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Human Rights in Southeast Asia: Are We Moving Backward?

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Abstract

Many challenges exist regarding the discourse over human rights in South East Asia due to the complex relationship between the region's myriad cultures, laws, religions and political desires. This socio-political environment produces a number of varying, and often contradictory, interpretations of human rights, as well as differing opinions on how they should be implemented. On one hand, some countries in Southeast Asia have internalized international human rights instruments by amending their constitutions in order to provide a semblance of protection for their citizen's human rights. On the other hand, some countries still operate under authoritarian regimes and continue to violate certain internationally recognized rights for the sake of preserving political stability and economic development. Proponents of such regimes often claim that this is done to maintain both societal and religious harmony. Therefore, the effort to address human rights issues in Southeast Asia must expand beyond the international legal sphere and take into account the intricate relationships and power struggles between the region's various economic interests, social and cultural norms, and religions. Furthermore, the successful implementation of human rights law in Southeast Asia will require a number of obligations and checks be imposed on the state governments in the region. The specific means by which to promote human rights in South East Asia, and how to reconcile diverging options on the definition and scope of said rights, was the theme of the 2nd Annual Conference of the Centre for Human Rights, Multiculturalism and Migration (CHRM2) and Indonesian Consortium for Human Rights Lecturers (SEPAHAM Indonesia), held in August, 2017, at the University of Jember. This article is a summary of the major points and topics covered during the two day conference.

Keywords: Human Rights, Southeast Asia, Plurality of Pluralities

I. INTRODUCTION

The purpose of this preliminary write-up is to provide a sketch of my own impressions of this important conference, organised so well by the Centre for Human Rights, Multiculturalism and Migration (CHRM2) University of Jember led by Dr. Al Khanif and his excellent team of helpers and the various organisations that supported this project. Huge thanks are due for the privilege for being part of such an important and in many ways pioneering effort, as I think we realise that, so much work remains to be done, at various levels, and in years to come. I would like to point to the valuable research tool of a major worldwide OUP encyclopedia of legal history,[1] which has many important contributions, including entries on Indonesia. For those who wish to read up on my theorising about legal pluralism in different contexts, I have added at the end of this

[1] Stanley N Katz, *The Oxford International Encyclopedia of Legal History* (Oxford University Press, 2009).

article references to my works.[2] In what follows, I shall often make reference to the kite model of law, which I spoke about in the final presentations, the second part of which was distributed to all conference participants. To clarify upfront, the four competing elements of law, according to this model, basically are:

Corner 1: ethics/morality/values/religion
Corner 2: socio-cultural norms, customs and traditions, plus economic concerns
Corner 3: various aspects of state law and institutions
Corner 4: human rights principles ('new natural law') and international law

I hope to have made it clear that this kite can apply to and be used by individuals as legal actors/agents in four different capacities, as more or less autonomous individuals, as members of societies or social groups, as citizens of a state, and as global citizens. These corners also represent four different kinds of law, and their connections to different academic disciplines. Whatever the scenario, there is no escape from the existing worldwide pluri-legality and the resultant competing claims, with their pushes and pulls, of different law-related expectations or other significant events or moments, like for example 9/11 or, in Indonesia, the fall of Suharto in May 1998.

This means that even an element of law that one hates, or does not wish to engage with, has to be included, as not to do so would be epistemic violence, but also most likely actual injustice, and would thus lead to more conflicts and risks for the crashing of the kite. Law, we know, is never just state law, or just human rights law, or just religious law, or *adat*, for that matter. The challenge is always to find a sustainable balance of the competing elements, which may however result only in a temporary moment of bliss, rather than a long-lasting state of serene peace, as the clock of time and changed circumstances constantly ticks on.

The changing circumstances to which we are all subject are also evident in the political background of the most recent piece of writing on Indonesian conflicts that landed on my desk while I was doing this write-up.[3]

II. CONFERENCE SUMMARY: THE CONCEPTUAL CONTEXT

The start of the Conference, with the singing of the national anthem of Indonesia and the strong reference to God and Pancasila, placed this event into a firm national context (corner 3, but also immediately the values connected to corner 1), while the speech on human rights that followed emphasised the role of corner 4. From the start, I got the impression that corner 2, in this gathering of people who are mainly lawyers and human rights experts, might be a little underdeveloped and underestimated. But that said, I detected a subtle kite balance from the start in much of the constructive engagement, and in various efforts to sail forward peacefully for the greater public good and the wider public interest, rather than developing a focus on particularistic and unconstructively

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[2] Menski, Werner F, "Bangladesh in 2015: Challenges of the 'iccher ghuri' for learning to live together", (30 December 2015), online: *Alochonaa Dialogue* <https://alochonaa.com/2015/12/30/bangladesh-in-2015-challenges-of-the-iccher-ghuri-for-learning-to-live-together/>. See also Menski, Werner F, "Law as a Kite: Managing Legal Pluralism in the Context of Islamic Finance" in *Islam Finance Eur Plur Financ Syst* (Chelthemham: Edrward Elgar Publishing, 2013) & Menski, Werner F, "Plural Worlds of Law and the Search for Living Law" in *Rechtsanalyse Als Kult* (Frankfurt am Main: Vittorio Klostermann, 2012).

[3] Kirsten E Schulze, "The 'ethnic' in Indonesia's communal conflicts: violence in Ambon, Poso, and Sambas" (2017) 40:12 Ethn Racial Stud 2096.

negative complaints and protests. In my view, critical analysis is one thing, and it remains important, but unconstructive critique for the sake of being critical or being perceived to be politically correct is quite a different matter. It can be petty and destructive, killing the spirit of academic enterprise and enquiry by trying to win points over one's opponents. Guided by many skilful chairpersons of panels, this conference took place in a spirit of constructive exchange and displayed a huge and quite remarkable willingness to learn from each other, with very few indications of self-righteous behaviour on the part of participants and questioners.

This is quite different, as I should emphasise from the start, from attending such conferences in South Asia, where political turmoil of various kinds often mars debates, allows pompous monologues, and makes constructive exchange virtually impossible in many scenarios. It also differs from euro-centric debates, where certain forms of political correctness now demand that some important topics cannot even be openly raised.

