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“Addressing Instability in Thailand’s Deep South with Law and Development”

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## Addressing Instability in Thailand’s Deep South with Law and Development

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*This paper approaches the longstanding instability in the southernmost part of Thailand, where a vast majority of the population is Muslim from a Law and Development perspective. The instability has resulted from a highly complicated conflict, of which religious and ethnic differences, political conflict, and even organized crime are generally claimed as the main causes. The present paper directs its attention to a sense of resentment among the Muslim population, which has arisen from enduring economic disparities and injustice they have suffered at the hands of the authorities. Addressing these two closely related issues certainly does not lead to a resolution of the conflict, but tackling them in an interrelated manner at least clarifies one of its significant aspects and contributes in a meaningful way to the ongoing search for a sustainable peace in Thailand’s southernmost region. The law and development approach we have adopted for this study attempts to show how the existing regulatory design (laws, legal frameworks, institutions) has been implemented – that is, how it has been complied with in terms of the generation of action programs and strategies (in the form of security operations and development initiatives), and to what effect. Our findings suggest that it is the quality of the implementation – the capacity and political will of the Thai state – that represents a major condition for the failure of the law and development implementation in its Deep South.*

Keywords: Instability, Insurgency, Unrest, Law and Development, General Theory of Law and Development, Thailand’s Deep South

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## 1. Introduction

Insurgency has been and still is an ongoing saga of Thailand’s internal security issue since the end of the Second World War. In the aftermath of a series of insurgent incidents in 2004, including armed robbery of military weapons from the Fourth Development Battalion of the Royal Thai Army, coupled with subsequent arson attacks on 20 schools in the provinces of *Songkhla*, *Pattani*, *Yala*, and *Narathiwat*, these southernmost provinces of Thailand have entered a new phase of conflict, violence, and crime, which has inevitably resulted in political and economic instability.<sup>1</sup> The unrest in Thailand’s Deep South is a highly sensitive and complicated problem, of which religious and ethnic differences, political conflict, and even organized crime are generally claimed as the main causes.<sup>2</sup> However, in this paper, our main aim is not to examine the root causes of insurgency in Thailand, but we propose to investigate the role of law for development in the southernmost part of the country where the vast majority of the population is Muslim.

Insurgency in the Deep South of Thailand is characterized by protracted low intensity violence, but it has taken a heavy toll on the civilian population. According to Deep South Watch (DSW),<sup>3</sup> during the 15-year period from 2004 to 2019, 6,938 people were killed and 13,540 injured as a result of the unrest.<sup>4</sup> In addition, a breakdown of the insurgent attacks from 2004 to 2018 is also shown in Table 1;<sup>5</sup> a few general observations about this report are that although the number of the insurgent attacks had fallen from a peak of 2,410 incidents in 2007 to 518 incidents in 2017, it bounced back a bit in 2018 with an increase of 30 incidents. Notwithstanding, it should be noted that the number of the insurgent attacks in recent years, including two bombs at the Big C shopping mall in

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<sup>1</sup> Ukrist Pathmanand, *Thaksin’s Achilles’ Heel: The Failure of Hawkish Approaches in the Thai South*, 38 *Critical Asian Studies*, no. 1 (2006), 73-93.

<sup>2</sup> Marc Askew, *Fighting with Ghosts: Querying Thailand’s “Southern Fire”*, 32 *Contemporary Southeast Asia*, no. 2 (2010), 117-155.

<sup>3</sup> Deep South Watch is “a platform organization based at Prince of Songkla University Pattani Campus in southern Thailand, working as a lattice or decentralized network with an emphasis on creating a ‘common space’ or ‘platform’ in mobilization of peace in areas of violent conflict, in this case, the Deep South provinces of Thailand or Patani.” Available at: <<https://deepsouthwatch.org/th/about>>, accessed July 1, 2019.

<sup>4</sup> DSW, *Database: Cumulative Incidents January 2004 – January 2019* (Patani, February 7, 2019), available at: <<https://dswdatabase.info/>>, accessed July 1, 2019.

<sup>5</sup> *Ibid.*

*Pattani* which injured 61 people in 2017,<sup>6</sup> or the shooting attacks on a Buddhist monastery which costed the lives of two monks and wounded two others,<sup>7</sup> and the bombing attacks at one of the checkpoints in *Pattani* which killed two soldiers and two armed civilian volunteers<sup>8</sup> (both events happened in 2019), seems to suggest that clear targets are identified. This also indicates that the current situation remains worrisome.

