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Book Review

Thai Legal History: From Traditional to Modern Law

Andrew Harding and Munin Pongsapan (eds)
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Reviewed by *Thongchai Winichakul*[*]

Congratulations to the new publication on Thai legal history. A new monograph or an edited collection in this field is infrequent, especially the one that is not mainly about current issues. Perhaps because of this, *Thai Legal History* (TLH) does not pretend to focus on a coherent theme or concept. Instead, eighteen articles in this collection cover quite a range of subjects in this relatively small field. I think it is the right approach that serves the field at this time very well as an invitation to readers to see how exciting Thai legal studies is.

TLH covers ancient legal doctrines, Buddhist and local legal customs, both public and civil laws, constitutions and coup orders, administrative justice and gender equity, and more. Chronologically, it covers traditional law and legal culture in pre-modern Siam, to the modernizing legal reform in the late nineteenth to early twentieth century, and the constitutional and legal crises since the mid-2000s to the present day.

As an historian of Thailand with interest in its legal history, I have five observations about the "H"—history—as it pertains to the articles in TLH.

First, we can find different kinds of history integral to the narratives and often as the unspoken premise of the analyses in TLH. Some are conventional and less critical historiography, while others are very critical ones. These different histories do not necessarily contradict one another. But if one is taken instead of another as the premise of many studies, the outcomes would be quite different. (I will clarify below.)

Second, the articles on recent politico-legal crises in Thailand, mainly Part III (on the constitutions, the legal aspects of the Thai-style democracy, legal immunity of the coup regimes and so on), plus chapter 6 on the lèse-majesté law by Eugénie Mérieau, are historicized very well. They often take Buddhism and cultural matters into consideration, too. I take note of this point because the discussion on these issues

[*] Professor Emeritus, College of Letters and Science, University of Wisconsin–Madison, twinicha @wisc.edu.

in Thai language has often been more technical, legally, and not historicized. The different tendencies are perhaps attributed to the previous works in English, like the ones by Björn Dressel, Andrew Harding, Peter Leyland, and David Streckfuss, that set the more historical tone than the Thai ones, except those by Somchai Preechasilapakul and Piyabutr Saengkanokkul.

Chapters 15 by Rawin Leelapatana and 16 by Henning Glaser in particular engage with some history and contending ideas in Thai jurisprudence beyond the recent disputes surrounding Thai-style democracy or the royalist regime. Tyrell Haberkorn takes a step further from her recent book on impunity of the coup regimes[1] and tries to find a legal approach to end it. I wish she would have elaborated the final section much more.

The recent politico-legal crisis should have led us to examine the systemic problems and the fundamentals of the legal system and Rule of Law in Thailand. However, the constitutional struggles, the abuses of the security laws, and the unjust judiciary, are understood primarily as political issues or as the politicization of the laws and the system, not their systemic problems. Hence the limited scrutiny of the legal system and Thai jurisprudence in similar fashion as Nick Cheesman does with regard to the legal system in Burma[2] and Jothie Rajah with regard to Singapore,[3] in which they historicize the currently perplexing conditions of the Rule of Law in those countries, then identify their particular characteristics.

The third observation: The narrative about the beginning of the modern legal system in Siam is that the legal reform was due to the colonial threats and its success was a key to save Siam's independence. This narrative, which has been formed in the early twentieth century, basically follows King Chulalongkorn's views shown in many of his writings in the 1890s and 1900s. In English scholarship, the same narrative has hardly changed since David Engel's seminal work in 1975.[4] This narrative in legal history closely observes the conventional historiography of Siam during King Chulalongkorn's era that has been challenged by historians in the past few decades.

Critical historiography has suggested that Siam was in fact semi-colonial (in various connotations of the term), and the reforms were to maintain Siam's imperial power by transforming the state into a modern one under the absolute monarchy. Modern technology of the state was adopted and employed effectively, such as the creation and management of territorial sovereignty, modern functional bureaucracy, railways and telegraph, and of course, the centralized and modernized legal system, to consolidate the power of Bangkok's rulers.

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[1] Tyrell Haberkorn, *In Plain Sight: Impunity and Human Rights in Thailand* (University of Wisconsin Press 2018).

[2] Nick Cheesman, *Opposing the Rule of Law: How Myanmar's Courts Make Law and Order* (Cambridge University Press 2015).

[3] Jothie Rajah, *Authoritarian Rule of Law: Legislation, Discourse and Legitimacy in Singapore* (Cambridge University Press 2012).

[4] David M. Engel, *Law and Kingship in Thailand During the Reign of King Chulalongkorn* (University of Michigan Center for Southeast Asian Studies 1975).

We cannot say that the critical narrative is merely ideological while the conventional one is based more on facts. They are the outcomes of different points of views and questions that historians employ. In some ways, we may say that they were two sides of the same coin. Yet, each have different implications conceptually and methodologically. For example, while the reform-saved-independence is a narrative of victimhood that regards the monarch as the savior, the reform-for-absolutism is a history of the traditional imperial power that reaffirmed its domination over its former vassals and subjects.

If the alternative narrative is taken more seriously, and the views of the Bangkok elite are taken more critically instead of taken for granted, the legal reform might look quite different, such as Tamara Loos has done in her book *Subject Siam*.[5] The two historiographies may also lead to quite different legacies of the legal reform under King Chulalongkorn. One suggests the establishment of a modern legal system and the Rule of Law, while the other points to the authoritarian legal system.