A lot of this notably constructive approach in an Indonesian context may have to do with the unspoken, but constant and vivid presence of the five principles of Pancasila in Indonesia, which to most people present would have been entirely familiar. To me this warrant being highlighted here for the benefit of us all expressly, to illustrate the wider holistic context within which this important conference took place and also to indicate the remaining potential for turbulences over disagreements on some of these principles:

1. Belief in God

This is clearly a reference to corner 1, and the major challenge here for Indonesia is to accept a plurality of forms of belief in some kind of higher entity or force. God, as we know from religious studies, can take many forms, or no visible form at all, but is also perceivable simply as a higher force that we humans ignore at our peril. As I indicated in the final presentation, a more wide-ranging reference to 'being connected to some higher entity' would be useful to be aware of as a more broadly uniting principle. The explicit reference to 'God', no doubt influenced by the majoritarian presence of Muslims in Indonesia and the colonial Christian heritage of the country's legal system, risks, as we know, that certain forms of belief might struggle being recognised and accepted. The fundamental right to freedom of religion is, however, connected to this principle, both as a matter of law (corner 3) and of philosophy (corner 1). Hence a plurality-conscious, diversity-friendly approach to this *Grundnorm* would appear to me to remain essential for maintaining the national 'unity in diversity' that characterises Indonesia (see also principle 3 below) under this heading so well.

2. Just and Civilised Humanity including Tolerance to all People

This refers not only to corner 4, but is first of all a statement of socio-cultural diversity, so concerns also corner 2. The challenge here is not only about freedom of belief and culturally informed practices of various kinds, whether traditional, customary/indigenous or more recent and received, but probably also about acknowledgement of socio-economic differences and all the status implications that might or would go with it. This is therefore also an affirmation of the principle of common citizenship on the basis of individual identity, which therefore also connects to corner 3.

3. Unity of Indonesia

This expects clearly a basic commitment to the political and national unity of the country, a huge challenge for a country and a nation state composed of so many different groups, regions and islands. The focus here is undoubtedly on corner 3, but it also contains a lesson for corner 4, to the effect that national unity and sovereignty come before commitment to globally constructed values and principles which may not be imposed on the country without due deliberations, debates and, if necessary, as some conference panels brought out well, certain reservations. This is because the task of defining a sustainable identity postulate of Indonesia, following the work of Masaji Chiba[4] is a primary task for Indonesians as a collective civic body, not for the international community and their representatives or any other stakeholders.

4. Democracy Led by the Wisdom of Deliberation among Representatives of the People

This indicates today a strong commitment to the basic state principles of participatory democracy in a plural nation (corner 3), but is also aware of the massive and potentially dangerous scope for different opinions and perceptions, which should be subject to well-considered debate and open exchange. So, this is also taking care of socio-cultural and socio-economic diversities (corner 2), different belief structures (corner 1) and also concerns human rights principles (corner 4).

5. Social Justice for All

While this looks at first sight like a commitment to equality in corner 2, it also touches on corners 4, 3 and 1 respectively. I see here an ambitious engagement to construct a sustainable future in which all citizens of Indonesia have a share in the nation, and an expectation that everyone involved needs to be aware of the balancing of rights and duties.

The great basic point about these five principles seems to me, compared to what I know from the basic principles of state policy statements in Pakistan, Bangladesh and also India, the observation that these five principles or programmatic ideals of a national vision are actually broadly agreed pillars of the nation in Indonesia, especially in the post-authoritarian era,[5] would seem to doubt that, but I think knowing that this vision exists and deliberately not following it are two quite different things that both need to be analysed together. As a nation that is turning 72 on the day when I began to write this piece, Indonesia seems to have finally grown wiser and has shed earlier authoritarian models of law and governance to become a more convincingly true democratic republic. There are, it seems, still many concerns and objections, but no major subversive forces that would seek to kick any one of these Pancasila principles out altogether. That said, though, recent developments in Aceh, in particular, provide some insights into what may happen if one ignores the balance, and what the risks and harms are, if one goes down that route.

This is of course very different in the highly bi-partisan politics of implementing the national vision of Bangladesh in particular, but also in Pakistan and in India and Sri

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[4] Masaji Chiba, *Legal pluralism: toward a general theory through Japanese legal culture* (Tokai University Press, 1989). See also Masaji Chiba, "Three-Level Structure of Law in Contemporary Japan, The Shinto Society" in *Asian Indig Law Interact Receiv Law* (London ; New York: KPI, 1986).

[5] Schulze, *supra* note 3.

Lanka. As was expressed at some point during the Conference, the presence of an explicitly Islamic party or parties in Indonesia that would then seek to exclude others would constitute a considerable risk factor for this entire Muslim-dominated nation. This would be so especially if the definition of Islam and what it means to be Islamic is not broadly enough conceived, but is dogmatically and narrowly focused on specific textual interpretations, overlooking the human-made interpretations of what tend to be very broad and wide-ranging moral/ethical statements in the Qur'an, in the first place. It should thus be beneficial in future years for scholars of Islam in Indonesia to engage in comparative work to check what comes out of other jurisdictions in which, for example, Islamic criminal law is sought to be introduced as a man-made construct, which may end up being of rather questionable Islamic standing, if one dares to analyse such problems more deeply. Warning examples are plentiful from Pakistan, in particular. For those who read German, Naarmann offers a brilliant study of blasphemy laws, a comparison of the legal position in Germany, England, India and Pakistan.[6] Also useful on this topic is Knights.[7]

In this context, I indicated at the end of the conference that the new massive study by Shahab Ahmed "*What is Islam? The importance of being Islamic*,[8] though it does not explicitly cover Indonesia, and Ahmed speaks of the range 'from the Balkans to Bengal', is going to be highly pertinent also for Indonesian discourses. By opening up the epistemological range in such a way as to include Pre-Text, Text, and Context for the deliberation of anything to do with Islam and being Islamic, this study contains important lessons for many years to come, for all of us. It was good to see that in panel session 4.2, Dr. Ahmad Syamsu Madyan actually identified such hermeneutical gaps, which are of crucial importance for Indonesian discourses today and in the future. Notably, such discussions go well beyond earlier, still very important studies on conflicts and tensions within Islamic law.[9]

III. DAY 1 OF THE CONFERENCE

The Conference itself, on day 1, kicked off with a keynote lecture by Professor Carol Tan of SOAS, asking to what extent CEDAW could help women from Indonesia who venture to work abroad and may suffer significant harm, abuses and much precocity. While this raised questions about the interaction of corners 4 and 3 of the kite of law, in terms of who should be held responsible in case of trouble, I think it became clear through this presentation that international law, despite much persuasive effort and energy, has limited practical reach for the individual woman suffering abuse and harm. The conclusion, that adjustments to local conditions would be needed before any wide-ranging global conventions were relied on, reflects not only on the scenario of pluri-legality also in this field of studies relating to international worker migration. It should in future conferences be brought out much more that a nation state that somewhat encourages its people to go abroad for work, as the state will benefit from massive remittances, should then also be held more responsible for ensuring that its nationals, while working abroad, are suitably protected, maybe through bilateral agreements rather than wider global instruments. The

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[6] Bennedikt Naarmann, *Der Schutz von Religionen und Religionsgemeinschaften in Deutschland, England, Indien und Pakistan* (Tübingen: Mohr Siebeck, 2015).

