



## The unbearable lightness of legalism: the historical role of social morality in South East Asian international politics

Alan Chong

Centre for Multilateralism Studies, S. Rajaratnam School of International Studies, Nanyang Technological University, Singapore, Singapore

### ABSTRACT

The application of law in South East Asia frustrates many scholars due to its subliminal character. I call this subliminal form of law 'legalism'. This article adopts the method of historical sociology to trace three evolutionary phases in South East Asia's international history of legalism to illuminate the cumulative mixture of informality beneath formality in the practice of legalism via 'social morality'. In pre-colonial times, divinely-guided moral censure and the ethical reputation of particular rulers passed for proto-intersocietal law. In colonial times, international law was foisted by Western powers onto the informal social morality of the region, resulting in power politics operating behind legal manoeuvres. The advent of ASEAN saw a reversion to a preference for even greater informality and soft law. Finally, the post-colonial era witnessed experimentation with Westphalian international law. This has resulted nowadays in a cumulative halfway house of soft legalism operated through diplomatic social morality.

### KEYWORDS

Law; international law; South East Asia; premodern politics; Asian international relations; Asian diplomatic culture

The idea of law, its formal interpretation and practice, is a thoroughly modern endeavour in South East Asia. The historical past of the region defies neat incorporation into modern notions of a positivist, law-based international society. In the pre-colonial era, South East Asia resembled nothing like a Westphalian-derived state system. Instead, there were relationships of justice across borders that were for the most part socially defined rather than territorially delimited and scripturally declared. This culture or system is what I locate under the term 'legalism', in contrast to a specific time-limited notion of domestic law and international law. As it is used here, legalism refers to the theory and practice of some semblance of law sanctioned by reigning political regimes. This can be derived equally from custom or royal whim. In this article, legalism bridges traditional South East Asian notions of social morality as an imperfect substitute for the black-and-white quality of law, while retaining the amorphousness of social justice in governing peoples and relations between kingships.

A quick illustration from the anonymously authored royal hagiographic text, the *Sejarah Melayu* (Malay Annals), dated somewhere between the seventeenth and eighteenth centuries, provides an entry point to this article's argument. In the *Sejarah*, an unwritten social contract is described as existing between monarch and subject. This is

ascribed to a cumulative series of Acts of Providence and royal ancestral gallantry. The contract specified that benevolent rule was to be reciprocated by complete submission by its subjects. Moreover, the fortunes of any kingdom would automatically be jeopardized in the eyes of God should this contract be violated. There are countless episodes in the *Sejarah* where punishment was inflicted by Providence upon the violators. In cases where the breach was repaired by some conciliatory gesture by the raja, his nobles or his subjects, the ruling royalty lived out its normal span of existence.

Consequently, the Melaka Sultanate established its civilizational status in the Malay world *primus inter pares*, since its leaders enacted a system of just rule without parallel. In one case, the Raja of Pahang's henchmen carried out an assassination against a Trengganu noble, Tun Telanai, on the grounds that the latter had visited Melaka to pay homage without his Raja's consent. Trengganu was a satellite of Pahang at the time. It aggravated the moral gravity of the crime when Melaka's Sultan learnt that the Raja of Pahang had sent a fellow noble to kill Tun Telanai. The Raja of Melaka, Sultan Alla'u'd-din, was enraged by these reports. He interpreted the assassination as an act of arrogance against him by the Raja of Pahang and expressed the intention to invade Pahang to teach its raja a lesson. Wiser counsels, however, prevailed in Sultan Alla'u'd-din's court. The chief minister, the *bendahara* [also spelt *bandahara*] convinced his Sultan that he should repay like-for-like instead of destroying the kingdom of Pahang, whose raja was Alla'u'd-din's elder brother. Heeding this counsel, Sultan Alla'u'd-din of Melaka despatched a secret assassination squad masked as a formal delegation, led by an official who was both an esteemed champion and a war minister (*laksamana*). Their target was the family of the assassin who murdered Tun Telanai. As soon as this Melaka delegation was seated according to protocol at the court of Pahang, one of their members seized the opportunity to slay the assassin's brother, who was seated in the same hall. The Raja of Pahang angrily demanded that the Melaka delegation account for this brazen public execution. The *laksamana* pretended to be surprised that a member of his delegation had openly committed murder, and even owned up to it. He then quickly pre-empted the Raja of Pahang's next move by arguing that although one of his men had committed manslaughter, he 'cannot consent to any account being taken of this, for the Sri Akar Raja [the Raja of Pahang's assassin] himself offended against the Raja of Malaka [Melaka] in killing the Telanai of Trengganu without obtaining sanction from Malaka' (Brown 1970, 109). The Brown translation of the *Sejarah* merely records that the Raja of Pahang fell silent when faced with this intrepid retort. The Leyden translation adds that the Raja of Pahang finally confessed

I ordered this Talani [also spelt 'Telanai' in Brown's translation] to be put to death, on account of his disrespectful language, and asserting that the country was under his influence; but this matter rests entirely between the *laksamana* [from Melaka] and Sri Agra di Raja [also spelt 'Sri Akar Raja' in Brown's translation]; and nobody else has anything to do with it. (Leyden 2001, 235–236)

In this way, the violation was considered resolved. Satisfaction had been attained on the part of the victim's family under the auspices of Melaka's prestige, while the Raja of Pahang found a way to avoid direct responsibility for the feud between the families of the two slain victims. The narrator did not pursue the matter of Sri Akar Raja's loss of dignity in his narrative but wrote that upon returning to Melaka, the *laksamana* was congratulated and rewarded for his wise discretion.

