary Asia* pp. 103–121.

[58] Government of Singapore, 'Maintenance of Religious Harmony', Cmd 21 of 1989.

[59] *Ibid.*, at p. 19.

'Conspiracy'.[60] The *MRHA* cannot be understood without appreciating this contextual and precipitating event of the 'Conspiracy'.

A *Facts and Fear: State Discourse on the 'Marxist Conspiracy'*

Significantly, the state's account of the 'Conspiracy' was rarely clear about the precise nature of the activities of the Catholics it detained. Instead, the focus was on the threat to the 'nation' that had been averted. One example of this discursive strategy can be seen in a speech made to Parliament in July 1987 by Goh Chok Tong,[61] then First Deputy Prime Minister. Goh's speech was long and an apparent defence of the state's decision to order the arrests, but at no point in his speech did Goh specifically address the basic question of what the 'conspirators' actually did that threatened the state.

The closest Goh came to addressing the issue of the activities of the 'conspirators' is found in his statement that he "was concerned that the ISD[62] should not make a mistake and confuse young idealists out to improve society for sinister Communists out to wreck Singapore".[63] As the discussion below suggests, the actions of the 'conspirators', and in particular, of the Catholic social activists, might easily have been interpreted as well meaning actions of 'young idealists'. But the space for different interpretations was not granted in Goh's discursive construction of the necessity for decisive, pre-emptive state action.

In his speech, Goh did not offer facts to the public. Instead, his speech was an argument for the necessity of sufficient state discretionary authority. Rather than disclosing 'facts', Goh assured the public that the hard questions had been put to the ISD by "Prime Minister and me"[64] and the "younger leadership",[65] and they had nonetheless been convinced by the ISD of the seriousness of the threat. In so doing, Goh delivered the message that 'the people' need to trust in their leaders' assessments, that the ruling elite knows more and knows better. Knowledge, in other words, is the domain of the rulers, in part because it is the state that has access to surveillance.

B *State Omniscience: 'We' the People and the 'Royal We'*

Goh's argument worked at two levels. At one level, the public response of incredulity at the announcement of the 'Conspiracy' was indirectly acknowledged when Goh contextualised the 'Conspiracy' as surprising in two ways: first, because Singapore was no longer poor and, secondly, because the detainees were English

[60] Singapore, *Parliamentary Debates*, vol. 54, 22 February 1990, col. 1076 (Aline Wong).

[61] Singapore, *Parliamentary Debates*, vol. 49, 29 July 1987, cols. 1484–1489 (Goh Chok Tong, First Deputy Prime Minister).

[62] The Internal Security Department is commonly referred to as the ISD.

[63] Singapore, *Parliamentary Debates*, vol. 49, 29 July 1987, col. 1484 (Goh Chok Tong, First Deputy Prime Minster).

[64] *Ibid.*

[65] *Ibid.*, col. 1485 (Goh Chok Tong, First Deputy Prime Minster).

The subtext of this argument appears to be that general principles to do with individual rights and freedoms cannot apply to Singapore because of these exceptional vulnerabilities. This subtext facilitates the concluding argument, which justifies the decision to order the detentions on the grounds of national interests: "the Government cannot avoid unpleasant decisions if these are in the overall interest of the state". Here, Goh again positions himself as a member of the ruling elite. He speaks, after all, for 'the government', which acts for 'the people'. By calling the decision to order the detentions an 'unpleasant decision', Goh minimises the nature and the impact of detentions. There is no acknowledgement in this description that issues of 'law' and justice, or of fundamental liberties guaranteed by the *Constitution*, are at stake. The detainees are constructed by this discourse, not as individuals, but as members of the category 'communists', a category that in Singapore is replete with social meanings of sinister dangers.

D *The Passive Citizen*

One effect of constructing such a strongly authoritative relationship for the state as 'author' is to construct the citizen as receptive to the authority of the state, as needing to be informed and instructed by the state. This identification of the state as authoritative and the citizen as receptive to this authority is consistent with the construction of a social hierarchy in which the citizen engages with the state in a relationship of submission and subordination rather than in a peer relationship. The conduct of the Catholic social workers detained as 'Marxist Conspirators' arguably breached the subtext of the knowledgeable, authoritative state in two ways: first, the Catholic social workers were not passive citizens, (this point is discussed further below), and secondly, the activities they were engaged in dislodged the submerged social category, 'class'.