The fourth observation: Underlying the conventional historiography is the modernization theory. It suggests that the legal state or the Rule of Law in Siam was established since the reform, and, like other respects of the modernizing reform in the same period, it only needs further development to achieve the "normative" Rule of Law as in a developed country. This narrative usually, though not always, raises minimal, if at all, frictions between the modern system from the West and the pre-existing legal traditions in the creation and operation of the modern one. In other words, the legal transplantation was near perfect!

Even where the transplantation took place simply by translating foreign laws without understanding the concepts or history of the original ones, as Munin Pongsapan shows in his article on contract law, the law can function on the new soil without much problem. Indeed, it has been in place for more than a hundred years. The trust law, discussed meticulously in chapter 11 by Surutchada Reekie and Narun Popattanachai, was also entirely imported since there had been no such law in Siam before. It has served well for pragmatic purposes for more than a century, even though it might not fit well with the rest of the Thai legal system. The friction-free importation is hard to believe and even if it is true, these two articles do not explain why such was the case.

Perhaps the private laws are easier to be transplanted, I guess. Then, I assume that for public laws, which reflected the relations of power between the state and people, the transplant from the post-absolutism in Europe to the rising absolutist state in Siam must show serious frictions, particularly because the feudal systems in the two worlds were quite different, too. But Kanaphon Chanhom, in chapter 10, doubles down that the traditional Thai penal laws were similar and compatible with the European ones; thereby, the reform was merely a technical upgrade to rearrange, recategorize and systematize the old aged, disorganized laws by the European ones. Differences and frictions were minimal and mostly technical and were solved easily. Siam's first

[5] Tamara Loos, *Subject Siam: Family, Law, and Colonial Modernity in Thailand* (Cornell University Press 2005).

modern penal code of 1908 has been primarily in use until today with thorough reviews and minor revisions only a few times.

Does the near-perfect transplantation reflect Siam's exceptionalism? If true, how? It needs further explanations. Otherwise, should we raise doubts to the narrative of transplantation with minimal frictions and to their historiographical premises?

The narratives in chapter 12 on gender by Apinop Atipiboonsin and chapter 13 on administrative justice by Peter Leyland do not fit the legal modernization narrative. In the former, the modern family law awkwardly embraces monogamy while inheriting many traditional elements of gender inequality. Frictions are never resolved. In the latter, the discontinuous history of administrative justice results in multilayered laws with the written laws in appearance while customs, religions, history and politics are at work underneath it. Astonishingly, this arrangement allows the possibility of legal changes from below, unlike the conventional historiography in which the reform was entirely from above.

In social science, modernization theory has fallen out of fashion in the 1970s–80s because it failed to explain or solve the economic and political underdevelopment (poverty and authoritarianism, respectively). Somehow it survives rather well in the history of legal reform in Siam. Perhaps, legal underdevelopment (failure of the Rule of Law) has not been the case in Thailand. Or it is the contrary, that is, scholars do not consider the repeated, serious problems, including crimes by the state and impunity it enjoys, as symptoms of the failure of the legal system but as aberrations due to human errors and corruptions in the fine system.

The fifth and final observation: According to the conventional narrative, the success of the legal reform was a rather clean break from the pre-modern legal traditions. Buddhism and customs do not play significant roles in the modern system. Most studies of Thai legal history, therefore, do not pay much attention to the religious and cultural factors in the transplantation process or their legacies in the modern system, with a few exceptions, such as David and Jaruwan Engel's recent book *Tort, Custom, and Karma*.[6]

Every article on Part I of this book is refreshing as they revive the excitement in the pre-modern legal traditions including the roles of Buddhism and customs. Chris Baker and Pasuk Phongpaichit argue that the Thammasat in the Thai legal tradition was not as restrictive and in fact kings enacted new and lasting laws regularly. Eugénie Mérieau argues in chapter 6 that the monarchy's authority continues even today over the court, the constitutions, and the use of the laws. The legal influence of the monarchy is implied even in the royal proclamations at the beginning of the reign, according to Kongsajja Suwanapech in chapter 4. Besides, as several articles in Part III indicate, prominent Thai legal scholars today regard the monarchy as the supreme legal sovereign in Thai jurisprudence.

Khemthong Tonsakulrungruang, in chapter 5, also argues convincingly that the idea of Dharma (ธรรม; *tham*) still pervades throughout the modern legal system—in

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

the laws, in the interpretation and enforcement of them, in the mentality, the principles and practices of the judiciary, and in two of the most important concepts for the entire legal culture, Yutti-tham (ยุติธรรม, "justice") and Nititham (นิติธรรม, "Rule of Law"). If words matter, perhaps the Thai jurisprudence and legal system is not as secular as we assume since the Thai ideas of "justice" or "Rule of Law" are shaped by Buddhism rather than the Roman or Western laws. David Engel also reminds us of the cultural and regional diversity in Thailand's legal traditions.

One final note—the judiciary could be the institutional nexus in which the various forces in the history of the modern Thai legal system converge, such as modernity and traditions, both sides of the legal reform, and various trajectories of subsequent development. We could probably learn a lot about legal history by focusing on it. Unfortunately, there are only two chapters in TLH in that regard (chapter 8 on British judges in the post-reform period and chapter 17 on the crisis in the judiciary in 1991–92). The implications of both articles to the broader history are not less interesting, nonetheless, especially the article by Duncan McCargo that tries to bring us to look beyond the phenomenon of personality to the matter of principles and the system.

Last observation, though not about history: The majority of authors in TLH are from the younger generations of legal scholars. Such is a bold approach to an edited volume. Kudos to the two editors of the project. Judged by the quality of their works, the field has a bright future indeed.