The point of this opening tale is to highlight that the historical origins and practice of moral rectitude in South East Asia pose a challenge to modern expectations that law must be binding in nature, formalized in documents that specify sanctions for violations, and admit as little margin for error as possible in interpretation. Instead, the world captured in the *Sejarah Melayu* reflects the operation of quasi-law or legal custom (Alexandrowicz 2017b, 80–82). The residues of South East Asian historical practice challenge positivist notions of international law that are taught in mainstream schools of law today. Why is this so? I argue that this lightness of legalism based on unwritten law and intuitive, communitarian, culturally filtered codes of conduct must be acknowledged when one examines the question of why institutionalized law in South East Asia is a project that causes so much frustration to modern-minded politicians, businessmen and scholars. It is not far-fetched to argue that the status of international legalism in the region is a cumulative halfway house of soft international law operated through diplomatic moral censure that in some way echoes the opening illustration from the *Sejarah Melayu*. Just as frequent is the practice of fitting the rule of law to some local particularist notion of social morality co-constituted by a coalition of like-minded interests. Bargaining and informal toleration is frequently a last resort to render social morality workable as the backbone of the rule of law. Social morality exists as a constant *modus vivendi* amongst interested parties, making up acceptable standards, and negotiating sanctions flexibly as circumstances may require for the overriding goal of maintaining stability in international relations (Alexandrowicz 2017a, 2017b).

The ongoing imbroglio over the South China Sea claims casts the vagaries of international law as practised by contiguous states around it into sharp relief. Claims have been facilitated by various historical arguments as frequently as they are by invocations of the United Nations Convention on the Law of the Sea. Every so often, one of the claimants invokes the precedent of European colonial jurisdiction as the baseline for a succeeding stake. Simultaneously, a complex, quasi-sovereign patchwork of oil and gas exploitation deals are signed over the disputed territories in spite of the lack of movement on the claims themselves. To understand this and other tangled and suspended international legal cases within the South East Asian or ASEAN region, the method of historical sociology is loosely employed.

Historical sociology is an approach to explaining international politics that scrutinizes the evolution of practice and conceptualization over time. In the words of one of its leading exponents, Justin Rosenberg, there is ‘a huge gulf – a structural discontinuity – which separates the way the world used to be from the way it is now’ (1994, 1). Rosenberg criticizes the modernity of international politics that is widely assumed to have been universally embraced as the most scientific and objectively reliable basis for studying relations between states. This assumption that international politics is practised uniformly around the globe obscures the haphazard but intimate interactions between peoples, their rulers, general ideas and their critiques, their temporal concepts of borders and even of morality and the use of force over time (2–6). People and their deliberately designed institutions catering to the needs of order and other human goals cannot logically arise in a vacuum. Michael Mann, another well-known practitioner of historical sociology, argues that the theoretical mainstream in the discipline of International Relations disturbed him greatly in its neglect of the empirical and the utility of ‘test cases’ to scrutinize rival theories (Mann 1997, 222). This divorce from the reality of social evolution over time

creates a sense of unreality in the final analysis of many so-called sophisticated scientific theories. This article agrees with Rosenberg and Mann insofar as it is important to view the current conceptions of international law in the ASEAN region as a cumulative result of complex processes that have both imitated *and* defied foreign influences. This current condition is what I will expound as the unbearable lightness of legalism in the region. The development of domestic law, ‘inter-mestic’ law and international law, as perceived through the historical evolution of the region, is quite inseparable from the anthropology, cosmology, culture and contingent ethics of society on the ground.

The rest of the argument will be historically phased, anchored to the frame of the English School idea of international society. Subsequently, the first phase of analysis will be themed as the ‘pre-colonial Southeast Asian international legalism: the informal, the unwritten, and intuitive morality’; the second phase as the ‘arrival of European influence: the superficial territorialization of international legalism’; and the third phase as ‘international legalism in South East Asia today: embracing ambivalence and prioritizing social agenda’. The conclusion will reiterate the meaning of international law in South East Asia as a manifestation of diplomatic social morality.

### The informal foundations of regional international society

In his standard work articulating the concept of ‘society’ in international relations, Hedley Bull drew heavily on sociology’s study of pre-industrial society when he posited that

the order which men look for in social life is not any pattern or regularity in the relations of human individuals or groups, but a pattern that leads to a particular result, an arrangement of social life such that it promotes certain goals or values. In this purposive or functional sense, a number of books display order when they are not merely placed in a row, but arranged according to their author or subject so as to serve the purpose or fulfil the function of selection. (Bull 1977, 4)

Bull thought that this was a helpful starting point for his argument about international relations as being practised as an ‘anarchical society’, although he felt that society founded primarily on order necessarily relegated justice to a secondary consideration. Bull consistently vacillated between the possibilities of a society operating as a system of rules and dependable expectations of maintaining order with justice, and the other extreme of a society operating without any sense of a system. In the cases in between these two,

... a sense of common interests is tentative and inchoate; where common rules perceived are vague and ill-informed, and there is doubt as to whether they are worthy of the name of rules; or where common institutions – relating to diplomatic machinery or to limitations in war – are implicit or embryonic. (Bull 1977, 15)

This expression of inconstancy and theoretical worry exemplifies South East Asia’s challenge to formalized understandings of order manifested in international law.

The work of Linda Quayle addresses the relevance of the ‘English School’ view of anarchical international society to South East Asia. Right from the start, Quayle acknowledges that an endeavour to study formal international regimes in the region must be ‘alert to complexity’ manifested in the reality that ‘an extraordinary amount of simultaneous and not always compatible activity is underway’ (Quayle 2013, 12). In her work, Quayle

is keenly aware that society in this region always reaches collectively for a higher goal. This is in word. But in deed the grasp of this inchoate regional international society is limited. Quayle extensively cites indigenous South East Asian scholars and Association of South East Asian Nations (ASEAN) officials to build a case that society is always existential in nature. The fact that there are treaties, concords, agreements, declarations and annual calendars chockful of summits, middle- and low-level official meetings mean that society is tangible in the absence of outright armed conflict between sovereign states (Quayle 2013, 60–77). In Quayle's colourful phrasing, this unbearable lightness of socially derived legalism within ASEAN *qua* South East Asia baffles observers who try very hard to bind regional international society to realism, liberalism or some variant in between:

The gap between ASEAN's declaratory ambition and its implementation is often perceived as a puzzle. Yet no-one who has made – and broken – a New Year's resolution should find it so. By 31 December, the ideal weight or the non-smoker status may not have been reached, but a consciousness that it *needs* to be reached has probably at least affected behaviour. (Quayle 2013, 62. Emphasis added)

Quayle has not been the first, and will certainly not be the last, to attempt to expound on the peculiarity of the 'halfway house' character of ASEAN as its own archetype of a regional international community in progress. Some have openly dubbed the South East Asian community a coordinated diplomatic community and a 'categorical mistake' as a security community (Leifer 1989, 1999). Some have argued that the absence of war amongst all of its ten members, along with informally codified declarations and treaties without enforceability provisions, means that ASEAN is no more than a generator of norms to suit its particular understanding of normative interstate behaviour (Acharya 2001; Haacke 2003; Katsumata 2006; Acharya 2009). Others, partial to aspects of Realist analyses, have had to admit that even intra-regional balancing behaviour has exhibited unstated-rule-governed conduct (Emmers 2003).