V 'Class' in the 'Marxist Conspiracy'

'Class' is almost an absent category in public discourse in Singapore.[69] The state's construction of nationhood tends to assume that material prosperity has been delivered to all via a meritocracy. As Goh put it (in that same speech), if Singaporeans "learn hard, study hard, work hard, they can climb up the ladder in Singapore". The implication of this declaration is that there are no obstacles to social and economic mobility in Singapore — no class barriers that impede diligence and determination and no manner in which citizens are not placed upon a level playing field.

[69] On the ideological concealment of class constructed by Singapore state policies, see Tremewan, *supra* note 23, at pp. 98–103. Rahim's study details ways in which economic and social marginalisation become subsumed by a discourse of socio-biology around 'race', 'culture' and 'ethnicity': *supra* note 30. See also Gary Rodan, 'Class Transformations and Political Tensions in Singapore's Development' in Richard Robison and David S.G. Goodman (eds.), *The New Middle Class in Asia: Mobile Phones, McDonald's and Middle Class Revolution* (Routledge, London, 1996), pp. 19–45.

Many of the activities of the Catholic social workers centred on supporting economically disadvantaged groups in Singapore. It might fairly be said then that their activities brought 'class' to the forefront of public discourse in a way that state generated discourse did not. In his study of the 'conspiracy', Michael Barr describes the activities of the Catholic social workers as "not overtly ideological, being directed predominantly at helping particular groups and individuals".[70] Barr's paper sets out how, for example, the Catholic social workers assisted "foreign workers"[71] by advising them of processes by which they could exercise their rights, teaching them English, assisting individual workers to represent themselves to the Ministry of Labour when they had a grievance, providing advice and refuge to abused and frightened foreign maids, and acting as liaison with the Ministry of Labour for the maids.[72]

The Catholic social activists also conducted a campaign against the government's introduction of the twelve hour shift. A report was written and the issue given prominent coverage in the *Catholic News*. A government Member of Parliament, who was also Catholic and a senior official of the National Trade Union Congress, engaged the authors of the report in a debate in the letters page of the *Catholic News*. This debate was picked up by the press. In this way the debate crossed the boundaries of Catholic community activity into the 'national' space. The Catholic activists also led a campaign to raise awareness of the consequences of retrenchment so as to pressure employers, the trade unions, the government and society to treat the retrenched with a sense of justice and compassion. A 1985 statement on retrenchment was published in the *Catholic News*. A booklet on the results of a survey of retrenched workers was also published, but was marked 'for private circulation'.

The Catholic social workers also initiated awareness-raising measures on industrial rights such as minimum wages, workplace health and safety, and supplied leadership training to workers who wanted improvements in work conditions. They initiated another campaign against the Graduate Mothers Priority Scheme, which gave the children of graduate mothers priority in enrolling their children in schools of choice and published a critique of certain features of the education system, for example, streaming and the Gifted Education Programme.

If this was the limit of the activities of the Catholics, then they could easily have been labelled "young idealists out to improve society" rather than "sinister Communists out to wreck Singapore".[73] But the state's interpretation of these actions was

[70] See Barr, *supra* note 56.

[71] Barr uses the term 'migrant workers', but in Singapore, people who engage in manual labour are often contractually present in Singapore, from neighbouring countries, under terms which prevent their remaining in Singapore or becoming citizens or migrant workers, and are commonly referred to as 'foreign workers'. See also the *Employment of Foreign Workers Act* (Cap. 91A, 1997 Rev. Ed. Sing.).

[72] A significant proportion of the foreign domestic workers in Singapore are Filipinas, who are usually Catholic.

[73] Singapore, *Parliamentary Debates*, vol. 49, 29 July 1987, col. 1484 (Goh Chok Tong, First Deputy Prime Minister).

very different and is best captured by the Internal Security Department's report appended to the white paper, 'Maintenance of Religious Harmony':

> In the mid-80s, a number of Catholic priests ventured into 'social action' and acted as a political pressure group. A few of them formed the Church and Society Study Group which published political booklets criticising the Government on various secular issues. … [it] accused the Government of emasculating the trade unions and enacting labour laws which curtailed the rights of workers. …
>
> *The Catholic News* … also began publishing articles and editorials on economic and political issues. It criticised multi-national corporations, the amendments to citizenship laws and the *Newspaper & Printing Presses Act*, and Government policies on TV3 and foreign workers.
>
> Vincent Cheng … embarked on a systematic plan to infiltrate, subvert and control various Catholic and student organisations, including the Justice & Peace Commission of the Catholic Church, and Catholic student societies in the NUS and Singapore Polytechnic. He planned to build a united front of pressure groups for confrontation with the Government. … Some of the articles adopted familiar Communist arguments to denounce the existing system as 'exploitative', 'unjust' and 'repressive'[.][74]

