

Codification in Developing Nations: Ritual and Symbol in Cambodia and Indonesia

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INTRODUCTION

As first conceived, this Article was about patterns and styles of codification in developing nations. However, events occurring

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during the summer of 1997 brought about a change of subject. One of these events was quite dramatic: the coup d'état in Cambodia which occurred while I was in that country teaching law. The other was more mundane: a slow realization, resulting from several weeks of teaching law in Indonesia, that the Basic Agrarian Law ("BAL") and Marriage Law of Indonesia were widely disregarded. These two very different experiences caused this Article to evolve into its present form: an inquiry into the purposes served by written law in the developing nations of Cambodia and Indonesia.

This Article shows some of the different ways in which developing nations understand and utilize their written law. In societies that have traditionally ordered human conduct by such non-legal means as custom, religion, ethics and despotism, the written law, newly arrived from the West,¹ must be fitted into the pre-existing frameworks of social ordering and governance. A common result is that indigenous social ordering mechanisms retain their function of regulating conduct, while Western written law assumes new roles. Specifically, the written law sheds the Western cultural gloss that views the central purpose of law as the framing of commands that both citizens and governments must obey. The result is societal usages and understandings of written law that are unfamiliar to citizens of Western liberal democracies having a rule-of-law tradition.

The written law is often incorporated into the traditions of ritual and symbol as tools of governance that are common in developing nations. For example, in some societies that share the Indic tradition of governance, written law is incorporated into the tradition of rituals that role model the desired ruler-subject relationships.² In a much larger group of countries that

¹ Time is relative. "Newly" here refers to the colonial period during which European law was received in Asia: roughly the sixteenth through nineteenth centuries. See Dolores A. Donovan, *The Cambodian Legal System: An Overview*, in REBUILDING CAMBODIA: HUMAN RESOURCES, HUMAN RIGHTS AND LAW (Frederick Z. Brown ed., 1993); Dolores A. Donovan, *Building a Legal System from Scratch*, 27 INT'L LAW. 445, 446 (1993) [hereinafter Donovan, *Building a Legal System*] (discussing Asian and French influence on Cambodian legal system); SUDARGO GUATAMA & ROBERT N. HORNICK, AN INTRODUCTION TO INDONESIAN LAW — UNITY IN DIVERSITY 1-21 (1978).

² See CLIFFORD GEERTZ, NEGARA: THE THEATRE STATE IN NINETEENTH CENTURY BALI 108 (1980) (stating that dramatic performances draw analogies to political system); cf. P. Linebaugh, *The Tyburn Riot Against the Surgeons*, in ALBION'S FATAL TREE: CRIME AND SOCI-

are characterized by the legal pluralism common in developing nations, written law is valued primarily for its symbolic functions and secondarily as a mechanism for regulating human conduct.³ Cambodia best illustrates the incorporation of written law into a tradition of rituals that role model the desired ruler-subject relationships, while Indonesia best illustrates the use of written law as a symbol rather than a regulator of human conduct.⁴ Western observers frequently lament that written law or codified law⁵ is brazenly flouted or simply ignored in developing nations.⁶ The Cambodian coup d'état and the disregard of the Indonesian BAL and Marriage Law respectively have been said to illustrate this point.⁷ From this Western perspective, coup

ETY IN EIGHTEENTH CENTURY ENGLAND 65-66 (Douglas Hay et al. eds., 1975).

³ See CLIFFORD GEERTZ, LOCAL KNOWLEDGE 174 (1983); John Denvir, *Capra's Constitution*, in LEGAL REELISM 129 (John Denvir ed., 1996).

⁴ It is also true that Cambodia uses written law as symbol and Indonesia uses enactment of law as a ritual of governance. The topics of law as symbol in Cambodia and law as a component of governance by ritual in Indonesia must, however, await a later exposition.

⁵ The term "codified law," or "codification," is used here in its broadest sense. Developing nations do not nowadays enact codes in the traditional French or German way. Instead they enact statutes that cover a particular area of the law, such as land law or labor law. The term "codified law" is used as a synonym for written law to differentiate it from the unwritten customary law.

The terms "positive law" and "formal law" are often used as synonyms for "enacted law" or "written law." Because the first two terms are derived from two schools of thought, positivism and formalism, that carry with them well-established value judgments about the nature and purpose of codified law, the less value-laden terms "enacted law" and "written law" will be used throughout this Article. It should be noted that enacted law and written law are not necessarily the same thing. Enacted law is a subset of the category of written law. In many developing nations there exists written law issued by a head of state that is not duly enacted in the technical sense of the word. See, e.g., Mark Cammack et al., *Legislating Social Change in an Islamic Society-Indonesia's Marriage Law*, 44 AM J. COMP. L. 45, 62 (1996) (stating that Muslim tradition allows underage marriage even though state technically forbids it).

⁶ See Robert M. Hardaway et al., *Tropical Forest Conservation Legislation and Policy: A Global Perspective*, 15 WHITTIER L. REV. 919, 922 (1994) (arguing that developing nations often disregard environmental and forestry laws); Judith Kimerling, *Rights, Responsibilities, and Realities: Environmental Protection Law in Ecuador's Amazon Oil Fields*, 2 SW. J.L. & TRADE AM. 293, 379 (1995) (discussing how Ecuadorian government and oil industry disregard environmental laws).

⁷ See Daniel Fitzpatrick, *Disputes and Pluralism in Modern Indonesian Land Law*, 22 YALE J. INT'L L. 171, 203-04 (1997) (stating that Indonesian courts frequently do not enforce BAL); Cammack et al., *supra* note 5, at 72 (indicating that forced and underage marriages still occur despite enactment of Marriage Law). These authors note patterns of widespread breaches of law. Neither of them takes the position that conscious, intentional violation of the law is characteristic of developing nations in general or Indonesia in particular.

d'états and the chronic disregard of fundamental, constitutive laws signify a conscious and intentional law-breaking. Had these incidents or patterns of behavior occurred in the developed nations of the West, such a conclusion would no doubt be a correct one. However, when such incidents and patterns of behavior occur in countries in which Western versions of the rule of written law are not established, more reflection is needed. The relevant questions are: what is the cause of such behavior and what does that behavior tell us about the function of written law in these countries?⁸

In Cambodia and Indonesia, written law has traditionally not functioned as the primary social ordering mechanism for large segments of the population.⁹ Even today, notwithstanding the governments and educated elite of these nations who profess their faith in written law, the effectiveness of written law in regulating conduct is spotty at best. For example, the lawfully elected and duly appointed Second Prime Minister of Cambodia who orchestrated the recent coup d'état did not view the written law of Cambodia's constitution and penal code as binding upon him.¹⁰ Likewise, many Indonesian people fail to view the provisions of the BAL and Marriage Law as immediately enforceable commands by the state that they must obey.

The thesis of this Article is that in societies where ordering the behavior of people and governments is largely accomplished by mechanisms other than written law, written law necessarily has little to do with the regulation of conduct. As a result, the enactment of written law need not mean that the law is intended to be obeyed immediately. The behavior of the citizens and governments of such societies cannot be fully understood until this observation is recognized.

⁸ The goal of this Article is to contribute to a better understanding of the norms guiding the behavior of the people and governments of Cambodia and Indonesia; judgments as to the propriety of that behavior are not contained herein. Inquiry and description are the tools that hopefully will lead to understanding.

⁹ See M.G. HOOKER, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS 273-78 (1975) (discussing *adat* law in Indonesia, which is unwritten indigenous law, and how *adat* laws remain in effect even after enactment of Constitution and new ideology).

¹⁰ See *infra* note 15 and accompanying text (noting that Hun Sen violated several constitutional provisions).

This Article examines two different cases. The first is a single incidence of the use of state power to violate fundamental norms embodied in the most basic written law: a constitution. This is the case of the Cambodian coup d'état. The second is the widespread disregard of certain laws by the people, and the tolerance of that disregard by their government. This is the case of the Indonesian land and marriage laws.¹¹

Part I of this Article describes both the Cambodian coup d'état and the Indonesian patterns of behavior at odds with the land and marriage laws. Part II discusses the theories that have traditionally informed the process of codification in developed Western nations. Part III examines selected modern theories concerning the functions of written law. Specifically, it discusses written law as ritual and as symbol and then analyses the applicability of these theories to Cambodia and Indonesia. The Article concludes by advancing three hypotheses. First, the command-and-obey function of written law is relatively unimportant in nations such as Cambodia and Indonesia where the primary means of social ordering are nonlegal. Second, the enactment of written law in Cambodia functions at times as the modern equivalent of the ritual that was the central means of governance practiced by traditional Indic kingdoms of Southeast Asia. Enactment of written law can be and often is a theatrical performance intended to role model the state-citizen relationships characteristic of liberal democracy. Third, in nations such as Indonesia that are characterized by legal pluralism in that several different mutually inconsistent normative systems operate simultaneously, the symbolic functions of national written law are highly valued, while the enforcement of such laws is given a very low priority. In Indonesia, the national written laws function primarily as symbols of national unity, state ideology, state power, and governmental legitimacy rather than as commands backed by the coercive power of the state.¹²

¹¹ The Cambodian coup d'état and the Indonesian disregard of the BAL and Marriage Law have been chosen as case studies that illustrate more wide-spread patterns of behavior. It is no doubt also true that the Cambodian people, not just their government, have disregarded certain Cambodian laws and that the Indonesian government has at times used state power to violate fundamental legal norms. Investigation and analysis of these patterns of behavior will hopefully provide the subject matter for a future, and lengthier, article.

¹² See Cammack et al., *supra* note 5, at 63-65 (discussing how Indonesian people dis-

I. WRITTEN LAW IN DEVELOPING NATIONS: THE PRACTICE

A. *The Cambodian Coup d'État*

The intriguing aspect of the 1997 Cambodian coup d'état was that the leader of the coup, Cambodia's Second Prime Minister, could likely have seized power by lawful means.¹³ Instead, he chose to use armed force.¹⁴ In so doing, he violated many written laws of Cambodia, ranging from the constitution to the penal code.¹⁵ From a Western rule-of-law perspective, the conduct of the Second Prime Minister, Hun Sen, appears to be that of an unprincipled dictator. From Hun Sen's perspective, very likely shared by many of his countrymen, his decision to bypass the legal system, which he himself had set up only a few years earlier, was justified and fell within the parameters of traditional Cambodian notions of governance.

For almost two years prior to the coup d'état, two rival Cambodian political parties had been manoeuvring for advantage in anticipation of the elections scheduled for late 1997 and early 1998. Hun Sen, as the leader of the Cambodian People's Party ("CPP"), had the advantage because he controlled the armed forces.¹⁶ His opponent, Prince Ranariddh, the leader of the

place Indonesian law in favor of Islamic law and that government does not enforce state law unless necessary). The focus here is the role of law in situations of competing normative systems. The claim is not made that the Indonesian government never uses the coercive power of the state. Certainly it does, both to enforce the criminal laws and to repress its political opponents. *See id.* at 53-54 (stating Indonesia used national law to overcome individual's local attachments and to maintain control over diverse population).

¹³ *See* Tricia Fitzgerald, *Hun Sen Planning Beijing Trip to See King*, S. CHINA MORNING POST, Aug. 7, 1997, available in 1997 WL 2273467 (stating that legal experts believe that Hun Sen's seizure of power might have been legal had Hun Sen obtained King's authorization).