From within the English School approach to International Society, critical voices have also added to the need for appraising diversities in the way a historically posited European-derived Westphalian standard of international law 'incorporated' non-Western territories into a universal culture of modern international law. This incorporation usually occurred through force or fraud, or equally violently through the tutelage of incremental colonization. As Christian Reus-Smit and Tim Dunne put it, the primary intellectual task in the twenty-first century is to break from Hedley Bull and Adam Watson's violent incorporation thesis of the spread of modern international law outwards to the non-West from Europe. This rethink ought to call attention to the 'domination and violence' that incorporation visited on non-Western peoples and the 'waves of political struggle required to dismantle Europe's empires and force the expansion of international society' (Reus-Smit and Dunne 2017, 6). In this regard, the work of Andrew Phillips is helpful in pointing out that the historical record showed that 'proto-globalization' of legal norms had occurred spontaneously outside Europe through what he terms Afro-Eurasian civilizational interactions (Phillips 2017). Earlier, Phillips had collaborated with J.C. Sharman in arguing that comparable autonomous processes of hybridized learning were taking place around the Indian Ocean rim polities before and during the advent of the successive arrivals of the Spanish, Portuguese, Dutch and English merchant imperialists in the area (Phillips and Sharman 2015).

Likewise, Neta Crawford calls attention to the severe discriminatory neglect of marginalized non-Western indigenous peoples' positions in governing themselves and their relations to outsiders according to laws that predated European arrivals and *their* narratives of civilizational incorporation via *their* modernity (Crawford 2017). Even the more sensitive scholars of international law have accommodated into their reasoning that pre-colonial Asia found ways to establish *modus vivendi* of various forms to deal with proto-sovereign *yet imperial* entities that claimed they had no equal to their subjects (Simpson 2017). The renowned scholar of Asian international law, C.H. Alexandrowicz, has openly argued that despite China's suzerain attitudes towards vassal states all along its land and maritime borders, some operational forms of 'legal equality' seem to have been practised (Alexandrowicz 2017a). This is evident in early treaty-making that dealt with distinctions between combatants and non-combatants in wartime along with other humanitarian principles. I have identified a quote from Confucius' writings where he advocated humanitarian intervention by Chinese emperors enjoying positive transnational moral reputations to restore broken royal authorities in lands undergoing political and economic distress (Confucius, trans. Legge 1971, 410–411). These so-called indigenous Asian initiatives in practising international law are amply evident in South East Asia.

### Pre-colonial South East Asian international legalism: the informal, the unwritten and intuitive morality

In one of the most concise volumes treating the historical jurisprudence of early South East Asia, M. B. Hooker (1978) identified four forms of local law: the written text, the oral law, the law in social institutions and indigenous adaptations (1–6). Hooker's book serves a useful starting point insofar as it draws attention to the need to consider categories other than the written forms of law one is used to today. The phrase 'following the law to the letter' does not apply literally when one examines in depth the nature of pre-colonial South East Asian law. Although Hooker takes the view that written law existed before the European arrival, where written texts are found locally,

the aim of this form is to relate the content of the text to an outside source of law, not to make clear the internal arrangement of the text itself ... It is clear that much was left to local customary practice. (1978, 2)

Oral law was in fact equally commonplace. Hooker referred to the Burmese 'law tales', the Minangkabau *perbilangan*, as well as the wider traditions of specifying the law through theatre as such as Malay/Javanese *wayang* and the Thai *nang talung* (1978, 3). The law embodied in social institutions is similar to oral law. In this category, law resides within complex ethnography. Social institutions such as the *adat* in Indonesia and Malaysia, and *Ifugao* in the Philippines exemplify the reality that culture embodies sanctions and other normative standards of behaviour by social status and age. Oral law is often complementary to social institutions (1978, 4).

Finally, indigenous adaptations are also common in the pre-colonial era and continuing well into the colonial era and up to the present. According to Hooker, this is manifested in the role and function of the 'petition writer' in many supposedly post-colonial South East Asian societies. He or she is supposed to perform form-filling functions for illiterate and semi-literate members of the population, but increasingly this expands into

the manipulation of some part of the machinery of government for the benefit of his clients. He is able to adapt administrative regulations and the formal laws for his clients' benefit. His function extends also to the adjudication of disputes in which the formal law and local custom are brought into contact as an undifferentiated mass upon the basis of which an adjustment of competing claims can be made. (Hooker 1978, 5)

The point of summarizing Hooker's findings here is to preface what I will consistently argue to be the structural problem of the lightness of legalism in South East Asian international law. If Hooker's taxonomy is to be taken seriously, South East Asian indigenous legal traditions do not even offer a clear demarcation of the distinctions between positive and customary law in either civil law or international law in modern legal education.

The recently rediscovered fourteenth-century Malay code of laws, titled the *Nitisarasamuccaya*, exemplifies much of Hooker's categorization (Kozok and Waruno 2015). The text was mostly inscribed on buffalo horn as a tangible testament to some form of binding agreement between two tribes. Moreover, given the mostly agricultural economy of both the island and mainland divisions of South East Asia, it is highly plausible that a written tradition could not have developed before the coming of the Europeans. In fact, the paper medium has been associated only with the cumulative effects of the arrival of both Islam and European culture in the region from the 1400s onwards. Therefore, it is reasonable that the recording of what we retrospectively call 'the law' is potentially no more than an expedient arrangement made to settle a local dispute. This is a possible treatment of a *modus vivendi* as law.

