

RESEARCH ARTICLE

Judging and Judgment in Contemporary Asia: Editor's Introduction to this Special Issue

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Abstract

Although the figure of the wise judge may be a universal trope, respect is not automatically accorded every person who passes judgment on another. To be perceived as legitimate, judges must occupy an institutional status with the power to decide controverted cases and must have access to specialized or even sacred knowledge and moral authority. Historically, Asian judges could claim legitimacy through their connection to transcendent legal principles, such as *dhamma* or *dao* or *shari'a*. In contemporary Asia, however, conceptions of law and legal legitimacy have become pluralistic, contested, and contradictory. Judges may to some extent retain a connection to the sacred and the transcendent, yet that connection is no longer sufficient in itself to insulate their judgments—or their character—from criticism. How, then, can the “good judge” be distinguished from judges who fall short of the mark? In this Special Issue, five distinguished scholars explore the crisis of legitimation as it affects judging and judgment in Sri Lanka, India, China, Indonesia, and Thailand.

Keywords: judge; judgment; legitimacy; sacred law; rule of law

The judge who renders a wise decision in a controverted case is a ubiquitous and perhaps universal figure—consider Solomon of the Old Testament, Manu in South and Southeast Asian texts, Bao Zheng in China, and Ōoka Tadasuke in Japan. Although the wise and revered judge appears in most cultural traditions, the act of judging itself is always contingent. It is not necessarily a good thing for one person to pass judgment on another and may, in fact, be morally offensive—“Judge not, that you be not judged.”¹ Passing judgment becomes desirable and beneficial only when it is accompanied by certain legitimating prerequisites. The judge must occupy an accepted institutional position that empowers him or her to make such pronouncements; and the judge must be cloaked with moral authority and access to specialized or even sacred knowledge that guides the act of judgment toward a sound result.

Simply because a judge has the power to pass judgment and, when necessary, to enforce it does not in itself guarantee legitimacy. Those in positions of judicial authority may, after all, render decisions that are incompetent, corrupt, partisan, or otherwise unworthy of respect. Furthermore, the fora themselves may appear unjust, as in hastily convened kangaroo courts or vengeful postwar tribunals that mete out harsh retaliatory punishments to the losing side. To confer legitimacy, a judgment must appear not only authoritative, but also morally sound. For this reason, the most venerated examples of judges and judgments throughout history tend to be rooted in cultural, philosophical, and religious

¹ Sermon on the Mount, Matthew, Chapter 7.

traditions that are widely accepted, guaranteeing that earthly judgments are linked to transcendent forces and principles.

An example of the linkage between judgment and religious tradition appears in some versions of the Burmese *dhammasattha* and Thai *thammasat*. In these texts, a mythical judge's bad decision and its aftermath result in humankind receiving sacred law for the first time. According to an early Burmese text described by Christian Lammerts,² the legendary first king of humankind, Mahāsammatta, asked his learned minister Manu to serve as judge to resolve disputes among his people. Initially reluctant to assume this post because no written law yet existed, Manu eventually agreed to preside for just one week. During that time, he heard a case between two neighbours, who quarrelled over ownership of a cucumber on a vine that had grown from one of their properties to the other. Manu wrongly decided that the cucumber belonged to the man on whose property it had ripened rather than the man in whose land the vine was rooted. Although he later reversed his decision, he was troubled enough by his error to seclude himself in the forest, where he practised asceticism, eventually acquiring extraordinary knowledge and magical powers. When the king asked him to produce a legal treatise—a *dhammasat*—Manu travelled to the boundary wall of the universe where the law was written in enormous letters and brought the sacred text back to serve as the foundation of all law within the kingdom. A similar story can be found in early Thai law texts, including a fragmentary account of the Manu story in the Law of the Three Seals.³ Sound judgments and the origins of law itself in both Burma and Thailand were thus associated with the principles of *dhamma*, and erroneous judgments were seen as corrupted and as deviating from cosmic laws.⁴