¹⁴ *See Fighting in Cambodian Capital Kills Four*, XINHUA ENGLISH NEWSWIRE, July 5, 1997, available in 1997 WL 11185606 [hereinafter *Fighting*] (describing battle for weapons between Hun Sen's and Norodom Ranariddh's troops).

¹⁵ *See* CAMBODIA CONST. art 1 (stating that King of Cambodia must rule in accordance with tenets of liberal democracy); *id.* art. 52 (requiring government to protect public order and welfare); *id.* art. 107 (stating that government members shall be charged for any crimes they commit in course of duties); UNTAC LAW OF CRIMES AND CRIMINAL PROCEDURE art. 31 (1993) (discussing homicide); *id.* art. 36 (discussing organized crime); *id.* art. 41 (discussing battery with injury); *id.* art. 52 (discussing wrongful damage to property).

¹⁶ *See* Tricia Fitzgerald, *Troops Impounds PM's Arms Shipment*, S. CHINA MORNING POST, May 28, 1997, at 14 (stating that CPP has military supremacy); *War of Words*, STATESMAN,

National United Front for an Independent, Neutral, Peaceful, and Cooperative Cambodia ("FUNCINPEC"), was hard put to achieve an equivalent force. When the Khmer Rouge re-entered the political scene, what began as simply political rhetoric escalated to a build-up of armed forces on both sides. Under the guise of arming an extensive corps of bodyguards, each leader accumulated impressive arrays of firepower. Ranariddh, for his own part, entered negotiations with the outlawed Khmer Rouge, who still maintained an impressive fighting force and who had been his allies during the long years of civil war.¹⁷ Ranariddh also resorted to the importation of increasingly large shipments of arms.¹⁸

Customs officials discovered one particular shipment of several tons of armaments in the spring of 1997.¹⁹ After Hun Sen publicly accused Ranariddh of illegal importation of arms,²⁰ Ranariddh anticipated an arrest and conviction, given that almost all of the Cambodian prosecutorial and judicial corps belonged to the CPP. As anticipated, an investigation by the Hun Sen-controlled police was initiated.²¹ Ranariddh defended himself, stating publicly that the arms were for his personal bodyguards and that, as premier, he had the right to bring them in.²²

Aug. 24, 1997, available in 1997 WL 12930273 (noting that Hun Sen controls Cambodia's military).

¹⁷ See Pen Chantira & Chiep Mony, *Cambodia: FUNCINPEC Generals Visit Anlong Veng*, CAMBODIA TODAY, June 13, 1997, available in 1997 WL 8789760 (stating that FUNCINPEC generals negotiated with Rouge); Richard S. Ehrlich, *Cambodia: White Paper White Out: Lawyer from the U.S. Tries to Keep His Distance from CPP Document*, CAMBODIA TODAY, July 25, 1997, available in 1997 WL 8789991 (noting that Ranariddh tried to negotiate with Rouge); *Cambodia: Pilots Kidnapped by KR Set Free*, CAMBODIA TODAY, July 30, 1997, available in 1997 WL 8789961 (stating that Hun Sen attacked Ranariddh's forces in response to Ranariddh's negotiations with Rouge).

¹⁸ See *Cambodian PM Defends Controversial Weapons Purchase as Necessary*, AGENCE FRANCE-PRESSE, May 29, 1997, available in 1997 WL 2123536 [hereinafter *Defends*]; Chiep Mony, *Cambodia: Ranariddh Pledges to Return Weapons if Co-Premiers Agree to Give up Tanks*, CAMBODIA TODAY, May 30, 1997, available in 1997 WL 8789687 (indicating that Ranariddh admitted to purchasing weapons).

¹⁹ See Fitzgerald, *supra* note 16, at 14.

²⁰ See *id.*; *Defends*, *supra* note 18; Sonni Efron, *Hun Sen Denies Ouster of Rival Is a Coup*, L.A. TIMES, July 11, 1997, at A10.

²¹ See Efron, *supra* note 20, at A10; Fitzgerald, *supra* note 16; *Cambodia: Review 1997*, ASIA & PAC. REV. OF WORLD INFO., May 1, 1997, at 26.

²² See Mony, *supra* note 18.

The situation grew increasingly tense. In late June, large numbers of troops were relocated to positions around the capital, Phnom Penh.²³ Ranariddh left the country.²⁴ On July 5 fighting broke out between the two forces in Phnom Penh.²⁵ By the end of the following day, Hun Sen had emerged victorious.²⁶ Although fighting continued between the two sides throughout the summer, the issue was never in doubt — Ranariddh's troops had been routed and Hun Sen was in control. Hun Sen justified his use of armed force in terms of the law, claiming that Ranariddh had illegally imported arms and illegally entered into a military pact with the Khmer Rouge.²⁷ Hun Sen asserted that his use of troops was not a coup d'état but rather a peacekeeping action.²⁸ Meanwhile, the criminal prosecution of Ranariddh moved steadily through the pre-trial phase.

To the West, Hun Sen's behavior was both predictable and bizarre. As recently as 1993 his government had participated in the drafting and adoption of a liberal democratic constitution, a Law of Organization of the Courts, and a Penal Code.²⁹ Had Hun Sen relied on these documents, he could have achieved his goal of ousting Ranariddh within the parameters of the law. Instead, he resorted to armed force to achieve his desired result.³⁰ He used armed force even though he had been instrumental in enacting the constitution and the statutes creating a criminal justice system.

As soon as Ranariddh and his closest followers left the country, Hun Sen returned to his role as leading proponent of the rule of law. Having violated both the constitution and the laws

²³ See Thet Sambath, *Cambodia: Military on the Move in North Provinces: Tensions on the Rise in Siem Reap*, CAMBODIA TODAY, June 30, 1997, available in 1197 WL 8789864.

²⁴ See Efron, *supra* note 20, at A10.

²⁵ See *Fighting*, *supra* note 14.

²⁶ See Efron, *supra* note 20, at A10.

²⁷ See Mony, *supra* note 18; David Saiget, *Can Vote Save Cambodia from Itself?*, WASH. TIMES (D.C.), Jan. 23, 1998, at A16.

²⁸ See Efron, *supra* note 20, at A10.

²⁹ See Miriam Coronel Ferrer, *Cambodia: Corrupt Cops Appear as Fighting Wanes*, INTER PRESS SERV. GLOBAL INFO. NETWORK, Aug. 25, 1993, available in 1993 WL 2537257; Sheri Prasso, *Cambodian Assembly Passes Constitution by Big Margin*, AGENCE FRANCE-PRESSE, Sept. 21, 1993, available in 1993 WL 10772063 (discussing adoption of new constitution); *Cambodia Government to Bring Legal Action Against Local Papers*, AGENCE FRANCE-PRESSE, Sept. 14, 1994, available in 1994 WL 9550071.

³⁰ See *Fighting*, *supra* note 14.

in the most pernicious of all fashions by successfully using deadly state force to alter the balance of political power, he immediately began to observe them again.³¹ To Western observers, Hun Sen's actions were a cynical and duplicitous manipulation of the rule-of-law concept to gain the trust of his political opponents, as well as that of the many Western nations who supported him through Cambodia's reconstruction process. From a traditional Cambodian perspective, however, other norms and values were responsible, at least in part, for his behavior.

B. *The Indonesian Basic Agrarian Law and Marriage Law*

Indonesia is one of the world's leading examples of legal pluralism. Within its boundaries, multiple legal systems exist. These systems include Islamic law, the Dutch-derived system of national laws, and the many different systems of customary law scattered over the far-flung archipelago that comprise this modern nation-state.³²

Historically, each of Indonesia's thousands of islands had its own system of customary law regulating land ownership, marriage, and the family.³³ When Islam arrived in the twelfth century, taking root mainly in western Indonesia, Islamic law replaced customary law in the area of marriage and the family.³⁴ The Dutch arrived at the end of the sixteenth century, bringing with them their own civil-law tradition. In theory, this Dutch civil law applied only to persons of European origin.³⁵ In 1945, Indonesia achieved independence.³⁶ In 1960, the BAL was enact-

³¹ See Ted Bardacke, *Cambodia Reshuffle Rejected*, FIN. TIMES, Sept. 17, 1997, at 4. Hun Sen has publicly pleaded for the remaining members of the opposing political parties to remain in Cambodia and continue to voice their opposition to the policies of the government. Many of them have remained; some of them are even vocal.

In the days following the conflict, Hun Sen reportedly justified his actions as required to preserve the rule of law. The reconvening of the National Assembly to select a replacement for Ranariddh and the commencement of criminal proceedings against Ranariddh were returns to the forms of law.

³² See generally HOOKER, *supra* note 9, at 279 (discussing interaction of all political influences in post-independence Indonesia).

³³ See *id.* at 257 (stating that Java, Sumatra, and Moluccas have always had their own laws and rights).

³⁴ See Cammack et al., *supra* note 5, at 45 (stating that prior to Marriage Law of 1974 unamended rules of Islamic law exclusively governed issues of marriage and divorce).

³⁵ See generally HOOKER, *supra* note 9, at 250-57 (discussing Dutch colonization).

³⁶ See ADAM SCHWARZ, *A NATION IN WAITING: INDONESIA IN THE 1990'S* 3 (1994)

ed, purporting to apply the same rules of land ownership throughout Indonesia.³⁷ In 1974, the national government enacted the Marriage Law, which likewise purported to govern all Indonesia.³⁸ In practice, however, both the BAL and Marriage Law have been widely disregarded.

In the area of land ownership, disregard of the written law is seen in the failure to register land with the government as required by the BAL.³⁹ By some estimates, less than fifty percent of the land in Indonesia is registered.⁴⁰ Before enactment of the BAL, landholding in Indonesia had been governed by a mix of Dutch and customary law.⁴¹ Dutch law held sway in and near major urban centres while customary law ruled the countryside. The customary laws were based on deeply-held principles of village social, political, and economic life.⁴² They varied from village to village, were complex, and dominated Indonesian life.⁴³ In recognition of the existence of plural legal systems, Indonesia's central government wrote a land law that sought to codify the values of customary law while merging them with the newer European concepts of land ownership. In retrospect, scholars have adjudged the BAL a failure, accusing its authors of misapprehension, perhaps willful, of the essence of land ownership in Indonesia.⁴⁴

(discussing Dutch colonization of Indonesia prior to Indonesian independence).

³⁷ See Fitzpatrick, *supra* note 7, at 172 (discussing BAL reformation of Indonesian land law).

³⁸ See Mark Cammack, *Islamic Law in Indonesian New Order*, 38 INT'L & COMP. L.Q. 53, 53 (1989) (discussing passage of Marriage Law in Indonesian Parliament).

³⁹ See Fitzpatrick, *supra* note 7, at 173 (stating land registration under BAL is low); see also Keebet von Benda-Beckmann, *Development, Law and Gender-Skewing*, 30/31 J. LEGAL PLURALISM 87, 103-04 (1990-1991) (discussing legal disincentives for women to register land).

⁴⁰ See Fitzpatrick, *supra* note 7, at 173 (stating only 10 to 20% of registrable land is registered).