In the state's construction of events, labour rights and regulation, the economy and 'political issues' are secular and are thus outside the domain of what individuals and institutions linked to 'religion' might be permitted to participate in, or express an opinion on. The Internal Security Department report does not define 'politics', but it does supply the probable boundaries marking this territory that the state protects so vigilantly. In a discourse of nationhood that constructs the 'nation' as perpetually vulnerable, frames 'race' and 'religion' as potentially violent, and characterises economic prosperity as the marker of the successful delivery of political goods, is political activism (whether actual or potential) being identified as 'communist' or 'communalist' in order to regulate it?

VI Religion: The New Communism?

At the time of the 'Marxist Conspiracy', it was the 'communist' identity of the detainees that was discursively presented and insisted upon. However, the Catholic identity of some of the detainees made 'communist' a particularly unconvincing label.[75]

[74] Government of Singapore, *supra* note 58.

[75] This might be why the 'Marxist Conspiracy' occupies a liminal space in contemporary Singapore history. Even the *Straits Times*, which is widely perceived as conservative and reticent in its willingness to be critical of official state positions, has written of the 'Marxist Conspiracy' in ways that suggest there was no conspiracy. This muted critique did not begin to emerge in the public domain until more than ten years after the event. See, for example, 'A Giant of S'pore Legal History', *Straits Times* (Singapore), 6 June 2005, p. H5, which refers to "the so-called Marxist conspiracy", and Cherian George, 'The Cause Celebre of the Chattering Classes', *Straits Times* (Singapore), *Life!*, 29 December 1999, p. 11, in which quotation marks are used in a reference to the 'Marxist Conspiracy'. However, the most significant undertones of criticism emerge through the 2001 report of an interview with Tharman Shanmugaratnam. Shanmugaratnam is, at present, a Singapore cabinet minister. In

MRHA	*Sedition Act* or *Internal Security Act*
The Minister may make a restraining order against any person who has committed, or is attempting to commit the act of "exciting disaffection against the President or the Government" (s 8(1)(d)).	The *Sedition Act* defines a "seditious tendency" as including "a tendency to … excite disaffection against the Government" (s 3(1)(a)).
The Minister may make a restraining order against any person who has committed, or is attempting to commit the act of "causing feelings of enmity, hatred, ill-will or hostility between different religious groups" (s 8(1)(a)).	The *Sedition Act* defines a "seditious tendency" as including "a tendency to promote feelings of ill-will and hostility between different races or classes of the population" (s 3(1)(e)).
An order made under subsection (1) may be made against the person named therein for the following purposes: (a) restraining him from addressing orally or in writing any congregation, parish or group of worshippers or members of any religious group or institution on any subject, topic or theme as may be specified in the order without the prior permission of the Minister; (b) restraining him from printing, publishing, editing, distributing or in any way assisting or contributing to any publication produced by any religious group without the prior permission of the Minister; (c) restraining him from holding office in an editorial board or a committee of a publication of any religious group without the prior permission of the Minister. (s 8(2))	Under the *ISA*: If the President is satisfied it is necessary to do so, the Minister shall make an order for all or any of the following purposes: (i) for imposing upon that person such restrictions as may be specified in the order in respect of his activities and the places of his residence and employment; (iv) for prohibiting him from addressing public meetings or from holding office in, or taking part in the activities of or acting as adviser to any organisation or association, or from taking part in any political activities; and any order made under paragraph (b) shall be for such period, not exceeding two years, as may be specified therein[.] (s 8(1)(b) *ISA*)
Any order made under this section shall be for such period, not exceeding 2 years, as may be specified therein. (s 8(3))	

these inherently ideological terms. As demonstrated by the above discussion, the state's discursive responses to arguments it did not agree with became opportunities for renewed assertions of state authority and state definitions. The absence of discursive contestation outside of the 'rule of law' process has resulted in terms like 'religious harmony' and 'politics' acquiring taken-for-granted meanings consistent with state definitions, thereby facilitating the operation of the *MRHA* as 'law'.

