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## Introduction

### *Continuities and Ruptures in Global North Legal Pressures on Global South Societies*

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Since Durkheim's *Division of Labour in Society* (1893), the sociological discipline has treated the law as a privileged object of study. And to this day, the law maintains this privileged position in contemporary sociological theories (see Bourdieu, 1986; Latour, 2009; Luhmann 2014). At the same time, however, laws schools tend to train lawyers exclusively in the technical skills necessary to practice law, many times ignoring the very important social ramifications of the law, or the deeply embedded meanings or biases in the laws themselves (Abel, 1995). Furthermore, many sociology departments do not have courses on law and society, and the study of law is even less common in history, philosophy and anthropology, except perhaps at the graduate level (Friedman, 1986). Finally, when studying the law, from any disciplinary perspective, the ideas, concepts and values embedded within it become studied from the lens of the “West”, given the dominant impression that modern, democratic and progressive values originate in the works of Hobbes, Locke, Rousseau and Kant, or that contemporary human rights are a product of Eleanor Roosevelt and Rene Cassin's active role in the drafting of the United Nation's Universal Declaration of Human Rights. Whether or not other individuals from outside of the West can help us understand the meaning of rights in a different way, or what are the manifold conceptualisations of what constitutes “human rights” outside of the West, are questions that have only recently begun to be examined. It is the hope of the editors that this special issue contributes to this very important project.

This special issue is an interdisciplinary analysis of the challenges faced in Southeast Asia to examine the concepts of “rule of law” and “human rights”. Although the authors have written their pieces through various disciplinary lenses—political science, anthropology, law, history and philosophy—a shared feature of the articles included in this issue is that they do not approach these

issues from an “Asian” or a “Universal” perspective. They reject both because the former analyses the region in isolation from the rest of the world, and the latter reads regional problems with an ahistorical universal lens and, by doing so, reproduces a Western or colonial ethnocentrism. Instead, they propose to engage in these diverse regional issues by breaking with the colonial mentality that seeks the source of knowledge in central societies, to take advantage of the experiences and knowledge from other societies of the Global South that have similar experiences. It is, therefore, important to understand the relevance of this critical shift that accompanies the reference to the Global South and the idea of constructing a South-South dialogue.

Studies on the Global South have blossomed in the last decade. Although the term “Global South” emerged in international relations, political science and economic studies (Dados and Connell, 2012), it is now used by anthropologists (Emerald et al., 2016), sociologists (Motta and Nilsen, 2011), legal scholars (Bonilla, 2013) and, finally, as this special issue evidences, socio-legal scholars. Due to the relative novelty of the term, it is not surprising to find there are multiple (Dados and Connell, 2012), and in some case contesting (Sousa Santos, 2016), definitions of the Global South; more commonly, it is used without providing any clear definition (Motta and Nilsen, 2011; Bonilla, 2013). Despite the difficulty in setting its boundaries, the term is still widely used and we believe that it is because such a concept is needed. The Global South is used to replace terms with heavily negative connotations, such as “underdeveloped” or “developing” countries and “Third World”. Global South points to a section of the world that has suffered the colonial experience, and that it still is suffering its enduring economic, political, cultural and social legacy, without implying in any way that the region is inferior to, or falling behind, the former colonial metropolis. Thus, it is important to reflect on the two terms that composes the concept: global and south. The reference to the south is clearly related to the Southern Hemisphere, though we should not set a strict geographical boundary between the Global North and the Global South because, as the examples of Australia or Mongolia clearly illustrate, the reference is metaphorical and not physical. This metaphorical reference to the south is accompanied by the global adjective to highlight the interconnections between the southern countries, results of colonial histories, and the current phenomenon of globalisation (Dados and Connell, 2012).

By stressing the shared experience of colonial violence, not only at the material level, but also at an epistemological level, the reference to the Global South invites us to engage in a South-South dialogue. This dialogue aims at helping societies to learn from each other in a non-hierarchical exchange of knowledge based on similar experiences. It is in this sense that we refer in this special

issue to Southeast Asia and Latin America as regions of the Global South. Furthermore, the articles in this issue can be grouped into those focusing on the institutional changes that result in reform of judicial and legal structures in the Global South, and the second group of articles discuss alternative versions and meanings of, and pressures on, the concept of “human rights” embedded within these institutions.