⁴¹ See *id.* at 174-75 (explaining history of Indonesian law prior to BAL); Stephen Day, *Suburban Sprawl or Suburban Villages? Defining Planning Principles for New Land Development in Indonesia*, 5 PAC. RIM L. & POL'Y J. 331, 343 (1996) (explaining sources of Indonesian land use law).

⁴² See B. TER HAAR, *ADAT LAW IN INDONESIA* 4 (E. Adamson Hoebel & A. Arthur Schiller eds., 1948) (stating *adat* law is deeply rooted in traditional culture).

⁴³ See *id.* at 6-7 (stating *adat* law is highly differentiated by local variability); M. B. HOOKER, *ADAT LAW IN MODERN INDONESIA* 36 (1978) (describing *adat* law as complex whole made up of indigenous units).

⁴⁴ See Fitzpatrick, *supra* note 7, at 184-85, 188-89 (stating that Indonesian commentators

Nonobservance of the marriage law is seen in the continued practice of underage and polygamous marriages,⁴⁵ as well as in violations of the principle of joint management and control of marital property implicit in the language of the law.⁴⁶ Families determined to marry a daughter at an impermissibly young age bribe or otherwise persuade state officials to look the other way.⁴⁷ Another path for circumvention of the law is to allow an underaged girl to marry in a religious ceremony, and then re-marry her before state officials when she reaches the legal age of marriage.⁴⁸ As for polygamy, the marriage of one husband to two or more wives is allowed so long as the consent of the first wife and the permission of a court are obtained.⁴⁹ The number of petitions to courts seeking such permission is increasing.⁵⁰ Often, however, the courts have balked in granting petitions.⁵¹ Authorities estimate that the result of the inability to obtain court permission is more entries into unlawful polygamous marriages.⁵²

Before enactment of the Marriage Law in 1974, the institutions of marriage and family in Indonesia were governed by four different bodies of law: the *adat*, or customary, law of the vil-

assert BAL retains general principles of customary law but that author believes individual registration of land under BAL threatens traditional village structure and land ownership).

⁴⁵ See Cammack, *supra* note 5, at 63-65, 72-73 (discussing lack of compliance with Marriage Law).

⁴⁶ See generally von Benda-Beckmann, *supra* note 39, at 102-04 (explaining that women generally decline to exercise their rights of joint management of marital property because of difficulties with enforcement, bank credit, and cultivation rights). Although the number of underage and polygamous marriages has not increased, a new form of disregard for state-imposed norms in these areas has appeared. See Cammack et al., *supra* note 5, at 62 (discussing techniques for avoiding Marriage Law). The Marriage Law allows for underage marriages under certain circumstances. See *id.* (stating marriage valid if performed according to religious law regardless of age); INDONESIA PLANNED PARENTHOOD ASS'N, FAMILY LAW AND FERTILITY IN INDONESIA 56-57 (1978) (explaining that minimum age requirement can be avoided by petition to court, thus defeating purpose of law) [hereinafter PLANNED PARENTHOOD].

⁴⁷ See Cammack et al., *supra* note 5, at 64-65 (discussing existence of bribery in Indonesian cultures).

⁴⁸ See *id.* (noting common methods of avoiding Marriage Law).

⁴⁹ See *id.* at 65.

⁵⁰ See generally James Kyngé, *The Very Model of a Modern Moslem State*, FIN. TIMES, April 26, 1997, at 1 (discussing effects of Islamic law on divorce rates and polygamy).

⁵¹ See Cammack et al., *supra* note 5, at 62-63.

⁵² See *id.* at 63-64 (stating that some people wishing to marry prior to legal age requirements either circumvent or ignore Marriage Law).

lage, found especially in eastern Indonesia; the Islamic law, which held sway in the heavily-populated islands of western Indonesia; the "Ordinance on Marriages for Christian Indonesians in Java, Minahasa and Amboina"; and the Dutch-inspired Civil Code for Indonesians of European or Chinese descent.⁵³ The Islamic law, both before and after 1974, was administered by a separate set of courts, Islamic religious courts having jurisdiction over matters relating to marriage and the family.⁵⁴ The *adat* law before 1974, which varied from island to island and sometimes within a given island, was also administered separately by the informal dispute resolution bodies in the villages.⁵⁵

Given the multitude of well-entrenched customary laws juxtaposed with the enormous geographic sweep of an archipelago encompassing cultures wholly unfamiliar with the concepts of national government and uniform written laws, even the most casual observer might have predicted that nation-wide compliance with either the BAL or Marriage Law could not be expected. Nonetheless, the Indonesian government proceeded to enact these laws.

II. WESTERN THEORIES OF CODIFICATION

Theories of codification date to Aristotle who conceived of law as a rule of moral actions which imposed obligations to do what is right.⁵⁶ He drew a distinction between natural law and "volitional law," the latter being described as "statutory."⁵⁷ Thus, statutory written law was that by which humans chose to govern themselves, as opposed to the natural law which ante-dated human efforts at self-governance. The purpose of volitional law was regulation of behavior or, in more modern terms, social ordering. Grotius wrote that "[t]he maintenance of social order . . . is the source of [all] law . . ."⁵⁸ Portalis followed suit two centu-

⁵³ See PLANNED PARENTHOOD, *supra* note 46, at 34 (listing marriage laws before 1975).

⁵⁴ See *id.* at 63-64 (discussing tasks of Indonesian Religious Court).

⁵⁵ See HAAR, *supra* note 42, at 51 (outlining kinship relations, which include marriage relations under *adat* law).

⁵⁶ See 1 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 38 (Francis W. Kelsey trans., Oceana Publications 1964) (1646) (discussing Aristotle's treatment of natural and volitional law).

⁵⁷ See *id.* at 38-44.

⁵⁸ *Id.* at 12.

ries later, stating that the purpose of the French Civil Code of 1804 was to regulate human affairs, although not to regulate all foreseeable situations.⁵⁹ By the late nineteenth century, enforceability by state coercion had become an important part of the definition of written law.⁶⁰ In France and the United States, this view persisted into the second half of the twentieth century.⁶¹ German scholars agreed that the purpose of law was social ordering, but disagreed as to the source of law. In Germany, the law was thought to be not the will of the legislator but rather the manifestation of the history and consciousness of a nation⁶² or, by the nineteenth century, a sociological phenomenon.⁶³ However, even from the perspective of sociological jurisprudence, the law, once reduced to writing and promulgated by the state, was expected to be immediately obeyed.

The primary purpose of codification in the West was to reduce to writing and give public notice of those rules of conduct that the state expected citizens to obey and which would be enforced by state coercion. A secondary function of codification in the West was to bring about uniformity in the laws.⁶⁴ Uniformity was valued on the theory that when laws are in conflict, human behavior can be neither effectively, nor fairly, regulated.⁶⁵ The assumption, at least since the intellectual revolution

⁵⁹ See Rodolfo Batiza, *Sources of the Field Civil Code: The Civil Law Influences on a Common Law Code*, 60 TUL. L. REV. 799, 814-15 (1986) (discussing Poralis' statements regarding civil code drafting).

⁶⁰ French civil law defines law (*droit*) as "the body of rules or precepts of conduct by observation of which it is permitted to restrain man by external or physical coercion One calls positive law the body of precepts which in fact have been recognized or declared susceptible of such coercion by custom . . . or statute (*loi*)."¹ C. AUBRY & C. RAU, COURS DE DROIT CIVIL FRANCAIS, §§ 1-2 (4th ed. 1869).

⁶¹ "[A] code [is] . . . a body of rules that will govern the conduct of citizens in their relations with each other Each is an order directed to the citizens" Léon Julliot de la Morandière, *Preliminary Report of the Civil Code Reform Commission of France*, 16 LA. L. REV. 1, 24-25 (1955).

⁶² See F. C. VON SAVIGNY, VOM BERUF UNSRER ZEIT FÜR GESETZGEBUNG UND RECHTSISSENSCHAFT (1840).

⁶³ See Arthur von Mehren, *Book Review*, 63 HARV. L. REV. 370-71 (1949). Sociological jurisprudence evolved from the jurisprudence of interests, which held that the function of the legislator is to regulate the life relationships of the people by delimiting protective spheres, by evaluating competing interests in light of the general welfare. See Max Rümelin, *Developments in Legal Theory and Teaching During My Lifetime*, in THE JURISPRUDENCE OF INTERESTS 3, 17 (M. Magdalena Schoch trans., Harv. Univ. Press 1948) (1930).

⁶⁴ See John Griffiths, *What Is Legal Pluralism?* 24 J. LEGAL PLURALISM 1, 2-5 (1986).

⁶⁵ See generally JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION, 14-18, 48-55 (2d ed.

of the late eighteenth century, was that each nation-state, or, in a federal state, each subset of the federated whole, should be governed by a single law.⁶⁶ The value of certainty in the law, aided and abetted by the nationalism and rationalism of the eighteenth century intellectual revolution, was thought to require this result.⁶⁷ Although nowadays it is possible to depart from the view that effective governance requires a single set of laws,⁶⁸ orthodoxy still requires that wherever a single set of laws exists it should be immediately obeyed by all persons within the geographic confines of the nation-state or its subdivisions.

The governments of Cambodia and Indonesia no doubt had in mind the goals of social ordering and uniformity of laws when they enacted their present constitutions and codes.⁶⁹ The view of both governments, as demonstrated by their legislative behavior, was at least in part that these objectives were best achieved by a single set of written laws governing all their subjects. To that end, each government set about enacting a new set of laws. Cambodia faced the task of replacing not only the laws of its colonial master, France, but also the laws of the intervening socialist government. Indonesia's task was even more complicated due to the flourishing system of legal pluralism that existed at the moment of independence. The new Indonesian government needed not just to replace the laws of the Dutch who had colonized it, but also to resolve conflicts between Dutch law, Islamic law, and customary law. For both of these new governments, uniform laws through codification at the national level was seen as the most efficient means to the end of social ordering.

However, in Cambodia and Indonesia, social ordering through uniform laws did not always entail an expectation, either by the government or its citizens, that the laws in question were to be immediately obeyed.⁷⁰ Although it would be difficult to take

1985) (discussing evolution of civil law).

⁶⁶ *See id.*

⁶⁷ *See id.* This notion is sometimes described as legal centralism. *See, e.g.,* Griffiths, *supra* note 64, at 2-5 (discussing ideology of legal centralism and its flaws).

⁶⁸ *See generally* HOOKER, *supra* note 9, at 281-83 (stating that Indonesians preferred codification and unification of laws to maintain separate legal systems).

⁶⁹ A constitution is the basic law of any nation. Constitutions are, therefore, included here under the rubric of codification.

⁷⁰ The provisions of penal codes are, with some exceptions, expected to be obeyed.

issue with Aristotle, Grotius, and Portalis, that the purpose of written law is social ordering,⁷¹ reasonable persons disagree whether the regulatory effect of written law is to commence immediately upon promulgation and whether substantial compliance is to be expected.⁷² Reasonable persons, even those who assume that social ordering is the purpose of law, can also disagree on the threshold question of whether written law is, or should be, the primary ordering mechanism in a given society.⁷³ Alternatives to written law that have proved effective in the past for governance are religion,⁷⁴ normative ethical systems,⁷⁵ ritual,⁷⁶ custom,⁷⁷ and enlightened despotism.⁷⁸ Where written law, though present, is not the primary mechanism for social ordering, the likelihood of widespread compliance with the written law is necessarily diminished.

