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# *Religion and Constitutional Practices in Asia: Five 'Cs' for Reflection*

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**Abstract**
In considering the articles in this Special Issue, I am struck by the importance of a set of factors that, in my view, both run through the articles like a leitmotif, as well as shape the major 'take away' lesson(s) from the articles. In this short commentary, I elaborate on these factors and the lesson(s) to take from them through five 'Cs': context; complexity; contestation; the framework of constitutions; and the role of comparative law. The first three 'Cs' are lessons from the case studies of the articles themselves, while the second two 'Cs' are offered as lessons to help take the dialogue forward. Fundamentally, these five 'Cs' highlight the importance of the articles in this Special Issue and the conference from which they emerged on the one hand, while on the other hand, also making us aware of what are the limits of what we should conclude from the individual articles. In other words, taken together, the five 'Cs' are, one might say, lessons about lessons.

## 1. CONTEXT

The first and perhaps foundational point made by the essays is the importance of context. Each study makes it abundantly clear that we must understand and appreciate the contextual factors in the individual environments. That this is the case is, perhaps, not at all surprising.

In his 2017 book, *A Realistic Theory of Law*, Brian Tamanaha begins by stating:

> Law is rooted in the history of a society, continuously remade in relation to social factors. Law is an integral aspect of society and society infuses law, their interaction mutually constitutive and bidirectional in cause and effect. Law assumes different forms and functions in connection with levels of social complexity and surrounding economic, political, cultural, technological, ecological, and social factors. [1]

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1. Brian Z Tamanaha, *A Realistic Theory of Law* (CUP 2017) 1.

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Tamanaha's assertions here are not unique – the whole 'law in context' movement is based around the importance of understanding the law in its social and political environment and has generated publication series as well as academic journals.[2]

The first point to be made here, then, and at least implicitly apparent in the different articles in this Special Issue and the papers presented at the conference, is that the law and constitutional practices that are being discussed must always be seen and understood in their context(s).

This leads to a second observation about context, namely, to appreciate what the context of law consists of. Broadly, we can say that legal contexts consist of the whole range of social, political, economic, and cultural forces that exist in a society. As Jaakko Husa has said: 'Law is part and parcel of society's cultural entirety – law is the law of the human communities …'.[3] Context is the weight of the past and exigencies of the present; ideational and practical. Context is also not entirely endogenous but is influenced by outside forces, so it is dynamic and developing.

Third, and more particularly, when considering religion and constitutional practices, we have seen in the papers and articles that, indeed, context is much shaped by the religious environment and culture that is present, and by the types of education, and religious education, offered in the jurisdictions. As Dian Shah's paper says directly about her case study of Malaysia: 'What all this illustrates is that religion (or more specifically, the majority religion, Islam) has become a significant force in shaping the laws, policies, and politics in Malaysia.'[4] In fact, we might say that the religious environment is, for better or worse, having a larger social impact in the present time than it had in the past. Thus, along with a heightened sense and the enhanced visibility of religious diversity in so many environments, including those in Asia, is also presently coming to a heightened sense of religious cleavage and tension. This is unfortunate, but it highlights how significant the forces of religious identity, religious diversity, and perhaps most challenging of all, religious definition are in Asia (and beyond). As we have seen in the papers, in some jurisdictions (especially in South Asia and in Malaysia) this is generating more case law of the 'hard cases' variety that can be, simultaneously, a boon and a blight.

## II. COMPLEXITY

The second 'C' I raise is complexity. This follows, perhaps inevitably, from what we have said above about context. But I want to draw out a related aspect to the analysis.

When thinking about context, and context as a dynamic, we need to both appreciate as well as – if one can put it this way – embrace complexity. That is to say, we need to understand that the contexts which we are interested in are evolving as a result of

2. See for eg the Cambridge University Press Series on 'Law in Context' <www.cambridge.org/core/series/law-in-context/> accessed 2 July 2018 and the International Journal of Law in Context <www.cambridge.org/core/journals/international-journal-of-law-in-context> accessed 2 July 2018.

3. Jaakko Husa, 'Comparison' (2018) Helsinki Legal Studies Research Paper 51, 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3174643> accessed 2 July 2018 (forthcoming in David S Law and Malcolm Langford (eds), *Research Methods in Constitutional Law: A Handbook* (Edward Elgar Publishing 2018)).

4. Dian AH Shah, 'Religion, Child Conversions and Custody Battles in Malaysia' (Religion and Constitutional Practices in Asia Conference, Colombo, 9–10 November 2017) 20.