[7] Samantha Knights, *Freedom of Religion, Minorities, and the Law* (Oxford University Press, 2007).

[8] Shahab Ahmed, *What Is Islam?: The Importance of Being Islamic* (Princeton University Press, 2015).

[9] Noel James Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (University of Chicago Press, 1969).

emphasis, then, is on corners 3 and 2, not on corner 4. That in this labour market scenario any too explicitly protective state intervention might drive away interest on the part of certain nations in recruiting Indonesians as migrant workers could be one significant consequence, which also deserves deeper analysis. If that scenario occurs, it is evident that there will be other people from other countries willing to take up such places.

Another related issue is the fact that many stakeholders actually benefit from worker migration abroad, so this becomes also an issue for corner 2 of the kite, at all levels of interaction, right down to the concerned family and individual members. If individuals find themselves trapped in bad working conditions abroad, which are not necessarily linked to big corporate abuses of power, but petty misuses of authority at household level, for example when employers are violating the basic rights of their domestic staff, appeals to CEDAW seem far-fetched, but are perhaps not completely irrelevant as 'soft law' or moral admonishments. In such scenarios, Pancasila principles 2 and 5 may be invoked as basic postulational values to remind those in positions of privilege to be better human beings and to treat others with greater respect.

Whether this would be directly effective and helps the troubled individual, I seriously doubt. Maybe this is also a matter of public education, then, basically to inform people, and especially women, about the potential risks of going abroad for work and exposing themselves to all kinds of harm. Far too many individuals seem to be driven by entirely unrealistic dreams of a better life and may then be trapped and in due course crying for help in vain, resorting to potentially self-harming methods of seeking relief or release. While I was travelling back to the UK, I read in the Straits Times of 15.8.2017, page B6, a report of a maid from Myanmar in Singapore. She had poured Dettol into the cereals for her constantly nagging female employer, in a desperate effort to get out of this bad employment and be sent home. The report ends by saying that this maid could have been sentenced for up to 10 years in jail and a fine. Her lawyer's successful plea for leniency resulted in a reduced sentence of five months' jail. The individual drama experienced here does not even touch the presence of CEDAW as a protective tool from corner 4. This is mainly a matter of corners 2 and 1, with the state on stand-by to turn CCTV evidence of the mixing of the drink into a criminal offence for this miserable individual.

As Professor Tan rightly stressed, making individual rules, regulations or laws does not immediately provide redress. There is of course no law prohibiting nagging of employees, anyway. In this unfortunate but telling case of the Burmese maid, the plea for mitigation provides some relief, but many other migrant workers would probably not find such help and would suffer in silence. That this kind of report is even published is telling – what are the agenda and intended messages of such reporting? In light of this, whether the right route is to advise women in Southeast Asia against becoming migrant workers in the first place or not may be debated. Merely calling for more international law seems like a shot in the dark. Nothing, it seems, will protect any of us against abuses arising from multiple acts of the basic human nastiness that results from the prevalence of unreason in the world that Amartya Sen has identified as a major recurring source of injustice. Becoming a migrant means to carry additional risks.[10]

This message was very clear also from the presentation by Dr. Jesper Kulvmann on the predicaments of Pakistani asylum seekers in Bangkok. His account of 'urban refugees', who live mostly in camps, from which they might seek to extricate themselves for various reasons, was quite depressing, but of course no news at all for someone who knows how Pakistani asylum seekers are treated in the UK.

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[10] Amartya Sen, *The Idea of Justice* (Harvard University Press, 2011).

In Bangkok, too, most asylum applications are in due course rejected, more so (90%) for the about 20% of Christian Pakistani asylum seekers than the 80% Ahmadis who made it to Thailand and have ultimately a reported success rate of 90%. But before one gets to that stage of some kind of security, daily life is marred by police raids, hostility of locals, denial of the right to work, bribes to be paid to and by employers, and serious mental health implications. The presentation showed that recourse to human rights law is severely limited at all levels, as the realities of life are first of all played out between corners 2 and 3. Worryingly, children pay the highest price of falling through all sorts of holes in the officially existing protective nets of international law, despite much concerted effort of child-centred policies. Here again, recourse to corner 4 arguments provides little relief to the affected individuals, so that even the most basic human rights are violated.

But here again, questions also need to be asked why such people have turned up as asylum seekers or refugees in a particular place. Who else, in particular, has benefited or profited from their trajectories of journey, which probably involved some form of trafficking, even if it was a form of self-trafficking? This makes it a corner 2 issue, both in terms of the social factors that lead, motivate or force families to migrate, and those who offer them 'help' in getting asylum seekers into a specific foreign country. The beneficiaries may very well be sitting in Pakistan itself, even creating and stirring up trouble locally to motivate more people to leave, and then 'offering' them help in managing the journey – of course for a price. In other words, this is not only an issue for Thai law, or a problem of international refugee law. Again there are all kite corners involved here, and multiple jurisdictions.

The Q&A on this Plenary brought out a number of further issues regarding the fast rising role of remittances and the fact that ASEAN as a regional body does not manage to exert enough influence to protect migrant workers or refugees. It will be pertinent to be aware that migration into the region also occurs from outside ASEAN. While human rights activists would tend to defend the role of CEDAW, it was also observed that the laws produced by the UN have lost international respect, as any progress made seems really slow. The rich evidence of abuses might suggest that there is a moving backwards of the protective mechanisms, but at the same time there are also various initiatives and programmes to provide support. There is a massive global refugee crisis, no doubt, but not all of this is total gloom and doom. Humans have always moved, and not all migrants are refugees or asylum seekers, though they may have to claim that they are to seek entry to a particular territory or supportive mechanism in the first place.