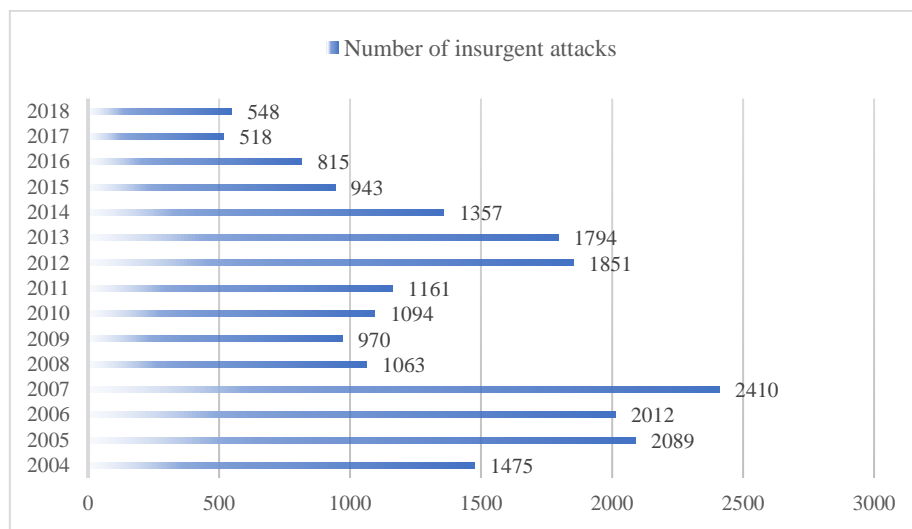


Table 1: A Breakdown of the Insurgent Attacks in Thailand’s Southernmost Part from 2004 to 2018

In its classic definition, and often concerning communist movements, “insurgency” can be explained as “a struggle to control a contested political space, between a state (or group of states or occupying powers), and one or more popularly based, non-state challengers.”<sup>9</sup> In the Thai case, Askew indicates that insurgency is based on three components: “(1) ideology or legitimacy claims supporting insurgent action; (2) an

<sup>6</sup> Maximillian Morch, *The Slow Burning Insurgency in Thailand’s Deep South: While the Overall Situation Has Improved, a Recent Attack Should Motivate Both Sides to Return to the Discussion Table* (February 6, 2018), available at: <<https://thediplomat.com/2018/02/the-slow-burning-insurgency-in-thailands-deep-south/>>, accessed July 1, 2019.

<sup>7</sup> Caleb Quinley, *Attacks in Thailand’s Deep South: Who, Why and What’s Next? Burst of Violence Deepens Concerns the Situation in the Conflict-Hit Region Could Deteriorate in the Coming Months* (Bangkok, January 21, 2019), available at: <<https://www.aljazeera.com/news/2019/01/attacks-thailand-deep-south-190120233033431.html>>, accessed July 1, 2019.

<sup>8</sup> Surapan Boonthanom and Panu Wongcha-um, *Four Killed in Attacks in Thailand as Anger Burns* (Yala, July 24, 2019), available at: <<https://www.reuters.com/article/us-thailand-insurgent/four-killed-in-attacks-in-thailand-as-anger-burns-idUSKCN1UJOY3>>, accessed July 25, 2019.

<sup>9</sup> David Kilcullen, *Counter-Insurgency Redux*, 48 *Survival*, no. 4 (2006), 111-130.

organization (however loose and decentred); and (3) a guerrilla-style campaign to contest state authority, together with the use of violence and intimidation to gain control over people and territory.”<sup>10</sup> Based on the strain-based theories, it is argued that “strains” or “grievances” are a major cause of political violence. Some terrorism researchers even argued that terrorism exists as a result of a grievance. According to Agnew, typical grievances are associated with the following key aspects: violation of human rights, serious threats to religious belief and/or ethnic identity, as well as political and economic discrimination based on race or religion.<sup>11</sup>

Interestingly, terrorism scholarship has shifted much of its focus on the root cause of terrorism to poor economic development in the wake of the September 11 attacks in the United States. While in some jurisdictions, there has been no ample evidence to suggest that poor economic development constitutes a grievance leading to political violence, in Thailand, the findings of the third peace survey conducted in 2017 indicate that 49.8 percent of the respondents (1,583 samples) believed that poverty and unemployment are some important factors fueling the unrest.<sup>12</sup> Indeed, after the *Thaksin* administration (2001-2006) was overthrown in a military coup,<sup>13</sup> successive governments exploited the late King Bhumibol Adulyadej’s advice, which emphasizes on the “understanding, reaching out, and developing” approach as the Thai version of the “Winning Hearts and Minds” strategy.<sup>14</sup> In accord with the aforesaid approach, billions have been spent on addressing instability through prevention and suppression of insurgent attacks, and on development programs. The following table shows annual government spending on addressing instability in the southernmost part of Thailand from 2004 to 2018.