## 1 Institutional Challenges and Reforms

In the first group, we find the articles by Andrew Harding, Pablo Ciocchini and Daniel Goh. The articles by Andrew Harding and Pablo Ciocchini explore the lessons learned from decades of programmes on legal and judicial reforms. Andrew Harding critically analyses the need for judicial reforms, one of the core tenets of the programmes of reforms implemented under the law and development movement in the context of Asia. He specially focuses on the case of Myanmar, a country that is undergoing a transition from an authoritarian regime towards an open democracy. Harding explains that over the last 70 years, the programmes of legal reforms have been guided by the dogma that the rule of law was crucial for development. An effective and independent judiciary was considered to be an essential element of the rule of law. Consequently, the programmes of reform targeted the judicial institution, offering legal training and seeking to secure its independence through improving the transparency of the appointment of judges and protecting them from the executive pressure by granting them tenure, among other measures. Nevertheless, Harding argues despite the consensus among scholars and promoters of reforms on the relevance of the rule of law, and of an independent and strong judiciary to protect it, Asia has proven that development can be achieved without it and that the rule of law can be a consequence and not a cause of development. The model followed by many successful Asian countries, such as Singapore or South Korea, has been called the “developmental state” and is characterised by a combination of a strong state and a market economy. This model favours political stability and a highly competent administration in detriment of a strong and independent judiciary that can control state power. Harding develops a brief but acute analysis of the legal history of Myanmar and explores key obstacles that legal reforms in the country are currently facing. Led by this analysis, Harding, argues that the focus on judicial reforms in Myanmar should be revisited under the evidence of the success of the Asian development state model. He concludes by arguing that programmes should perhaps prioritise, at least in a first stage, the building of a strong, well-organised and stable state over judicial reforms.

Pablo Ciochini's piece picks up Harding's fundamental point that there are no universal solutions and that we should be cautious of reforms based on legal systems from the Global North. Thus, while Harding criticises the over-emphasis on the rule of law and judicial reforms as a necessary condition to foster development in Asia, Ciochini focuses on the assumption that the replacement of the local criminal procedures with an adversarial system will improve transparency, accountability and efficiency. Ciochini adopts a comparative approach and critically examines recent reforms in criminal courts and criminal procedures in Latin America and Southeast Asia. He describes the different "waves" of reforms in Latin America and how they reacted to their failures by shifting their focus from due process to managerial efficiency. Thus, criminal courts have centred their resources in sentencing simple street crimes through plea bargaining. Meanwhile, reforms in Southeast Asia, although more diverse, have still focused on reducing backlog. Ciochini argues that this approach is problematic because it is based on importing legal systems and mechanisms from the Global North, expecting they will be adopted and applied by Global South institutions. However, such an approach neglects local material and cultural conditions. As a result, the reforms fail to reach their goals. But the reaction to that failure is to relegate the focus on transparency and accountability to increase the courts' efficiency narrowly understood as reducing the backlog. Through a comparative study of a jurisdiction from a country of each region (Argentina and Philippines), Ciochini identifies similarities in the reforms proposed and the obstacles faced and argues that lessons can be learned by sharing the experiences of jurisdictions from the Global South. The analysis of four strategies show that assumptions such as the efficiency associated with oral hearings and inversely that written documents generate bureaucracy should be reconsidered under the evidence of the daily needs and practices of judicial actors from Argentina and Philippines. A South-South dialogue between these jurisdictions can help them develop innovative local solutions suitable for the particular conditions, such as a discredited and authoritarian police force or a severely overcrowded prison system, under which courts in the Global South have to operate.