III. WRITTEN LAW IN DEVELOPING NATIONS: THE THEORY

A. *Ritual: The Case of Cambodia*

In all human societies, performance of ritual is important to the maintenance of social structure and social order. In societies whose structures have traditionally been defined by means other than written law, observance of ritual is often more than important — it is critical to the maintenance of both structure and order.⁷⁹ Clifford Geertz has taken the argument one step fur-

The same cannot be said of other sorts of codes or statutes.

⁷¹ See, e.g., ARISTOTLE, *THE POLITICS*, book I, ch. 1, (Benjamin Jowett trans., Random House 1943).

⁷² See *infra* notes 124-57 and accompanying text.

⁷³ See VICTOR LI, *LAW WITHOUT LAWYERS* 23-26 (1977) (discussing rule by vigilante groups rather than rules of law).

⁷⁴ See, e.g., Saul Lubetski, *Religion and State: Does the State of Israel Provide the Forum for the Rival of the Jewish Legal System*, 26 N.Y.U. J. INT'L L. & POL. 331, 334-36 (1994) (discussing Jewish oral laws believed to be transmitted by God).

⁷⁵ See, e.g., Janet E. Ainsworth, *Interpreting Sacred Texts Preliminary Reflections on Constitutional Discourse in China*, 43 HASTINGS L.J. 273, 295 (1992) (stating Confucian texts are comprised of ethical prescriptions).

⁷⁶ See Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 725-35 (1988) (discussing ritual certification of law).

⁷⁷ See, e.g., Bojosi Othogile, *Criminal Justice and the Problems of a Dual Legal System in Botswana*, 4 CRIM. L.F. 521, 526-32 (1993) (discussing customary law crimes in Botswana).

⁷⁸ See, e.g., Carl F. Horowitz, *Pitfalls of Housing Redistribution*, 143 U. PA. L. REV. 1379, 1391-95 (1995) (discussing despotism in America).

⁷⁹ See generally MAX GLUCKMAN, *POLITICS, LAW AND RITUAL IN TRIBAL SOCIETY* 240-47

ther by describing a model of the state in which ritual actually creates, not just maintains, structure and order.⁸⁰ Geertz's model, based on nineteenth-century Bali, is arguably characteristic of the traditional societies of Indic Southeast Asia, a group to which Cambodia and parts of Indonesia belong.⁸¹

This model, which Geertz terms "the theatre state," or, in the Balinese language, *negara*, is based on the doctrine of a center of government that exemplifies, through ritual, the political order sought to be achieved by ruler and subjects. This center of government, which in the traditional societies of Indic Southeast Asia was the king-court-and-capital, "is not just the nucleus, the engine, or the pivot of the state, it is the state."⁸² The "controlling political idea . . . is that by the mere act of providing a model, a paragon, a faultless image of civilized existence, the court shapes the world around it into at least a rough approximation of its own excellence."⁸³

Geertz's theory of the theatre state provides insight into the meaning of the political acts of the late twentieth-century inheritors of these nineteenth-century political traditions. From the perspective of the theatre state, each ceremonial act of a ruler was designed to express a view of the perfect reality and at the same time, to create that reality. "[T]hat is, theatre to present an ontology and, by presenting it, to make it happen — make it actual."⁸⁴ The cultural forms that the theatre state celebrated in rituals were, hopefully, the institutional ones it would take in society.⁸⁵ Thus, in the *negara*, form did create substance.

The Balinese theatre state persisted into the early years of the twentieth century. The last Balinese state, Klungkung, fell to the Dutch in 1908.⁸⁶ Its Cambodian equivalent endured until 1955

(1965) (describing value and importance that some tribal societies place on rituals, including belief that breach of ritual may lead to disruption of relations among tribe members or relations with nature); V. W. TURNER, SCHISM AND CONTINUITY IN AN AFRICAN SOCIETY: A STUDY OF NDEMBO VILLAGE LIFE 98-104 (1957).

⁸⁰ See GEERTZ, *supra* note 2, at 13.

⁸¹ See *id.* at 9. The island of Bali is one of the provinces of modern Indonesia.

⁸² *Id.* at 13.

⁸³ *Id.*

⁸⁴ *Id.* at 104.

⁸⁵ See *id.* at 108 (asserting that cultural forms *negara* celebrates in ritual are same as institutional ones).

⁸⁶ See *id.* at 11-13.

when the present King of Cambodia, Norodom Sihanouk, temporarily abdicated the throne in order to become the Prince who would lead his people to democracy.⁸⁷ The Cambodian line of kings, like those of Bali, were divine rulers, God-Kings, in the ancient Hindu tradition.⁸⁸ King Sihanouk is still revered today as a divine father by many Cambodian peasants.

Geertz's description of nineteenth-century Balinese political thought will seem eerily familiar to students of modern Cambodia. "The center is exemplary, status is the ground of power, statecraft is a thespian art" — these are the three main themes of Balinese political thought.⁸⁹ Both the man⁹⁰ who is the center of government and surrounding supporters have an obligation to role model the politics and ruler-subject relationships desired. Status is the indicator, the means to, and the actuality of power. An official's status in the hierarchy of government is determined by the skillfulness with which the official plays his part. Accession to and retention of supreme political power is awarded to the man who is the most accomplished thespian of them all. Orchestration of relations between the man who is the center and the members of his government, as well as between the state and the other nations of the world, is the production of theatre. It is a drama in which all the members of government are assigned roles to play but none more so than the leader who is the center.⁹¹ Once having obtained supreme political power, the man at the center may even become the author of the play.

Norodom Sihanouk for many years was the most accomplished actor in Cambodia, and the author of his own play.

⁸⁷ Several historians have written accounts of both modern and ancient Cambodian history. See NAYAN CHANDA, *BROTHER ENEMY: THE WAR AFTER THE WAR 108-35* (1986); DAVID P. CHANDLER, *A HISTORY OF CAMBODIA* (1983).

⁸⁸ See GEERTZ, *supra* note 2, at 124-36 (describing concept of divine kingship throughout Southeast Asia).

⁸⁹ See *id.* at 120.

⁹⁰ In these societies, it was not possible for a woman to be head of state.

⁹¹ One might well ask how the western liberal democratic state is to the contrary. The difference lies in the West's insistence on a command-and-obedience conception of political life. The transformative power of thought — of ideology — role modeled and conveyed through performed ritual and ceremony, is absent from the western conception of state. The impact of this distinction on understandings of the nature of law is obvious. See *infra* notes 120-25 and accompanying text.

Throughout his rule, life in Cambodia revolved around the rituals created and dramas produced by its King. The King played the starring role in each of these productions. One of the earliest of these dramas occurred in 1955 when Sihanouk abdicated from the throne, allegedly to form a democratic state that he would lead.⁹² This act, like all others, was accomplished with great fanfare.⁹³ Cambodia's king was role modeling for his subjects the proper behavior of a modern ruler.

One may well ask how such behavior is different from that of the modern politicians of the Western world. Certainly, political posturing is a universal characteristic. The difference is that in the theatre state implementation of the images of ruler-subject relationships modeled in the political drama is not seen as the responsibility of the government, nor is input from citizens into the creation and definition of these images expected. Often, citizen input is not even allowed.

Sihanouk's abdication and self-transformation into the democratic ruler of a democratic state was perhaps his most important production as the center of the Cambodian *negara*.⁹⁴ The pageantry of the monarch's abdication and remaking of himself as the new democratic man and leader⁹⁵ was at once representational of the perfect political reality he sought to achieve and a force for realizing such a goal in the real world. The lesson was not lost on those of his subjects who would later lead Cambodia to communism and then hopefully, once again, to democracy. Sihanouk's renunciation of a kingship in favor of a prime ministership also taught the lesson that the modern source of status and power in the theatre state must be political office

⁹² Many students of the Cambodian history and many Cambodians would contest Sihanouk's assertion that the polity he created in the 1960s was a democracy.

⁹³ See CHANDLER, *supra* note 87, at 185-91 (discussing Sihanouk's gaining independence).

⁹⁴ Cambodia's king is well-known in Asia as perhaps the political leader most proficient in this thespian school of statecraft. See Matthew Chance, *Abdication Card Played by Cambodia's Ailing King*, INDEPENDENT (LONDON), Aug. 12, 1997, at 10 (discussing King's colorful lifestyle and notoriety throughout Asia).

⁹⁵ Compare Marxism-Leninism, one of whose goals was the creation of the "New Man." Sihanouk was known at this time as "the Pink Prince."

rather than hereditary kingship and divine right. From a legal perspective, his most significant act in his new role was the promulgation of a constitution.⁹⁶

Hun Sen, growing to maturity during the early years of Sihanouk's rule, was not likely to have escaped indoctrination into the theatre state's perspective. His position as a youngster in Phnom Penh and then a teen-aged student in Kompong Cham, a provincial capital close to the seat of government in Phnom Penh,⁹⁷ gave him a box seat in Sihanouk's playhouse. In particular, the concept that a real-life change in society could be achieved by ritualistic dramatizations of the desired changes must have had the same tremendous impact on Hun Sen that it did on all educated Cambodians.⁹⁸

The lessons of radical Maoism that Hun Sen encountered were not to the contrary. Radical Maoism is a political doctrine which holds that observance of the forms of political ideology is, like ritual, capable of restructuring the real world.⁹⁹ The syner-

⁹⁶ This was the Cambodian Constitution of 1956. See generally Donovan, *Building a Legal System*, *supra* note 1, at 450.

⁹⁷ See CHANDLER, *supra* note 87, at 162. Hun Sen joined the Khmer Rouge in 1971 at the age of 19 and served in the Eastern Region, near Kompons Cham and the Vietnamese border. See BEN KIERNAN, *THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-79*, at 210, 370-71 (1996).

⁹⁸ The view of government that Geertz titles "the theatre-state" is inextricably intertwined with a view of the cosmos characteristic of Hindu-Buddhist societies.

⁹⁹ Radical Maoism, influenced by Confucianism, was based on a view of the cosmos as replicating itself in an unbroken continuum from Heaven to the smallest social unit, the family, on earth. The Chinese Emperor held the Mandate of Heaven, which legitimated his governance. The Emperor was the seat of virtue, he was expected to role model for his subjects the proper behavior, in life and in relationships, required of the virtuous man. So long as he adhered to the path of virtue, all would be well in the Middle Kingdom that was China (mid-way between Heaven and Earth). Deviations from the path of virtue could result in floods, earthquakes, and other natural disasters, indicating that the Emperor had lost the Mandate of Heaven. See generally FREDERIC WAKEMAN, JR., *THE FALL OF IMPERIAL CHINA* (1975). The Chinese Emperor, like the Indic rulers of the theatre states, had the power, through his example, to transform reality. The Chinese Emperor differed from the rulers of the theatre states in that he, unlike them, was neither divine nor the incarnation of divinity on earth. Radical Maoism, by its insistence on the power of properly role-modeled political ideology to transform economic reality, falls into this tradition. Mao's Cultural Revolution used such ideological role modeling in the hope of transforming reality. Cf. Dolores A. Donovan, *The Structure of the Chinese Criminal Justice System: A Comparative Perspective*, 21 U.S.F. L. REV. 229, 240-41 (1987) (comparing China's Law of Courts' explicit ideological requirement to "practice democratic centralism" with former Soviet Union's statutes, which lack similar requirements). See generally LOWELL DITTMER, *CHINA'S CONTINUOUS REVOLUTION* (1987); FRANZ SCHURMANN, *IDEOLOGY AND*

gy engendered by the combination of radical Maoism with the legacy of the theatre state rendered it inevitable that Hun Sen and his cohorts would conceive of acts of state as a modern form of political theatre, having the power in and of itself to remake society.