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<sup>10</sup> Askew (2010), *supra* note 2, p. 119.

<sup>11</sup> Robert Agnew, *A General Strain Theory of Terrorism*, 14 *Theoretical Criminology*, no. 2 (2010), 131-153.

<sup>12</sup> Office of Peace and Governance, King Prajadhipok's Institute (KPI), *The Third Peace Survey* (Bangkok: KPI, 2017).

<sup>13</sup> We argue that the former Prime Minister Thaksin’s mismanagement of the situations had contributed significantly to the outburst of violence since 2004; we discuss the issue in more detail in Section 2.

<sup>14</sup> Askew (2010), *supra* note 2.

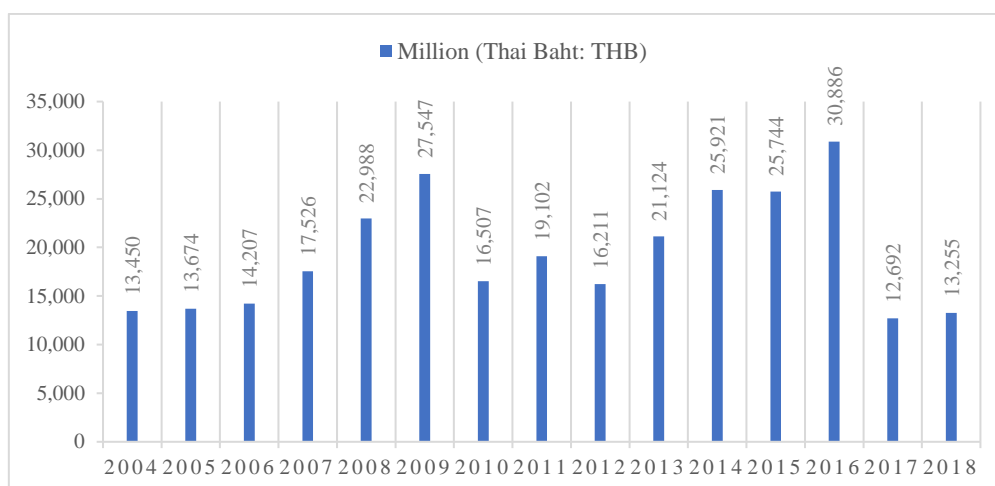


Table 2: Annual Government Spending on Addressing Instability in Thailand’s Deep South from 2004 to 2018  
(Source: Budget Bureau of Thailand)

Apparently, addressing chronic economic disparities and injustice in an interrelated manner at least clarifies the nature of the conflict and hopefully contributes in a meaningful way to the ongoing search for a sustainable peace in this troubled part of Thailand. Though Thailand’s public administration is very legalistic, the extent to which the role of law has created a positive impact on development and prosperity of the country’s southernmost provinces remains underexamined.

To investigate the impact of law on development, this paper examines the way in which law, legal frameworks and law enforcement institutions can contribute to the restoration of local stability and economic regeneration. The paper contributes theoretically by adopting a law and development framework, particularly the one developed by Professor Yong-Shik Lee. Whereas adopting a law and development approach for the analysis of the instability in Thailand’s Deep South provides different perspectives on the problem that go beyond the Winning Hearts and Minds approach, it is also expected that this carries wider implications for some other insurgent-prone jurisdictions. How this approach is relevant to the specific conflict situation in the southernmost provinces of Thailand will be made clear in the later parts of the paper.

The structure of our paper is as follows. In Section 2, the conflict in the southern border provinces is discussed and analyzed, which traces its historical roots and how it has evolved, identifying its causes, and depicting the current scene of resumed violence. This

analysis particularly takes cognizance of the fact that, “the southern border provinces are among the poorer regions of Thailand and are substantially less economically developed than other parts of the South.”<sup>15</sup> This section will provide some fundamental understanding about the conflict in Thailand’s Deep South. Section 3 discusses the emergence and importance of law and development. It focuses on the three moments of law and development, which form the basis for why law and development approach is relevant to the conflict in southern Thailand. Section 4 presents Yong-Shik Lee’s general theory of law and development, which provides the theoretical notion of law, legal frameworks and institutions (LFIs) – what Lee refers to as the “inalienable amalgam of the constituent concepts in law and development”<sup>16</sup> while the possible impacts of LFIs on development in the southernmost provinces of Thailand are assessed in Section 5.

