

Introduction

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1.1 PAST, PRESENT AND FUTURE

The starting point for much research and speculation on Thai law is that the framing and understanding of contemporary issues is so much rooted in the past. This much should be true of legal history, or even for that matter of history in general, anywhere. As we see from the contributions to this volume, however, it seems truer of Thai law than one might expect, given the enormous changes over the last one and a half centuries.

But why exactly do we study legal history? Is it in order to gain a more complete understanding of law in the past, which contributes to our understanding of history and how we got where we are; or a more complete and intelligent understanding of law in the present? In the implicit view of the contributors to this volume, each of these reasons appears to be both adequate and compelling. Not many of our contributors can be described as pure historians, and in almost all cases their work displays as much interest in the present as it does in the past. At least they do not describe a static legal world, but rather a dynamic one where both change and continuity are essential parts of the stories they tell. While legal scholars, historians and political scientists may have slightly different reasons for studying legal history, the joining of these three modes of scholarship in this volume offers welcome triangulation and counterpoint. Importantly, the past is seen here as something of value and integrity in its own right, not just as a prelude to the present. In this vision, law and the past are both implicated in the *volksgeist*;¹ there is probably no clearer example of this than Thailand. The essays presented here have in general a Savigny-like assumption as to the relation between law and society, and the following words of Savigny seem very apt to a study of Thai legal history:

this organic connection of the law with the essence and character of a people manifests itself also over time, and here also it is to be compared to language. As with language, so too the law does not stand absolutely still for even an instant, but undergoes the same movement and evolution, is subject to the same law of internal necessity as every earlier development, therefore, the law grows forward with a people, constitutes itself out of them, and finally becomes extinct as a people lose their individuality.²

¹ Friedrich Karl von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Goldbach: Keip, 1997) 8–9, translated by E. Donald Elliott in ‘The Evolutionary Tradition in Jurisprudence’ (1985) 85 *Columbia Law Review* 38.

² *Ibid.*, 42. I am grateful to Munin Pongsapan for this reference.

The melding of past and present (and, by implication of course, the future too – some chapters – 11, for example, on the law of trusts – discuss or imply current or possible law-reform issues) is present throughout the volume. It is taken to a logical conclusion in Peter Leyland's Chapter 13 on administrative law, to which the label 'holographic' was attached during discussion at the symposium at Thammasat University³ in which the chapters were discussed. This adjective could also be applied to several other chapters. In Chapter 13 various tropes in administrative law are examined conceptually rather than chronologically, narrative dissolving almost entirely into conceptual analysis. A similar tendency is seen in Khemthong Tonsakulrungruang's Chapter 5 on the influence of Buddhism, and in Eugénie Mérieau's (Chapter 6) on the law of *lèse-majesté* through the ages. However, some other chapters either adopt a more conventionally diachronic approach, or seek to pinpoint a particular significant moment or series of moments in history. Examples are David Engel's Chapter 7 on the blood curse, in which one can see traditional Lanna history and culture captured within intense recent constitutional conflict in Bangkok; and Chapter 17, by Duncan McCargo, exploring an episode in executive-judiciary relations in the early 1990s. Even these chapters have an eye to both what went before and what came after such moments.

The complex interactions of law and society in different periods of history are present throughout this book, so that one could, in line with what is said above about Savigny, view it as being as much about law and society as it is about legal history, notwithstanding the technical tenor and concern of some of the material, especially that relating to the reform period set out in Part II. This law-and-society approach is another (I suggest inevitable) consequence of a multi-disciplinary approach to legal history.

Another axis of comparison that the various chapters indicate is that of the lens through which history and law are being viewed, and here geography and comparison become important. The chapter by Krisdakorn Wongwuthikun and Naporn Popattanachai (Chapter 14), for example, starts from the perspective of international law by looking at the standard of 'civilisation' in the nineteenth century, a matter of close concern to Siam, as it led to the treaties of extraterritoriality and then the civil-law reforms, which are discussed further in several of the other chapters.⁴ Certain chapters also see historical connections between Siam/Thailand and a broader geography encompassing, for example, Buddhist Southeast Asia (Chris Baker and Pasuk Phongpaichit, Chapter 3, and Khemthong Tonsakulrungruang, Chapter 5); Lanna (David Engel, Chapter 7); Britain (Adam Reekie and Surutchada Reekie, Chapter 8; and Surutchada Reekie and Narun Popattanachai, Chapter 11); Germany and Japan (Munin Pongsapan, Chapter 9); and France and Germany (Apinop Atipiboonsin, Chapter 12). As with many legal history stories in Southeast Asia, legal transplantation is a constant factor, and not just in respect of modernisation in the nineteenth to twentieth centuries, but even before that in the context of Buddhist law.⁵

³ Faculty of Law, Thammasat University, 27–8 September 2019.

⁴ See Chapters 7, 10, this volume; David M. Engel, *Law and Kingship in Thailand during the Reign of King Chulalongkorn* (Ann Arbor: University of Michigan Center for South and Southeast Asian Studies, 1975); M. B. Hooker, 'The "Europeanisation" of Siam's Law 1855–1908' in M. B. Hooker (ed.), *Laws of South-East Asia, vol 2* (Singapore: Butterworths, 1988), 531–607; A. J. Harding, 'The Eclipse of the Astrologers: King Mongkut, His Successors and the Reformation of the Thai Legal System', in S. Biddulph and P. Nicholson (eds.), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Leiden; Boston: Martinus Nijhoff Publishers, 2008).

