A CONCISE LEGAL HISTORY OF SOUTH-EAST ASIA

M.B.Hooker

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Preface

SOUTH-EAST Asia is an area of special interest for the legal historian because it has been a meeting-place for almost all of the world's great legal systems. But they never survived long in their original form. The peculiarly South-East Asian genius has always shown itself in the ability to absorb and transform foreign elements and this has been as true of law as of any other aspect of culture. Moreover, the laws in the area have always interacted with each other and with indigenous elements, producing a *mélange* unique in legal history. These characteristics pose serious methodological problems which I have tried to deal with in the Introduction as well as throughout the text. I should emphasize that this book is not in any way a narrative or chronological history, nor is it more than a bare outline compressed and perhaps over-simplified in some parts. There are considerable lacunae in the legal history of the area—for example, the Portuguese legal administration in Malacca, Vietnamese administrative regulations, and Javanese inscriptions, to name only the most obvious. However, there is sufficient material for an outline of the history of South-East Asian legal thought, and it is with this fundamental aspect that I have been concerned.

In writing this outline I have had the immense advantage of earlier work on particular South-East Asian laws and I acknowledge an obvious debt to scholars such as Emil Forchhammer and D. Richardson (Burma), W. E. Maxwell and J. W. Norton Kyshe (Malaysia), Robert Lingat (Burma, Thailand, and Indo-China), Ph. Philastre and G. H. Camerlynck (Indo-China), Cornelis van Vollenhoven and J. C. G. Jonker (Indonesia), and Juan Plasencia (Philippines). It is also pleasing to record that modern scholars are showing an increasing interest in South-East Asian legal history in such diverse subjects as Thai law, late medieval Javanese law, and the classical laws of Malacca, to mention only those with which

I am personally acquainted. It is also important to acknowledge that much material is being made available by historians and social scientists, and here I would like to enter a plea for more co-operative effort in writing South-East Asian law, both historical and modern.

It is very pleasant to pay tribute to the efficiency and patience of the staff of the Clarendon Press in seeing this book through the press.

My wife, yet again, typed a disorganized draft and by her patient criticism helped immeasurably. She also bore cheerfully the disruptions to normal life which were inflicted upon her.

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Introduction
A Historical Jurisprudence of South-East Asia

South-East Asia is a complex area from any standpoint, whether political, economic, ethnic, or religious, and its law is no exception. From Burma in the west through Thailand, Cambodia, Laos, and Vietnam to the Philippines in the north-east, and south through Malaysia and Indonesia, the number and variety of laws is bewildering. The area is marked by considerable cultural diversity[1] and so, inevitably, by a diversity of laws. The central problem is therefore to establish the means by which the material of South-East Asian laws can be classified so as to make sense of the nature of law in this area and of its historical development. To do so might be thought to pre-empt the question, what is law in the South-East Asian context? but such a result need not necessarily follow. The difficulty is that the boundaries of law are rarely defined clearly *vis-à-vis* religion, ethics, or philosophy, so that definition alone is not likely to be helpful, relying as it all too often does on ethnocentric conceptions of law.

THE FORMS OF SOUTH-EAST ASIAN LAW

We know South-East Asian laws in four distinct forms:

(i) *The Written Text*

The law texts fall into two groups, (*a*) the Oriental laws comprising the Indian-derived, the Islamic, and the Chinese-derived laws, and (*b*) the Occidental laws which are made up of the English, French, Dutch, and Spanish-American laws. In terms of the nature of law these two groups of texts have nothing in common. In the first place the language of the former group is rarely confined or specific as it is in the Occidental group of laws. There has been no development of a specialized legal vocabulary or form of presenting law such as occurred in the

[1] See Lebar *et al.* (1964), Lebar (1972).

European laws. We are not, therefore, faced with the difficulty of coping with a technical legal language but rather with the problem of uncertainty in meaning because of the looseness of language in the Oriental texts. The European-derived laws are always confined and specific as to language, and a person trained in such laws must approach the interpretation of Oriental texts with caution. Even at the level of translation one is always tempted to use terms with which one is familiar to define a foreign legal principle. The two groups of texts could not be more dissimilar in their approach to (legal) language, and this difference is reflected in the structure of the texts.