It is evident that this whole complex field is going to grow in importance and relevance. It is also clear to me from evidence from South Asia, especially from Bangladesh, that organised movement of migrants all over South East Asia and into and out of the region involves very many stakeholders, who often do not have the best interests of the migrants at heart. This comes down to the local bazaar, where 'friendly' advice to seek migratory escape is really designed to entrap vulnerable people into parting with lots of money that they may not even have. In such a messy scenario, there could be some scope for strengthening bilateral agreements between nations which also involve specific protective mechanisms for the migrants involved. There may also be a need for local criminalisation of traffickers and their support networks.

In my kite model of analysis, the focus in terms of migrants is then again more on the interactions between corners 3 and 2, and far less on corner 4 than human rights activists would like to believe. In other words, what we need are situation-specific, sort of "glocal legal methods" of searching for viable solutions and suitable models, not merely a global blueprint of idealised statements about rights that remains too vague and liquid to offer

sustainable remedies for disadvantaged migrants and especially those people who are at the most direct risk of just being completely victimised.

I personally also think that a state that encourages its citizens to migrate for work abroad, and basically trades in its own people, especially if such a state obviously seeks to benefit from the remittances that they would generate, then has a clear-cut obligation to ensure that the citizens are protected at all stages of this migrant worker journey. This protection should be extended and discussed right until the eventual re-integration into the home society, perhaps by providing the right framework to cultivate and promote sustainable investment. Specifically, any profits to the family concerned should not be blown in conspicuous consumption, but are better properly invested to safeguard the long-term future of the people and the nation. In Indonesia, this could also be discussed in terms of Pancasila principle 5, which could then be looked at as a principle of socio-economic empowerment for those who have ventured abroad and their families. Here again, this is a matter of protecting people's human rights through appropriate state-based laws and modifications in people's socio-cultural normative perceptions rather than devising more and more well-sounding international conventions.

The panels on day 1 contained a rich range of topics focused around gender justice. Of course this meant I could only attend certain papers and thus have no complete overview of what was being discussed.

The presenters in Chamber 1.2 discussed child marriage regulations in Indonesia and showed very well how the national law in Article 7 of Law No. 1 of 1974 lays down minimum ages of 19 years for men and 16 years for women, but dispensations to marry earlier may be given in certain cases. In other words, there is ample room for discretion here and for exceptions within corner 3 itself. As a result, the human rights argument from corner 4 continues to be that there is a risk of moving backwards if too many allowances are made and the law is not strictly enough enforced. Yes, but what about social and ethical concerns? In other words, what about corners 2 and 1 of the kite? What was not brought out clearly enough, I felt, is the somewhat suspect effort on the part of international law stakeholders to enforce a globally uniform norm for minimum ages of 18 years for both parties, clearly for the sake of establishing a uniform global framework. This was justified by reference to statistics that a quarter of girls in Indonesia are married before the age of 18. That neither tells us how many girls are married before the age of 16, and thus identifies the potential harm of very early marriages, nor does it productively contribute to the discourse over any permissible exceptions. The focus in such arguments is only on enforcing a global corner 4 perspective, the 18 year rule. This is clearly too simplistic, and will remain unproductive for tackling the actual problems and their consequences.

Indonesian scholars need to perhaps be more aware that this discourse is also being used to paint Indonesia in a negative light internationally, when it does not appear that there is in fact a serious problem of massive numbers of very early marriages. We clearly need more sophisticated research on this, as we do in south Asia. Similarly, devious arguments are not by coincidence also strongly being advocated for South Asian jurisdictions, where in India and Bangladesh, for example, the respective minimum ages are 21 years for men and 18 years for women presently. Again, in view of such high official minimum ages, the reported numbers of 'child marriages' are bound to be enormous, for many young people would marry between 16 and 21, for all kinds of reasons. In such discussions, it is also not disclosed and factored in that in several European countries, by comparison, the legal minimum ages are actually much lower. In English law, one can marry, with parental permission, at age 16. Other European

countries allow this even earlier. The result is that it always looks like Europe has abandoned child marriages, while the problematic Asian jurisdictions lag seriously behind. This is, however, misused as devious demagogics, of precisely the kind identified by Maeso & Araújo[11] in the quote presented on slide 5 of my second set of final comments to the conference (which was distributed as a printout to participants), depicting the 'problematic non-European other' and claiming that we are not racist in Europe anymore, we are just concerned now about the correct values!

It is thus made to look as though Indonesia, too, has a big problem with child marriages and international law protection is moving backward, because it is not being implemented. I know too little about the Indonesian scenario to understand whether what I would call 'infant marriage' rather than 'child marriage' is a real problem. But I would guess that problems will arise where young people after relatively early puberty discover the attractions of sexual contact and wish to engage in relationship, thus risking negative impact on local norms of honour and the family's status, also infringing of course Islamic principles relating to the avoidance of *zina*. In such a scenario, also in countries like the UK, parents may resort to agreeing to an earlier marriage, or in fact may force an early marriage (rather often, however, not to the individual the young person concerned actually wants to marry), thus raising serious human rights concerns that have been classified under 'forced marriage' rather than 'child marriage'.

I do not know whether this is actually an issue in Indonesia, but at any rate, my advice is that in future conferences and research generally, this important topic should be further debated, with more detailed ethnographic evidence of what is actually going on in society. This is not primarily, in my view, a matter of the interaction of corners 4 and 3, but again of a more informed interaction of corners 2 and 3, with a strong dose of values and ethics coming from corner 1 as well. This suggests that debates focused only or too much on human rights miss the actual local picture and any real problems, and are then also not able to help devise strategies to support young individuals who for one reason or another were getting married rather earlier than they might have wanted. Or, if there is a desire to marry early, what are the reasons for this, and what should/could the state do to ensure that this does not have negative consequences? Merely repeating stereotypes that early marriages result in certain specific problems, as was also done during these presentations, is too simple and lacks convincing evidence. Further, what are the implications of any policies regarding marriage age on demographic management of an already very large population?