IX Conclusion: 'Law' as Policy and Policing Statement

A *Naming 'Truth'*

The *Maintenance of Religious Harmony Act* is significant because it marks a shift in the way the Singaporean state shapes the discourse of 'law', 'religion' and 'nation' into the explicitly ideological. This shift resides in the way *MRHA* fails to explicate and instead implies the nature of the substantive offence, and implies the definitions of key terms like 'religious belief", 'politics' and 'religious harmony'. The offence under *MRHA* is not the actual or potential event that precipitates the restraining order, (the causing of feelings of enmity, for example). Instead, the offence consists of breaching the terms of a restraining order.

> *Section 16(1)*
>
> Any person who contravenes any provision of an order made under this Part shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 2 years or both.

Under the terms of the *MRHA*, the substantive 'wrong' the *MRHA* aims to prevent or punish, (acts that jeopardise 'religious harmony'), is not the 'wrong' that amounts to an offence. It is as if the substantive offence is implied: the offence of causing feelings of enmity, of promoting a political cause while under the guise of practising a religious belief, and so on.

If the substantive offence is an implied offence, the key terms of the *MRHA*, undefined by the *MRHA* itself, are perhaps meant to be understood by implied definitions. What, for example, amounts to "carrying out activities to promote a political cause, or a cause of any political party while, or under the guise of, propagating or practising any religious belief?"[105] 'Political cause' is not a defined term nor is 'religious belief'. To use these terms as if their meanings were uncontested is to express an ideological position denying the possibility, the validity, of a range of positions and interpretations. Does the *MRHA*, by not defining the terms, require citizens to adopt the same ideological positions as the state? Do citizens interpret the language of the *MRHA* in a manner consistent with the state's definitions because no others are available? And if these terms are not defined in the *MRHA*, does the citizen grasp at meaning from the discourse of 'law', 'religion' and 'nation' that surrounds the *MRHA*?

[105] *MRHA*, s. 8(1)(b).

B *The Law That Has Not Been Used*

The question arises in 2008, sixteen years after the *MRHA* was gazetted into effect,[106] what the significance of this law is if it has not, in fact, ever actually been enforced.

Eight years after the *Maintenance of Religious Harmony Act* had been passed, Lee Kuan Yew explained the need for the *MRHA* thus:

> But when the Christians became very active and evangelical ... wanting to convert the Muslims, and the Catholics decided to go in for social action, we were headed for trouble! ...We've just got out of one trouble — communism and Chinese chauvinism — and you want to land into another? Religious intolerance? It's just stupid. Stay out of politics. The *Religious Harmony Act* was passed; after that, it subsided.[107]

Significantly, Lee summarises the activities of 'the Catholics' as 'social action'. There is no effort in this narrative, ten years after the event of the 'Marxist Conspiracy', to resuscitate the 'Marxist' label or to recall the shadowy, "nefarious activities" that were said by Goh[108] to be so "prejudicial to the security of Singapore".[109] Instead, the threat to the ever precarious 'nation' is now 'religion' and the territory that 'religion' needs to stay out of is 'politics'. Communalism, a term wide enough to embrace 'race' and 'religion' (in the 'race-d' constructions of 'religion' in Singapore), is reframed as 'Chinese chauvinism', thus opening the door for 'religion' to be separately addressed as a security issue. Lee justifies the *MRHA* on two grounds, evangelism and social action, without explaining how social action becomes 'politics' or 'religious intolerance'. If we remove the shadowy 'conspiracy' element from the state discourse on the 'Marxist Conspiracy', and bear in mind the actual activities engaged in by the Catholic social workers, then the formula the state constructs is marked by the constant repetition of an unexplained sequence:

Social action → Politics → Disaster for the nation

This device of repetition, of asserting ideological positions as if they were 'fact' or 'truth', is a device that shapes the *MRHA*.

[106] A law comes into effect, not on the day it has its third reading and is passed by Parliament, but on the date set by a government gazette notification. The *MRHA* was passed in Parliament in 1990, but was only gazetted into effect in 1992.

[107] Fook Kwang Han, Warren Fernandez and Sumiko Tan, *Lee Kuan Yew: The Man and His Ideas* (Times Editions, Singapore, 1998), at p. 190. The stature of Lee Kuan Yew in Singapore society is immense, and the impact of words spoken by him, considerable. Lee was Prime Minister of Singapore from 1959 to 1990, and has remained a cabinet member. The current Prime Minister is his son.