⁵ Andrew Huxley (ed.), *Thai Law, Buddhist Law: Essays on the Legal History of Thailand, Laos and Burma* (Chiang Mai: White Orchid Press, 1996).

All this of course indicates that with regard to any given legal issue the present cannot be properly understood without reference to the past, and both cannot be understood without reference to society, culture and to those factors Montesquieu described, in relation to the highly resonant theme of legal transplantation, as having an environmental nature.⁶ If this seems an obvious point, it is probably even truer in Thailand than it might be elsewhere. The reason for this is that, as is heavily implicit or even explicit in many of these chapters, the gap between law and society often seems unusually wide, so that one struggles to map the legitimacy, reach and even sometimes the very definition, of law. Many of the chapters address this gap explicitly, explaining its nature and consequences over time.

1.2 THE STRUCTURE OF THE BOOK AND THE TYPOLOGIES OF LAW

Before proceeding further, we need to consider a question relevant to many chapters in this book, and also the structure of the book – what is the meaning of ‘legal’ in ‘legal history’? While the contributors do not appear to sense a need for exactitude, the reader might need this matter explained.

It will be rare these days to find scholars who define law solely by reference to *lex scripta* (written law), as opposed to *lex tradita* (traditional law). Legal pluralism has taught us that law has many sources, both in the epistemological sense (how and where do we find it and prove it – ‘written on the wall of the universe in characters the size of elephants’, or ‘in the government gazette in characters the size of ants’⁷?) and in the history-of-ideas sense (conceptually or metaphysically, where does it come from? From the unmoderated nature of the universe or the sovereignty of the ruler?). Although the state is the pre-eminent source of legislation, it cannot create out of nothing by sheer will a body of law in the wider sense of rules and institutions extending to a comprehensive conceptual apparatus for resolving disputes and ordering of all public and private relations. In almost all systems this dual nature of law is present. Indeed, in Chapters 3 and 5 in particular (but see also Chapters 15 and 16), the balance between the two conceptions of law is examined specifically and in some depth.

This only of course partly resolves the problem of what counts as ‘law/legal’, because we still need to know in relation to *lex tradita*, given that many things can be handed down to successive generations, what is counted as ‘lex’. There is no easy resolution of this, and in an important way the implicit approach taken in the chapters that follow is that it should not matter that there is a penumbra of ambiguity surrounding this question. We should be content for the purposes of legal history, in a society where custom and religion have meant so much, with an understanding that whatever a community as a whole (not just legislators, lawyers or judges) considers as normative, that is, as regulating and ordering society’s internal structures and relationships, can be considered as legal.⁸ For example, where Kongsatja Suwanapech in Chapter 4 discusses initial royal commands, it seems irrelevant to ask if these are law, because they shed so much light on legal imagination. We do not even need to call in aid an Austinian theory of law as a set of commands to appreciate this point. Traditionally, in Siam, royal commands of any kind were considered to be binding for the future as general rules, and are therefore more than entitled in the Thai context to be

⁶ C. Montesquieu, *The Spirit of Laws*, vol. 1 (New York: Nugent T tr., Colonial Press, 1899), 6 ff.

⁷ Harding, ‘The Eclipse of the Astrologers’, 314.

⁸ B. Z. Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Global to Local’ (2008) 30 *Sydney Law Review* 375, 392 ff.

called ‘law’, even though it is their ultimate theoretical impact, not their legal enforceability, that is significant.

The material presented in this book sees Thai legal history as falling naturally into three parts that are defined ultimately by the process of modernisation in which the law and the legal system were changed beyond recognition during the late nineteenth and early twentieth centuries, as discussed in detail in Part II. This period represents a kind of centre of gravity for most Thai legal-history studies, or a fulcrum balancing the ancient and the modern; and the reform period features extensively, one way or another, in discussion even in the other two Parts of the book that deal principally with what went before, and what came after, the reform period. Part I looks at the pre-modern period, with an emphasis on sources in the dual sense indicated above; Part II is mainly concerned with private law; while Part III looks at public law and the constitutional struggles of the post-reform period to date.

This division seems a conventional one, and was not disputed as a suitable arrangement by the chapter authors when they met in Bangkok in September 2019 to discuss the chapters in draft. However, almost all of the chapters also break easily the bounds that such a division seems to impose – again by treating past, present and future as essentially one. Eugénie Mérieau’s Chapter 6, for example, on the concept of *lèse-majesté*, deals historically with an idea that has both deep roots in the past and is very much for many people a defining element of Thai law as it is today. For Rawin Leelapatana (Chapter 15), the idea of *dhammaraj* is as relevant now as it was in the pre-modern period. More than this, the vector of reform, once instantiated more than 100 years ago, is still far from spent, as all of the chapters in Part II recognise as they move beyond the reform period into more recent times with discussion of long-term consequences and further reforms. Thus, the division of Thai legal history into these three parts should be taken as a convenient arrangement to facilitate clarity of exposition, not as a rigid, confining or comprehensively explanatory, distinction.