Similar connections between earthly judges and cosmic forces can be found in many Asian countries and cultures. In the Islamic tradition, for example, the concept of *shari'a* represents what Salim calls the “immutable, sacred, and universal” principles that permeate the laws, sometimes found in legal texts but more often “in the substantive content of the legal rules.”⁵ A sound judgment in that context must reflect not only the mundane circumstances of a given case, but also the transcendent principles of Islam. The same could be said of Chinese understandings of legal legitimacy. According to Kirkland:

In Chinese tradition—within Taoism, Confucianism, and the ritual and ideological traditions of the state itself—earthly authority and spiritual authority were regarded as, in essence, wholly identical . . . [I]nto late imperial times, China's rulers and their subjects all shared the belief that all legitimate authority derives directly from *heavenly sources*.⁶

It may be asked, however, to what extent these traditional cultural underpinnings of judges and judgments remain salient today in Asian societies, which have undergone massive social and economic transformations and have experienced powerful influences from other parts of the world. These external influences carry with them new conceptions of judging and judgment unrelated to long-standing traditions or beliefs and sometimes in conflict with them. Moreover, the new understandings of judges and judgments may contain their own purportedly “universal” concepts of law, such that adherence to older

² Lammerts (2018), pp. 62–4.

³ Thammasat University (2005), pp. 12–3. See also Baker & Phongpaichit (2016), p. 20; Lingat (1959), p. 17. Like Lammerts, Lingat translates *taeng* as “cucumber;” Baker and Pasuk refer to the disputed vegetable as a “gourd.”

⁴ Lammerts, *supra* note 2, pp. 72–83, points out that the cucumber–dispute narrative is not the only origin myth in the Buddhist legal world, and others emphasized the teachings of the Buddha and the legal precepts of the *vinaya*.

⁵ Salim (2008), pp. 15, 12.

⁶ Kirkland (2004), p. 146, emphasis in original.

traditions may now appear unjust, even if they do conform to historical understandings of morality and sacrality.

In short, although contemporary judges in Asian societies may find it less challenging to assert power and authority than in the past, they may at the same time find it much more challenging to establish the legitimacy and moral soundness of their judgments in the eyes of the citizenry. Judges now live in an era of multiple, disparate, overlapping, even kaleidoscopic philosophical, religious, and political frameworks derived from highly diverse sources. At such a time, what can secure the legitimacy of their judgments? As judges and judgments become even more central to the economic and political life of Asian societies, what moral authority can jurists invoke to command respect? To what extent do older traditions linking judges to transcendent or sacred knowledge still cloak judges with an exalted identity and to what extent have such traditions given way to newer frameworks of legitimation—or to none at all?

Each of the five articles in this Special Issue on “Judging and Judgment in Contemporary Asia” explores a facet of these questions in one or more of the societies of East, South, and Southeast Asia. Each of them examines the perplexing issue of legitimacy of judgment in a post-traditional, post-colonial, post-modern world. In the legal cultures of Sri Lanka, India, China, Indonesia, and Thailand, some centuries-old traditions do remain highly influential, though not necessarily in their original form. To some extent, judges do retain their exalted image through their continuing associations with *dhamma*, *dao*, and *shari’a*, yet much has changed. The legitimacy of their judgments nowadays depends on other factors as well—adherence to “modern” concepts of rule of law, proficiency in legal science, bureaucratic and administrative prowess, and even commercial acumen. Such contemporary indicia of judicial soundness at times reinforce older worldviews and at other times conflict with them—and with one another. The quest for legitimacy has indeed become a confused tangle of the secular and the sacred, the technical and the ideological, the imperious and the righteous.

Benjamin Schonthal’s article, “Judging in the Buddha’s Court: Buddhist Judicial Systems in Contemporary Asia,” illustrates one context in which judging based on sacred principles and procedures interacts with secular, rule-of-law frameworks. Schonthal reminds us that not all judges are agents of the state, and not all courts are administered by the government. In Sri Lanka, as in most other countries, non-state courts still operate in religious communities and issue judgments across a broad swath of social life. Schonthal notes that Buddhist courts and judges still “play a particularly important role in the pluri-legal landscapes of places like Sri Lanka, Thailand, Bhutan, India and Myanmar, where Buddhist monks comprise major parts of the population.”⁷ Such courts deal not only with cases involving monks, governed by the Vinaya and other legal texts, but more generally with monastic matters of many kinds ranging from questions of doctrine to property ownership.