From this perspective, codification is seen as a form of political theatre. Enactment of a constitution or a code is at once an act of state and a ceremony, engaged in to exemplify and to create political reality. Enactment of a modern liberal democratic constitution is expected, in and of itself, to create democracy, as enactment of a modern commercial code is expected, in and of itself, to create a market economy. The enactment of these laws is a sort of talismanic ritual, an expression of political theory that is in some sense expected, even by such modern rulers as Hun Sen, to have an impact on, perhaps even to transform, reality. "The dramas of the theatre state, mimetic of themselves, were, in the end, neither illusions nor lies, neither sleight of hand nor make-believe. They were what there was."¹⁰⁰

Parenthetically, the same is true of Hun Sen's reconvening of the National Assembly to select a new premier to replace the now-exiled Prince Ranariddh. The reconvening of the National Assembly was an act of theatre — an assertion of the forms of democracy and rule of law — even after a coup d'état. This act, which seemed a futilely transparent attempt at self-legitimation to Western observers, no doubt meant a great deal more than that to Hun Sen and his fellow inhabitants of the Cambodian *negara*. To them, it was a ritualistic expression of a desired democracy and rule of law, an expression that had the ability to shape reality and the Cambodian polity in the desired fashion. To some, the undemocratic coup d'état was regrettable;¹⁰¹ to others, it was necessary.¹⁰² Yet to all it was but a side-show in

ORGANIZATION IN COMMUNIST CHINA (2d. ed. 1968).

¹⁰⁰ See GEERTZ, *supra* note 2, at 136.

¹⁰¹ See Ted Bardacke, *Growing Pains for Expanding Asean*, FIN. TIMES, July 24, 1997, at 6 (indicating that Malaysian foreign minister believes coup d'état in Cambodia was regrettable); *Regaining Control in Cambodia*, DAILY YOMIURU, July 27, 1997, available in 1997 WL 12800205 (stating that Association of Southeast Asian Nations views coup d'état in Cambodia with regret). Of course to the families and friends of those who died, the coup was a tragedy.

¹⁰² The official position of the CPP, vigorously espoused by cabinet members with whom the author spoke in the days immediately following the coup, was that Ranariddh

Cambodia's transition to democracy, the temporary nature of which was underscored by the theatre state's immediate return to its central drama — the drama of democracy.

Unlike Hun Sen and the majority of the CCP officials, Prince Ranariddh, and the majority of the FUNCINPEC officials have spent most of their adult lives in Western liberal democratic states, such as the United States, France, and Australia, where the written law reigns supreme. Rather than learning the art of statecraft in a theatre state, Prince Ranariddh learned the law and politics of liberal democracy.¹⁰³ At one point, he even became a law professor at a university in France.¹⁰⁴ The legal cultures that shaped the thinking of the law professor prince and his followers were those in which written, enacted law is the primary social ordering mechanism, carrying with it commands backed by the coercive power of the state. These legal cultures were in turn the products of political cultures that conceived of the state variously as a “monopolist of violence within a territory, executive committee of the ruling class, delegated agent of the popular will, [and] pragmatic device for conciliating interests.”¹⁰⁵ Although the nation state of modern Cambodia surely partook of all of these elements, none of these definitions includes what was the primary function of a state in the *negara* tradition — the creation and dissemination of ritual, ceremony, and drama. To the Prince and his followers, a constitution and penal code enacted at the cost of two billion dollars under the aegis of the United Nations¹⁰⁶ represented paradigms of written law that must necessarily be obeyed by both citizens and government.

To Hun Sen, steeped in the *negara* tradition, the drafting of the constitution and the enactment of the penal code represented a form of political theatre rather than a process that generated commands to be obeyed. To Hun Sen, the constitution and laws were ritualistic forms of political theatre that would eventu-

and his soldiers had left Hun Sen with no option other than a resort to armed force.

¹⁰³ See *Cambodia: Still Naive to Political Realities*, BUS. NEWS REV., July 14, 1997, available in 1997 WL 9790458 [hereinafter *Naive*]; Robin McDowell, *Cambodian Leaders Hold Hatreds Forged in Bloody Civil Wars*, AUSTIN AMERICAN-STATESMAN, July 7, 1997, at A2.

¹⁰⁴ See *Naive*, *supra* note 103; McDowell, *supra* note 103, at A2.

¹⁰⁵ See GEERTZ, *supra* note 2, at 122.

¹⁰⁶ See *supra* note 15 (citing Cambodian Constitution and penal code).

ally have a transformative impact on political reality. Pending arrival of that new political reality, observance of the forms expressed by the constitution and the laws was a matter of personal preference, especially for those thespians who were the authors of the new play. It is Hun Sen, not Ranariddh, who is the true son of King Sihanouk.¹⁰⁷

What, then, is the purpose of codification and written law in a theatre state? Written law is a way of imagining the reality of rule of law.¹⁰⁸ If the imagined reality materializes, in the sense that citizens and government officials begin to obey the law, then all is well and good — the written laws have performed their function.¹⁰⁹ At that point, the government might even begin seriously to enforce them. If the imagined reality of rule of law fails to arrive, perhaps something more in the way of ritual and theatre is required. From this point of view, enforcement of laws by which citizens do not yet abide would be premature and unfair.

The case of the Cambodian coup d'état is instructive on many levels. Assuming the facts most favorable to Hun Sen — that Ranariddh violated the penal code by illegal importation of arms and that he was entering into a secret and illegal military pact with the Khmer Rouge — it appears that one of the prime actors in the central drama of the Cambodian theatre state had refused to play his part. The system was compromised on two levels. On the most superficial level, a leading citizen failed to abide by the laws; therefore, the ritual of governance had failed to produce the desired reality — the reality of the rule of law. Something more was needed to achieve the desired reality. Probably what was needed was a better performance. But how could a better performance be produced if one of the two lead-

¹⁰⁷ Sihanouk has often referred to Hun Sen as “my other son.” Raoul Jennar, a long-time and astute observer of the Cambodian political scene, commented, in the *Cambodia Daily*, only a few days after the coup d'état and the announcement that the National Assembly would be immediately reconvened to ratify FUNCINPEC's selection of a new First Prime Minister to replace Prince Ranariddh, that Hun Sen was not practicing the politics of totalitarianism; rather, he was practicing the politics of King Sihanouk.

¹⁰⁸ See GEERTZ, *supra* note 3, at 174 (stating that law's function is to “translate between a language of imagination and one of decision and form thereby a determinate sense of justice”).

¹⁰⁹ The fatalism inherent in Buddhism plays into this somehow, probably reinforcing the passive attitude towards implementation that one senses in Cambodian officialdom.

ing actors insisted on blatantly deviating from his script? Here we have the second and fundamental failure: the government had failed in its attempt to role model the relationship between ruler and subjects characteristic of liberal democracy. The failure went to the core of the system that was to produce democracy and the rule of law. The system was compromised. If the central drama could not be performed, then certainly the imagined reality could not arrive. The answer became obvious: get rid of the actor who is deviating from the script.

Thus, it is possible to imagine that the Cambodian coup d'état was carried out with good intentions. In such a scenario, the architects of the coup are the true democrats and the protectors of the rule of law. It is the ousted Prime Minister who is the villain of the play.

Of course, the coup d'état achieved other goals that were equally important to Hun Sen. The coup consolidated his power and placed him in an almost invincible position for the next election. Nonetheless, it is important to remember that in the mind of Hun Sen and his followers, these results are not inconsistent with realization of the rule of law and the democratic aspirations of the Cambodian people.

It is important to note the function of the 1993 constitution and criminal law in the above scenario. These pieces of written law had been enacted as part of the script for democracy. They were no doubt viewed as an integral part of the scene. But they were not as central as the actors. It was the actors who would bring democracy to Cambodia. Due to a bad performance by one of the leading actors, however, the play had failed. An *ex post facto* enforcement of the penal code by Hun Sen could not undo the negative consequences of the failed performance. It was necessary to begin again with a more reliable cast of characters.

In this tradition of governance characteristic of the Indic states of Southeast Asia, the processes of governance are themselves a form of ritual, substituting for or coexisting with the more traditional rituals commonly found around the world. The political theatre of nineteenth-century Bali and twentieth-century Cambodia each portray the desired relationship between the state and its subjects in much the same way that the masked

dances¹¹⁰ of Balinese, Cambodian, and other societies portray a desired relationship between the people and their gods. In both types of ritual, whether by government or by dance, the performance is intended to alter reality so as to ensure the desired realignment of relationships. So it is that in the Ramayana the desired result is the triumph of good over evil;¹¹¹ in nineteenth-century Bali the desired result was absolute monarchy, and in Cambodia on the verge of the twenty-first century the desired result is liberal democracy.

* * *

Once it is understood that acts of governance and written law perform some of the functions of traditional ritual, a whole new dimension for understanding the actions of government in this tradition is realized. For example, a generally understood function of ritual is to affirm the continuation of the existing social or political order. In developing nations, particularly those with low literacy rates, ritual has traditionally been used to restore social order after a breach of social norms has occurred. This order-restoring function of ritual is not exclusive of judicial conflict-resolving processes. The two can coexist,¹¹² as they do in Cambodia.

Judicial process is generally relied upon to settle quarrels where condemnation of one or more individuals, rather than preservation of the relationships impacted by the quarrel, is desired.¹¹³ In cases where large social groupings have become mobilized on either side of the breach, ritual may be used to heal the breach or, if the breach is irreparable, ritual may be used to establish or convey social recognition of the fact that the breach has occurred and cannot be healed.¹¹⁴ The perfor-

¹¹⁰ See GLUCKMAN, *supra* note 79, at 126 (stating that dances represent hardship and fighting that villagers must endure). An example is the classical masked dance based on the Ramayana found in both Bali and Cambodia. See I. MADÉ BANDEM & FREDRIK EUGENE DE BOER, *BALINESE DANCE IN TRANSITION* 59-60 (2d ed. 1995).

¹¹¹ See GREGORY D. ALLES, *THE ILLIAD, THE RAMAYANA, AND THE WORK OF RELIGION* 87-88 (1994) (discussing how peace will result when people live by dharma rather than persuasion).

¹¹² See GLUCKMAN, *supra* note 79, at 240-41, 246-47; TURNER, *supra* note 79, at 122-28.

¹¹³ See GLUCKMAN, *supra* note 79, at 241; TURNER, *supra* note 79, at 124.