[108] See Pt. IV C, 'Communism: Concealed and Criminal', pp. 280–282, for a fuller discussion of Goh's comments. Goh's comments are extracted from Singapore, *Parliamentary Debates*, vol. 49, 29 July 1987, cols. 1484–1489 (Goh Chok Tong, First Deputy Prime Minister).

[109] This different framing, articulated by Lee in 1998, is possibly a reflection of post-Cold War dynamics. In his memoirs, however, Lee maintains the narrative of a communist threat having surfaced from 1985–1987 via a "small group of English-educated pro-Marxist activists": Lee Kuan Yew, *From Third World to First: The Singapore Story 1965–2000* (Times Editions, Singapore, 2000), at p. 137.

In his comment on the *MRHA*, Lee Kuan Yew suggests that the passing of the Act had the desirable effect of 'subsiding' what he calls 'religious intolerance' marked by misdirected evangelism and 'social action'. Could not this same effect have been achieved by amending an existing law on public order? If racially and religiously offensive 'jokes' on a blog constitute an offence under the *Sedition Act*,[110] then why should misdirected proselytisation not be a comparable offence? The 'threat' of 'communism' is clearly contained by the operation of the *ISA*, as is the threat of religiously motivated anti-state terrorist (or potentially terrorist) activity. Why then enact a new law? And why has the state not seen fit to use the *MRHA*?

In 2002,[111] and again in 2007,[112] men accused either of being members of the militant Jema'ah Islamiyah plotting acts of violence against the state, or, in one case, of being a "self-radicalised" militant,[113] were detained without trial under the *ISA*. In the media, these men were presented as having been motivated by their religious beliefs.[114] Some among those detained held occupations connected to their religious beliefs.[115] If indeed these men were plotting against the state, were they not "carrying out subversive activities under the guise of propagating or practising any religious belief", the conduct that s. 8(1)(c) of the *MRHA* seeks to restrain? The detention of these men under the *ISA* may signal the severity of the threat against the state, but it may also signal that the policing of 'religion' is flawed, that threats to 'harmony' are not noticed by the state until a certain level of gravity has been reached.

In 2005, bloggers who had posted content that was racist and offensive about Islam were charged under s. 3(1)(e) of the *Sedition Act*,[116] which states that "[a] seditious tendency is a tendency to promote feelings of ill-will and hostility between different races or classes of the population of Singapore". In 2006, a blogger who had posted offensive cartoons of Christ was also charged under this section of the *Sedition Act* but was eventually let off with a stern warning.[117] If offensive cartoons and racist 'jokes' can amount to acts of sedition, why has the *MRHA* not been invoked to restrain these individuals? Section 8(1)(a) of the *MRHA*, which appears to have been modelled on s. (3)(1)(e) of the *Sedition Act* addresses conduct "causing

[110] In July 2006, the Singapore government dropped charges against a blogger who had posted "offensive cartoons of Jesus Christ" on his blog, issuing a stern warning in lieu of prosecution. The press coverage described the blogger as having flouted the *Sedition Act*. In 2005, three men were convicted under the *Sedition Act* for posting offensive 'jokes' about Malays and Islam. Two of those convicted were given jail terms: see 'Warning for Blogger Who Posted Cartoons of Christ', *Straits Times* (Singapore), 21 July 2006, p. 4.

[111] Dominic Nathan, '15 Nabbed Here for Terror Plans', *Sunday Times* (Singapore), 6 January 2002, p. 1.

[112] Sue-Ann Chia, '"Self-Radicalised" Law Grad, 4 JI Militants Held', *Straits Times* (Singapore), 9 June 2007, p. 1.

[113] *Ibid.*

[114] Nathan, *supra* note 111; Chia, *supra* note 112.

[115] 'ISA Detainee Taught MP's Sons', *Sunday Times* (Singapore), 3 February 2002, p. 33.

[116] 'Two Bloggers Jailed for Making Seditious Remarks Online', *Channelnews Asia*, 7 October 2005.

[117] Zakir Hussain, 'Blogger Who Posted Cartoons of Christ Online Being Investigated', *Straits Times* (Singapore), 14 June 2006, p. 1.

feelings of ill-will between different religious groups". The offensive blogging surely comes within the ambit of the *MRHA*.