It may be helpful here, in order to understand more carefully the nature of this tripartite division of the material, and referring back to the problem of defining ‘law’, to recall Ugo Mattei’s creatively destructive attempt to demolish the concept of legal families by substituting three basic types of law that may be seen in different configurations in a given national legal system. These types, each based on the social activity giving rise to it, are traditional law, professional lawyers’ law and the law of politics.⁹ The three Parts of this volume correspond essentially to these three types, but it should be seen that all three are still present (as, one would argue, elsewhere) in the legal system of Thailand, quite consistently with Mattei’s analysis. If one can discern layers of law here, the layers do not always simply displace lower layers, but may still be seen, much as geological layers of rock may be seen in a canyon.¹⁰

This conception of legal typology explains the resistance of the material discussed in this volume to being parcelled easily into distinct periods. The legal families approach to analysing legal systems, much elaborated by earlier comparative law scholarship, in the case of legal systems like that of Thailand, would have us see Thailand as a ‘civil law’ country.¹¹ Such description defies historical analysis, since the civil law reforms were only finally completed less than a century ago (in 1935), as well as defying sociocultural analysis

⁹ Ugo Mattei, ‘Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems’ (1997) 45(1) *American Journal of Comparative Law* 5, 13 et seq.

¹⁰ Andrew Harding, ‘Comparative Law and Legal Transplantation in South East Asia: Making Sense of the “Nomic Din”’, ch. 9 of D. Nelken and J. Feest (eds.), *Adapting Legal Cultures* (Oxford: Hart Publishing, 2001) 208.

¹¹ For a detailed analysis of what this means in practice, see Prachoom Chomchai, *Gleanings of Thai Private Law in a Roman and Anglo-Saxon Setting* (Bangkok: Faculty of Law, Thammasat University, 2015).

based on analysis of legal culture, religion and politics.¹² This is very apparent, for example, in Rawin Leelapatana's Chapter 15 on Thai-style democracy. It is striking that even the chapters concerned with the civil law reforms do not confine themselves to purely technical lawyers' analysis of the issues, as one would expect with a system seem as falling entirely within a civil law 'family'; Munin Pongsapan's Chapter 9 on contract law is a narrow exception here, showing that even a purely civilian comparative discussion can be revealing about the technology of lawyers' reform processes.

1.3 PART I

Part I discusses, or at least begins the discussion, with traditional Siamese law that predates the period of modernisation, but with an eye also to the later and even contemporary relevance of traditional legal culture and conceptions of law. Three of the six chapters in this part (Chapters 3, 4 and 6) are concerned mainly with the Thai concept of kingship. The other two chapters relate to Buddhism (Chapter 5), and legal culture (Chapter 7). Thus, three critical and historic elements that enliven any discussion of law in Thailand (monarchy, religion and culture),¹³ are central to a consideration of the traditional law but also shed light on contemporary legal issues in the twenty-first century. These three traditional elements reappear throughout the book, even in those chapters (Chapters 15 by Rawin Leelapatana, 16 by Henning Glaser and 18 by Tyrell Haberkorn) concerned with the most recent events. These chapters discuss the sources of traditional authority and legitimacy in monarchy, religion and Thai culture.¹⁴

For the pre-modern period, the main problem is epistemological, and this is due to a lack of unarguable and helpful sources for the ascertainment of law, the notable exception to this being the Three Seals Code which dates from 1805. Chris Baker and Pasuk Phongpaichit's Chapter 3 is groundbreaking in overturning our long-standing, major assumptions about law in the pre-Bangkok era. These assumptions are based on Lingat's well known assertion that the major source of law was the *thammasat*, with royal legislation, the *rajasat*, being merely interstitial and resting on its consistency with the *thammasat* for its very validity, as if, in Prince Dhani Nivat's words, 'it can almost be said that in the past the *thammasat* was a constitution that placed limits on the king's legislative power'.¹⁵ Lingat drew a sharp distinction between Western and Eastern concepts of law, where the former depended on the will of the sovereign and the latter on the primacy of tradition. As we have seen, and contrary to the legal-families approach, this distinction reflects a broader understanding of the ambiguity surrounding sources of law more generally, across all societies. Chapter 3 argues that Lingat's theory lacks supporting evidence in respect both of the primacy of the *thammasat* and of the absence of royal promulgation of law. The evidence presented suggests that the idea of royal promulgation should be taken in light of the traditions of the Ayutthaya era, continued in the Bangkok era up to at least the mid-nineteenth century, under which the King gave judgment in matters disputed before him, or reviewed earlier decisions, and then

¹² Pridi Kasemsup, 'Reception of Law in Thailand – A Buddhist Society' in M. Chiba (ed.), *Asian Indigenous Law: In Interaction with Received Law* (Bangkok: KPI, 1986).

¹³ F. E. Reynolds, 'Dhamma in Dispute: The Interactions of Religion and Law in Thailand' (1994) 28 *Law and Society Review* 433.

¹⁴ See, further, C. Baker and Pasuk Phongpaichit (translated and edited), *The Palace Law of Ayutthaya and the Thammasat* (Ithaca, NY: Cornell Southeast Asia Program Publications, 2016).