In a religious tribunal, such as the Rāmañña Nikāya court system that Schonthal studied, the judge’s connection to long-standing sacred principles cannot be doubted, and the qualities that are valued in a good judge are, among others, “uniquely Buddhist virtues, such as equanimity, wisdom, compassion and knowledge of the Buddha’s teaching.”⁸ But it would be a mistake to view judging and judgment in these religious courts as little more than an atavistic throwback to pre-modern legality. One of Schonthal’s most important conclusions is that the legitimacy of judgments rendered by clerical judges in “the Buddha’s court” involve not just the ideal personal traits of a devout follower of the Buddha’s teachings, but also the scrupulous adherence to procedural rules and institutional structures that bear a striking similarity to those found in the secular courts of

⁷ Schonthal (2021), p. 00.

⁸ *Ibid.*, p. 00.

the state. Based on Schonthal's work, influence in contemporary Sri Lanka seems to flow in both directions. Secular judges appear more legitimate when they display traditional Buddhist qualities that are familiar to much of the population; but, at the same time, religious judges appear more legitimate when they display secular legal virtues such as procedural regularity and transparency, impartiality, rational weighing of evidence, fair consideration of competing positions, and provision of a right to appeal. *Ex cathedra* religious pronouncements based on direct access to sacred authority—even in a religious court—would be completely unacceptable. Thus, in the judicial system of the Rāmañña Nikāya, Schonthal has discovered a complex interplay between contrasting and overlapping legal world views. His findings illuminate not only the qualities of judging and judgment that are required within the clerical courts, but also, by implication, those that could guarantee legitimacy of judgment in Sri Lanka's secular courts as well.

Deepa Das Acevedo's article, "From Mythic Saviors to #MeToo at the Indian Supreme Court," focuses directly on India's highest court and the identity of its highest-ranking judge, former Chief Justice Ranjan Gogoi. Whereas Schonthal explored the problem of legitimation in a religious court located outside the formal governmental structure, Das Acevedo considers legitimation at the very apex of India's secular judicial system. Here she finds a fundamental shift from "mythic" to "mythos" with respect to judges' identities. That is, India's most highly regarded judges were formerly regarded as "mythic figures . . . worthy of the authority they possess," because they championed the cause of marginalized and impoverished members of society who had been forsaken by the Indian legislature. Judges' legitimacy rested on their democratic virtue and their adherence to rule-of-law principles, if not their access to sacred knowledge. More recently, however, the mythic aspects of legitimation have given way to what Das Acevedo calls "mythos"—a type of discourse redolent of power and authority rather than virtue, morality, or wisdom. In her view,

the CJI Scandal signals the ascension of a new attitude towards judging in India, one that is less concerned with "virtuous male power" and more with "unvarnished assertions" from those "who believe their strength, position in society, and/or the justice of their cause entitles them to prevail."⁹

The predominantly masculine aspects of mythos are no coincidence, given "the deeply masculine ethos of Indian judging"¹⁰ and the extreme gender imbalance of the Indian judiciary. Thus, when Chief Justice Gogoi was accused of sexual harassment, a set of justice concerns associated with the transnational #MeToo movement collided head-on with the reframed authority structure of the Indian Supreme Court. As a result, Gogoi was able to characterize the accusations of ethical violations not as a complaint deserving investigation and a fair hearing, but rather as an assault upon the judiciary itself. To protect the authority of India's highest court, he saw no impropriety in serving on the very panel that considered the charges against him. As Das Acevedo interprets the case, sacred or mythic elements of legitimation faded into the background and instead the accusation elicited a response asserting power and authority of a particularly gendered kind. This more recent form of identity for the highest Indian judges proved controversial, largely because it failed to satisfy norms of gender equality rooted in transnational legal trends. In the absence of a more traditional, mythic legitimation for judges, the assertion of raw authority in response to an allegation of sexual misconduct struck many observers as unjust, particularly as measured by contemporary rule-of-law standards.