The last paper of this group is Daniel Goh's article on the implementation of Family Justice Courts and new legislation to regulate divorce process in Singapore. In this article, Goh crosses the boundaries between the academic and the political fields and offers the reader a thorough analysis of political ideologies that have shaped the legislation on family matters. Goh argues that previous reforms have paved the way for a paradigm shift in family law from a traditional understanding of family values, informed by conservative "Asian values", to a people-, and particularly child-, centred justice. Singapore enacted some

very progressive legislation, such as the Women Charter, in its early days as an independent nation state. However, by the 1980s Singapore had moved towards a developmental state that fostered an anti-welfarist conservatism in family matters, labelled as “Asian values” by the state narrative. These policies have started to change in the last decade as a consequence of profound changing family realities and developments in international conventions and common law jurisdictions. Goh’s article explains, through a self-reflective analysis, how “Asian values” have been incorporated in the local culture as “common sense”, to the point that his own interventions in the legislative debates, as well as the governmental responses resisting his initiatives, were deeply rooted in the same Asian values’ discourse. Goh proposes to overcome the debate over “Asian values” by moving away from generalised discussions and focusing on the need to protect vulnerable subjects. He names two examples: giving voice to children in their parent’s divorce proceedings, and providing financial support and strengthening the legal rights of unwed mothers. Goh argues that indigenous values should not be equated with conservative ones. Progressive policies are also not necessarily Eurocentric; on the contrary, they reflect both the local roots and emancipatory processes that societies from the Global South have experienced.

Although these articles explore judicial reforms in different countries, and focus on different dimensions of these processes of reforms, the three articles mentioned above illustrate the constant tensions between the introduction or rejection of foreign legal mechanisms and institutions. Harding warns us that even if these foreign institutions are considered desirable they may not work or can aggravate existing problems in the local context. Ciochini agrees with this diagnosis and proposes to start paying attention to the experiences of other jurisdictions from the Global South. Lastly, Goh reminds us that local culture and local values cannot be used as a pretext to prevent progressive change in our societies.

## 2 **Alternative Meanings, Versions and Pressures on Human Rights**

The last three papers by Jose-Manuel Barreto, Stefanie Khoury, and George Radics and Vineeta Sinha provide three important interventions in the discourse on human rights. Barreto’s piece entitled, “Decolonial Thinking and the Quest for Decolonising Human Rights”, helps to frame the discussion by illustrating the debate regarding human rights as a dialectic. Drawing from Hegel, the dialectic comprises a thesis, antithesis and synthesis. This three-part process translates nicely into a critical moment, encounter and construc-

tive movement in the decolonising of human rights. To decolonise human rights, according to Barreto, we must first recognise flaws in its conceptualisation. The prevailing definition of human rights is Eurocentric—with the West being depicted as the birthplace of modern conceptions of rights, freedom and liberty, and the East as authoritarian, overly disciplined and suffering from a lack of civil liberties. Through recognising these biases and assumptions, the “encounter” can help us recognise that many of these conceptualisations are flawed. The West has had its own periods of suppression, discipline and harsh rule, with even the definition of modernity emerging out of brutal conquest, slavery and colonisation. Moreover, by retrieving human rights concepts from outside of the West, moving beyond crass characterisations of the East, and recognising that the undeniable manifestations of authoritarianism and oppression outside of the West is directly a product of the encounters with the West, we can further enrich the definition of human rights and make greater progress in its decolonisation. Finally, this dynamic discussion can produce new and insightful conceptualisations of rights that move beyond one-sided and biased definitions. Barreto cites to Raimundo Panikkar’s idea of the *dharma* and how current discourses on human rights ignore the “value of harmony while condemning to invisibility injustices committed against individuals and excluding the contribution of social conflict to a less unjust and more harmonious society.” He also includes Abdullahi An-Na’im and Boaventura de Santos who argue that *shariah* law can also learn from contemporary discussions on human rights to become more cosmopolitan and responsive to modern conditions. Barreto concludes his piece with examples of works to highlight how the process of decolonising human rights is about “mutual learning and critique” as seen in the work of Twining, and rewriting history to recognise the contributions from the “Third World”—from its assistance in the drafting of human rights charters, to the valiant fight for recognition and sovereignty that have taken place over the years by those marginalised in mainstream histories of human rights. Barreto makes a concerted effort to remind us of the significance of some of these important figures, such as Ottobah Cugoana and Olaudah Equiano in the 18th Century, Frederick Douglas and Sojourner Truth in the 19th Century, Martin Luther King, Malcolm X and Nelson Mandela in the 20th Century, to name a few.