A related issue, which also was not debated in the panel session I attended, is the presumption that marriages are of necessity registered by the state to be legally valid. I am not convinced that locally, Indonesian state law is everywhere so effective at grassroots level that it has achieved clear-cut harmony between what the state law directs and what people actually do. I am saying this because many years ago, in 1999, when Mick Jagger tried to defend himself against a divorce petition from Jerry Hall (which famously ended in an out-of-court settlement in London), I was called upon to investigate for the English court what the Indonesian law says about marriages of different kinds. I could see as a result of this research that this law is not as simple and as nationally uniform as it is often portrayed by law-centric people. Mick Jagger and Jerry Hall were not members of the local Hindu community on the beach at which they celebrated their colourful 'marriage'. Hence, as non-locals, their marriage law was the state-centric Indonesian law which

[11] Silvia Rodríguez Maeso & Marta Araújo, "The semantics of (anti-)racism in the governance of non-Europeanness: an introduction" (2017) 51:1 Patterns Prejudice 1.

certainly demands formal registration, which was not done. Among Indonesian locals, however, if there is – as I suspect - considerable room for the *de facto* existence of unregistered marriages of Indonesian citizens in Indonesian law, are there any implications in relation to age limits? How much of this then remains below the official radar, and why?

Regarding the position of multiculturalism in Indonesia, or whether one should rather discuss this as a form of interculturalism, Joeni Kurniawan, following the advice of foreign advisers (not me, in this respect, to be clear), relied to some extent on the writings of Kymlicka.[12] These are world-famous, but may not actually be the pertinent theoretical material to provide appropriate foundations for a sustained and fitting debate on this topic in regard to Indonesia, where different forms of ethnicity and 'difference' intersect, overlap and contradict each other. As a Muslim majority state, moreover, and despite a formal commitment to secularism (which can, as we know, mean so many things), the presumption that the English words of the Constitution of Indonesia can capture the true ambit of what is going on in the country is highly doubtful. A reading between the lines and beyond the formal text would appear to be necessary to produce a country-specific analysis also here. My advice is, thus, that future scholarship on Indonesian law needs to be assiduously conscious of and alert to culture and its many influences. I am saying nothing new here that Hooker and others have not said and written about before, of course! But we always still far too often tend to forget such important methodological advice when we discuss 'law'.

In this concern for socio-cultural normativities and their related ethics not only the 'margin of appreciation' as a constitutional law term of art for modern lawyers, but also the Islamic notion of plurilegality, as encompassed in the term *ikhtilaf*, would need to be interrogated. Both concern forms of discretion in interpretation, albeit in very different contexts. Their relevance for any debates on Indonesian law and the protection of gender justice and other forms of basic justice cannot be conducted only in or along the lines of human rights terminology, but has to be also perceived as a localised entity to make sense to the people of Indonesia. It is they, as citizens and ultimately as voters in democratic elections, who have to balance the various competing expectations. They need to learn to look through various tempting forms of demagogic representations that might sound and be convincing at first, but may turn out to be unsuitable, and even positively dangerous, for a deeply plural poly-ethnic and highly syncretic nation state that wishes to remain united, and prosperously sustainable, under the Pancasila umbrella. Here, too, a discourse focused on human rights might result in complaints and misgivings about lack of achievements in the direction of certain global benchmarks. But the challenge to devise a glocal system that fits the people of this huge nation state will simply not go away, and a more intensely plurality-conscious analysis is required.

Day 1, I may just add here, ended with a delicious dinner and a presentation of Indonesian art forms that clearly showed and confirmed for all to see the hybridity of the living law of Indonesia, here in the field of performing arts.

IV. DAY 2 OF THE CONFERENCE

The plenary session at the start of the day was composed of two very different presentations, connected to human rights issues. Dr. Shahrul Mizan Ismail from Malaysia eloquently proposed an inverted triangular approach to rights protection. I guess this was

[12] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, 1996).

trying to make a contribution to global theorising about law and its effectiveness in terms of rights protection. However, this seemed to me too narrowly focused on corner 4 of the kite and largely left out the state perspective (corner 3) both in terms of public interest, public policy, and also the responsibility of the state to multiple stakeholders and interest groups, not only human rights activists or proponents. There was thus also, for my taste, too little concern for the fact that the issues debated are also matters of a socio-cultural and socio-political nature. In the discussion, it was raised that awareness of multiple forms of discretion is important, but quite how this is to be instrumentalised was not brought out in sufficient clarity.

The presentation on land rights in Timor Leste by Dr. Alex Grainger scrutinised the crucial issue of the extent to which a newly created modern nation state can claim reliance on the principle of eminent domain, in a socio-cultural and socio-political context where various communities have long-standing and often competing claims to multiple forms of land use and ownership. The presentation showed that these cannot, especially in today's democratic contexts, just be ignored by reliance on the more or less naked power of the state, and not at all by appeals to 'rule of law'. But simplistic human rights claims or discourses about indigenous people's rights also run the risk of missing out the complexities indicated by the kite methodology of accounting for multiple competing stakeholders at one and the same time.

How such competing claims are to be managed will engage researchers for many years to come, and this is an issue all over the world. The huge question to what extent a modern nation state that claims such rights of ownership then has an obligation, first and foremost, to guarantee and help provide (if not directly serve on a silver platter) rights to livelihood has quite evidently also arisen in this fairly small nation of about a million people. So we can anticipate that in future research and conferences, related topics will feature strongly, too, in relation to this young nation. Here again, the prominent international protection regime for minorities and indigenous people can be only one element in a highly complex arena of debates about the right balances between rights and duties. It was also made clear that as long as there was ample land for everyone, this was perhaps less of an issue than now, where perceptions of competition and scarcity, for all kinds of reasons, have become more prominent.[13]

Focus on human rights discourse alone, to the neglect of other perspectives underplays also here the pragmatic importance of socio-economic concerns and claims, which is just as much a matter for individuals and communities as it is for the state and for any potential foreign or outside stakeholders like multinational companies, which were notably not (yet) involved in this scenario. These struggles over distribution are also matters that affect relations between citizens and the state and between different groups of citizens. The speaker did indicate at least the potentially spiritual role of land as well, manifestly a factor that cannot just be ignored in today's modern world where 'religion' in al sorts of forms has crept back onto the agenda, or is simply making its presence more clearly felt and heard than earlier. In this we are right in the middle of the most recent and most sophisticated writing about the nature of the legal order in our post-modern world,[14] where state-centricity remains a hugely important factor, but is not the only guardian, nor the only yardstick, of sustainable justice.

