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Keynote Address: Reimagining Law and Society Research in Southeast Asia

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Introduction

The conference that gave rise to this collection of papers commemorated an earlier meeting of scholars that took place at Chiang Mai University more than twenty years ago. That earlier conference was, as far as we could determine, the first ever held that addressed law and society research throughout all of Southeast Asia. At that time interdisciplinary research on law was not at all common in the region, despite the pioneering efforts of scholars such as Daniel S. Lev and Franz and Keebet von Benda-Beckmann in Indonesia. The 1992 conference led to a major publication—a special issue of the Law & Society Review entitled, *Law & Society in Southeast Asia*.[1] Now, more than twenty years later, Chiang Mai University has again hosted a major conference to encourage law and society scholarship on Southeast Asia. It is hoped that this renewed

1 **Law & Society Review,** vol. 28, No. 3, 1994 (eds. Jane Collier, David Engel, & Barbara Yngvesson).

effort will forge closer connections between Southeast Asian scholars and the communities of law and society researchers elsewhere in Asia and in other world regions.

The 2015 conference at Chiang Mai University was entitled, "The Real Law in Society in Southeast Asia." This name refers to a distinction that is now nearly a century old—the distinction between studying law primarily through written texts and studying what Eugen Ehrlich called "The Living Law"[2] and the Legal Realists dubbed "The Law in Action." Law and society scholars who study the living law—or the law in action—believe that there are some extremely important things that we cannot learn if we confine our research to legal theory and the written word. We cannot learn whether written laws are actually known and understood. We cannot learn what role official laws play in the thoughts and actions of ordinary people. We cannot learn whether the law achieves its stated goals, whether it is enforced, and whether it produces unintended consequences—or no consequences at all.

Written law is, to quote Clifford Geertz, a way of "imagining the real," but it is just one way. When researchers consider written laws, or law on the books, they need to ask whose "imagining" they reflect. State law is usually produced by a social elite, by persons with status, with political and economic power, and with access to particular kinds of knowledge and expertise. Other groups lacking such status, knowledge, and clout, have different ways of imagining the

2 Eugen Ehrlich, **Fundamental Principles of the Sociology of Law** (Transaction Publishers, 2001).

world and different ways of behaving. Typically, rather than ordering their lives exclusively with reference to written law, they act according to their own customs, their own systems of normative enforcement, and their own unofficial sanctions and punishments. Non-state laws are not better or worse than state law. They are just different, and the differences between state law and non-state law can be extremely important. This has been a recurring theme of law and society scholarship for many years and in numerous research settings around the world.

1. Focus of law and society research

What, then, are some of the most widely acknowledged foci of law and society scholarship that differentiate it from conventional legal research? The following list of subject areas illustrates some of the most prominent and enduring topics of scholarship concerning "the real law in society" as it has developed in many parts of the world:

i. Legal pluralism

Research on "the real law in society" usually assumes that nearly all people live in a condition of legal pluralism. We are subject to the law of the state; but we are also subject to the law of the village, the neighborhood, the workplace, and the religious community. We are even subject to the written or unwritten laws of the highway, the classroom, or the street corner. We are intuitively familiar with all of these unofficial forms of law, because we live with

them every day and comply with their mandates—or risk the consequences. We know what these non-state legal systems expect of us, even though we may never have put it into words or written it down. We know what will happen to us if we violate these laws. In fact, we may find ourselves in a great deal more trouble if we violate the law of the school, the community, or the church than if we violate the laws of the state. The coercive force of non-state law can be very powerful indeed.

ii. Studying law in its social, cultural, and historical contexts

Scholars who try to study "the real law in society" find it essential to investigate law's social, cultural, and historical contexts. Researchers who study only the law on the books tend to underestimate the importance of law's social context, and they typically analyze law as an autonomous body of knowledge that is not significantly inflected by local practices or beliefs. But this conventional approach to legal study can narrow our understanding of how law actually works in society. Admittedly, the aspiration of state law is to transcend the particularities of personal and cultural variation across the social landscape. State law tends to imagine society as a flat and even plane where law extends uniformly and without friction to cover every square centimeter of human activity. Variations in the social context from one space to another should not matter greatly, from the perspective of the state, because the law is universal. From a state-centric point of view, it is the job of legal scholars to

understand law's transcendent verities. But once we acknowledge that the state holds no monopoly over the production and enforcement of "law," that the true condition of most humans is one of legal pluralism, then we must also accept the fact that the realm in which state law asserts primacy is not flat and even after at all. Law's real social context is full of peaks and valleys that reflect different cultural perspectives, belief systems, normative values and practices embraced by different social and ethnic groups, and by people of varying sexual and gender identities. The meaning and significance of state law varies greatly across the social landscape. Studying the real law in society means that we need to go beyond the written law texts to understand as much as possible about the social and cultural context in which it operates.