¹⁵ Prince Dhani Nivat, 'Rueang borommarachaphisek' [On the coronation] (1946) 4 *Warasan haeng sayam samokhom chabap phasa thai* [*Journal of the Siam Society*] [Thai edition] 10–11.

gave instructions for them to be expressed as general laws in royal decrees. From (inter alia) the discovery of parts of the Three Seals Code in provincial locations, we can conclude that it was used throughout the kingdom and formed the basis for administration of justice until its replacement by the civil law reforms. It seems to have been a notable culmination of a traditional process of updating the laws at the beginning of a reign, incorporating those laws and decisions from the previous reign that were considered part of the general law. As the authors state: “The text [of the Three Seals Code] attempts to bridge the contradiction between the “natural” origin of the *thammasat*, and the royal origin of the laws, by stating that the kings studied the *thammasat*, and then adapted and elaborated its content into the royal law-making.’

Accordingly, by collecting, verifying and indexing the law, the Three Seals Code, in spite of its variegated sources, is actually good evidence of law going back at least to the sixteenth century, not just law as stated in 1805. Contrary to the nineteenth-century view of Siam’s legal system, observed by foreigners, as barbaric and chaotic – lacking in what were called ‘civilised’ standards (for which see Chapter 14) – earlier travellers to Siam in the seventeenth and eighteenth centuries seem to have had a favourable view of Siamese law. They praised the ordering of Siamese society as being very much based on written legal sources and the court system and the King for enforcing the law with reason and consistency. Perhaps what had changed by the nineteenth century was not Siam’s legal system but the Western legal systems by whose standards Siam’s was then assessed.

Enlarging on the theme of royal power in the context of high symbolism, Kongsatja Suwanapech’s Chapter 4 uses the initial royal commands at each King’s coronation through time as evidence of the changing nature and concept of monarchy. The wording of these commands indicates subtle changes of emphasis reflecting changes in society. Earlier commands provide evidence of ultimate royal ownership of all land; whereas later commands from King Mongkut onwards emphasise the sovereignty of the King as the people’s representative. The change is striking, and occurred over a short period of half a century between the Three Seals Code, designed to cure the pollution of the *thammasat* via corrupt human agency, and the embracing of positive law as the expression of human will through the exercise of royal prerogative. Critical in Kongsatja’s analysis is the Buddhist notion of the King as the *Mahasommutiraj* or Great Elected, which enabled King Mongkut to assert human power over the law. Interestingly enough, the author cites King Chulalongkorn’s brother, Prince Phichit Preechakorn’s, skilful blending of religion, custom and British utilitarian ideas (Jeremy Bentham was a close friend of Sir John Bowring,¹⁶ which might explain the connection) in justifying an extensive royal power to legislate. There have in fact only been two initial royal commands during the era of constitutional monarchy, those of King Bhumipol and recently King Vajiralongkorn. These, as one would expect, reflect the constitutional nature of the monarchy, which sits better with the idea of the King as the ‘Great Elected’ than it does with the King as subject to the *thammasat*.

The other main aspect of pre-modern law is of course Buddhism, which has impacted heavily as a formulant on Thai law throughout its development. In his Chapter 5, Khemthong Tonsakulrungruang discusses this impact from the earliest times up to the present century – another example of the holographic nature of the discussion of Thai legal history. From this diachronic and conceptual discussion we can see the development of a body of Buddhist law in Southeast Asia from the teachings of Buddha in the *Tipitaka*, the concept of *dhamma* as

¹⁶ Bowring was the author of the treaty of 1855, for which see, further, Chapter 14.

the ultimate truth of the universe, with *karma* as the enforcement of this truth; and the *vinaya* as the disciplinary code for monks.

Although the author accepts the finding in Chapter 3 that man-made law, the *rajasat*, had pre-eminence over the *dhamma* as a source of law in the Ayutthaya period, he nonetheless stresses the ultimate power, even up to the present day, of *dhamma* in providing a higher moral content for the positive law. The contribution of *vinaya* lies in providing a concept of fair procedure and legalism to the Buddhist tradition, but it is the *Thammasat* as a code of law that provides the basis of traditional law in Siam, as elsewhere in Southeast Asia. In the Siamese version, we find *dhamma*, *vinaya* and local custom amalgamated. It was this tradition that was found by King Rama I to have been corrupted or polluted by subsequent judgments. Being disturbed by an appeal case where the judges had granted a divorce to a faultful woman against her faultless husband, he ordered a restatement of the traditional law that became the Three Seals Code. It was this law that in turn was eclipsed by the civil law reforms later in that century. However, the author traces the complex and contested relationship between the received, secular, civil law legislated by the King and the traditional notion of law, so that the idea of *dhamma*-over-law remained and remains influential in Thai jurisprudence to this day. As Khemthong Tonsakulrungruang puts it succinctly, '[t]he Three Seals Code was replaced by modern legal codes, but the idea of *dhamma* as higher law was not'. Much the same can presumably also be said of the many constitutions since 1932 (see Chapters 15, 16 and 18).

What appears to emerge from this process is an unlikely but nonetheless successful phenomenon of syncretism, the origins of which can be traced back to the great monk-legislator King Mongkut, who laid the foundations of the reform process in the 1850s. As an example of this we can see the process of training judges, in which the values of *dhamma* are used to inculcate judicial virtues such as the absence of fear, favour, anger and ignorance. Ultimately, Thai jurisprudence by this process has filled the gap between the (necessary) positive law and (equally necessary) idea of substantive justice by using traditional legal/moral concepts.