Historians Uli Kozok and Waruno Mahdi have translated the *Nitisarasamuccaya* from a pre-Islamic Malay script influenced heavily by Sanskrit, a language imported from South Asia. Here I excerpt a few clauses from their translation to exemplify the melding of oral, social and other performative notions of legalism:

1. Whoever does not obey his chief, two taels and a quarter shall be the fine.
2. When the head of the community calls a community meeting, and the person does not come down, does not come down to the meeting, causes a commotion, he shall be fined one tael and a quarter.
3. When two are fighting, both shall be fined equally.
- ....
7. Whoever hosts a person without the permission of the head of the community, and the hosted person causes a disturbance, he [the guest] shall be fined one tael and a quarter, the person who incited [the host] too shall be fined the same amount. (Kozok and Waruno 2015, 74–75)

There are altogether sixty-three paragraphs to the *Nitisarasamuccaya* specifying punishments for various felonies that are perhaps reminiscent of criminal codes found in modern Asian constitutions. The four paragraphs highlighted above reveal an obsession, echoed throughout, with the propriety of place and other spatial and social decorum. Next, juxtapose this characteristic against the closing sentences of the document, supplementing the sixty-three paragraphs:

- (1) This is the proclamation of the royal order and decree of the Emperor of Dharmasraya.
- (2) Most attentive was the assembly of the magnanimous of the entire land of Kerinci, the whole stretch of Kerinci [in Sumatra where the legal document was found].
- (3) It was completely written down by Kuja Ali, the chief, in the assembly hall in Palimbang, in the presence of His Majesty, the illustrious emperor of Dharmasraya.
- (4) Whatever was wrong (of the contents of the law book) was changed, amended by the great convocation, finished and complete.
- (5) A bow of the head in homage to the god, the Amaleswara.
- (6) Aum, a bow of the head in homage to the god,
- (7) A hymn of praise to the lord of the three worlds,
- (8) Who restrains many enemies, is firm in speech,
- (9) And is the leader of the entire assembly of nobles. (Kozok and Waruno 2015, 79)

There is strong evidence here that pre-colonial notions of law treated people, collectively and individually, as subjects of law instead of institutions. Not only that, the law ultimately enjoyed the equivalent of the sanction of otherworldly authorities even though some form of proto-democratic ‘convocation’ was in session to amend parts of the legal code. These ending sentences also reminded the populace that their behaviour was permanently under the gaze of Providence and its many personalities. This could very well imply that the punishment for violations in this world rested in a parallel cosmological world that included the afterlife. Law and its observance were bound up with practising righteous ways of existence on earth.

The next most salient pre-colonial text worth summarizing here is the earlier-mentioned *Sejarah Melayu* (Malay Annals). There is much continuity with the *Nitisarasamucaya* even though they are two to three centuries apart. The *Sejarah* started out as a multipronged mythical-historical genealogy of the kings that built the Melaka Sultanate that reigned from approximately 1403 until 1511, when the Portuguese captured it. As a text designed to legitimize the Melaka Sultanate and its successors through the glorification of the divine mandate of the ancient Malay world, the anonymous authors of the *Sejarah* creatively fused historical fact with incidents of cosmo-religious fantasy. But this does not detract from our present ability to glean from the *Sejarah* insights into the Malay ruling elites’ worldview of law and morality at the time (Raffles 2001). In these annals, the original ancestors of the Sultanate of Melaka behaved magnanimously in war and peace, offering to spare their enemies’ lives if they submitted peacefully to their new rulers, and pursuing policies of stabilizing peace and mercantile prosperity for both its territorial population and their trading counterparts. But the *Sejarah* was not a random collection of assorted tales of royal accomplishment. Social and political mobility were expounded in ancillary stories about commoners who proved their worthiness of social and political elevation through magical deeds of harvesting crops, clearing the land for habitation, or defeating evil spirits, royal usurpers and materialistic foreign invaders.

Rulers were in the main obeyed because they demonstrated a combination of instrumental legitimacy and moral wisdom. The former was evidenced by forming diverse trading partnerships across land and sea, encouraging diligence and industry in agriculture and trade, and acting impartially when settling disputes among their subjects. Above all, vindictiveness was frowned upon in the social contract between ruler and subject, and by extension between rulers of different kingdoms (Brown 1970, 16). As illustrated in the

opening sections of this article, moral wisdom comprised of the oral and social reporting of deeds that royalty carried out to restore a sense of justice and fair play after a violation had been committed. Often, ideal leaders were praised for their restraint at home and abroad. Morality was a primary consideration, while codifying law was secondary. In this scheme of things, the Melaka Sultanate was expected to uphold the moral exemplar. Where interstate disputes erupted concerning materialistic exactions by parochially minded monarchs, or rival ‘emperors’ of distant kingdoms claiming overbearing superiority over Malay kingdoms, the Melaka Sultanate demonstrated diplomatic ingenuity, often with Providence implied to be on their side. Melaka challenged its rivals to demonstrate cultural superiority, martial exercises, generosity and the willingness to exchange tributary gifts via noble acts of giving away beautiful princesses in marriage to a tributary lord, exquisite gifts of gold and jewellery, and magical genies (Brown 1970, 80–82). An unstated blend of Islamic, Buddhist and Hindu inspirations are depicted as being at work within the pluralistic context of the ancient Malay world. In the *Sejarah*, as in the *Nitisarasamuccaya*, law was not the primary restraint on acts of human malevolence; cultural authenticity, moral example and their consequent ‘soft power’ were the first to condition moral behaviour internationally (Chong 2012). Interestingly, moral corruption contaminated the stability of the Malay world after the Portuguese successfully captured Melaka in 1511 through brute force and the wanton destruction of local lives. Not only was the moral centre that was Melaka shattered, its subsequent Sultans lived demoralized, avaricious lives in exile, plundering from the neighbouring population’s agricultural and trading labours instead of inspiring them with moral rectification (Chong 2012, 100–101).