iii. Studying legal actors, broadly defined

Studying "the real law in society" entails not just an awareness of multiple legal systems but also an attention to the lives and practices of different legal actors—and this, too, is a hallmark of law and society research. Judges, lawyers, and government officials are not robots, they don't think and act like computers, they aren't necessarily even rational in their behavior. Researchers have attempted to learn as much as possible about the psychology, beliefs, and motivations of these and other legal actors. They have attempted to understand what makes them think and act the way they do. Some highly sophisticated and influential research has explored the sociology of the legal profession, the careers of judges, and the

behavior of lawmakers. Such individuals play a central role in operationalizing state law. But the key actors in a legal system are not just the representatives of state law. Legal actors also include non-state legal figures, such as village leaders, fortune tellers, shamans, and even the leaders of criminal gangs. Researchers who study the real law in society have broadened the scope of their scholarship to include such individuals, as well as judges, lawyers, and legislators, since all of them can determine what form of law will be most influential in a given situation. Furthermore, non-state legal actors very often encourage others either to use or to avoid state law, and therefore understanding their behavior can go a long way toward appreciating the success or failure of state law at different moments or in different social locations.

In short, studying the real law in society means that scholars cannot simply focus on the official institutions of the state. Equally important are the institutions of non-state law, not just the courthouse but also the shrine of the spirit medium, the house of the village elder, village-level tribunals, and non-governmental organizations of various kinds. All of these non-state legal institutions may at times act in tandem with state legal institutions, but at other times they may act as alternatives to state institutions—and sometimes in conflict with them. And even when they do study official institutions, such as courts or legislatures, law and society scholars tend to look behind the scenes, not just at the official rituals and ceremonies that are intended for public audiences. As someone said of American courts, "In the halls of justice, the only justice is in

the halls." Law and society scholars like to study what happens in the hallways, not just in the courtroom when court is in session. A realistic view of institutions involves looking behind the curtain and not accepting legal rituals at face value. Rituals are important, of course, but so are the interactions, negotiations, mediations, and decision making that occur far from public view.

iv. Studying low profile, not just high profile, events and experiences

Traditional legal research focuses on high profile events and experiences, such as famous trials or decisions of the highest courts or the enactment of landmark legislation. But research on the real law in society also studies low profile events and experiences—everyday disputes that never become famous lawsuits, ordinary conflicts that never are decided by a judge, and village-level practices that never pass through Parliament.

2. Lessons learned

These, then, are some of the characteristic topics of law and society research around the world. This list suggests how it is that many researchers understand "the real law in society," and how they study it. But what, exactly, have we learned from their efforts? What value does this kind of research have for understanding law in Southeast Asia?

One of the most important lessons is that, even though legal pluralism can be found in every society, Southeast Asia is a social and

cultural setting in which legal pluralism truly flourishes. Southeast Asia has remarkable ethnic, religious, cultural, and demographic diversity. The people of Southeast Asia are accustomed to navigating among many different legal systems every day of their lives—almost every moment of every day. When Ajaan Jaruwan Engel and I studied people who suffered personal injuries in Chiangmai, we discovered that they almost always viewed their experiences through many different lenses at the same time, reflecting their intuitive grasp of legal and cultural pluralism.

For example, a woman we called Buajan was struck by a car driven by an elderly man. Buajan offered a number of different explanations for her injury. She said, that the injury was caused by ghosts along the side of the road. But it was also caused by her own bad karma—she had beaten a dog and injured its leg, foreshadowing the injury to her own leg not long afterward. There was also a karmic connection to the old man from a previous life, when Buajan must have injured him. Injuries recur in karmic cycles from one lifetime to the next, and the injurer and victim may simply trade places in each iteration. Buajan's injury was also caused by her young niece who had had sex with a boy and offended the ancestral spirits (*phi puya*). The spirits expressed their disapproval of the girl's behavior by injuring Buajan rather than her niece, because Buajan was more vulnerable—her stars were at a low ebb at the time. Of course, Buajan's injury was also caused by the negligence of the other driver. But Buajan, like other interviewees, emphasized that it was also caused by what she considered her own negligence. She told us that

everyone must be mindful at all times, they must have *sati.* If we are truly mindful, we are less likely to be harmed by someone else's negligence.

