

## Comments and Discussion

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### Custom, State Law, and the Problem of Selective Enforcement

After Satjipto Rahardjo's presentation, discussion by the conference participants explored several themes related to inclusion, exclusion, and empowerment in Southeast Asian societies. Akin Rabibhadana, in the following comments, distinguishes between laws that reinforce villagers' common-sense understandings of right and wrong and those that defy common sense. The latter are particularly troubling when selectively enforced on the basis of wealth, social status, and improper influence. Then, state law appears to be an arbitrary tool of an alien government bureaucracy, sometimes in an alliance with rich and powerful elements of Thai society.

Akin Rabibhadana observes that forces at work in contemporary Thai society can curtail arbitrary uses of power by the government. Newspapers, for example, have sometimes been effective in publicizing villagers' grievances, and the government has been quick to respond. Nongovernmental organizations (NGOs) recognize the power of the press and have become increasingly skillful in publicizing disputes with officials over issues such as environmental degradation. Thus, selective applications of the law by self-interested officials and their allies can be countered by the mass media, which reach vast numbers of citizens in the nation-states of the late 20th century.

#### AKIN RABIBHADANA

There are two types of law. One type consists of laws that make statements of the kind that people accept in general, such as, Don't kill people, Don't steal. But other types of laws are simply regulations coming from government departments. Government departments issue minutely detailed regulations that are very often opposed to the practices of the local people.

We have to distinguish between the two, because the first type of law follows the way people normally behave. The law merely confirms the behavior or the inclination of the people. But the second type of law goes against the behavior of the people. How? Whether enforced or not—and by whom—it depends on several things. First, those who have power, who have money, may give money to an official who applies regulations selectively. Let us say that loggers give a lot of money to an official who lets them

go into an area and cut trees. But if a farmer just carries out a small piece of wood, then he is arrested. That is selective application of the law.

Second, at certain times, NGOs can protest. They can make their voices heard, and the newspapers will print their message. The newspapers in Bangkok are quite influential. Even a military government will listen to certain big newspapers, such as *Thai Rath*. If news of what is happening up in the hills and how the NGOs are working with the hill people could be taken down to the big newspapers in Bangkok, and if the newspapers would publish it, that would bring out into the open the kinds of things that the officials have been doing—the selective enforcement of law—and they would stop doing those things. They would not dare do them. Even now, with an appointed government, when *Thai Rat* prints something, then the government stops doing it.

The problem is that the mass media are centralized and concerned only with middle-class or upper-middle-class interests. They are not interested in what is happening up in the hills or among the people generally. But the situation varies. When the military is in power, the newspapers do not publish what the NGOs are saying. But when there is a democratic government, the big newspapers in Bangkok are willing to publish quite a lot. In the northeast, one of the big people involved in the last government ran a salt mine that contaminated a whole river and caused a lot of problems to the farmers. The NGOs protested. Then the major newspapers took up the story and commented on it. If a military government is in power, it is very difficult for this kind of advocacy to make the voice of the people heard. A democratic government is more willing to listen.

But there are other points to consider. The appointed government, or, let us say, the military in power, is different nowadays from the military that was in power during Sarit's regime 20 or 30 years ago. The military rulers are listening much more to the voice of the people as it is reported in the mass media than they did before. Why? Because the government depends much more on the international arena. It depends on its image in the international sphere, too. In that sense, if the government is going to suppress all voices and refuse to listen to the people or the mass media, then Thailand will become just like Burma. It will have to pull itself out of the international arena. But it cannot. The behavior of the government is influenced by people inside the country, as well as by international forces, and those influences are not only political or legal but also economic, among other things.

## **Legal Rights and Social Inclusion**

To the Southeast Asian villager, laws may appear to disrupt traditional practices and to vest government officials and social elites with unprecedented powers. Moreover, as Satjipto Rahardjo suggested, the adversarial aspects of state law may seem uncongenial to those who live in cultures where overt conflicts are avoided.

Nonetheless, the conference participants did not necessarily believe that law was inevitably a disruptive and destructive force in Southeast Asian societies. Joel Handler, drawing on examples from Western cultures, suggests that law and legal rights can be used to achieve inclusion and to forge new conceptions of com-

munity among groups that were previously at odds. He asks whether this possibility might also exist in Southeast Asian societies as they grapple with seemingly intractable problems of ethnic pluralism. Although legal institutions may seem distant and inaccessible to many, the law can also play an important symbolic role and can educate a population to expect new forms of participation in the political process and new constraints on official actors. It is not necessary to wait until the poor and oppressed members of society have attained sufficient education to make use of their legal rights. The law can point the way and contribute to the educational process.

Myrna Feliciano agrees with Handler's point and discusses efforts in the Philippines to make laws more accessible to ordinary people. A variety of approaches have been used, including measures to assure widespread dissemination of official enactments, "legal literacy" programs, and the introduction of basic concepts of legal rights to children in the public schools.