⁹ Das Acevedo (2021), p. 00, quoting Lincoln (1997), p. 356.

¹⁰ *Ibid.*, p. 00.

In contrast to the studies by Schonthal and Das Acevedo, the article by Kwai Hang Ng and Peter C. H. Chan, “‘What Gets Measured Gets Done’: Metric Fixation and China’s Experiment in Quantified Judging,” depicts a judiciary in which neither myth nor sacred norms play any part in constituting the identity of the good judge, at least from the perspective of the central government. Instead, soundness of judgment and the capability of individual Chinese judges are evaluated according to secular, technocratic standards and measured by quantified algorithms. Traditional religious, moral, or philosophical frameworks are conspicuous by their absence, and instead the attempt to establish the Case Quality Assessment System (CQAS) metrics represents a bureaucratic approach to the problem of judging and judgment—a way of viewing judges’ behaviour that James C. Scott called “seeing like a state.”¹¹

The CQAS was launched in 2011 to address a recurring dilemma in the Chinese legal system, namely how the central government could determine from a distance whether judges’ decisions were proper and efficient. With courts and judges spread across a vast landscape deciding cases in quite different circumstances, the government sought a means to ensure that judgments conformed to standards acceptable to the Ministry of Justice. Appeal to sacred principles or transcendent values was not an option within the bureaucracy of the People’s Republic, nor did administrators attempt to assess abstract qualities such as wisdom, fairness, or moral soundness. Instead, they adopted a standardized index of good judging—the Integrated Case Quality Index—that would measure “effectiveness” and “efficiency” and was entirely quantified, reducing capable judgment to a single combined metric composed of 31 individual indices:

The CQAS did not measure individual qualities such as independence and legal sophistication, nor did it touch on institutional qualities such as legitimacy, public acceptance, and decisional coherency. In many ways, it adopted a black box approach to justice by measuring only input and output In short, the metric system was most concerned about the *processing* capacity of the court system.¹²

Ng and Chan’s article details some of the ways in which local court judges and officials subverted the aims of the CQAS system and contributed to its ultimate demise in 2014. Even after the Chinese government abandoned this effort to quantify and standardize judicial excellence, however, the CQAS enjoyed a robust afterlife. Despite the resentment and resistance of lower-court judges, collection of some of the same statistics has continued up to the present time. Ng and Chan suggest that the persistence of the CQAS methodology represents one aspect of an ongoing effort by the Supreme Court of China to assert control over China’s far-flung judiciary and to impose its concept of the “good judge” by incentivizing conformity to the judicial qualities that lend themselves most readily to quantitative measurement. To the extent that the CQAS lives on despite its official termination, the concept of sound judgment in Chinese courts has been constructed on an entirely technocratic and bureaucratic model.

Simon Butt’s study, “What Makes a Good Judge? Perspectives from Indonesia,” explores much the same question—how to determine whether an individual is actually a “good judge”—in the context of Indonesian law and culture. He focuses on a former Supreme Court justice, Artidjo Alkostar, who is widely regarded as one of modern Indonesia’s leading jurists. His study begins with an explanation of the qualities that are generally cited to establish Alkostar’s exalted reputation. Through a careful examination of a number of Indonesian Supreme Court decisions in which Alkostar participated, however, Butt goes on to raise serious questions about Alkostar’s adherence to basic legal principals and

¹¹ Scott (1998).

¹² Ng & Chan (2021), p. 00, emphasis in original.

doctrine, and his apparent bias against defendants. In his case-by-case analysis, Butt shows that Alkostar's tendency to rule harshly against those accused of wrongdoing led him at times to ignore the evidence and the well-reasoned arguments of defence counsel.