Stefanie Khoury’s paper, “Addressing Corporate Violations of Human Rights: A cross-regional examination”, examines the structural and economic constraints that complicates contemporary debates on human rights. In particular, she explores the quandary of characterising corporate entities as “legal persons”. This practice can be traced as far back as 1886 in the United States in *Santa Clara County v Southern Pacific Railroad Company* where the Supreme

Court held that a corporation, as its own legal entity, had property rights and that the constitutionally provided due process clause barred the State of California from taxing the property of a railroad corporation differently from that of individuals. The concept can also be traced to the 1897 United Kingdom case of *Salomon v Salomon* where the court established that the shareholders of an insolvent company could not be sued for outstanding debts. Perhaps this concept of a “legal person” allowed the applicant corporation in the seminal case *Retimag S.A. v Federal Republic of Germany* (1961) to be recognised as a “non-government organisation” entitled to protection under the European Convention on Human Rights (ECHR). The problem in all of these cases is that while corporations seek the protection of its rights, and now its “human rights”, whether these same corporations are held responsible for their *violation* of the human rights of others is doubtful. Examining the mechanisms created by the Inter-American Commission of Human Rights, the oldest regional court of human rights, to address this problem, Khoury identifies three ways the court addresses this issue. The first mechanism is drawing from a “positive obligation” or a state’s obligation to secure the effective enjoyment of a fundamental right, as opposed to the classic negative obligation to merely abstain from human rights violations. The second is the controversial “horizontal effect” in which the state is held responsible for allowing a non-state actor to violate the human rights of another. The third mechanism is an operational measure that the European Court of Justice has termed the “duty to prevent”. The duty to prevent is, as the name implies, preventative, requiring corporations from states and corporations to affirmatively act to ensure violations of rights does not occur. The “duty to prevent” of the European Court of Human Rights is similar to the “due diligence standard” in the Inter-American Court of Justice, which does not just demand that actions be taken to prevent harm from happening in the future, but threaten to punish corporations retroactively, for their failure to prevent harm from taking place. These mechanisms, according to Khoury, can provide guidance in Southeast Asia’s own desire to establish a court of human rights. Given ASEAN’s historical emphasis on the economy and pro-business orientation, in addition to the region’s reliance on large scale industrialisation and extraction of natural resources, the experience of the Inter-American Court of Human Rights and the European Court of Human Rights, particularly in the context of corporations as “legal persons” can provide insight and guidance, cross regionally, on this important issue. The paper also highlights how beyond the symbolic violence that takes place through the biases embedded in the Western-dominated definitions of “human rights”, is the practical and structural concerns that accompany the human rights discourse, and how cap-

ital and development restricts, ensnares and defines what is “human” in the debate.

Finally, George Radics and Vineeta Sinha delve into the historical roots of the freedom of religion in Singapore. In their paper, they look specifically at the allocation of public holidays for religious communities in the country. In particular, they examine the *Tai Pucam* procession that is practised to honour the Hindu god of war, Murugan, in which participants carry the *kavadi*, otherwise known as a “burden”, as an offering to Murugan, to register appreciation for vows fulfilled or undertaken as a sacrifice to seek Murugan’s help in easing the burdens of loved ones. By the mid-1950s, *Tai Pucam* was no longer recognised as an official holiday prohibiting it from enjoying the freedoms of other recognised holidays, and by 1973, a music ban denying the use of live musical instruments was set in place. This controversial situation came to a head in 2015, when a scuffle between the police and procession participants erupted because the participants insisted on playing instruments in order to lessen the burden of family members carrying the *kavadi*.<sup>1</sup> The event also triggered the filing of the High Court case *Vijaya Kumar s/o Rajendran and Others v Attorney General*, in which the court upheld the security over freedom argument so common in government justifications for the restriction of rights. Although the court’s decision seems predictable, the article argues that this position is grounded in history and is a product of the post-colonial state’s continuation of colonial policy. As the British were interested in maintaining order in their multicultural colony, they organised society according to “race”, with each “race” having a corresponding religion. Since independence, the post-colonial Singaporean state entrenched this multi-racial policy by defining it further and dividing the nation into the four main “races” of Chinese, Malay, Indian and “other”, with each racial community being allocated two religious holidays. Although it was under the British that the “unmaking” of *Tai Pucam* as a public holiday took place, it was in the post-independence period that restrictions on non-gazetted holidays were enhanced. The music ban is but one example. The article argues, therefore, that although government definitions and use of public order, and racial and religious harmony, serve as justifications behind exerting extra regulations on *Tai Pucam*, these additional definitions and regulations may in fact undermine the minority Singaporean Hindu and Tamil community’s faith in the government’s respect of their rights, and undercut the public order and racial harmony the government aims to achieve.