Each of Buajan's explanations points to a different belief system or ideology, a different concept of why things happen in the world, and a different idea about law and remedy. Buajan, like many people in Southeast Asia, is accustomed to living in a world where all of these different belief systems operate simultaneously. This is truly a world of legal pluralism.

Dr. Anan Ganjanapan, Professor of Anthropology at Chiang Mai University, has written about legal pluralism, and he told a story that my American students found both charming and illuminating. It seems that there can be multiple legal systems even in a single mango tree. When Ajaan Anan moved to Chiangmai as a young man, he bought a house in a village outside the city. In his yard there grew a mango tree whose fruit he enjoyed eating. Soon Ajaan Anan became puzzled by the behavior of his neighbors. Even though he kept the gate shut, the villagers opened it without asking permission and came into his yard. They went straight to his mango tree to collect the delicious red ant eggs, which they used for salads and other foods. They took as many ant eggs as they pleased, but they never touched the fruit of the tree—the mangoes themselves.

As a newcomer, Ajaan Anan felt he should not question or challenge his neighbors, but after a number of years, when they had come to know each other well, he finally asked one of the villagers, "Uncle, why are you collecting these things from my house?" The

answer came back immediately, "Ajaan, the only things I am collecting from your house are the red ant eggs. I have never taken any of the mangoes. That's because you grew the tree yourself. The mangoes belong to you, true enough. But as for the red ant eggs, let me ask you, Ajaan, did you raise those ants yourself?"

Ajaan Anan then understood that, in a single mango tree, there coexisted two different legal systems and two entirely different concepts of ownership. Ownership of the mangoes derived from state law, which provided a system of private property rights. Ownership of the ants and their eggs derived from a system of community rights governing products of nature.

This same plurality of laws in a single site could be seen elsewhere in Ajaan Anan's village. For example, the rice fields were never fenced. The villagers understood that they had individual ownership rights in the rice they planted, but after the harvest no villager could claim individual ownership of the fish or frogs that occupied the padi fields. Anyone could enter the fields to catch and eat them. It would never occur to the children or adults fishing in the rice fields that they were taking something that belonged to the owner of the land. The law governing rice plants was different from the law governing fish and frogs in the very same fields.

Ajaan Anan has suggested that recognizing the plurality of legal orders may resolve tension between local norms and customs and state law. Rather than granting new rights or special rights to individuals or communities, it may be possible for the state to recognize that for different purposes different laws should be

applied in a single setting. We do not have to choose either community rights or individual rights, but both forms of law may be used at different times for different purposes.[3]

3. Rights consciousness after globalization

The study of rights has been of great interest to law and society scholars. Once we resolve to expand our research focus beyond the abstract theory of rights, what is it possible to say about the actual use or avoidance of rights from the perspective of the "real law in society?" Perhaps it will be helpful to make two related points about research on rights in the contemporary societies of Southeast Asia.

First, it is probably incorrect to assume that rights consciousness is inevitably on the rise because of the forces of globalization. Certainly observers tend to talk about rights as if they are constantly expanding and playing a more and more important role in the modern world. It is common to say that the conditions of globalization tend to make all people more conscious of their rights and more likely to make rights claims when they experience wrongful behavior.

It is true that globalization has promoted a universal discourse of rights in every region of the world. International

3 Discussion of Dr. Anan's anecdote and interpretation is based on Jintanakan thang manutsayawitthaya laew yon mong sangkhom thai [*Anthropological Imagination and Looking Back at Thai Society*] (Faculty of Social Sciences, Chiang Mai University, 2012).

institutions, including the United Nations and the World Bank, encourage the use of rights concepts. Some private corporations are now providing mechanisms for people to make rights-based claims when they feel they have suffered injustice. And hundreds of NGOs around the world actively assert and protect rights.

All of these rights-based activities have been well documented, and they are very important for researchers to understand. But it is not enough for researchers who want to study "the real law in society" to focus only on rights activism. If they look only at people who assert their rights, they cannot say whether rights consciousness is expanding in comparison to other forms of legality. Studying the real law in society means that we must always compare claims that are asserted to those that are not asserted. The *rate* of claiming has both a numerator and a denominator. We cannot ignore the denominator, which is the number of wrongs that have occurred. It may not be correct to say that rights consciousness is expanding if it turns out that rights violations are increasing more rapidly than rights claims. In that case, it would be more accurate to conclude that rights consciousness is actually in decline.