European-derived texts in South-East Asia are made up of statutes, codes of law, administrative regulations, and the like, and follow the general Western form of such documents. They are written for defined purposes, which are stated in the text itself, and generally provide for principles of interpretation and for the establishment of machinery for their enforcement. Throughout, the formal structure is highly stylized; definitional sections are common, and devices, such as schedules, which enumerate classes referred to in the main sections of the text, are also found. The pre-European texts of South-East Asia share none of these characteristics. Indeed, the lack of formal style is the single most striking characteristic, except perhaps in the Chinese-derived texts of Vietnam. However, different sorts of stylistic forms do exist in the Oriental texts, most often in the preambles or exordia. The aim of this form is to relate the content of the text to an outside source of law, not to make clear the internal arrangement of the text itself. As has often been noticed, inconsistency of content does not invalidate an Oriental text, although it may do so in the case of a European-derived text.

In the question of content the distinction between the two sorts of text is quite striking. Even the most superficial acquaintance with an Oriental text will demonstrate that large areas of (private) law are not treated at all in texts which purport to be of general application. It is clear that much was left to local customary practice. In addition, there is a good deal in the texts of a religious and ethical nature which never appears in the secular modern text.

For these reasons care must be exercised in the interpretation

of South-East Asian texts, particularly in their use of specialized and technical terms ('right', 'duty', 'ownership') derived from European legal cultures. If one is not careful, one may attribute to the texts characteristics which they do not have, or have only to a minimal degree. For example, it used to be said that they were characteristically 'public law' documents, the implications being that private-law matters were completely unregulated and also that this terminology made sense as an analytical device. A further assumption, again drawn from the characteristics of European texts, was that the indigenous texts constituted the totality of the law. In colonial legal administration this had serious practical consequences arising from the view that because the two sorts of text were in *pari passu*, the contents of the indigenous laws could be assimilated to the European laws. Only in the Netherlands East Indies were steps taken to combat this assumption.

(ii) *Oral Law*

Much South-East Asian law existed, and continues to exist, in oral form, in marked contrast to the generality of European laws. Some of the oral forms were easily recognizable by European commentators as legal, for example, the Burmese law tales,[2] the Minangkabau *perbilangan*,[3] and so on. In addition, oral traditions in a wider sense, transmitted in forms such as the Malay/Javanese *wayang* and the Thai *nang talung*, also served and still serve to communicate moral and legal values which can be identified as such. In the largely illiterate peasant communities of South-East Asia, such forms not only serve the function of expressing generalized standards for conduct but also contain directives of varying specificity for the solution of disputes. The two functions are complementary and neither is thought of as separate from the other.

This is a form of law which, for the most part, had disappeared from European laws by the late eighteenth century. Its contrast with secular and written law codes of European origin in South-East Asia was striking. The Eastern and the European forms of law were opposed in almost every respect, and it was only in the English legal world, with its

[2] See Maung Htin Aung (1962).

[3] 'Customary sayings', see Caldecott (1918).

tradition of common law developed by the judiciary, that oral forms were at all consonant with a European-derived legal theory. Although the Dutch did attempt the preservation of oral forms of law, specifically the Netherlands East Indies *adats*, the civil law demanded the reduction of these laws to writing in the form of jurists' doctrine.

(iii) *Law in Social Institutions*

The complex ethnography of South-East Asia provides numerous examples of rules of law being identified in terms of social institutions. This is a contribution of social science to the study of indigenous law in South-East Asia: the best-known examples include van Vollenhoven's[4] 'normative systems' in Indonesian *adat*, Wilkinson's[5] 'democratic' laws in Malaya, Barton's[6] description of the Ifugao, and Guilleminet's[7] Bahnar 'code'. All attempt to describe law in terms of social institutions, and all are concerned to distinguish law from other mechanisms of social control by the use of various criteria such as sanction, the existence of 'normative' propositions, reciprocity, dispute settlement, and so on. Very often these descriptions rely upon examples taken from the field of oral law but add some extra analysis.

Such definitions of law are not those which the European systems, whether based on codes or on judicial practice, require for the general administration of law. Nor are the data which sociology produces to establish legal classes particularly attractive to the courts; for example, in English law the admissibility of anthropological evidence may well be denied because it breaches parts of the law of evidence. Such a practice is especially undesirable since the laws identified in this way are truly descriptive of legal reality.

(iv) *Indigenous Adaptations*

The final form that is of interest here is a comparatively modern phenomenon and represents an attempt by the peoples of South-East Asia to come to grips with the European-style laws. It is an attempt to make sense of the formal system in what

[4] van Vollenhoven (1918) (1931) (1933).
[5] R. J. Wilkinson (1908).
[6] Barton (1919).
[7] Guilleminet (1952).