The question posed by Butt's article, then, is how a Supreme Court justice who demonstrated what some would consider serious flaws in judgment and, in Butt's view, denied a number of defendants a fair hearing could nevertheless be considered an exemplar of judicial excellence and propriety. The answer appears to lie in the legal culture and history of Indonesia. Although Alkostar may have been guilty of indiscreet behaviour on occasion and may arguably have been overzealous in his punitive treatment of defendants he had prejudged as guilty, he nevertheless was widely viewed as incorruptible. Those who praised him for his "unique combination of honesty, integrity, industriousness, and modesty" were implicitly saying that other judges lacked these qualities.¹³ Concerns about judicial corruption appear to be paramount within the profession and in the population at large. As Butt concludes: "After decades of Indonesian judicial decrepitude, and in particular very high levels of perceived corruption, maybe resisting bribery attempts was all Alkostar needed to distinguish himself from his judicial brethren."¹⁴

In the concluding article of the Special Issue, entitled "Punitive Processes? Judging in Thai Lower Criminal Courts," Duncan McCargo offers a unique portrait of Thai judges engaged in the mundane business of hearing and deciding run-of-the-mill criminal cases in provincial courts. Although much of the scholarly literature on judging focuses on prestigious judges in high-level courts, this article looks at judging through the other end of the telescope. Appropriately, if unconventionally, McCargo's portrait draws extensively on his fieldnotes, jotted down as he dropped into courtrooms somewhat at random to observe the ordinary day-to-day activities of judges who live and work far from the centre of Thai legal and political power. Although charged by the late king "with enacting justice and protecting Thai society from immorality and corruption," these judges, as McCargo notes, find themselves consigned to routine and often tedious tasks, seldom involved with issues of broader social significance and possessing very little leeway to exercise discretion or creativity to enact justice.¹⁵ Many of the judges assigned to the more distant provinces are young and inexperienced in the law and in life. Their ability to understand the culture, history, and social norms of the community surrounding the court is limited by their frequent and relatively brief postings as well as their youth. For this reason, the act of judging appears to depend primarily on abstract principles enshrined in the law codes rather than an understanding of the litigants' life experiences that have brought them before the judge.

McCargo's observations of lower-court Thai judges have relevance for the Special Issue as a whole. Most of the judges he describes—particularly the young ones who have recently passed an extraordinarily demanding competitive examination—aspire to the lofty ideals articulated by the late Thai king who appointed them. Yet the realities of judging in contemporary Thailand, particularly at the trial-court level, bear little relationship to the goal of enacting *dhammic* justice that legitimated adjudication in the past. Modern Thai judging in criminal cases, according to McCargo's account, consists of the bureaucratic processing of mostly docile defendants who almost always plead guilty.

This picture is not unique. Observations of criminal-trial courts in most countries of the world yield similar results—as Malcolm Feeley's classic study of criminal case processing in Connecticut demonstrated nearly 30 years ago.¹⁶ Yet one cannot escape the sense that, in contemporary Asian countries, the act of judging has become entangled in a crisis of

¹³ Butt (2021), p. 00.

¹⁴ *Ibid.*, p. 00.

¹⁵ McCargo (2021), p. 00.

¹⁶ Feeley (1979).

legitimation. Asian judges may to some extent retain a connection to the sacred and the transcendent, yet that connection is no longer sufficient in itself to insulate their judgments from criticism, as the examples from Sri Lanka and India suggest. Nor can wisdom or even intellectual distinction confer legitimacy, as the examples from China and Indonesia illustrate. Judges nowadays must be skilled bureaucrats, yet the Thai as well as the Chinese examples suggest that judging cannot be reduced merely to another form of administrative processing—the act of judgment requires something more to achieve justice. But what that “something” might be remains elusive and perhaps in the end undefinable.

The social and political environments in which judges preside create highly specific demands that may lead to conflicting ideals. Thus, a figure like Alkostar in Indonesia could be widely revered even without reference to his legal expertise, primarily because he was tough on defendants in a society where too many of them were seen as escaping the punishment they deserved. The sometimes turbulent cross-currents of contemporary Asian societies can shape understandings of the “good judge” in ways that cannot be explained simply with reference to historic legal traditions or modern rule-of-law doctrines. As Das Acevedo suggests, the legitimating myths that support popular understandings of judges and their work are continually evolving in response to social and political exigencies. Whether they will evolve in the direction of authoritarianism or democracy, punitiveness or fairness, corruption or integrity, vindictiveness or wisdom, and whether they will lead to increased or diminished support for the judgments of Asian judges remains very much in doubt but is surely a question of considerable importance for the future of the region.

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