The Panel Sessions throughout the morning offered a rich menu of papers about agrarian and environmental issues, rights to education and development and indigenous

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[13] Schulze, *supra* note 3.

[14] Amartya Sen, *The Idea of Justice* (Harvard University Press, 2011).

rights in Southeast Asia. The paper presentations I attended were fascinating. Elizabeth Rhoads, talking about Burma/Myanmar showed the connections of urban property regimes and citizenship laws in an exciting glimpse of an ongoing study that will be a major contribution to knowledge in due course, it seems.

Gerry Pindonta Ginting focused in his presentation on human rights and the theory of sovereignty, in relation to an apparently well-known Indonesian case of forced eviction of a local community, the Bukit Duri case in South Jakarta. Rather than theorising this through Agamben and highlighting the rather evident device of discretion in the law on the part of those who have or claim power, more focus on comparative research into these kinds of scenarios over basic land rights would have been useful, it seemed to me. What I find missing here is not just the insistence on recognition of certain formal or informal rights to property that some people may present as arguments, but a much more basic problem, namely that we jump to fashionable theorising too fast without telling the audience/reader what is actually going on in lived reality and how competing claims may be balanced out.

Notably, this was also raised earlier by the presentation of Alex Grainger, namely that when a state claims control of regulating property rights, what is that state then going to do with people who cannot provide any proof that they own the place on which they put their head to rest at night? This very serious predicament, which arises today all over the world, and which in Western cities is called 'homelessness' when people are found sleeping on the pavement or in the entrances to the poshest shops in London, has much more widespread and massive implications in Asia and Africa where millions of uprooted local people now converge on cities, and then of necessity need to claim public space for their private use, as they could not possibly acquire new property rights in their situations of precarity. What, then, are the basic rights of such people, and what kind of legal order can protect their most basic needs and human rights, simply the right to occupy a space that is not their own as a member of the citizenry of that state? The Olga Tellis case of pavement dwellers in Mumbai in 1985, reported at AIR 1986 SC 180, raised such fundamental issues early on and simply concluded that such people had not absolute right to that particular spot of land they were occupying, so would need to move on, if so required, but only after due notice, and not in the form of brutal slum clearance or other removal methods. Bangladesh has had some important cases on this same subject, with similar outcomes, and the public interest dimension is clearly in evidence everywhere. We have, however, not even begun to address the burning key issue of what rights to concede to the landless masses from a more plurality-conscious multi-dimensional angle if we only focus only on human rights. It is unsurprising that states are not keen to discuss this or have this raised, but if states everywhere are so keen to grab and claim property rights, have they no corresponding obligations to protect those individuals and social groups whom they divested of the basic right to occupy a minimal space to be able to live?

I observed a similar lack of activist acumen and plurality consciousness when it comes to legal analysis in the papers in Panel 3 that morning on eradication of illiteracy. Here, however, the risk is that as academics we overemphasise the duties of the state and fail to see that the individuals and their respective social groups have huge responsibilities for their own development. For, when it comes to learning, there also has to be a will to learn, a desire from within the individual to develop and be empowered, and we should not forget that in simplistic appeals for more state intervention in education. Such appeals to corner 3 of the kite may be completely justified, but without active involvement of corners 2 and also 1 this development process will not take sustainable shapes.

That the risk of falling back into illiteracy when the skills acquired at basic school are not solid enough and are not practised is still a reality for far too many people, but not only in countries like Indonesia. In that sense also in the global north, complete literacy is a myth. It is indeed tempting to think and talk of moving backwards in relation to places like Indonesia. But many more questions need to be asked about why the education that is being offered, or the way in which it is being offered, may not be suited for the needs of people, and especially of children. Is this not sometimes a matter also of language, given the many languages that Indonesia has? Or is it just the culture of the school environment and all sorts of deficiencies in the delivery of education? Simply claiming that the government is lazy, as was so passionately done in this panel, may sound good and appropriately 'critical', but is just not constructive and sophisticated enough, it seemed to me. The same argument goes for child-friendly villages, where again the extent of state involvement and state support is something that Indonesian scholars will need to discuss in more depth. This is not like Singapore, or Switzerland, of course, the conditions in Indonesia are very different, and effective protection mechanisms and processes require multi-level engagement and constant awareness, thus, of plurilegality.

Education everywhere is a multi-agency process, so we would also here need to consider the input of the individuals and their mental framework or values (corner 1) and the socio-economic concerns of parents and children (corner 2) in law-related debates about education and child protection. The intensive interaction of human rights principles, state policies and laws, but also family and community strategies as well as individual engagement and participation, all need to be considered together, to break what many Asian scholars now seem to call the 'vicious circle' or 'vicious cycle' of disadvantage in primary education, in particular. Here again, scholars and activists in Indonesia can learn a lot from other Asian (and African) countries that face similar problems, and they should not presume that 'Western' systems have sorted out all problems, far from it.

Intriguingly, this session also touched on the implications of digitalisation and the risks that even more people who are insufficiently schooled or educated will be left further behind in this new process of interacting with the world. Yes, indeed, in the age of the mobile phone and all sorts of apps, it is not only a matter of human rights, but also of common sense and socio-cultural and socio-economic prudence to ensure that as many people as possible have basic levels of literacy and numeracy so they can competently operate such gadgets. But let us have no illusions. That this challenge is never going to go away is already evident from new research in Western countries, where despite claims of 100% literacy, this is manifestly not the case when it comes to using modern apps. So when a forward-looking city council, for example, is demanding online contact rather than face-to-face service (which is much costlier as a form of service delivery), it is depriving certain individuals and whole groups of equal rights and thus violates the most basic norms again. As new research from various countries is confirming, absence of relevant knowledge and skills in these rapidly developing fields leads very fast to further disadvantaging of already disadvantaged individuals and, if we are not careful, whole groups.