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endogenous and exogenous forces in complex ways. Complexity, then, is and will be ever-present. This means that we need to see narratives presented as windows into the complexity of the contexts, and contingent rather than final explanations of the contexts. Change will come and settled truths can quickly become unsettled. Consider for a moment the 'political earthquake' of the most recent general election in Malaysia ('GE14' as it is known) that took place on 9 May 2018, and where the Barisan Nasional coalition that had governed Malaysia (and its predecessor of Malaya) since 1957 was dramatically swept out of office by the Pakatan Harapan coalition. The political result was dramatic and recast the 'old truths' of Malaysian politics. It evidenced, in its aftermath, that there was a rumbling complexity to the (political) context of Malaysia that even the most seasoned observer would have been hesitant to predict before the election – an evolving, ever-present complexity.

## III. CONTESTATION

The third 'C' is contestation. The articles in this Special Issue and the papers presented at the conference have highlighted that the contexts they discussed are full of contestation on fundamental and perhaps even less fundamental issues. This ongoing contestation is linked to the contextual complexity I have just mentioned. Thus, when we consider the overwhelming Muslim-identifying majority in Afghanistan, the Malay-Muslim majority in Malaysia, or the shared 'subcontinental' identity in India, Pakistan and Bangladesh, we see that all these large, shared identities are replete with contestation of values and identifications.

To illustrate from the case studies, consider the (Sunni) *Hanafi* majority in Afghanistan. As Shamshad Pasarlay's study of Afghanistan makes clear, there is not a unique '*Hanafi* view' that pertains in Afghanistan. Some of this is because of the structure of authority and opinions within *Hanafi* Islam: 'different *Hanafi* Sunni claims might look to different *Hanafi* scholars for guidance.'[5] This is not because, for the vast majority, there is a rejection of the label or identity as Sunni *Hanafis*; rather, it is because this identity does not engender uniformity. Nor, of course, does 'South Asian(ess)' or 'Malay(ness)'. So, to take another example, India and Pakistan, due to a common history, share a great deal of legal architecture. For instance, as Matthew Nelson's article points out, both jurisdictions have the concept of a 'basic structure' in their constitutional law.[6] However, as Nelson explains, this does not mean that these two jurisdictions address the 'basic structure' concept in the same way.

Most importantly, the meaning, values, claims, and positions of these identities are subject to inevitable contestation coming from a variety of perspectives and influenced by a variety of sources. For instance, as Shah says with respect to Islam in the Malay-Muslim context in Malaysia: '…there are deeply rooted legal, political, and social conditions that define (and will continue to define) disputes on religion and their outcomes'.[7]

5. Shamshad Pasarlay, 'Constitutional Incrementalism in a Religiously Divided Society: The Case of Afghanistan', this Special Issue, 261.

6. Matthew Nelson, 'Indian Basic Structure Jurisprudence in the Islamic Republic of Pakistan: Reconfiguring the Constitutional Politics of Religion', this Special Issue, 333.

7. Shah (n 4) 21.

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In short what the above tell us is that the forms of law and understandings of justice that emerge from the different environments discussed – or from almost all environments – are forged through dialectical and discursive processes.

## IV. COMPARATIVE LAW

The next 'C' is the potential of comparative law.

In his recent book entitled *Sociological Jurisprudence*,[8] Roger Cotterrell asserts that jurisprudence needs to be cognizant of the social and political contexts within which legal issues arise if it is to provide effective responses to these issues. Thus, sociological jurisprudence 'should indicate jurisprudence consciously oriented to address the need for sociological awareness in all its inquiries'.[9] Cotterrell's perspective is targeted particularly at the dominant outlook of contemporary Anglo-American jurisprudence, which he characterizes as being captured by professional philosophy and disconnected from sociological context, especially but not only in its positivist core. His concern is that the characteristics of this form of jurisprudence – to be accurate, what he calls 'legal philosophy' – 'disable it for standing in for the jurisprudence as the *prudentia* of jurists and have made it largely unconcerned to try to do so'.[10] It is in contrast to this that Cotterrell advances his sociological jurisprudence that he characterizes later in the book, as well as in an earlier article, as 'bricolage jurisprudence'. Cotterrell argues that bricolage jurisprudence that collects insights from a range of different sources and is socially, empirically and politically engaged, aids in developing the *prudentia* of jurists.[11] *Prudentia* is found around 'acquaintance, knowledge, sagacity, prudence, discretion and foresight'.[12] Thus, Cotterrell's proposition is for jurisprudence to be informed, engaged and – resonant with Tamanaha – grounded in the social realties and contexts of society. In multicultural environments especially, he speaks about the need for a 'communitas' orientation seeing the law as expressing cultural conditions and adjusted for the diversity of legal and interpretive communities.[13]