¹¹⁴ See GLUCKMAN, *supra* note 79, at 240; TURNER, *supra* note 79, at 122-28.

mance of public ritual is most typically resorted to by a dominant social group that, in the pursuit of what it views as a legitimate social goal, finds itself in conflict with other social norms of the community of which it is part.¹¹⁵ In this situation where the dominant social group experiences irremediable conflict between deeply held principles that are at the foundation of the society of which it is a part, the only way out of the dilemma is either to stress the macro-values of the community as a whole or to reaffirm the breached social norms. The public ritual of affirmation of shared values, whether they be the community's macro-values or the breached norms, heals the wounds inflicted by the previous breach.¹¹⁶ Thus, the preservation of community is the goal of ritual in a situation of unresolvable conflict.

In the case of the Cambodian coup d'etat, Hun Sen and his followers were in conflict with the quite recently established social norm of peaceful resolution of disputes pursuant to the written law when they resorted to deadly force to end their quarrel with Ranariddh and his group. The law in question was the four-year-old Cambodian constitution and the penal code.¹¹⁷ Assuming the facts most favorable to Hun Sen, unresolvable conflict had arisen between the major principles of observance of the rule of law and preservation of the Cambodian polity. When Hun Sen convened the National Assembly after the coup in order to ratify the selection of a new premier to replace the ousted Prince Ranariddh, he was relying on the performance of public ritual to reaffirm the commonly held values of the Cambodian political community as set forth in the constitution of 1993.¹¹⁸ Likewise, the subsequent initiation of criminal proceedings against Prince Ranariddh served to affirm the commonly held value that the criminal law applies to persons high in government as well as to the common citizen.

A Westerner may find these points either boringly self-evident or naive. Only when one considers the Cambodian tradition of

¹¹⁵ See GLUCKMAN, *supra* note 79, at 241, 246; TURNER, *supra* note 79, at 123.

¹¹⁶ See GLUCKMAN, *supra* note 79, at 240, 246-47; TURNER, *supra* note 79, at 124-28.

¹¹⁷ See Effron, *supra* note 20, at A10.

¹¹⁸ A not incidental side-effect of this public performance, at least in the minds of Cambodians, was official recognition of the irreparable nature of the breach between Hun Sen and Ranariddh and affirmation that the political community would nonetheless continue to function.

governance by ritual, the fact that Cambodia was still in the throes of more than two decades of civil war, and the availability of totalitarian dictatorship, martial law, and other similar options usually exercised by dictators after a coup d'état does one perceive the significance of Hun Sen's post-coup decision to return to the forms modeled by the written law.¹¹⁹

It would be naive to ignore the fact that this ritualistic use of written law served not only to heal the wounds of the sundered Cambodian polity, but also to strengthen the hold of Hun Sen and his cohorts over the Cambodian government. Most Western observers have viewed the convening of the National Assembly as serving no purpose other than to endorse Hun Sen's flagrant disregard of the constitution and the law.¹²⁰ However, to the Cambodian Members of Parliament who participated in the reconvening of the National Assembly, Hun Sen's motives were not so transparently self-serving. These Cambodians were, above all else, conscious of the need to preserve the Cambodian community.

* * *

In a society that relies at least in part on ritual as a social ordering mechanism, ritual may at times subsume written law within its ambit, yet at other times function independently as a substitute for law. Rituals role model the proper relationships between men and women,¹²¹ parents and children,¹²² rulers

¹¹⁹ A corollary of the National Assembly's re-affirmation of the continued existence of the Cambodian political community was tacit recognition of the fact that, in this case, the written law would be ignored. Hun Sen would not be punished for his breach of the norms contained in the written law of Cambodia. The political community's disregard of the written law here arguably functioned as a means for limiting the social damage done by the breach of norms, bringing to a close the period of turmoil and disintegration.

It is interesting to speculate whether the result would have been different had such an event occurred in one of the developed nations of the West. On the one hand, written law is the primary social ordering mechanism in such nations. Arguably, the tradition of trial and punishment for breaches of the criminal law, even by heads of state, is strong enough to at least bring about impeachment proceedings. On the other hand, "victor's justice" may be a universal value.

¹²⁰ See GLUCKMAN, *supra* note 79, at 256.

¹²¹ See *id.*

¹²² See generally *id.* (stating that rituals are based on relationships between different types of kinsfolk).

and subjects,¹²³ as well as illustrate the misfortunes that befall someone who does not observe the proper forms.¹²⁴ Thus, a ritual prescribes both the conduct expected and the punishment meted out for deviation from a role modeled norm. It is possible to speculate that in societies where ritual functions at least in part as a substitute for law and where performance of public ritual is at times the remedy for a breach of a social norm, performance of a ritual that role models a norm may be just as important as observance of the norm.¹²⁵ In other words, as long as one faithfully and publicly participates in ritual, it is not so socially reprehensible when one's private real-life conduct violates the norm.

It would be an overstatement to say that the above principle, applied to law, mandates the result that form is more important than substance, or that adherence to form excuses lapses in substance. However, what does follow is that a person raised in a culture such as that of Cambodia would not assign to written law the potency as a social ordering mechanism that it has in the developed nations of the West. At a minimum, a person raised in such a culture would not view the written law as necessarily carrying with it the same sort of command and consequences that written law carries in the West.

*B. Symbol: The Case of the Indonesian Basic Agrarian
Law and Marriage Law*

The use of written law as symbol is not confined to developing nations. The emerging nation-states of fifteenth-century Europe also used written laws as symbols of national unity and national ideology.¹²⁶ What makes Indonesia and other develop-

¹²³ *See id.*

¹²⁴ *See id.* While some rituals illustrate the proper behavior expected of a person by his or her community, others illustrate the converse behavior — the most extreme deviations from the approved norm. *See id.* at 254-55. Although the understandings of the purpose of these negative rituals vary from anthropologist to anthropologist (is the purpose to let off steam? is it to illustrate what is unacceptable?) it is agreed that their purpose is to affirm the positive community values. *See id.* at 258.

¹²⁵ *Cf. GEERTZ, supra* note 2, at 107 (noting that Balinese idea is that felt experience copies structures of reality and that ritualizing experiences sustain structure).

¹²⁶ *See MERRYMAN, supra* note 65, at 10 (noting that idea of national sovereignty prompted fifteenth-century European nation-states to codify laws).

ing nations different is that they, unlike the European states, do not have a tradition of governance by written law. In Europe, the regulatory, command-and-obey functions of the new national codes were a continuation of the pre-existing command-and-obey legal tradition of Rome, dating back to the Twelve Tables.¹²⁷ In contrast, in the developing nations where European statutory law arrived between the sixteenth and eighteenth centuries, the command-and-obey functions of the European written law did not easily meld with local traditions of social ordering and governance by custom, religion, ethics, and despotism.¹²⁸ It was only the idea of written law as a symbol of nationhood and state power, with all of the complexities and corollaries that idea entailed, that easily found a home.¹²⁹

When an idea such as written law is transplanted to a new environment, it must adapt itself to the new order of things. More often than not, the written law, like any good idea, mutates in the process, taking on a new coloration appropriate to the culture in which it finds itself. Likewise, loss of at least some of the cultural meanings derived from the society in which the idea was born is an inevitable part of the transplantation process. The words of the written laws may remain the same, but the legal culture surrounding the words changes, adapting itself to its new social and political surroundings.

In Indonesia, myriad well-established legal cultures awaited the advent of the written law. Each island observed its own system or systems of customary law.¹³⁰ In addition to customary law, Islamic law had also gained a foothold in large parts of Indonesia.¹³¹ The newly-arrived Dutch law¹³² had to adjust itself to this situation of multiple legal traditions. Similarly, when inde-

¹²⁷ The Western rule of law tradition originated in Rome with the Twelve Tables. *See id.* at 2-3.

¹²⁸ *Cf.* Fitzpatrick, *supra* note 7, at 188-89 (finding that Indonesia's BAL requiring land registration, which stems from commercial and civil codes imported from Holland in 1848, threatens traditional village social structure, which relies on communal and cooperative elements).

¹²⁹ *See generally* Cammack et al., *supra* note 5, at 53 (stating that Indonesian government codified family law to promote national sovereignty).

¹³⁰ *See* HOOKER, *supra* note 9, at 257 (stating that Java, Sumatra, and Moluccas have different laws and rights).

¹³¹ *See id.* at 267.

¹³² *See id.* at 250, 278.

pendence came to Indonesia, the new national laws had to accommodate Indonesia's culture of legal pluralism.

Legal pluralism is present where the people of a nation-state are subject to more than one system of coexisting legal norms, each drawn from a widely different culture.¹³³ These differing principles may or may not be incorporated into the written law of a state. Often, the principles of the indigenous legal traditions are unwritten, whereas the principles of imported colonial legal traditions, such as that of the Dutch in Indonesia, are expressed in codified, written, and enacted law. When a modern nation-state comes into being, its written law is usually the law of the dominant political culture; the unwritten law is that of the subordinate political culture.¹³⁴ Thus, there are dominant and subordinate legal traditions existing within the boundaries of a single state. This state of affairs is contrary to the traditional Western notion of law which posits that the institutions of the state alone can be the source of law.¹³⁵ The traditional Western view is that law must emanate from a single source and be binding upon the entire population.¹³⁶

Indonesia's indigenous legal traditions are in fact derived from the ancient religions of Hinduism and Buddhism and the more recent religion of Islam. As such, the dichotomy between written and unwritten law does not hold entirely true, for the laws of these three religions are found in many ancient written texts.¹³⁷ However, over the centuries the text-based laws of Hinduism and Buddhism have merged with other legal traditions, such as animism, to form an unwritten body of legal principles known in Indonesia by the generic term *adat* law. The law of Islam remains written, but is applied only in modern Islamic courts whose jurisdiction is largely limited to matters of marriage and the family involving adherents to the Islamic faith.¹³⁸

¹³³ See *id.* at 1, 6. The essence of legal pluralism is the co-existence and the interaction of normative dissimilar bases and forms. See *id.* at 1. But see Griffiths, *supra* note 64, at 38-39 (giving competing definitions of legal pluralism).

¹³⁴ See HOOKER, *supra* note 9, at 6-7.

¹³⁵ See *id.* at 1. However, this is greatly oversimplified. See *supra* Part II.

¹³⁶ See HOOKER, *supra* note 9, at 1.

¹³⁷ The same is true in Cambodia. See Donovan, *Building a Legal System*, *supra* note 1, at 446 (discussing dichotomy of Cambodian law).

¹³⁸ See Cammack, *supra* note 38, at 57-65 (discussing introduction of Indonesian national marriage bill in 1973 and jurisdiction of courts). It is commonly said that the

Whether the law of the coexisting Indonesian systems of legal norms is written or unwritten, the point is that the pluralist Indonesian legal culture is hostile to the paradigm of uniform laws driven by a command-and-obey function. Thus, Indonesia's legal pluralism renders contingent the application of any particular written law.¹³⁹ Because several different legal systems coexist, any one fact pattern is potentially subject to the application of several different rules of law. Which rule will be applied is wholly situational. The same question of marital property could be resolved differently depending on whether the facts engendering it occurred in a village or a city or whether it involved a Muslim family or a Hindu one.

The law-consciousness and legal culture of citizens in a system of legal pluralism are necessarily different than the law-consciousness and legal culture of citizens of the mono-legal nations of the West. When one considers that written law has not traditionally been a primary social ordering mechanism in much of Indonesia, the radically different nature of the Indonesian legal culture becomes apparent. Certainly such a legal culture would take written national laws purporting to apply uniformly all across Indonesia with a grain of salt. Presumably, such a legal culture would have trouble seeing any one law as an absolute command. The impact of written law as a regulator of human behavior would certainly be less powerful than in the West. In such a pluralist legal culture, the nonregulatory, symbolic functions of the law come to the fore.