Expertly chaired by Dr. Dian Shah from Singapore, the plenary session after lunch offered two very interesting and rich papers. Benedict Rogers sought to illustrate the risks arising from religious intolerance in various jurisdictions and fora, making particular reference to the Rabat Plan of 2012 and the Beirut Declaration of March 2017 as evidence of international law engagement and human rights focus. These are notable efforts to protect freedom of religion and freedom of speech, and seek to exert moral as

well as sort-of-soft legal authority over leaders, to make them realise the enormous responsibility they have. However, as the presentation also showed so well, there are many continuing risks to freedom of religion and of expression, in many countries, not just Burma and Indonesia that were mainly used as illustrations that pluralism seems to be in peril everywhere and we are moving backwards.

In this context questions were raised in the discussion whether it is appropriate to oppose the efforts of states to make declarations about a particular religion as state religion. This is evidently a subject of much importance in the Global South, where the public sphere is often far less secular than it now is in the rest of the world. From the perspective of a global secular framework this reservation would thus make sense. But from a local, bottom-up perspective it may be questioned whether anything is wrong with making a clear-cut commitment to the respective religious identity of a nation's majority, where that exists in terms of religious identity. As this issue is so closely related to identity, silencing the voice or claim of religion would appear to be a questionable strategy for anyone seeking to win elections. However, making a declaration about a specific religious majority status is only half the job done. The immediate next step – and the most significant challenge today - needs then to be to ensure that minorities of whatever kinds have guaranteed equal rights and a constitutionally protected position, too. Anything less is not conducive to a fair system of human rights protection.

We have recent examples of efforts to do just this that are then being politically assaulted as a sign of moving backwards. This happened, for example, a few years ago in Bangladesh, where Islam was re-introduced as state religion, with an immediate addition, however, that the other religions were equal.[15] This was done by the current Awami League (AL) government of Sheikh Hasina, seeking to 'prove' that her 'secular government is not anti-Islamic. Such a strategic measure is of course also another form of legal fictionality or symbolism, but the human rights lobby's expectations that non-Western countries should make a firm commitment to separation of law and religion is manifestly not as simple as it sounds even in the Global North, and it makes no sense in many cases in the Global South. Thus, an explicit guarantee of equal treatment for all religions, which still raises questions about minorities within groups, is not only an alternative method, but probably a better suited one for countries that also retain personal law systems and thus account for the presence and inclusive combination of corners 2 and 1 in their legal systems anyway. This would also be the case, I believe, for Indonesia, where the fiction of being a uniform legal system is a nice fiction, similar to the Indian fiction that Indian law is a form of common law, which is now finally being challenged even by a leading Indian law school.[16] That whole issue, of course, too, continues to lead to massively convoluted debates among various groups of scholars of different convictions about the so-called 'problematic nature' of personal law systems[17]

The presentation by Dr. Abu Bakar Eby Hara threw specific light on issues of securitisation and terrorism in Indonesia, in the wake of the Bali bombings and subsequent developments and debates. It became clear through this presentation, too, that the role of identity in relation to religion and law-making is of utmost importance also in Indonesia. Hence, it can easily be manipulated by politicians who deliberately forget about the wider public interest and pursue their own agenda to profit in all sorts of ways. The definition of intolerance came up in the Q&A part, predictably, and it is pertinent

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[15] Menski, Werner F., *supra* note 2.

[16] M P Singh, *Examining India's Common Law Identity* (Mumbai: Oxford University Press, 2017).

[17] See on this implication at Maeso & Araújo, *supra* note 11.

that I should point here to a new study on this topic.[18] This is focused on south Asia, mainly Pakistan and Bangladesh, but also includes a chapter on Malaysia. It also has much to say to scholars in Indonesia, too, particularly about the relationship between religion and society, and so explicitly the relationship of corners 1 and 2 on the kite of law.

Panel Session 4, Chamber 4.2 allowed me to listen to Dr. Anton Widyanto, who had made interventions in earlier panels and now focused on the conflicts in Aceh and the role of Qanun No. 6/2014 in that part of Indonesia. It is clear that like in Pakistan, the boundary of private/public law is being affected by such laws, and thus the key problem identified by Benkin in relation to intolerance, namely the self-righteousness of the believers who impose their own convictions on others because they believe they are the only right truth, is the real problem.[19] However, in relation to Aceh, as well, not only the selfish agenda and ambitions of certain leaders may be implicated. Here, too, the pressures of international organisations and human rights activists may very well have led to a defensive local counter-reaction, generating reactive self-righteousness in the belief that this is the right thing to do to defend one's own beliefs and convictions. Of course, then we are right in the middle of all those debates about different shades and interpretations of *jihad* and its consequences. I think that the debates on all of this will benefit tremendously from taking account of what Ahmed (2016) suggests as a viable methodology to re-assess our global understandings of what it means to be Islamic.

Intriguingly, this realisation was completely re-enforced, at least for me, by listening to the next speaker, Syamsu Madyan, who intriguingly went as far as speaking of hermeneutical gaps in the convoluted debates about whether there are gaps between Islam and human rights. Another contribution of this session that was in my view very pertinent was the distinction of two kinds of rights (*haq*), namely God's right and human rights, and the resultant conclusion that therefore human rights must be different from Islam. From an internal Islamic perspective, this seems correct, as the statement that God's law is superior to any form of man's law is axiomatic from that religious perspective. However, the more wide-ranging approach, namely that all religions are ultimately forms of human constructs as efforts to make sense of something beyond human powers, on the one hand, and the realisation that there is no such thing as a globally uniform approach to human rights, suggests that Indonesian scholars, because of the existence of the basic principle of Pancasila, actually are ideally placed to enlighten the world on what it means to be Islamic in a plural context.

God, not as some old man-like bearded figure, but a higher entity than any human force, as in principle 1 of Pancasila, can then perhaps be seen to take any form humans care to imagine, or even no form at all, as this formlessness – which does not mean lesser power!) is indeed also suggested by Islam's ban on depicting God in images. So this higher force, in various cultural naming traditions that we classify as 'religions', is indeed higher than any form of human authority. But by dictating to its own believers how to envisage or imagine – and revere - God, while not allowing a visual identification, 'fundamentalist' Islam in a reductionist fashion, it could be argued, takes away some of the unending complexity of that higher entity's authority and complete ultimate control. It fails to implement the third pillar of Islam, namely that every individual at the end of life comes up for judgment. One may sense a self-contradiction here in identifying a personification of God in a religion that does not actually allow believers to perceive Him

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[18] Richard L Benkin, *What Is Moderate Islam?* (Lexington Books, 2017).