Returning to the issue of law and inclusion, Franz von Benda-Beckmann addresses Satjipto Rahardjo's analysis of ways the Indonesian government has drawn on traditional images of community. He cautions that concepts of community tend to be context specific and that they take on very different meanings when removed from the social environments in which they emerged. One concept of community, based on village organization and practice in Java, has been romanticized, but there is no reason to believe that this concept would be relevant in other parts of Indonesia. Variation in concepts of community from one locality to the next thus raises problems for nation-states that attempt to build on "indigenous" ideas and practices to foster a sense of inclusion among citizens.

#### JOEL HANDLER

A distinction has been set up in most of the papers—most clearly this morning in talking about Malaysia—between rights and community: that is, that in the traditions of the Third World, the notion of community conflicts with individualist notions of rights. I would like to change the discussion and look at rights from a different perspective: as necessary for community, necessary for inclusion, necessary for the participation of equal and empowered but previously subordinated people. This conception of rights as necessary for citizenship stems from very basic epistemological ideas and also from the idea that we are talking in a very fundamental sense about values and ethics.

In everyday life, when we look about, we are always making categories. We are always sorting information in dichotomous or even more complicated terms: chair versus table, green versus red, hotel versus house, and so on. We also categorize when we look at people; we look at their characteristics and behaviors. They are men or women. They are young or old. They are of different ethnicity or different religions. They are Indians or Chinese or Malays. They are laborers, professionals, or what have you. These are all ways we have of distinguishing ourselves from others.

The history of racial and ethnic discrimination and of gender discrimination is filled with this. Men historically have distinguished themselves from women in order to validate what they consider to be their superior position. In the societies that I am most familiar with and in my own country, whites have distinguished themselves from people of color in order to do this, and we find such attempts to validate superiority throughout the world. We also categorize on the basis of what has been called civic religion. We distinguish those who are participating in society from those who are taking from society—recently in U.S. politics it is tax contributors versus people who receive public benefits. This distinction between the deserving poor and the undeserving poor is an old one. We create these categories in order to affirm our values and also to affirm or validate our power over other people and our status above them. We have not talked too much about power so far, but power relationships affect all of us. . . .

Our conception of rights is tied to the same process. We heard about how the hill tribes in Thailand are being excluded and discriminated against on the grounds that they are not really Thai. They do not really belong to the civic religion, or their loyalty is in doubt, and so on. This is a way of denying them citizenship.

The development of citizenship in Western societies is usually based on T. H. Marshall's conception, which he wrote about in the 1950s. Marshall distinguished between civil rights, political rights, and social rights. As an Englishman, he liked to assign concepts to centuries—the 18th century was the time of civil rights; the 19th century, political rights; and the 20th century, supposedly, social rights. They do not fit so neatly into those categories, but for our purposes civil rights would mean the basis of civil rights before the law: contracts, property rights, criminal law, and so forth. Political rights, as the name implies, would be the extension of the franchise, the rights to work, and so forth. Social rights would be the rights to employment, to a decent income, to a proper standard of living. Marshall's point, which I think is fundamental, is that you need all three to have full citizenship rights, to participate in the community. If you lack any one of them, then the others will also be undermined in your society.

The history of blacks in the United States illustrates Marshall's point well. As a result of the civil rights movements of the 1950s, 1960s, and early 1970s, blacks did gain a fair measure of political rights, along with civil rights. Black voting behavior is fairly good at times; blacks achieve political office; in some major cities they now even have a disproportionate share of civil service jobs. On the other hand, in the past two decades there has been a serious and steady deterioration of black social rights. We have strong discrimination in housing and employment and the spread of poverty. Although the black middle class is slowly increasing in size, black society in general is becoming seriously bifurcated, and poverty is growing in the underclass. These trends are undermining previous black progress. You see this in the spread of poverty, the spread of unemployment, the decline in life expectancy, the incidence of AIDS, and homicide—all the social ills—because, again, of severe discrimination.

We often hear in discussions of human rights, Third World countries say, "We are a developing society." Somehow the implication is that therefore we cannot afford, or it is not appropriate for us to have, full citizenship rights or human rights. Full rights are for developed countries. Well, developed countries do not have full citizenship rights or human rights, either. The United States has a very, very uneven record with citizenship rights. . . . We also see the tremendous growing pressures in Western Europe concerning the human rights and citizenship rights issues. It is a

never-ending problem of the human condition. All societies at all stages struggle over who is included in the community and who is excluded.

In making my final point, I would like to come back to Mehrun Siraj's eloquent and important statement [see her essay in Part II] about the difficulties of trying to eliminate gender discrimination—which, again, is a worldwide phenomenon. The conclusion that she draws is that we expect too much of the law—that the law is undermined by basic values, by lack of education, by ignorance, and by prejudice—so we need to have moral values education before the law can come along. Through social engineering, we do expect too much from the law in many situations. But, on the other hand, if we take up Frank Reynolds's initial point about the imaginative-symbolic content of law, we could also look at law, or the definition of law, as part of moral education, as part of the affirmation of rights. If we can look at suppressed, subordinate, excluded people and say, "You are or ought to be part of our community, part of our citizenry. You should be rights-bearing citizens," that, too, leads to moral education. So we have another ambiguity, another conflict: sometimes we expect too much of law, but other times we expect too little.