As late as 1817, after the Netherlands had effectively colonized Java, the political culture of the kingdom of Mataram, which ostensibly shared the Malay cultural lineage of Melaka, embodied ideas of fate and paternalism in its royal edicts. As historian Somersaid Moertono elaborates, fate determined a subject’s station in society regardless of whether he was born servant or master, and hence he was ordained to perform his ‘duty’ to his king (Moertono 2009, 37). In interpreting legal relationships, the ruler and his court ought to care for their subjects as a parent unto children. The voluntary submission of the commoner was also based on the belief that the Sultan possessed *witjaksana*, which commoners lacked. This quality connoted a fine sense of balance in making judgements in difficult situations with the sole purpose of preserving a cosmic harmony simultaneously with gods and commoners. Moertono’s explanation of *witjaksana* is worth quoting in full: ‘this amounts to a policy of checking and balancing; that is, avoiding those disturbing open clashes that were not absolutely necessary’ (Moertono 2009, 52). The subjects of Sultan Paku Buwana X (1893–1939) of Surakarta revered him as the final member of the royal line that practised such virtues. This was the belief among his subjects at the time even though he was reigning at the leisure of the Netherlands-Indies colonial regime (52). On this note, my argument now transitions to an elaboration of the European colonial impact on international law in the region.

### **The arrival of European influence: the superficial territorialization of international legalism**

The arrival of European colonial powers did not herald an immediate change in South East Asian understandings of international law. On the contrary, the former adapted to local

ways in order to further their materialistic objectives, especially trade, and imposed only the thinnest veneer of the appearance of a region embracing something akin to modern international law (Alexandrowicz 2017a). The principle change in the colonial era was the territorialization aspect of authoring and implementing law. This was initially little more than a theoretical façade since the Europeans were interlopers to local games of fluid governance that entertained nothing resembling iron-clad sovereignty (Alexandrowicz 2017b). The reality of European attempts at engagement with local politics has been described by legal scholar Iza Hussin as follows:

Colonial law was neither a uniform nor neutral vehicle for the transplantation of law: colonial officials and local elites not only adapted law for local use and institutionalisation, but interpreted the meanings and application of these laws based on assumptions about local contexts and mores. (2017, 29)

Take, for instance, the early Portuguese impressions of Asia within a worldview that prioritized trade. From the preface of Ambassador Tomé Pires's famous travelogue turned intelligence report for his King in 1515, trade emerges as the filter through which governance was judged instead of absolute rights and wrongs:

... [I]n this *Suma* I shall speak not only of the division of the parts, provinces, kingdoms and regions and their boundaries, but also of the dealings and trade that they have with one another, which trading in merchandise is so necessary that without it the world could not go on. It is this that ennobles kingdoms and makes their people great, that ennobles cities, that brings war and peace. In this world it is customary for merchandise to be clean – I do not speak of the dealings in it, which are held in esteem – for what can be better than that which is based on truth. Pope Paul II was originally a merchant and he was not ashamed of the time he spent in trade, and the scholars of Athens used to praise trade as a wonderful thing, and nowadays it is carried on throughout the world, and particularly in these parts it is held in such high esteem that the great lords here do not do anything else but trade. It is pleasant, necessary and convenient, although it brings reverses, which make it more esteemed. (Pires 1944, 4)

Of course, the Portuguese, more than the European rivals that succeeded them, violated their own strategy of speaking the language of commerce to deal profitably with South East Asians. They were increasingly renowned for violence, plunder and the physical takeover of Asian ports.

The Dutch arrived in significant numbers to challenge the Portuguese and Spaniards nearly a century later but entered the game of building niches in the South East Asian trading networks with a much weaker hand. To gain a foothold, they had to oust their Iberian rivals port by port, and alliance by alliance. The Dutch state-linked trader, the *Verenigde Oost-Indische Compagnie* (VOC), assumed the mantle of supporting South East Asian 'sovereign rulers' against Iberian depredations. This was an ingeniously circular argument. In order to buttress its campaign in Europe for non-exclusive access to Asian markets, the VOC sought to depict their Iberian rivals as troublemakers to their European peers while attracting South East Asian rulers to side with the more reasonable European (Borschberg 2010, 195–196). As historian Peter Borschberg notes, 'far from facilitating interaction as sovereigns and equals, the [local] tributary system demanded subordination as "tributaries" and "barbarians", and this in turn affected the diplomacy and trading relations of the early European colonial powers with South East Asian princes' (Borschberg 2010, 196). By this time, the Portuguese and Spaniards too were

playing much the same game but with less success due to the Iberian insistence on forcible proselytization of the Catholic faith and the inflexible demands of their Iberian trading companies (Borschberg 2010, 197). The Dutch were far less motivated to spread their Protestant religion and easily switched allies among the local potentates in places like Sumatra, Johore and the Moluccas. The respective local sultanates in the latter areas likewise were quite willing to expediently play one European interloper against another with little regard for political and commercial *modus vivendi*, gentlemen's right of way in commerce, open navigation and protection of innocent mercantile passage. By the late 1600s, once the VOC had gained ascendancy over Portugal and Spain, they too adopted the arrogant postures of the latter in treating South East Asian rulers as dispensable inferiors (Borschberg 2010, 200). In this way, Dutch behaviour reproduced Realism rather than attempts to exemplify international law.