In light of the ethnic, cultural, and geographic diversity of the Indonesian archipelago, the purpose of the Indonesian government in enacting the BAL and Marriage Law, by their terms applicable nationwide, could not have been the traditional liberal democratic purpose. The geographical, ethnic, and cultural diversity of the islands precluded any notion of immediately

Indonesian form of Islam is a syncretic mixture of Moslem religious doctrine, animism, and the mutated forms of Islam still found in many parts of the archipelago. *See id.* at 54. In Indonesia and many other states where the majority of the population is Muslim, Islamic law governs only matters relating to the marriages and the families of those who profess the Islamic faith. In such states, other areas of social and economic activity are governed by the secular laws of the dominant political and legal culture.

¹³⁹ *See* HOOKER, *supra* note 9, at 128-81 (discussing efforts of unification and codification of Indonesian law).

effective regulation of social behavior by enactment of an immediately enforceable law. In fact, at least some of the island cultures involved were built upon values at odds with those upon which the institutions of law, at least as they are known in the West, were founded.¹⁴⁰ Although the government must have hoped that modification of behavior in accordance with the terms of the BAL and Marriage Law would occur some time in the distant future, another more immediate purpose provided the genesis for these laws.¹⁴¹

That purpose lay in the perceived usefulness of the symbols generated by the BAL and the Marriage Law. The enactment of these laws reified, reinforced and symbolized state power. First, by purporting to apply to all inhabitants of the thousands of islands of the Indonesian archipelago, the laws announced, functioned to preserve, and symbolized the territorial and political unity of the nation of Indonesia. Second, by their terms the laws announced and symbolized principles of the nation's political and economic ideology. Third, promulgation of the laws announced the dominance of the political elite that had enacted them, thus reinforcing and symbolizing the potentially coercive dimension of state power in that group's hands. Fourth, these laws by their content legitimated the exercise of power by the political elite, thus preserving and symbolizing the legitimacy of that power.

These symbolic functions of the BAL and Marriage Law were critically important to the state in its effort to maintain the power of the central government against the centrifugal effect of Indonesia's cultural, political, and legal pluralism. Paradoxically, the converse was also true — Indonesia's legal pluralism re-

¹⁴⁰ See *id.* at 250 (stating it would be impossible to impose civil law theory from West because of Indonesia's diverse culture). Some examples of these Western principles include equality under the law, equal protection under the law, or even enforceability of law in general.

¹⁴¹ Otherwise the government could simply have embarked on an educational campaign about the norms governing land ownership and marriage and the family in a developed nation. The laws could have been passed when the populace had been educated to the point that wide-spread compliance could be expected.

Enacted law is society's attempt to mediate between quotidian reality and larger ideals. See GEERTZ, *supra* note 3, at 174. Likewise, law is "the process in which we attempt to simultaneously bring concrete reality and our culture's animating ideals into focus." Denvir, *supra* note 3, at 129. In a developing nation, that process takes a long time.

quired a nonaggressive, selective governmental approach to enforcement of the norms contained in the laws enacted.

The need for symbols of the unity of the geographic whole falling within the territorial boundaries of the state was particularly compelling in the case of Indonesia. Delineation of the territorial boundaries of the nation calling itself Indonesia has not been easy. Conflict has attended every step of the process of determining over what territories the Jakarta government holds sway. For example, although Sukarno declared the independence of Indonesia in 1945, it was not until 1963 that the Dutch ceded West Irian. Not until 1975 did the Jakarta government gain control of East Timor by means of a military invasion. Armed resistance by a small segment of the Timorese population continued through 1991. Separatist sentiment remains present in East Timor and Aceh.¹⁴²

What was needed was concrete symbols of nationhood. Flags and national birds were all very well, but symbols more closely related to the actual functions of government were in order. Such symbols were needed to perform two functions. Reminders to all the inhabitants of the islands that they comprised a federated whole were required. Also necessary were reminders that the sine qua non of nationhood — a functioning government — was in place. Enactment of the BAL and Marriage Law did just that. The necessary symbols of the unity of the geographic whole, and of the presence of a state structure capable of governing that whole, were derived from the very lawmaking function of government. The first use of the lawmaking power of government to produce a symbol of Indonesia's nationhood was the Constitution of 1945.¹⁴³ Each subsequent exercise of the

¹⁴² See Human Rights Watch, *Rights Group Condemns Actions of French, Swiss, Brunei Governments Toward Acehnese* (Apr. 10, 1998) <<http://www.hrw.org/hrw/press98/apr1/acleu.htm>> (on file with author) (discussing Aceh separatist movement); HUMAN RIGHTS WATCH, REPORT: INDONESIA/EAST TIMOR: DETERIORATING HUMAN RIGHTS IN EAST TIMOR 4-7 (1997) (discussing separatist movement in East Timor).

¹⁴³ A constitution is a basic law; the constitutive document that creates a polity. An expression of nationhood may also be found in Indonesia's guiding philosophy, first articulated by Sukarno as *Pancasila*. See ADAM SCHWARZ, *A NATION IN WAITING* 10 (1994). National unity follows shortly after belief in one supreme God as a founding precept. See *id.*

lawmaking power of the government strengthened the statement of nationhood first made with the promulgation of the constitution.¹⁴⁴

Some laws provide more appropriate vehicles for the making of such a statement than do others. Laws regulating marriage and the family and ownership of land follow close on the heels of a constitution in this respect. This is so because such laws regulate matters that are at the foundation of life in organized society. A government that issues a written statement that all persons living within certain defined territorial limits are henceforth to conduct their family lives and hold their land according to rules which it prescribes is clearly announcing that such persons fall into the group the government has defined as citizens of the nation of Indonesia and that such citizens are expected to obey their government. Every human being within the territorial limits of Indonesia is affected. The impact in terms of declaration, preservation, and symbolization of nationhood is far greater than where the subject-matter of the written law is, for example, copyright.

The second symbolic function of written laws relates to ideology. Written laws are symbols of the political culture of their times and of their authors.¹⁴⁵ For Indonesia in the mid-twentieth century, the dominant ideology was the nationalism that was sweeping the developing world. The idea that a people had the right to determine its own destiny, an idea long established in the West, had finally taken hold in Asia and Africa. Nationalism in the developing world manifested itself in many different forms. The post-revolutionary legal culture of each new nation was determined by the brand of ideology that had characterized its independence movement. The brand of ideology that characterized Indonesia's independence movement was unique. It is generally thought to be contained in the principles of *Pancasila*, a doctrine first proposed in 1945 by Sukarno, the man who led Indonesia to independence.

¹⁴⁴ See MERRYMAN, *supra* note 65, at 14-18.

¹⁴⁵ See *id.* at 27-28 (discussing ideals of Roman and French codes); HOOKER, *supra* note 43, at 410-53 (discussing socialist law in former Soviet Union); Donovan, *supra* note 97, at 232, 240-42, 247-49 (discussing structure of Chinese law).

Pancasila is a capacious doctrine whose principles were purposefully articulated in a broad and abstract fashion, so as to accommodate the views of all factions of the Indonesian independence movement. Prominent among these factions at the time of independence were the Indonesian Communist Party, Islamic fundamentalists, and members of the military. The ideology of the Indonesian nationalist movement was, thus, a hodgepodge of political Islam, international communism, and military authoritarianism, with the consequences in terms of legal cultures that attach to each. A fourth and very important element in the ideological mix was traditionalism, the desire to protect and honor the best of the traditional Indonesian way of life — the *adat*. The legal culture accompanying the fourth element was that of customary *adat* law. These competing ideologies proved uneasy bedfellows. The 1945 Indonesian Constitution, like the doctrine of *Pancasila*, is notable for its success in avoiding an unambiguous endorsement of any one of them. The Constitution created a new political order: guided democracy.¹⁴⁶ The ideology most clearly present in the constitution is that of conflict avoidance and national unity. The constitution set the tone for the legislation that followed.

In 1960, when the BAL was enacted, the ideological conflict relating to ownership of land was between Western-style capitalism and the traditional village communalism of the *adat*. The traditional forms of land ownership under Indonesian *adat* law were, and are, communal in nature, frustrating attempts by developers to locate a single person with the power to convey the land. Instead, would-be developers were required to deal with groups of people, often represented by village councils. The Jakarta government, wishing to encourage economic development, sought to introduce new forms of and procedures for land ownership, characteristic of the legal cultures of the developed Western nations, that would facilitate development. The BAL's primary vehicle for so doing was a land registration provision, essentially requiring that land and the name of at least one

¹⁴⁶ See INDONESIA CONST. preamble. In Indonesian guided democracy, both the legislative and executive power vest in the President. See *id.* arts. IV, V. The President's legislative power is to be exercised with the concurrence of the House of Representatives. See *id.* art. XX.

of its owners be registered so as to facilitate transfer.¹⁴⁷ The BAL also sought to accommodate the legal culture of the *adat* by recognizing the validity of traditional forms of group land ownership.¹⁴⁸ The BAL, by its terms, sought to accommodate both Western legal capitalism and village communalism. Here again, as in the case of the constitution, the ideological message was one of tolerance. The BAL symbolized a blending of new and old ways of life.

From the point of view of the Indonesian government, the BAL is, in this respect, a success. If one accepts that aggressive enforcement of the land registration provision was never a part of the government's agenda because the paramount value of the BAL to the government was as a symbol of a governmental ideology of tolerance, then the BAL is in fact an unqualified success. By incorporating elements of both the Western capitalist legal culture of individual freely-alienable land ownership and the traditional *adat* legal culture of communal land ownership, the BAL symbolizes above all the government's ideology of tolerance and accommodation, casting sops to both developers and preservationists and to both Westernizers and traditionalists.

The Marriage Law, like the BAL, was enacted against a backdrop of ideological conflict. The ideologies of Islamic fundamentalism and secular Western-style nationalism were at odds with each other. The adherents of political Islam demanded that marriage and divorce between Muslims be regulated by Islamic law administered by Muslim judges in Muslim courts, wholly outside the control of the secular nation-state of Indonesia. The adherents of Western-style secular nationalism and its corollary of legal centralism advocated a national law applying equally to all Indonesian citizens and administered by the state courts. In the background lay the ever-present and central reality of Indonesian legal culture — the many forms of *adat* law that had traditionally governed marriage and the family in the villages of Indonesia. Once again, the central government was confronted by a situation of legal pluralism: multiple normative systems in

¹⁴⁷ See Fitzpatrick, *supra* note 7, at 183-84; von Benda-Beckmann, *supra* note 39, at 103-04.