As with the other chapters in Part I, Eugénie Mériéau's Chapter 6 on the law of *lèse-majesté* moves smoothly from the deeply traditional to the very modern. Indeed, this law is seen by many as a defining feature of Thai law, whether they argue for it or against it. This chapter yet again explores the persistence of tradition, while also noting the ways in which this law responded to foreign concepts as well as traditional ones during the reform period. This remarkable story has deep roots in Buddhist kingship and Thai legal consciousness reaching right up to the present day (see her discussion of recent Constitutional Court cases), and at almost every juncture marks off Thai from European law, not least in the context of constitutional struggles.

Finally in Part I, Chapter 7, by David Engel, deals with an unusual but illuminating topic: the blood-curse ritual performed by red-shirt protesters from Northern and Northeastern Thailand in Bangkok during the political disturbances of 2010. The origins of this ritual are found in Lanna culture and indicate a very different legal consciousness in those areas of Thailand from the metropolitan legal culture of Bangkok, where the blood-curse ritual was regarded with dismay and seen as typical of people from uncivilised regions of Thailand. As Engel shows, this ritual was an expression of outrage at the exclusion of those regions from the equal citizenship guaranteed by successive constitutions, and is based on traditional legal culture that is deeply rooted in the Lanna region, which had its own legal history originating in the code of King Mangraisat. The geographical divide in Thailand is also attributed to legal

history in that Bangkok's imposition on Lanna of the civil-law reforms under King Rama V was seen as another attempt to impose the power of Bangkok and obliterate the culture and autonomy of Lanna. The story of the blood curse shows also that Lanna legal culture is remarkably persistent in its view of justice, rights and wrongs, in spite of its being overwhelmed by the Thai state during the reform period. Justice in Lanna is seen as occurring between the parties to a dispute not as being given by a judge. It would be interesting to know how widespread this aspect of legal culture is in Thailand, and hopefully more attempts will be made in the future to look at law from a non-metropolitan viewpoint.

1.4 PART II

Part II examines the crucial half-century or so of legal reforms 1885–1935 inspired by King Chulalongkorn the Great (Rama V), with chapters devoted to various aspects of the creation of the modern legal system following the Bowring Treaty of 1855 with Britain and other treaties with Western states creating a regime of extraterritoriality, in which foreigners on Siamese soil were subject to their own rather than Siamese law.

In doing so, this Part examines the origins, dimensions and consequences of professional lawyers' law, and it is – as one might expect – the most legal-technical part of the discussion of Thai legal history. This part covers all major areas of law: contract law (Chapter 9 by Munin Pongsapan), criminal law (Chapter 10, by Kanaphon Chanhom), the law of trusts (Chapter 11 by Surutchada Reekie and Narun Popattanachai), family law (Chapter 12 by Apinop Atipiboonsin), and administrative law (Chapter 13 by Peter Leyland). Two chapters (Chapter 8 by Surutchada Reekie and Adam Reekie, and Chapter 14 by Krisdakorn Wongwuthikun and Naporn Popattanachai) are devoted to the influence on Siam of international law and foreign lawyers. The main emphasis in this part (Chapters 10 and 13 excepted) is on private law, and here the discussion turns from general issues of monarchy, religion and culture (these are never far away, however, as we have seen) to the more technical matters that are characteristic of law reform. These discussions of the reform period, as indicated above, also take the discussion right up to the present century. Chapter 11 on the law of trusts, for example, makes it clear that the problem of trusts is by no means resolved even in 2020, after about 160 years of discussion and development since the first trust was created in Siam in 1861.

Original research in the Supreme Court archives forms the basis for Chapter 8 by Surutchada Reekie and Adam Reekie on the role of British judges in the Siamese Supreme Court between 1910 and 1940. This chapter provides a counterpoint to the substantive law coverage of the other chapters in Part II by looking at an interesting aspect of the judicial branch.¹⁷ It is of course surprising, paradoxical even, to find British judges, trained in the common law, sitting in the apex court in a system in the process of converting from traditional to civil law, especially when Siam had recruited most of its legal advisers from civil law countries such as France, Belgium and Japan. Moreover, there was no treaty obligation to appoint British judges, as opposed to having European legal advisers sign off on decisions of the first instance and appeal courts, but not the Supreme Court. Yet, their presence was by no means simply diplomatic or ornamental, as they participated in well over 1,000 decisions over an extended period in which the Supreme Court (established in 1910) found its feet in the newly reformed legal system. The cases were not necessarily ones involving foreigners or

¹⁷ For a study of the judiciary in more recent times, see Chapter 17, this volume.

commercial interests, but represented rather the full range of legal issues and parties. They appear also to have decided more cases than other foreign judges. Over time, these British judges themselves became acclimatised to the civil law basis of the Siamese legal system, although there is some evidence of use of common-law reasoning techniques during the earlier part of this period. Taken with the chapter on the law of trusts (Chapter 11), this chapter gives some credence to the idea that the modern Thai legal system owes at least something to the common law as well as to the civil law, despite Part II's predominant emphasis on civil law.