Cotterrell's jurisprudential outlook (and indeed that of Tamanaha) conforms, I believe, with the work of Catherine Valcke in providing a perspective on comparative law. Valcke (with inspiration from William Ewald), advances the proposition of comparative law as comparative jurisprudence. Law as jurisprudence (and comparative law as comparative jurisprudence) here means:

> [...] that law is more than just the sum of its facts - the texts, the institutions, the sanctions, etc... created and implemented by the State. Law is also, and crucially, the ideas that

8. Roger Cotterrell, *Sociological Jurisprudence: Juristic Thought and Social Inquiry* (Routledge 2018).

9. ibid 13.

10. ibid 47.

11. ibid 45.

12. Roger Cotterrell, 'Why Jurisprudence Is Not Legal Philosophy' (2014) 5 Jurisprudence 41. See also Brian Bix, 'Bricolage Jurisprudence' (*Jurisprudence JOTWELL*, 24 April 2015) <https://juris.jotwell.com/bricolage-jurisprudence/> accessed 2 July 2018 (reviewing Roger Cotterrell, 'Why Jurisprudence Is Not Legal Philosophy' (2014) 5 Jurisprudence 41);

13. Cotterrell, *Sociological Jurisprudence* (n 8) 167.

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> underlie, animate, and tie these facts together … It is "law in minds"- "a deliberative enterprise ... [taking place] within 'the logical space of reason'", a "style of thought," "a web of beliefs, ideals, choices, desires, interests, justifications, principles, techniques, reasons, and assumptions"- which accordingly can be apprehended only from within, from the standpoint of legal actors. And comparative law as comparative jurisprudence correspondingly is "comparative law in minds:" "the comparative study of the intellectual conceptions that underlie the principal institutions of one or more foreign legal systems."[14]

Valcke's standpoint suggests a mutually constitutive dynamic between comparative law and legal theory that has bearing for the intellectual output of the conference from which this Special Issue arises.

The jurisprudential perspective provides a theoretical *raison d'être* which explains the work of comparative law. In this perspective, comparative law is seen as not just an instrumental or information sharing exercise, but rather an effort that can be harnessed to plumb the social and intellectual complexity of the nature of law in different environments. Simultaneously, the materials unearthed by comparative jurisprudence – the 'comparative law in the minds' – can provide the contextual richness and theoretical grounding to understand law as situated in a social and cultural location. In short, there is a complementarity to the jurisprudential frameworks and the comparative means – particularly by way of a 'comparative law as jurisprudence approach' – of comparative law's emphasis on context which, as we have seen, is a central idea that emerges from the articles in this Special Issue.

Indeed, there are more specific insights from comparative law that can be harnessed towards the larger understanding of context. One such insight is the idea of the dynamic and mixed/mixing nature of legal systems. As Esin Orucu has said:

> It follows from the foregoing that awareness that the law is not static, that it moves and changes and that legal systems today are at a crossroads, is essential…more and more systems will be mixed and mixing be they in Europe, in South East Asia or in the Middle East…It is the study of this 'mixedness' that can illuminate the path towards the comprehension of the interaction of law and culture."[15]

This viewpoint affirms what we have gleaned about the evolving and ever-changing nature – the complexity of context – that the papers in the conference and the articles in this Special Issue have presented.

Comparative law also reminds us, with its idea of 'transposition', that when legal ideas, doctrines or structures move from one environment to another, or even when we have a similar structure, doctrine or idea in different environments (eg, the presence of religion, 'basic structure' doctrine etc), we should not expect them to

14. Catherine Valcke, 'Comparative Law as Comparative Jurisprudence – The Comparability of Legal Systems' (2004) 52 American Journal of Comparative Law 713, 717–718.

15. Esin Orucu, 'A General View of "Legal Families" and of "Mixing Systems"' in Esin Orucu and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing 2007) 185. Orucu also notes that 'sometimes 'mixedness' can be the manifestation of a transition, sometimes it can be a final outcome of the process…[It] is usually a result of historical accident'. ibid 179.

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generate entirely similar results. Again, this is because of the impact of context or culture, which conditions how the doctrine or idea is received, interpreted, and applied.

The emphasis on pluralism – legal and otherwise – has been another idea of comparative law. Werner Menski's work emphasizes the presence of pluralism and he highlights the impact of hybridization that occurs in legal systems due to the influence of culture-specific locality and of legal traditions as 'fuzzy'.[16] As a further elaboration of this perspective, Menski develops a graphical kite with religion/ethic/morality at one corner of the kite, society at another corner of the kite, the state at the third corner, and international law at the 'tail-end' corner of the kite – hence, laws are created by the state, by society, and through values and ethics and with international influences.[17] Menski's analysis, coming out of his approach to comparative law, also helps us to articulate the contextual richness that emerges from the case studies discussed in the articles.