¹⁴⁸ See Fitzpatrick, *supra* note 7, at 172-73; von Benda-Beckmann, *supra* note 39, at 103-04.

conflict with each other concerning deeply-held principles governing the most intimate aspects of life. Once again, the written law, here the Marriage Law, sought to strike a balance, delivering an ideological message of political and legal tolerance. The secular national law relating to arbitrary divorce and polygamy would be applied to Muslims.¹⁴⁹ However, the secular law would be applied by Muslim judges sitting in Muslim courts.¹⁵⁰ Despite the fact that the Marriage Law has proven not to have affected the rate of divorce in Indonesia,¹⁵¹ the government's ideological agenda had been well-served. The ideological message of governmental tolerance for and accommodation of disparate political and legal cultures, required if the Indonesian nation-state were to survive, had been delivered.¹⁵² The fact that the Marriage Law had failed to regulate the conduct of Indonesian citizens was almost unimportant.

The third symbolic function of written law was to announce, reify, and symbolize the power of the political elite that enacted it. Enactment of written law demonstrated that control of state coercion now lay in the ruling clique's hands.¹⁵³ Enactment of national laws in a situation of legal pluralism asserts the dominance of the political and legal culture of the group controlling the institutions of the state because the law purports to cancel the legal principles of the competing legal cultures. Short of state use of deadly force, no more raw exercise of state power can be imagined. Paradoxically, the very fact that national laws may be enacted in the face of a thriving system of legal pluralism means that immediate enforcement is out of the question. In such a situation of legal pluralism, the national laws are en-

¹⁴⁹ See Mark Cammack, *Indonesia's 1989 Religious Judicature Act: Islamicization of Indonesia or Indonesianization of Islam?* 63 *Indonesia* 141, 151-52 (1997).

¹⁵⁰ See *id.*

¹⁵¹ See Mark Cammack, *The Marriage law of Indonesia*, in *FAMILY, RELIGION AND SOCIAL CHANGE IN DIVERSE SOCIETIES* (Sharon K. Houseknecht & Jerry G. Pankhurst eds., forthcoming 1998).

¹⁵² The ideological messages contained in written laws are often at odds with the practice of the governments that enact them. The fact that a government routinely creates symbols of governmental tolerance does not necessarily mean that the government in question will tolerate political dissent.

¹⁵³ See Douglas Hay, *Property, Authority and the Criminal Law*, in *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND* 18 (Douglas Hay et al. eds., 1975).

acted primarily to symbolize the possibility, though not the probability, of the dominant political elite's use of state coercion to enforce the norms contained therein.

The BAL announced the dominance of the Western-educated Indonesian elite, privileging their norm of economic development by passing into law their forms of land ownership. Enactment of the BAL was a blow to the traditional legal culture of the *adat*. The BAL struck at the core of the traditional Indonesian system of land ownership by refusing to convert into statutory form the concept of a community right to control disposition and use of individual land ownership.¹⁵⁴ On the other hand, the strength of the long and well-established *adat* tradition, with its competing norm of nonregistration of land, mandated that there be no penalties for failure to register land and that transactions involving unregistered land not be voided.¹⁵⁵ The BAL's usefulness to the dominant political elite lay in its value as a symbol of their acquisition of state power, not in its regulatory effect.

Enactment of the Marriage Law likewise announced the dominance of the values of the educated secular elite in Jakarta: all Indonesians, regardless of religion, would hereafter be subject to the norms contained in the central government's law. By this simple statement, the Marriage Law delivered a major blow to the Islamic hierarchy in Indonesia. However, the strength of the Indonesian tradition of legal pluralism mandated two concessions: first, when applied to Muslims, the new national norms would be administered by Islamic judges sitting in Islamic courts; second, when applied to persons previously falling under the governance of *adat* law, the new norm would not be aggressively enforced. The true value of the Marriage Law lay in its power as a symbol of the dominance of the Jakarta elite.

The fourth symbolic function of the written laws lay in their legitimation of the exercise of power by the dominant political elite. The BAL and Marriage Law legitimated the exercise of power by the dominant political elite which had enacted them. The BAL generated the utopian imagery of a new government capable of securing national unity and implementing a national

¹⁵⁴ See Fitzpatrick, *supra* note 7, at 180-81, 186.

¹⁵⁵ See *id.* at 184 & n.89.

administration that would lead Indonesia into the ranks of the developed nations, while at the same time preserving the traditional ways that were the essence of the beloved Indonesian lifestyle. The BAL's utopian imagery functioned to legitimate the government that had enacted it. These goals were shared by the Indonesian people, and the fact that the government had set about realizing them through enactment of a law legitimated that government in the eyes of the people.¹⁵⁶ As it turned out, the BAL's registration provision has, for better or for worse, functioned to destroy Indonesia's old way of life.¹⁵⁷

The same legitimation function can be seen at work in the Marriage Law. The Marriage Law, like the BAL, promised the new order of a nationwide government that would enact modern laws conferring equality on women while at the same time preserving the old Islamic ways. The enactment of this law legitimated the government in the eyes of two very important constituencies, which, taken together, accounted for almost ninety-five percent of the population: women and Muslims.¹⁵⁸ Not surprisingly, the utopian imagery of the Marriage Law has proven impossible to realize. Indonesian women are not yet equal to men in the realm of marriage and the family,¹⁵⁹ but neither have the Muslim ways been left entirely intact.¹⁶⁰

Indonesia is a nation in which social ordering had been primarily accomplished by plural normative systems, the bases and forms of which are in conflict with those of the national government's legal system. These deeply-entrenched normative systems are, or are akin to, legal systems.¹⁶¹ The Indonesian

¹⁵⁶ Cf. Hay, *supra* note 153, at 62.

¹⁵⁷ See Fitzpatrick, *supra* note 7, at 190, 193 (stating registration process has sharpened social conflict, and determinations made under registration process are likely to be unacceptable to customary law); von Benda-Beckmann, *supra* note 38, at 95-96 (discussing weakening of indigenous institutions). Cynics, or Marxists, would say that the government used the BAL to blind the people to the fact that it intended to destroy their way of life by creating a system of land tenure that, unlike the traditional one, allowed for development.

¹⁵⁸ See Cammack, *supra* note 38, at 54. Muslims account for 90% of the Indonesian population; of the remaining 10%, women account for roughly half. *See id.*

¹⁵⁹ See, e.g., von Benda-Beckmann, *supra* note 39, at 114 (stating that Indonesian women's social and legal position in society is skewed).

¹⁶⁰ See, e.g., Cammack, *supra* note 38, at 66-67 (discussing court's invalidation of marriage under positive law even though it met religious requirements).

¹⁶¹ See Fitzpatrick, *supra* note 7, at 178-79 (discussing normative systems, or *adat*, as formal law). Discussion of the point at which a normative system based on custom becomes

legal culture is one of deeply entrenched legal pluralism. Indonesia is also a nation whose government needed to codify at the national level in order to utilize and benefit from the symbolic power of the written law. A real-life impact on human behavior seems to have been the least of the government's goals. It is not surprising, therefore, that many residents of the Indonesian archipelago understood the newly-enacted BAL and Marriage Law as symbols rather than as commands and, thus, did not conform their behavior to the written national law, but rather continued to be guided by the normative systems that had ordered their lives and those of their ancestors.

These Indonesians did not consciously and intentionally violate the law. Rather, they obeyed it. The law that they obeyed, however, was not the national written law of their government but the customary law of their communities. They correctly understood that the BAL and Marriage Law were intended by the government as symbols, not as rules of law having a command-and-obey function.

CONCLUSION

The foregoing examination of the purposes of codification and the functions of codified law has demonstrated that a written law may mean one thing to denizens of Western liberal democracies and quite another to the rulers and citizens of a developing nation. In particular, the command-and-obey view of written law characteristic of the West is foreign to the legal cultures of many developing countries.¹⁶² The notion that written law is intended to be immediately obeyed is foreign even to the governments that enact it.

To Hun Sen, the purpose of codification of the law was to set the stage for the political drama of democracy. In particular, the enactment of a constitution and fundamental laws such as a penal code were intended to exemplify, and thereby create, through theatre and ritual, a rule of law regime characteristic of a liberal democracy. To Indonesian rulers, it was not the regula-

a normative system based on customary law is beyond the scope of this Article. *See generally* HOOKER, *supra* note 43, at 91-109 (discussing evolution of customary law in Indonesia).

¹⁶² The criminal law is the exception to this rule. *See supra* note 15.

tion of conduct but rather the symbolic uses to which the law could be put that were themselves the purpose of codification. From the perspectives of ritual and symbol, enforcement of the written law in Cambodia and Indonesia is not a necessary condition to its effectiveness in serving the purposes for which it was enacted.

Despite the fact that social ordering and regulation of conduct are not their primary purpose, laws that are components of ritual and laws that are symbols indeed have an indirect regulatory effect. Although such laws rarely effectively regulate the conduct that they purport to order, they do have a social ordering effect on a more general level. For example, presenting to the public a constitution and a penal law enacted in the democratic tradition has an ordering effect on a society. The constitution and the penal law will order the expectations of the public along the lines of a democracy. These documents function to create the image and to a lesser extent the reality of democracy. This is true whether or not their provisions are consistently and effectively implemented. Likewise, passage of the BAL and Marriage Law in Indonesia played a role in the unification of a nation and the legitimation of a government. Creation of belief in national unity and legitimate government is a form of social ordering. Thus, the BAL and Marriage Law have had a social ordering effect in Indonesia, despite the fact that they have not resulted in a wide-scale reordering of the patterns of landholding or of marriage and the family.

The human mind is a complex and sophisticated thing. It is capable of perceiving that a single action, or a single course of action, may serve multiple purposes. To undertake a course of action knowing that it will serve more than one purpose does not mean that the actor is insincere or cynical with respect to all but one of those purposes. For example, the theatre state's view of codification is that it serves the purpose of exemplifying, and thereby creating, through ritual, the rule of law characteristic of liberal democracy. Implicit in the theatre state's perspective is the absence of any duty of immediate enforcement of newly written constitutions and laws.¹⁶³ The absence of a duty

¹⁶³ The enactment of the laws is expected and intended, in and of itself, to produce the desired result. Once society has re-ordered itself in the desired fashion, it will be time to

of immediate enforcement is convenient for holders of social or political power in states in transition from one form of government to another. The confusion caused by an entire society's efforts to reorder itself allows the holders of power to reposition themselves and to consolidate their power in anticipation of the day when democracy or a market economy and, with it, the rule of law really will have arrived. The indubitable benefits to holders of political power of their own selective enforcement of written law or disregard of written law does not necessarily mean that the ritual of codification was engaged in cynically without any true intention of producing the rule of law.

A government that enacts laws for their symbolic value is likewise absolved of any immediate duty of implementation or enforcement. The symbolic view of codification, like the ritual one, can serve as a cover for a multitude of sins. Not the least of the advantages of the symbolic view of law is that it allows a government to pick and choose the laws that it will enforce. The choices may be made in the interests of fairness, as in the case of a decision to delay enforcement of a newly-enacted law criminalizing polygamy, or the choices may be made in the interests of suppressing political dissent, as in the case of a decision immediately to enforce a newly-enacted law criminalizing allegedly irresponsible criticism of a government. Selective enforcement of the sort common in developing nations does not necessarily mean that the unenforced laws were enacted cynically or without any true intention of establishing the rule of law.

An accurate understanding of the role of codification in developing nations such as Cambodia and Indonesia requires comprehension of the multiple motives that led their governments to enact written law. These multiple motives arise from the fact that the governments of these developing nations operate at the intersection of multiple legal and political cultures and, thus, exist at times in multiple realities.

begin enforcement.