Chapter 9 by Munin Pongsapan is a study of the drafting of contract provisions on non-performance and damages in the Thai Civil and Commercial Code (TCCC). This drafting process compels us to reflect on the process of legal transplantation in Siam and more generally. While transplant theory focuses on the conflict between existing and foreign law, the study shows that a bare transplantation of legal text, where there is in effect no previous equivalent law, is unproblematical in itself: in pre-reform Siam, contractual obligations were seen as moral rather than legally enforceable, and there being no distinction between contractual and other civil or criminal wrongs, there was in effect no commercial law. The problem lies rather in the interpretation of the provisions adopted, having regard to their historical origins and theory within the 'donee' system, which gives rise to the potentially difficult second stage of transplantation – the transplantation of theory. The study finds that, in the drafting process, insufficient attention was paid to proper use of comparative law and legal history, as opposed to the use of felicitous language in drafting the provisions.

After seventeen years of drafting provisions of the TCCC based on the French Code civil, the French model was in effect replaced by (what was erroneously considered to be) the model adopted in the Japanese Civil Code, thought to be a virtual copy of the German *Bürgerliches Gesetzbuch*. The main Siamese draftsman, in reviewing civil law models, mistakenly assumed the identical nature of the two codes, whereas in fact the Japanese code was drawn from different sources. Of the five members of the drafting committee, three were English-educated Thai lawyers, and the other two were French lawyers, so that none of the committee was actually expert in German law, English sources being in use to ascertain what German law said. Accordingly, while the study supports Watson's idea of the ease of transplantation, it also finds that, contrary to Watson's idea, a systematic knowledge of the relevant law is essential to avoid uncertainty arising from the transplant.¹⁸

Similar issues of sourcing of law reform arose with criminal law, discussed by Kanaphon Chanhom in Chapter 10. The chapter provides a brief survey of pre-reform Siamese criminal law. It explains how Siamese custom was integrated with the imported *thammasat*. There was, however, no clear distinction between civil and criminal law, a distinction that was introduced in the reform process, which began with the drafting of the Penal Code of 1908, regarded as not just successful but as a template for other areas of law reform. Extraterritoriality was introduced primarily for criminal law purposes, so that criminal law reform was seen by King Chulalongkorn as an important basis for Siam's further development and reform. As with the TCCC, a mixed cast of characters, Siamese, Japanese and European, sat on the drafting committees, but it was the French lawyer Padoux, relying on Italian and Japanese precedents as well as existing customs and the Indian Penal Code (there is more evidence of common law influence here) who eventually pulled it all together. The codification of criminal law went hand in hand with judicial efforts; thus, the defence of insanity was

¹⁸ See, for example, Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 *Law Quarterly Review* 79, 140.

carefully provided for in the Code, while the defence of mistake was inserted into the law by judicial decision. The chapter concludes with discussion of further criminal law reforms undertaken during the mid-twentieth century. In 1956, the Thai Criminal Code replaced the Penal Code, making some changes to defences but retaining most of the principles established in the 1908 Code. The process of reforming criminal law was thereby completed and seen generally as a success, attributed to wise leadership, good drafting and flexible adjustment by judges and scholars.

The topic explored by Surutchada Reekie and Narun Popattanachai in Chapter 11 is wholly unexpected in the history of a civil law country – the law of trusts. The chapter not only details a surprisingly long history of the equitable trust under common law going back to 1861, but finishes with speculation about the future development of this area in light of current legislative process. One of the interesting points about this chapter is that it illustrates extremely well the hybrid rather than purely civilian origins of Thai law. The trust was originally introduced to deal with the estates of deceased British residents following the Bowring Treaty of 1855. During the reform period, English law could be used to fill gaps in the existing law. When the TCCC was finally given effect in 1925, section 1686 prohibited the trust. From then until 2007, when this section was amended to allow specific cases of the trust to be provided by law, trusts were not recognised, but of course this did not affect existing trusts, of which there must have been many; the authors record forty cases going to the Supreme Court on trusts during this period. Finally in the present century, Thailand is moving towards wider recognition of the economic and social value of the trust as an instrument for asset management.

Apart from this, the story of the trust is a fascinating case for those interested in legal transplants. The incorporation of the trust in the Thai civil-law system has not been easy, and one is drawn to think of Teubner's 'legal irritant'¹⁹ as a way of describing this process. Teubner views the legal irritant as provoking gradual accommodation as the host system adjusts to the irritant. Chapter 11 describes just such a process of accommodation taking place over a period of 160 years and even by now not nearly completed.

One would expect that family law, being the area of law most related to social values and cultural issues, would be the most difficult area to change. Apinop Atipiboonsin's Chapter 12 on this subject fulfils this expectation and is directed principally to the issue of gender relations in family law. As with other chapters in this Part, this chapter traces the issues leading to reform, the reform process, and the ongoing effects of the reform debate and process.

Ever since the divorce case of *Amdaeng Pom* leading to the Three Seals Code in 1805, the position and status of women has been an important issue in Thai law. Ultimately, at the very end of the reform process, the issue of marriage had to be dealt with, the introduction of legal monogamy being effected in the final part of the reforms enacted in 1935. A knot of ambiguities is presented in this chapter. In ancient times, Thai women were amongst few in Asia living in a matrilineal, matrifocal society. Yet, their rights were very limited. The legal position of women has been remarkably improved since 1935; but on the other hand, the actual social impacts of this improvement have been less than might be imagined, and the law still contains some issues of inequality, such as with bride price and adultery.

¹⁹ G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences' (1998) 61 *Modern Law Review* 11.