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1 Sometimes the *kavadi* can be as elaborate as large constructions attached to the body using hooks and piercings through the skin, cheeks or tongue.



Although mundane and administrative, the colonial policy of legislating the number of public holidays to each religious community serves as a flash-point of controversy in modern-day Singapore. Radics and Sinha, therefore, demonstrate how rights on the ground, and on the intimate and personal level, can have a tenuous history, tracing back decades. Using a legal, historical and anthropological approach, their paper highlights how laws in Singapore, a nation constantly referred to as draconian, disciplined and prioritising order over freedom, is simply continuing a legacy that was left behind by the British, when these supposed rights and freedoms were produced in the context of the colony. Khoury, too, highlights the constraints imposed upon rights in countries of the Global South. As many of the countries of ASEAN, Latin America and other developing and industrialising regions of the world recognise, foreign investment and growth of corporations has become an important aspect of the economy. This is particularly the case in ASEAN, where many countries have taken on a reputation of being business friendly. Such reliance on foreign and corporate investment becomes problematic when existing frameworks tend to provide corporations protections as “legal persons”, but fail to hold such entities up to the same standards when it comes to their duties and obligations to others. Finally, Barreto nicely frames all three papers to highlight how the human rights discourse is a dialectical one in which there is a thesis, antithesis and synthesis—which he nicely transposes onto the topic as a critical moment, encounter and constructive movement. In his piece, he provides us with the larger picture of how biases embedded in language needs to be uncovered. The construction of the “East as draconian, and the West as progressive” falls apart when we consider that Singapore’s strict laws are a continuation of their colonial past, and Western corporations are continuing the legacy of extracting wealth with impunity. Barreto reminds us that as we continue the project of contesting human rights, the process is never-ending, and of mutual learning and critique.

### 3 Conclusion

All six articles in this special issue highlight that there are more similarities than differences across the Global South, and that what takes place in the Global South is inextricably a response to its encounter with the Global North. Continuities and ruptures happen in the most private spaces such as how one defines the parameters and definitions of “family”, or practices faith, to how corporations shape legal landscapes, and “rule of law” is defined and established. Within the various legal codes, judicial opinions and administrative regulations

are deeply embedded meanings that demand exploration to better understand who we are and where we come from. Nowhere is this more important than in the context of our legal institutions and definitions of what constitutes human rights.

The six papers in this special issue were a product of a workshop in Singapore in August 2016 in which several excellent scholars from Latin America and Southeast Asia convened to learn about the legal challenges they faced in their local jurisdictions. The editors are extremely grateful for the support that they have received from Law and Society Association of the United States, the University of Liverpool, the National University of Singapore, the participants of the workshop, and the students who attended—all of whom allowed the event to take place and made it such a success. Forums such as these are excellent opportunities to continue the task of learning from one another. They further help us reach across the divide to break down the dichotomies of North *vs.* South, East *vs.* West, Rich *vs.* Poor, and permit us to develop mechanisms to look inwards, identify what is important to all members of society and make sure that certain fundamental qualities are always part of the analysis—such as a deep respect for all human beings regardless of where they come from, what they look like, what they believe or how they choose to live their lives. George Radics and Pablo Ciochini would like to thank the authors of each piece for the excellent work and dedication to the project. Finally, Radics and Ciochini would like to extend their thanks and appreciation to the editors of the *Asian Journal of Social Sciences*, in particular Assoc. Prof. Joonmo Son, Assoc. Prof. Eric Thompson, and Dr. Zarine L. Rocha for their exceptional editorial support and advice.

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