If the *MRHA* has never been used, does its efficacy lie, as suggested by Lee in the fact of its existence? At least one individual claims to have been told that his conduct has opened him to "three charges of defamation … prosecution for sedition and contravening Singapore's *Religious Harmony Act*",[118] which suggests to me that the state views the *MRHA* as a security 'law', available for use alongside other security laws in exercising and maintaining state dominance of public *discourse* more than public *order*. The individual in question, Zulfikar Mohamad Shariff, came into prominence with his website, *Fateha.com*, on which he had argued that the sentiments of the detained Jema'ah Islamiyah activists was understandable given the Singapore state's close alliance with the United States and Israel. He further argued that state schools should permit Muslim schoolgirls to cover their heads with headscarves, and that Malay PAP members of Parliament did not represent the interests of Singapore's Malay-Muslim electorate.[119] Shariff fled to Melbourne, fearing imprisonment.[120] Shariff's comments on the Jema'ah Islamiyah arrests were characterised by the state as having "undermined the fabric of our multi-racial, multi-religious society" by having "cast doubt on the validity of the arrests and express[ed] sympathy for the detainees".[121] In other words, Shariff, like the 'Marxist conspirators' had breached the role of passive acceptance cast for him by the knowing state. In questioning and criticising the state, he had introduced a discursive strand into the public domain that the state was not ready to tolerate.

Shariff questioned the state's management of 'religion'. The activities of the Catholic detainees might also have been read as questioning the state's management of the economy. It appears to be discursive moments that interrogate particular facets of state ideology that trigger the state's turning to 'law' for its coercive power, prompting the state's rehearsal, yet again, of the narrative of Singapore's exceptional vulnerability. This narrative is used to legitimise law's violence being invoked before (an unmanifested) violence — predicted by the state as a certainty — might be visited upon the 'nation'.

To return to the question, why has the state not used the *MRHA* when it could have, choosing instead to prosecute offensive blog content under the *Sedition Act*? Significantly, the attention of the state was drawn to the blogs by members of the public. Letters written to the editor of the *Straits Times* drew attention to the offensive postings and precipitated the police investigations. This response, on the part of citizens, suggests to me that the discursive project of the *MRHA* has been successful. Citizens, ideologically consenting to the Singapore model of political pluralism, perceive blog postings as violating the precarious 'harmony' of 'multi-

[118] Michael Dwyer, 'Singapore's Accidental Exiles Leave a Damning Vacuum', *South China Morning Post* (Hong Kong), 2 September 2004, p. 16.

[119] Ahmad Osman, 'Ex-Fateha Chief Investigated for Net Comments', *Straits Times* (Singapore), 4 July 2002, p. 4.

[120] Dwyer, *supra* note 118.

[121] Wong Sher Maine and Ahmad Osman, 'Condemn JI Terrorists — Yaacob', *Sunday Times* (Singapore), 22 September 2002, p. 3.

racial, multi-religious' Singapore. It is consistent with acceptance of the state model of control and power in Singapore, that these citizens should draw state and public attention to the breach of this 'harmony', seeking a remedy from the state. In the unwillingness of members of the public to tolerate blog postings (which receive far more attention through the police action than they do from being in cyberspace) there is a consistency with state positions on such matters. When the state turns to the *Sedition Act* instead of the *MRHA*, the punitive power of the 'law' is more strongly performed.[122] All potential violators of 'religious harmony' are more potently instructed by imprisonment for criminal conduct under the *Sedition Act* than by restraining orders under the *MRHA*.

The text of the *MRHA* has enabled a public process by which the state reiterated and revitalised its version of Singapore's precarious stability. Possibly, citizens have understood, not so much from the *MRHA* itself, but from the larger discourse of 'law', 'nation' and 'religion' facilitated by the formulation of the *MRHA*, that 'religious harmony' is central to the security of the 'nation'. The *MRHA* has served its purpose by functioning as a policy and a policing statement. It does not actually need to be enforced, as 'law', in order to be effective.[123] The value of the *MRHA* to the state lies primarily in the discourse that it enabled.

[122] I am grateful to Professor Li-ann Thio of the National University of Singapore for this point.

[123] The Singapore state said as much when Minister for Home Affairs, Wong Kan Seng responded to constitutional lawyer and nominated Member of Parliament Li-ann Thio's query on whether any restraining orders had been issued. The Minister said that the government had come close to "invoking the Act on several occasions" and that Internal Security had had to issue warnings to certain religious leaders: Singapore, *Parliamentary Debates*, vol. 82, 12 February 2007, col. 1319 (Wong Kan Seng).