When the British arrived on the scene by the late 1700s, they adopted a more determined approach to socializing the chaotic, nascent state-like behaviour of South East Asian polities through treaty-making. The latter was regarded as binding even if they were inked on paper. In the view of the arch-imperialist Thomas Stamford Raffles of the East India Company, the Malay populations of South East Asia were ready for Britain's 'influence of example', given their existing predisposition to revere royalty, nobility and fine manners, along with a positive addiction to trade with all races and newcomers (Raffles 2001, xiii). Once the Malay emulates British high civilization,

... we [the British] may be permitted to indulge more sanguine expectations of improvement among the tribes of the eastern isles. We may look forward to an early abolition of piracy and illicit traffic, when the seas shall be open to the free current of commerce. Restriction and oppression have too often converted their shores to scenes of rapine and violence; but an opposite policy and more enlightened principles may, ere long, subdue and remove the evil. (Raffles 2001, xiv)

British practice however adhered to expedient strategies of imposition in establishing colonial rule. The acquisition of the colony of Singapore in 1819 demonstrated that the British were little different from the Dutch, Spaniards and Portuguese, except for the appeal to legalism. The indefatigable Raffles took his own initiative in treating the island as *terra nullius* despite the overarching influence of the Johore sultanate and its declared alliance with the Dutch. But *terra nullius* nonetheless required the instant recognition of a pre-existing overlord with whom the British could sign papers and defend property rights in a 'civilized' European court. Raffles therefore despatched his able lieutenant, Colonel Farquhar, to the island to ascertain if there was any notable Malay potentate physically residing there before dealing with his royal superiors residing in either nearby Riau or Johore. There was indeed a 'prime minister/mayoral equivalent', going by the title of the Temenggong, residing in Singapore. Farquhar not only recognized his authority but suggested that he support British designs by alerting him and Raffles as to which parts of a disputed local royal line could act as a higher level co-signatory for the acquisition of Singapore.

When the Temenggong reached Colonel Farquhar he saluted him and proffered his hand, which Colonel Farquhar shook several times. Then he led him up into his house. There Colonel Farquhar spoke of his object in coming, telling all about how originally he had received a letter from Mr Raffles at [the other EIC trading station at] Bencoolen authorizing

him to find a good place for a settlement, for His Majesty's Government had handed over Malacca to the Dutch Government. Colonel Farquhar added "If perchance the British were to found a settlement here it would be a great help to all the Malay people in their trade. Besides, in time a great many white merchants would come here to trade." Colonel Farquhar counselled the Temenggong in the most honeyed phrases to soften his heart, as one who offers lumps of sugar to chew. The Temenggong replied "Sir, I am an exile parted from my real home in Riau. You must know how it is the custom of Malay rulers to magnify their own importance. Therefore I withdrew myself to this Island in the middle of the sea, which in fact is my own lawful inheritance. For under the customs and laws of the Malays it is the Temenggong who holds power over all these islands, the real sovereign, Sultan Mahmud, being dead. He had two sons; Abdul Rahman, and Husain who possessed the title of Tengku Long; but neither of them is of royal birth ... For these reasons there has been a conflict of opinion. Tengku Abdul Rahman has taken offence and gone to Trengganu, while Tengku Long remains in Riau. That is how the whole affair started. All the regalia of the kingdom have fallen into the hands of Tengku Puteri, the late Sultan's widow." When Colonel Farquhar heard the Temenggong's words he smiled saying "Tengku, all these facts are known to Mr. Raffles and he will put them right". (Abdullah 1970, 141–142)

The point of this elaborate historical narrative supplied by an Anglophile Malay scholar in 1849 is to illustrate the awkward, and probably quasi-ethical, machinations through which international law was grafted onto the local scene by the European imperialists. Farquhar and Raffles of course conveniently 'chose' Husain to be the Sultan of Riau, and by extension of Singapore, and arranged a formal signing ceremony with both Sultan Husain and the Temenggong, complete with a naval gunfire salute, to confirm the right of the British to set up a trading settlement on Singapore along with a permanent Resident to oversee the growth of the port. For a while, Farquhar and Raffles maintained the legal fiction that both Malay rulers assumed ultimate sovereignty over Singapore, but this was not to last when the British took advantage of the latter's increasingly parlous financial situation to 'suggest' that they sign over complete sovereignty to Britain in exchange for a generous financial compensation. This 'mammon for sovereignty' deal constituted a significant cause for legal and moral regret when the eminent former Governor of the Straits Colony, Frank Swettenham, authored his quasi-official account of Britain's colonial domination of Malaya and Singapore some 87 years later (Swettenham 1948, 84–101).

The cavalier application of British administered international law in the acquisition of Singapore was also significantly reprised in the enforcement of anti-sedition and anti-rebellion law in British-controlled Burma right up to the 1930s. Not unlike the 'arbitrary' recognition of Sultan Husain and the Temenggong in 1819, the British colonial authorities carelessly invoked the idea of anthropological proximity in designing legislation to contain rebellion and punish its participants. As Maitrii Aung-Thwin argued in his study of the Saya San Rebellion between 1930 and 1932,

law was as much an expression of British Indian culture as it was a frame of reference in the defining of Burmese culture. As a system of organization, terminology, mediation, disciplining and punishment, law and its language contributed to the colonial ordering of Burmese society. (Aung-Thwin 2011, 14)

The British had assumed that the rebellion led by a local peasant leader, Saya San, in the Tharrawaddy district of Burma fit the template of the British Indian handling of the recurrence of 'terrorism' and 'assassination' in Bengal carried out by the Bengal Revolutionary Party. This social 'fit' was all the more justified by intelligence that the latter underground

Party had been in touch with the nationalist General Council of Burmese Associations. A British manual on the history of Burmese uprisings authored by Bertram Carey in 1914 treated revolutionary insurgency in the country as completely imitative of terrorism and a systematically organized revolutionary movement. In reality, the Saya San rebellion manifested little more than ‘a series of spontaneous and diverse expressions of peasant activism’ (Aung-Thwin 2011, 76–77). Hence, by superimposing the mosaic of revolutionary insurgency upon the Saya San ‘rebels’, British trial processes and punishments catalysed ever deeper anti-colonial sentiment across the territory when it ought not to have been the case (77–99). A more nuanced study of Burma’s social history could also have revealed that millenarian revolts were a common recurrence even under the pre-colonial indigenous Konbaung Dynasty of Burma.