#### MYRNA FELICIANO

The basic question in talking about rights from the community perspective is, How do we close the gap in power relationships? Let us look at the problem in a Philippine context; I cannot speak for all other countries. In the Philippines we have 114 or so laws pertaining to the environment, but not all are implemented, or sometimes a law is only partially implemented. Why? The economists and sociologists say that the law was taken from Western models and therefore cannot be obeyed. But basically the question of national law versus local implementation is, Do the people understand what the issues are or what the problem is? This is where education comes in.

A law in our civil code says, Ignorance of the law excuses no one. This law was implemented during the regime of martial law; although laws had not been published, people were imprisoned for human rights activities. Because of this experience, when the people had a chance to have an input in making the constitution, we saw to the incorporation of a law specifying that laws should be published in an official gazette or in a newspaper of general circulation. We also saw to it that people have a right to information, government research and data, and access to public records. At the time, the government was saying that everything in the Philippines was going fine. On the other hand, we knew that people were suffering from poverty, but this was not publicized. The media were controlled by the government. So we also say that there should be legal transparency and public accountability. After elections, representatives were asked to publish their assets in the newspaper so that people would know who was rich before they entered public service.

That basic question still stands: Can the law be understood? We can say that the law is for the people, and therefore they should obey it. But, first, the problem of language comes in, given the more than 100 languages and dialects in the Philippines. Second, laws are drafted in a technical language. I think there is a legal mystique that lawyers perpetuate. Should we translate laws into lay language? There have been some legal literacy programs in Southeast Asia. Third, on another level, Professor Rahardjo talks about legal attitudes. In the Philippines we talk about the value system. There is a breakdown of traditional Filipino values, of respect, responsibility, and duties. A course in the elementary grades used to

teach ethics and correct conduct, and there has been discussion about whether a value system should be incorporated in the curriculum. Now, in fact, we have started putting it in our curriculum.

Mehrun Siraj talked about who development was for. We must ask: Was there planning? Are the laws unjust? How do we bring indigenous people into the discussion? How do we make law just? Should there be local, popular participation? How? Should there be public hearings or aspects of representative democracy? Should the approach be confrontational or consensual? Regarding Philippine labor relations, the law itself indicates strikes as one method to settle disputes. But according to researchers, this method is confrontational and is not the Asian way of trying to obtain consensus.

Another problem is whether to take customary law within the fold of national law. What methods could be utilized? Should education at the grass-roots level be the approach? Should we try publication? Should we try informal or indirect advocacy? With regard to gender, we have started sensitivity programs for males and females alike, because we find that women themselves denigrate their own sex when it comes to making decisions. Although we have an ombudsman in the Philippines so that we can make complaints against public officials, we also have NGOs that act as watchdogs and articulate the needs of disadvantaged groups. These are some of the processes we have undergone, which we could ponder and consider in our research.

FRANZ VON BENDA-BECKMANN

We should be very cautious with generalizations. We have to look into different arenas, we have to contextualize, we have to look at who is speaking—in which situation for which reasons. . . . [In Satjipto Rahardjo's essay we see] politicians and philosophers finding new symbolic legitimization for state structures that are different from the colonial state structures, which are historically maintained by linking them to a perhaps romanticized idea of village government in the largest, most densely populated island—Java. Village governments in other parts of Indonesia had slightly different structures. Although the Javanese model has been followed, that does not mean that other people in other contexts share the same ideas. . . .

Satjipto Rahardjo also wrote about the distinction between the "I" and the community being nonexistent, or hardly present, or present in a very different way than in European countries. This difference is related to a certain set of social relations called the community. Although Professor Supomo and other politicians and philosophers would extend these relationships to the new community of the state, it does not follow that people would accept the extension. They might say, "Our community is our village, but the next village is the next village," and make sharp distinctions between the two. With increasing internal migration, voluntary or policy directed, even within the village people would make definite distinctions between "us" and "them." "We" are the original villagers, but "they" come from a different island, so they are just tolerated guests.

We also see a pluralism of citizenship, in the sense that state law provides one set of criteria for citizenship, which denies the political relevance of ethnicity or perhaps religiosity, but that at different local levels these criteria are perhaps much less important. Citizenship, village citizenship, is defined according to different criteria in local or customary laws. I think that, as we have seen in our research, this also extends to religious definitions of community. If we stay in Ambon in an Islamic village and see what,

in their definition and in their interactions, is considered the *umma*, the community of believers, we find that the *umma* in the village is Islamic ethnic Ambonese. And Islamic immigrants in the same village do not really belong. And Islamic ethnic Ambonese in the next village do not belong. Of course, again, this is contextual, because the villagers also know that *umma* is a concept that transcends ethnic boundaries, that transcends national boundaries. But in daily social and economic interactions, where the idea of *umma* may be significant—as, for instance, in the distribution and collection of *zakat*—*umma* is a very localized, very specific concept. That does not mean that one view of these problems is wrong and one is right. It is simply that definitions and the ways such normative constructions are being used in social interaction may differ from arena to arena, from context to context.