For example, when we studied personal injury cases in Chiangmai, we found that the number of personal injury lawsuits stayed about the same, or increased very slightly, over a 30-year period. Yet the number of injuries had certainly increased exponentially during the same time period. The total number of injuries is the denominator. If lawsuits stay about the same while the number of injuries increase greatly, then it is clear that the *rate* of

claiming has actually gone down. In personal injury cases, it did not appear that rights consciousness had expanded; it actually got smaller if we measure it in terms of claims per 1,000 injuries. What happened to all of the other injury cases? Where did they go? These are important questions for researchers who study the law in action and not just the law on the books.[4]

Second, it is important to study rights discourse in relation to other discourses of justice. Using the concept of rights is just one way to express a sense of injustice. In our study of personal injuries in Chiangmai, Ajaan Jaruwan and I concluded that rights discourse was not expanding but other discourses of justice were used more often while others were actually disappearing. One of the most dominant discourses used by our interviewees was that of religion. People who suffered injuries referred to Buddhist concepts of karma and a northern Thai discourse of conciliation in order to explain why they rejected the idea of using state law to make rights claims.

Ordinary people may reject or avoid rights discourse for many reasons. For example, people in Southeast Asian societies may feel that rights discourse is culturally unfamiliar, that it comes from far away—Europe, America, or the nation's capital—and it does not reflect local traditions or beliefs. Rights may seem too radically individualistic and not sensitive to group interests. Rights may seem selfish. They may seem too abstract and not related to sacred things that are the basis for local customs.

4 David M. Engel and Jaruwan S. Engel, **Tort, Custom, and Karma: Globalization and Legal Consciousness in Thailand** (Stanford University Press, 2010).

Here is how one northern Thai villager, whom we called "Phakdi," explained it to us: "Rights are fixed and defined by the law, but justice isn't based on a verdict. We can't tell what justice will be. It depends on the feelings of satisfaction of the two parties." Another villager, "Bancha," told us, "You must give each other justice," not receive it from a judge. It doesn't matter so much who is right and who is wrong. Justice in northern Thailand is not about right and wrong. As he put it, "Both sides should be able to understand each other. Justice should give equally to both of them."

This is a very different kind of justice discourse. We might call it *inter-subjective justice*. Justice is achieved when both sides understand each other, not when one side asserts rights against the other side and wins the approval of a judge. This type of discourse implies that justice does not come from making an objective determination of right and wrong. If the two parties can reconcile their minds and feelings, if they can understand each other and reach an agreement, it does not matter so much who is right and who is wrong. Obviously, this type of inter-subjective justice raises major problems from the perspective of rights-based justice. What if one of the parties really is right (by some objective measure) and the other is wrong? What if one of them violated state law and the other did not? From the perspective of inter-subjective justice, it may not matter so much whether anyone's legal rights have been violated. Justice when viewed from one perspective may become injustice when viewed from another.

Since there are different justice discourses in most societies,

if we are to study the real law in society we must ask what relationship rights discourse has to them. The relationship is sometimes quite complex. People who feel mistreated may find that in some situations, rights discourse is particularly useful or powerful, but in other situations they may find rights to be alienating and useless. We need to understand these different situations. We need to understand how people's view of rights may vary from time to time and place to place. We should never view rights discourse as the *only* language of justice that legal scholars should study. We should never assume that people view justice and rights as one and the same. We must listen to their voices and try to understand their thoughts and actions. We should not impose our own preconceptions about justice if we want to learn about the real law in society.

4. Conclusion

As we mark the twentieth anniversary of Chiang Mai University's previous conference on law and society in Southeast Asia, it is a good time to ask what we have learned and how things have changed or remained the same. It still seems very important for researchers to look beyond the law on the books and to study the law in action in Southeast Asia's complex and pluralistic societies. This is a complicated and difficult task. It requires time, energy, and imagination. But the papers p resented at the 2015 conference show how useful it is to understand law in all of its complexity. We must look at all the different ways in which law is created in many different social contexts. And then we must try to understand how these many

different forms of legality relate to one another in the everyday lives of the people of Southeast Asia. In this way, we can try to gain a more accurate view of the role state law and non-state law actually play in this fascinating region of the world.