There are numerous other instances of colonial misreading of local South East Asian pre-colonial governance that cannot be recounted here for reasons of space. But they all can be attributable to a fallacious misreading of the complex reality that native ideas of law and order were derived in secondary fashion from a primary social contract, usually between monarchs with overlapping spheres of jurisdiction and peoples owing equally bifurcated loyalties. In this regard, the eminent VOC-affiliated Dutch jurist Hugo Grotius’s rendering of sovereignty in relation to ‘non-European’ contexts was way off the mark in positing this universal assumption about the subjects of a European understanding of international law under colonial conditions:

That power is called sovereign whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will ... [T]he state, which we have defined above as a perfect association, is the common subject of sovereignty.

*We exclude from consideration, therefore, the peoples who have passed under the sway of another people, such as the peoples of the Roman provinces. For such peoples are not in themselves a state, in the sense in which we are now using the term, but the inferior members of a great state, just as slaves are members of a household.* (Grotius in Neff 2012, art.7, 50–51. Emphasis added by author)

### **International legalism in South East Asia today: embracing ambivalence and prioritizing social agendas**

The nationalist awakening in South East Asia provided the most vivid and probably the most enduring indictments of the colonial introduction of law on local ground. Filipino Jose Rizal, who was executed two years before the Spanish–American War ended Spanish dominion over the Philippines, fulminated in 1889 about operational ironies of law in the colony:

Give liberties, so that no one may have a right to conspire, and deputies, so that the complaints and the grudges are not condensed in the bosom of the families and from there become the cause of future tempests. Treat the people well, teach them the sweetness of peace so that they may adore and maintain it. If you continue the system of banishments, imprisonments and sudden assaults for nothing, if you will punish the people for your own faults, you will make them desperate, you take away from them the horror of revolutions and disturbances, you harden them and excite them to fight. (Rizal 2000, 92–93)

These are not simply fighting words for a nationalist revolution, they connote the social agenda behind intra-state and interstate violence in the process of decolonization or

recovering socio-political authenticity after European domination. Law is not desired in and of itself. Some three decades later, Indonesia's nationalist leader, Sukarno, echoed the need for order in the region, but not necessarily enacted through law:

Wherever the Europeans have occupied some Asian country to "give leadership", there then appears "order", but this "order" is, in fact, neither more nor less than pseudo-order. For order that is truly order consists of the orderly conditions obtainable only if there is mutual agreement between the party governing and the party governed, to be exact: when between these two parties there is the deepest harmony.

And those are not the conditions in the Asian countries which have been occupied by the European nations to "give them leadership". Every one of the peoples' wishes which deviates from and does not accord with the wishes of the Europeans who have colonised them, every effort by the people to develop freely apart from that "leadership", is answered with harsh regulations. It is these harsh regulations which then bring "order"; it is these harsh regulations which bring the "orderly conditions" and "peacefulness" ... For whoever wants to understand, it is evident that such "order" in reality is inverted order.

A row of gallows is also "order", but its orderliness is "orderliness of the gallows" ... It is a fact that slavery too is a kind of order; slavery too, is a kind of peace; slavery, too, is an orderly condition. (Sukarno 1966, 45)

The juxtaposition of order, peace and the imagery of the gallows is disturbing to modern sensibilities about humane international politics. But bearing in mind the possibilities of a regional international society prioritizing social order over niceties of legalism, analysis of legalism in the region needs to be exercised cautiously with an ear to the historical ground.

The terms of association in ASEAN's foundational declaration understandably capture this ambivalence about the rule of law in international relations. In the original ASEAN Declaration that signed the organization into existence in Bangkok, in August 1967, Article 2.2 made explicit mention of a conventional adherence to the rule of law:

To promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter. (ASEAN 1967, 2)

However, the rest of the document amplified the need for good neighbours to abide by common principles of goodwill, mutual assistance and reciprocity as their primary multi-dimensional security responsibility. Most remarkably in the preamble, a vaguely worded clause on the status of security bases was inserted as follows:

AFFIRMING that all foreign bases are temporary and remain only with the expressed concurrence of the countries concerned and are not intended to be used directly or indirectly to subvert the national independence and freedom of States in the area or prejudice the orderly processes of their national development. (ASEAN 1967, 1)

The upshot of these two manifestations of legal intent is that there is a mainstream, globally-understood written legal intent coexisting with a contingent and socially defined area of discretion. ASEAN's legalism awkwardly reconciles these opposing logics and transfigures them into the so-called ASEAN Way of building thin consensus and avoiding public shows of legal disaffection (Haacke 2003). Interestingly, the diplomatic negotiations leading to the signing of the ASEAN Declaration were characterized by tremendous attention to intergovernmental agreements forged informally by the respective national leaders

on golf courses, and by overlapping and speculative fears of distant neighbours disturbing the peace among the contiguous neighbours, and the need to uphold the path of non-communist self-synthesized development without the ideological taint of overt American support (Chua and Lim 2018, 1–12). Above all, all signatory states wanted to preserve the appearance of autonomy in decision-making, and the aura of ASEAN being an authentically do-it-yourself ground-up initiative consistent with the historical evolution of the region. By the time, the ASEAN members refined the ASEAN Declaration into the Treaty of Amity and Cooperation of 24 February 1976, adherence to the rule of law was ceremonially upgraded into the preamble in these lofty words describing ASEAN as

ANXIOUS to promote regional peace and stability through abiding respect for justice and the rule of law and enhancing regional resilience in their relations ... (ASEAN 1976, 1)

Regional resilience was clearly non-legal language open to a variety of interpretations, including possibly the ignoring of legal mechanisms, benign external intervention and mediation by international organizations. It could hence, within the same breath, legitimize domestic political action such as coups, revolutions (and their antitheses) and five-year development plans that have the prospect of restoring non-conflictual normalcy in intra-regional diplomatic relationships. Article 9 of the Treaty of Amity goes even further in making oblique references to unspecified, alternative means of furthering peace, harmony and stability:

The High Contracting Parties shall endeavour to foster cooperation in the furtherance of the cause of peace, harmony and stability in the region. To this end, the High Contracting Parties shall maintain regular contacts and consultations with one another on international and regional matters with a view to coordinating their views, actions and policies. (ASEAN 1976, 3)