Finally, we can turn to H Patrick Glenn's idea that we need to consider legal traditions (versus legal families or legal systems). Glenn has characterized tradition as having 'pastness', as described by TS Eliot.[18] Accordingly, he says that '[t]radition thus appears to involve the extension of the past to the present, though we must be cautious in thinking about time'.[19] He adds that there is another aspect of tradition, found 'in the necessity of tradition having been continuously transmitted in a particular social context, in order for it to be of current relevance'.[20] In another work, Glenn quotes AWB Simpson for the proposition that 'law is essentially a tradition, that is to say something that has come down to us from the past', which Glenn says common lawyers (at least) would agree with.[21] Fundamental to Glenn's understanding of law as legal tradition, therefore, is the impact of history which transmits normative information from the past into the law of the present. This perspective is relevant to the discussion in the articles, and to the earlier mentioned idea of evolution, because of the weight of history emphasized by Glenn's tradition and its evident, as well as unending, impact on how religion and constitutional practices unfold in Asia.

## V. CONSTITUTIONAL LAW

The final 'C' I offer is for Constitutional Law – a necessary focus for the articles of course, given the brief for the conference. More particularly, I consider what the articles enable us to see about constitutional law with respect to religion. Put simply, I believe that the lesson *from* the discussions is this: constitutional provisions with

16. Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2nd edn, CUP 2006) ch 1.

17. Werner Menski, 'Plural Worlds of Law and the Search for Living Law' in Werner Gephart (ed), *Rechtsanalyse als Kulturforschung [Legal Analysis as Cultural Research]* (Vittorio Klostermann 2012) 81ff.

18. H Patrick Glenn, *Legal Traditions of the World* (4th edn, OUP 2010) 5.

19. ibid 12.

20. ibid 12–13.

21. H Patrick Glenn, 'A Concept of Legal Tradition' (2008-2009) 34 Queen's Law Journal 427, 431.

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respect religion do not, in fact, settle the question of what role religion (or some specific religion(s)) have in the legal orders of any specific jurisdiction. Indeed, such provisions can profoundly beg the question. This is not at all surprising. Constitutional provisions are almost always much debated. Thus, what a provision means is a perennial zone of contestation. Law libraries stock many annotated constitutions – filled with small text and many footnotes – which outline the various interpretations that have been given to constitutional language, even to language that one might think at first blush is clear on its face (this before the lawyers get their hands on it!). Why should it be any different for constitutional provisions dealing with religion?

So, indeed, we should only expect the interpretative debates and contestations to be brought about by the articles in this Special Issue. That is fair enough. However, what I would like to suggest is that there is also a lesson *for* constitutional law here: constitutional law must not over valorize its texts, and constitutional scholars must not over valorize only the consideration of these texts. Rather, they should, as the articles in this Special Issue have done, see the text in its context(s). Of course, this does not mean the legal constitutional discourses are that they should be dismissed, merely that they should be consumed with a measure of modesty. The result of constitutional cases with respect to religion might furnish legal 'decisional resting points' which can, and almost certainly will be, revisited as circumstances change.[22]

## VI. CONCLUSION

This short commentary has sought to extract some insights from the articles in this Special Issue and the conference as a whole, as well as to make some propositions to move forward. The first three of the five 'Cs' presented here – context, complexity, and contestation – have been about what we can glean from the studies presented in the articles and papers. They seek to capture what the contributions detail carefully: namely, the nuanced diversity and local particularities which impact religion and constitutional practices in different jurisdictions in Asia. This richness also sets up the next two 'Cs' – outlooks on comparative law and the reception of constitutional law. At one level, the perspectives from these next two 'Cs' reinforce the first three 'Cs'. In another sense, however, they enable us to see that while the contested complexity of context may simply be, there are points of analysis that explain why this must be so. These points of analysis allow us to extract both information and meaning out of present situations regarding religion and constitutional practices in Asia, and provide us with a type of framework to digest developments that are, inevitably, yet to come.

22. The idea of resting points with respect to religion, and more specifically with respect to freedom of religion as an oft-invoked constitutional norm, is discussed in Arif A Jamal, 'Considering freedom of religion in a post-secular context: hapless or hopeful?' (2017) 6 (3) Oxford Journal of Law and Religion 433, 449.

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