[19] *Ibid.*

as a person. I think that here, too, the methodology proposed by Ahmed to bring together Pre-Text, Text and Context helps us identify the legal vision of Pancasila in Indonesia as a highly sophisticated balancing act that is completely Islamic, while still allowing freedom of religion - and the discretion of the third pillar of religion - to individuals.[20] This kind of debate about religious philosophy was of course not held in the Q&A, but I see the scope, in future discussions, to go into such matters in much more analytical depth also in relation to Islamic law topics. The foundations for this kind of progress were laid in this really exciting session which, notably, attracted more men than women, which is something that ought to be watched, as female voices and inputs in this debate are urgently needed, too.

Alvin Dwi Nanda's contribution also gave rise to interesting questions at the end, which would appear to me to focus on the extent to which humans can actually sit in judgment over matters that God is believed to have regulated, but often by the Qur'an leaving so many open questions.[21] Here again, Ahmed and his methodology come into perspective, and I look forward to hearing more in future discussions.

Panel Session 5, Chapter 5.1 saw a presentation by Irfan L. Sahindi about symbolic violence in Indonesia. His theoretical efforts to link the debate to Bourdieu's work on indicators of groups seemed to me to lack recognition of the fact that these groups are made up of individuals as thinking and reacting beings, and also as believers in particular forms of 'religion'. If around 340 churches have been shut or destroyed in Indonesia between 2005-10 and blasphemy-related arguments are increasingly used as justification in conflicts, fuelling them rather than toning them down, we are right back in the middle of debates about the dangers of self-righteousness of the convinced believers who tolerate no other views than their own. It is clear that if Indonesia goes down further that route, it will end up where Pakistan is today, in a self-destructive spiral so clearly identified by the amazingly complex study of Naarmann,[22] which unfortunately is written in German, but which I have reviewed in English.[23] It is clear that this important comparative study on the risks of operating a blasphemy law needs to be made more widely accessible, so that resourceful people like the young speaker can develop their own understanding of the very important topic they are studying in future research.

Farah Dina Herawati in the same panel session almost seamlessly continued the discussions about methods of defending Islam. She observed significant changes in her environment in Indonesia and linked her debate to the theorising of Habermas. Doing so makes sense, but one needs to be aware that the original theories of Habermas about the public sphere were completely secular and it is only since after 9/11 that Habermas has included 'religion' as a factor in his consideration, of course with remarkable consequences for his theories, but also for his image among 'progressive' thinkers and observers. I think that an important lesson for this development for Indonesia may well be further studies of what it means to be more specific about what 'secular' actually means in the Indonesian public sphere. This would also tell us more about to what extent the writings and considerations of Habermas are actually pertinent to Asian debates about religion and law.

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[20] Ahmed, *supra* note 8.

[21] *Ibid.*

[22] Naarmann, *supra* note 6.

[23] Menski, Werner F, "Review of: Benedikt Naarmann, Der Schutz von Religionen und Religionsgemeinschaften in Deutschland, England, Indien und Pakistan. Ein interkultureller Straftrechtsvergleich" (2015) 48:3 Verfass Recht Übersee.

Finally, Rizqi Bachtiar sought to measure the feasibility of online petitions in Indonesia in relation to public policy. This important issue of responsible governance and efforts to manage a more open form of government were presented as further evidence that human rights protection may be moving backward, as so little seems to happen in reaction to such online activities. This is of course a matter of Indonesian politics and its administrative management, but the wider issue would be to what extent government in Indonesia is responsive to public interest claims of various kinds. Questions would also arise to what extent, if the government does not listen to petitions and representations, various form of social action litigation or public interest litigation would be possible in Indonesia. These types of action are very prominent in Indian law and now also in South Africa, too, and they are not, as many scholars are wrongly claiming, copied from the USA, but are an indigenously rooted form of action, which is also supported - and in fact anticipated - by the Indian Constitution and its cleverly worded Article 32, which also guarantees the right to access to the protective mechanisms for protecting human rights. notably, it does this by using the term 'by appropriate proceedings', which as we know, may be a postcard from jail on the part of someone who is illegally incarcerated, or any *bona fide* petition by any concerned individual, provided there is evidence of an actual infringement of a basic fundamental right. The young presenter, who was right to defend his position by saying that he only talked about public policy in this paper, should nevertheless be encouraged to think further than his present project, and deserves congratulations for daring to raise this potentially highly conflictual topic. But then, the fact that one can raise such debates in post-authoritarian Indonesia is itself a sign that not everything is moving backward, and that discussions such as these ones held in this conference are not only necessary, but will be fruitful and constructive. This will be more so, if we all learn to be a little more aware of the fact that so many different competing voices and claims co-exist and vie for our attention, and we constantly have to make choices in our assessment of any one issue for debate.

Thus for me, the Conference confirmed the basic principle of the kite theory that in all these potentially conflictual debates, even though it may not look like this, some progress is being made, and we are not actually moving backward, quite apart from the fact that time is relentlessly ticking on. But the pressures to make decisions, and thus to arrange and critically consider, basically in a two-level process, the respective sequences of the ever-present four kite corner elements, with their respective sub-corners, are a taxing demand on all of us. Making a decision about our own positionality simply identifies what corner of the global kite of law is our respective starting point. In that sense, as I explained in the final lecture, a responsible judge will be aware that s/he has to start from corner 3 and operates the decision-making trajectory as part of a state-dominated framework of legal reference, so to say.

That is easy, compared to what comes next. Having selected one's starting point, now the decisions have to be made about how, within that particular corner of the global kite, the respective sub-kite is to be balanced out. In this process, none of the four corners involved may be completely ignored or discarded, as this would be epistemic and actual violence. This predicament forces lawyers to constantly remember that law is more than just state law, or just human rights law or international regulation, and it is also more than just religious law, or just *adat* normativity in any specific local Indonesian manifestation. Where is, in any one specific scenario, the right balance? And, aware that this right balance might be only a temporary arrangement, how does one sure, if that is even possible, that a particular legal position or strategy becomes secure, solidifies into something sustainable in the long term and becomes and remains a 'good law'? Contrary

to what one of the most recent books in this field, Croce seems to still suggest, 'the right law' and finding an appropriate legal order is not just a matter of state-centric management, though the state, also in Indonesia, is clearly a central element in this context.[24]

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