This embrace of vagary, which effectively leaves the door open for intersubjective understandings of legalism, has surfaced repeatedly in the ongoing internal ASEAN campaign to persuade its member governments to tweak the region's political economy into an explicitly rules-based community. As an active facilitator in the multi-stakeholder, quasi-NGO facilitated ASEAN-US Partnership for Good Governance, Equitable and Sustainable Development and Security (PROGRESS) rules-based community initiative, the author has been briefed on the interest of the US Agency for International Development's joint coalition with the Singapore Government and the ASEAN Secretariat to stage a series of seminars from 2015 onwards to drive ASEAN's bureaucratic mindsets towards embracing a region-wide standard of rule adherence partially emulating the European Union. The motivation, as expressed in the initial concept paper drafted by ASEAN-US PROGRESS, was a concern that ASEAN was not living up to its promise of fully realizing the ASEAN Community vision sketched out in the ASEAN Charter. The pillar of the ASEAN Economic Community would be immediately at risk if goods, services and labour flows were impeded by a thicket of non-standard rules for access, welfare protection or transit through ASEAN national jurisdictions. More importantly, a whole raft of ASEAN documents – tackling environmental pollution, combating transnational crime, countering terrorism, ending discrimination against women and protecting migrant workers – cannot translate into effective national policy if policymakers do not even desire to know how and where to monitor compliance gaps. This technical turn in the

ongoing incremental struggle to implement international law within ASEAN is phrased this way by ASEAN-PROGRESS:

It might be that such information is considered 'sensitive' and states are reluctant to reveal the statistics and policies involved. However, ASEAN integration is a collective process; if all member states are invested in it and share a common understanding, then such data could and would be looked at through more neutral lenses and with more understanding according to the exigencies of each member state. Moreover, monitoring is central to the rule of law and institutions – this is a crucial point which the EPG [Eminent Persons Group] has highlighted and the ASEAN states have committed to in the Charter – thus should not be viewed as an undue intrusion into the internal affairs of member states. (ASEAN-US PROGRESS 2015, 7)

During the two rounds of seminars, variously co-sponsored by developmental NGOs like the US-based DAI (Development Alternatives Incorporated) and the Germany-based GIZ (Deutsche Gesellschaft für Internationale Zusammenarbeit), the audience of mid-level and senior ASEAN national civil servants registered reactions that ranged from indifference to cautious acceptance of the principles behind the initiative. The most defensive behaviour was exhibited by the Myanmar delegation who publicly criticized the superfluity of a rules-based ASEAN. The Indonesian delegation pointed out that while this was a positive endeavour, ASEAN's informal ways and means were a virtual form of rules-based community. The Malaysians echoed this position and suggested that a rules-based community would not contradict ASEAN's tried and tested informal ways. The Philippines and Vietnam both emphasized incremental progress towards a rules-based regime and constructively suggested building in a programme of 'capacity building' to facilitate a culture of rule adherence on an ASEAN-wide basis in the economic sectors.<sup>1</sup>

The most caution, and some slight pushback, was triggered in the areas of democratic practice, legal defences for human rights and issues of national security. As the host of the two rounds of the Seminar, Singaporean officials were privately urging their ASEAN counterparts to move forward on economically related international law while taking no position on national security matters. At the second seminar in 2017, ASEAN governments seemed to have shifted slightly towards discussing the informational aspects of international legalism within ASEAN. This orientation pitted principles of economic efficiency against political transparency during the seminar discussions. In a clear bid to persuade the member states to aim for information dissemination as a first step towards transparency, the NGO GIZ made available for a briefing an Italian lawyer with deep expertise in litigating European Union cross-border economic issues. The latter suggested that cost considerations and the avoidance of 'national dirty laundry' being aired at global institutions like the World Trade Organization should incentivize ASEAN to produce its own economics-related rule-based community. This suggestion was met with silence and an open ended call for further study by the ASEAN-US PROGRESS.<sup>2</sup> As of October 2019, the meagre progress made by this quasi-NGO consortium had stalled. No date had been set for further discussions of advancing legalism within ASEAN.

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<sup>1</sup>Author's personal notes taken during the ASEAN Rules-Based Seminar, Singapore 2015.

<sup>2</sup>Author's personal notes taken during the ASEAN Rules-Based Seminar, Singapore 2017.

## Conclusion: is the lightness of legalism so unbearable for a region mostly at peace?

The troubleshooting of the progress of legalism in South East Asia has resulted in a half empty and half full conclusion. The use of historical sociology has drawn attention to ingrained cultural patterns that persisted through the era of European colonialism. In this regard, this article has offered a tentative answer to the ‘why’ of the lightness of legalism. Culture in the region was concerned with privileging the cultivation of human behaviour. Human beings’ existence is enmeshed with both Providence and earthly power. The social contract reining in aberrant behaviour did not need to be fully formalized and clarified in terms of rigid terms of infringement and punishment. It had to be contextualized within the culture of obedience and proper behaviour. Remarkably, pre-colonial South East Asia never possessed anything resembling the imported European idea of territorial and legally delimited sovereignty. Indeed, the European practice of artificially imposing the idea of following law to the letter produced a backlash following the independence of the colonies. It is not surprising that ASEAN’s wariness in embracing international law greatly reflects an accumulation of highly resistant pre-colonial attitudes as well as resentment against the European practice of it in South East Asia. In this sense, one has to ponder if the lightness of legalism embodied in the various utterances by South East Asian nationalists and ASEAN’s treaty documents is necessarily bad for regional peace if it has demonstrated such longevity.

This exercise in historical sociology has suggested that legalism, rather than modern law *per se*, is socially embedded in the South East Asian experience. The post-colonial states may strive to be modern in their institutions, but the question that my article poses is: are their populations ready to revise their social contracts with their rulers to embrace a black-and-white vision of communitarian living? In this regard, the South East Asian experience may offer a useful warning to the new-fangled field of international relations instrumentality known as ‘lawfare’ (Kittrie 2016). The use of sovereign law has historically been corrosive to local culture and social compacts. Does ASEAN, embodying a modernizing South East Asia, have to embrace it all the way?

## Disclosure statement

No potential conflict of interest was reported by the author.

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