Peter Leyland's Chapter 13 on administrative justice adopts a genealogical approach, finding the origins of the current system in the past and defining a line connecting the two. The essential condition for administrative justice was of course a centralised administrative state, and so the inquiry begins in the late nineteenth century when modern Thailand with its powerful centralised bureaucracy was in the process of being defined geographically and its administrative structure reformed. Apart from the structural development of administrative law, Leyland discusses the increasingly important and related area of judicial review of administrative actions, starting with the emplacement of the administrative court system in 1997. The number of cases in this system now numbers over 10,000 per year, and this system is reckoned to be a success story amongst the 1997 reforms. In particular, the external element (always present in this volume) in the form of the concepts of legitimate expectation and proportionality, deriving from German law, is discussed. The chapter draws attention to the increasing use of middle-class/activist-driven environmental litigation in more recent times. Although, as Leyland points out, the intention in reforming administrative law in the reform period was not to create a liberal-democratic order but rather a strong centralised state, the outcome has been to create some effective remedies against administrative acts. As with other topics, we see here a complex layering of law where the legal logic takes on, to some extent, a life of its own.

In Chapter 14, Krisdakorn Wongwuthikun and Naporn Popattanachai draw the lens wider to look at the reform process in the context of international law and the 'standard of civilisation'. This chapter discusses the unequal treaties Siam concluded with foreign states from 1855, embodying the principle of extraterritoriality. This concept is discussed further in Chapter 8 and forms background to, and explanation of, the reform process and how it was designed to slough off the poor reputation of Siamese law.

As Thongchai Winichakul has explained, the encounter with international law was a highly disruptive moment in the development of the Thai state.²⁰ International law necessitated many internal changes and a humbling acceptance of a lower, semi-colonised, status within its structure of rules. This chapter traces the origins and the concept of civilised status as formulated by international lawyers and applied to Siam between 1855 and 1938, by which time all the unequal treaties had been revoked and Thailand was able to take its place as fully equal to other states, a status it had gradually been attaining since the late nineteenth century. By confronting international law and its institutions in a positive way, Thailand was able ultimately to counter the threat of colonisation which lurked behind Bowring's insistence on the treaty of 1855. One interesting feature of this story is that Siam has not always been treated as uncivilised; indeed before the nineteenth century it had been treated on an equal basis. This changed when Western powers asserted their power in the region, basing the concept of civilisation squarely on the characteristics of a Christian state, thereby serving their own interests.

The importance of international law in the shaping of Thai law as we know it now can hardly be overstated. As we have seen in other chapters, it not only sparked the reform process but continues to exercise some influence over the development of law in modern Thailand.

1.5 PART III

Part III of the book examines the seemingly perennial problem of constitutional struggle from the fall of the absolute monarchy in 1932 to the drafting of the 2017 Constitution. In so doing,

²⁰ Thongchai Winichakul, *Siam Mapped: A History of the Geo-Body of a Nation* (Honolulu: University of Hawai'i Press, 1997), ch. 1.

this Part examines the underlying political nature of law, or the foundations of law, in Thailand.

In this period, the attempt by King Chulalongkorn to separate the reform of private law from public law went awry as Thailand experimented with as many as twenty constitutions from 1932, in a state of seemingly permanent provisional constitutionalism punctured by several military coups, the latest being in 2006 and 2014. The cyclical nature of constitutionalism in Thailand again refers back to legal culture, the role of the monarchy, and also the rather newer element of militarism, first present in the coup of 1932 but continually present over the following nine decades. Following the latest coup in 2014, only in 2019 were elections held and a civilian government restored under the 2017 Constitution.

In the view of the authors presented here, the contemporary condition of law in Thailand is incomprehensible without an understanding of the legal history set out in Parts I and II, and amounts to a crisis of legality that is still being played out as we move to Part III.

The theme of constitutional struggle was introduced in David Engel's Chapter 7 on the blood-curse ritual. Two chapters opening Part III of the book, Rawin Leelapatana's Chapter 15 and Henning Glaser's Chapter 16 analyse in depth the nature and history of this conflict over the nature of democracy and constitutionalism in the constitutional (post-1932) period. Chapter 15 deals with the pre-1997 period, while Chapter 16 deals with the post-1997 period. The authors present an historic struggle between two conceptions of constitutionalism, based on what Rawin Leelapatana calls the *dhammaraja* tradition of Thai-style democracy that looks to royal power and traditional political values, and a liberal-democratic conception of the constitution. Rawin Leelapatana traces the contradictory development of these two conceptions leading to what he terms a 'binary-star' system in which neither conception has been able to escape fully the gravitational pull of the other, explaining the apparently eternal cycle of coups and democratic constitutions (referred to as constitutional *samsara*) that commenced with the coup against the absolute monarchy in 1932. The narrative presents an almost schizophrenic constitutional system, with constitutional, civilian government giving way periodically to military government established by overthrow of the established constitution. The contribution of this chapter to an understanding of legal history (and indeed legal present) lies in its explanation of Thai-style democracy. This is likened to 'Weber's patrimonialism, in that it is a product of a traditional belief in a stratified authority rather than in individualism and humanism', linking, in King Vajiravudh's formulation, nation, religion and monarchy in an official state ideology. Tracing the persistent conflict between two conceptions of the constitution (never itself, interestingly, part of the official ideology), the chapter concludes that

coups and martial law were convenient means for the traditional elites and the military to parry and resolve what they deemed to be threats to the *Thai-ness* tradition. However, and secondly, the more the military strove to prolong the TSD [Thai-style democracy], the more it had to struggle against mass demands for constitutionalism and liberalisation and risked further losing their legitimacy. This development forced the conservative camp after 1973 to refrain from maintaining a permanent military rule, and instead to accommodate, or more precisely, to co-opt a greater space for liberalism.

Taking up the story with the 'people's constitution' of 1997, Henning Glaser's chapter, searching for basic structure in Thai constitutionalism, discerns a different approach to constitutionalism in the post-1997 period compared to the earlier periods discussed in the previous chapter. This period, he argues, is

characterised by a new form of constitutionalism in which the Constitution figures as a more *legally* conceived rule-book with much more reach and impact than before, while the polity is ultimately still governed by unwritten normative references. This is the constitutional era of the new DRKH [democratic regime with the King as head of state], whose fate reflects that of the political system at large.

The 1997 Constitution introduced ‘a stunning range of new or significantly upgraded institutions as watchdog bodies over electoral politics’, replacing ‘the formerly predominant political mode of constitutionalism’ with a form of ‘tight legalism’ in which the ‘Constitution and the concretizing organic laws created a differentiated regime of highly rigid anti-electoral regulations reinforced by an apparatus of draconic sanctions’. The basic structure is found in the DRKH, rendered immovable by the Constitution’s own provisions. In due course, the rising conflict of ‘colour-coded [red-yellow] politics’ following Thaksin Shinawatra’s assumption of office as Prime Minister was seen as setting electoral politics against the DRKH, precipitating yet further actions and reactions resulting in the coups of 2006 and 2014 and their corresponding constitutions, interim and permanent. As a result, constitutional developments since 2006 have bound the system more firmly to its DRKH basic structure, a cultural constitution still at odds (as during previous periods, discussed in Chapter 15) with the legalism implicit in constitutional government.

Duncan McCargo in Chapter 17 tells the interesting story of a signal attempt to preserve judicial independence in the 1990s. Judicial independence was compromised when the government attempted to interfere with the process of high-level judicial appointments. Although the judicial crisis was ultimately resolved, it was also partly a result of division over personalities within the judiciary. McCargo warns:

The 1991–92 judicial crisis was partly about interference in the Thai judiciary by politicians. While today’s judges have extracted from the story the simple moral that politicians must not be allowed to meddle in judicial appointments and decisions, there was much more to the crisis than that. The story was also about a prominent judge [Pramarn Chansue] who became in effect a politician in his own right, polarising the judiciary from within.

This chapter offers a unique window into the underlying realities of relations and processes within the judiciary and between the judiciary and executive powers. Such divisions within the judiciary are not unusual, and obviously undermine public trust and judicial standing. Happily, despite the complexity of the issues this episode had to deal with, the eventual outcome is positive for judicial independence, and the episode is an important one in Thai legal history.

A question about Thai law that is frequently raised is why there have been so many coups d’état and why nobody is ever punished for an act of what looks very much like treason. Tyrell Haberkorn’s Chapter 18 on coup-amnesty provisions provides part of the explanation, and is another example (like Kongsatja Suwanapech’s discussion of initial royal commands in Chapter 4) of how examination of texts repeated over time (albeit with some changes) can be revealing. In respect of the twelve coups that have occurred since 1932, [i]mpunity has been secured in eight coups by stand-alone laws, in two coups by articles in post-coup constitutions, in one coup by both a constitutional article and a stand-alone law, and in only one case with no special legal measure promulgated. Each amnesty article or law has retroactively legalised the coup in question and protected the coup-makers from possible

prosecution or other sanction'. Such amnesty provisions have proved in an important sense determinative of Thai constitutionalism and how we should conceive it.

In offering a hopeful conclusion that accountability for a military coup can be conceived in future, Tyrell Haberkorn illustrates the fact that, if long-standing legal history is to be changed, we need to trace it, understand it and see how it can be reversed.

1.6 CONCLUSION

A study of legal history recognises above all that there is no neat dividing line between past, present and future. In the imagination of the authors, the present appears to be almost an arbitrary dividing line between the past and the future. They recognise, as they peer into the future, that law has always in the past been a site of struggle, whether over constitutionalism, freedom of expression, property and economic justice, the rule of law, or military/royal prerogative, and it will no doubt continue to be so. Whereas in the past these struggles were within the drafting group and the government, we now see that they take place in the public forum of politics where we see different visions being set out.

In illuminating the past, the chapters in this book have outlined the shape and the trajectory of law in Thailand, as evidenced in many fields of endeavour. The authors recognise too that there are many questions still to be answered before a complete picture of Thai legal history can be presented. Despite encompassing eighteen chapters, this volume does not cover all areas of law, and there is without doubt much more to be said about the areas that are covered. It is to be hoped that this wide-ranging collection offers groundwork for the future, both in scholarship and in law reform. Each chapter implicitly or explicitly suggests that there is more we need to know, and that different perspectives may be brought to bear on the subject than those evident in this volume.

It is fervently to be hoped that scholars of several disciplines, not just legal scholars, will contribute to an understanding of Thai legal history, which we hope at least to have outlined usefully in our endeavours in putting together this volume. The comparative youth of most of our contributors offers strong expectation of an outstanding future for this subject. In discussing Thai legal history, we hope also to have contributed to the understanding of legal history across Asia and beyond.