## 2. The Conflict and Violence in Thailand’s Deep South

Geographically, southernmost provinces of Thailand include *Songkla*, *Satun*, *Yala*, *Pattani*, and *Narathiwat*. All these provinces except *Pattani* share borders with Malaysia (Figure 1). Although *Songkla* and *Satun* are also affected from time to time by insurgent attacks, *Yala*, *Pattani*, and *Narathiwat* are evidently the most insurgency-prone area among the southernmost provinces;<sup>17</sup> they are therefore the main focus of attention in our paper. Demographically, *Yala*, *Pattani*, and *Narathiwat* have a combined population of 2,048,441 people, as of 2018.<sup>18</sup> Muslim communities reside in many parts of Thailand but the absolute majority of them live in the country’s southernmost part; among them, Sunni Muslims are the largest group. It is generally assumed that the Islamic faith was first introduced in the Malay Peninsula, this region of Thailand included, by Arab merchants during the thirteenth century.<sup>19</sup>

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<sup>15</sup> Anders Engvall and Magnus Andersson, *The Dynamics of Conflict in Southern Thailand*, 13 *Asian Economic Papers*, no. 3 (2014), 169-189.

<sup>16</sup> Yong-Shik Lee, *Call for a New Analytical Model for Law and Development*, 8 *Law and Development Review*, no. 1 (2015), 1-67, p. 2.

<sup>17</sup> Judging by the scale of insurgency and the frequency of insurgent incidents.

<sup>18</sup> Bureau of Registration Administration, *Official Statistics Registration Systems* (Bangkok, May 2019), available at: <<http://stat.bora.dopa.go.th/stat/statnew/statMenu/newStat/sumyear.php>>, accessed July, 1, 2019.

<sup>19</sup> Joseph Chinyong Liow, *The Security Situation in Southern Thailand: Toward an Understanding of Domestic and International Dimensions*, 27 *Studies in Conflict and Terrorism*, no. 6 (2004), 531-548.



Figure 1: A Map of Southernmost Provinces of Thailand  
(Source: www.independent.co.uk)

## 2.1 Historical Roots of the Conflict and a New Phase of Violence

Historically, *Pattani*, *Yala*, *Narathiwat*, and *Satun* were once a self-governing state known as “*Pattani Raya*” or “*Greater Pattani*”.<sup>20</sup> The people of *Pattani* apparently embraced Malay-Muslim cultures which dominated the Malay Peninsula during that time. Recorded history indicates that *Greater Pattani* had become a vassal state of *Siam* (Thailand) since the *Sukhothai* era (1238-1438), from then on undergoing periods of self-determination that alternated with Thai suzerainty.<sup>21</sup> In the wake of the conquest of the *Malacca* sultanate – the main kingdom in the Malay Peninsula – by Portugal in 1511, the rulers of *Greater Pattani* were concerned that *Siam* would pursue a policy of expansionism towards its southern territories; therefore, they reluctantly decided to establish a relationship with *Siam* through a tributary system with a view to retaining its

<sup>20</sup> Wan Kadir Che Man, *Muslim Separatism: The Moros of Southern Philippines and the Malays of Southern Thailand* (Oxford : Oxford University Press, 1990), p. 32.

<sup>21</sup> Nantawan Haemindra, *The Problem of the Thai-Muslims in the Four Southern Provinces of Thailand (Part One)*, 7 *Journal of Southeast Asian Studies*, no. 2 (1976), 197-225.



sovereignty. This type of relationship was maintained for quite some time. However, *Pattani* was ready to rebel against *Siam* whenever the latter became weaker.

It was not until the reign of King Rama I of *Siam* became the monarch that *Siam* began extensive annexation of *Pattani Raya* in 1785 to subdue the *Pattani* rebels.<sup>22</sup> Governance of *Pattani* after the incorporation was under the divine right of the *Siamese* kings. The ruling elite loyal to *Siam* were basically appointed by the king to administer the Greater *Pattani* region on behalf of the central bureaucracy while the local leaders were simply sidelined. Nonetheless, this unsurprisingly brought about uprisings against the *Siamese* government from the late 1700s until the early 1800s.<sup>23</sup> With the effect of the Anglo-Siamese treaties signed in 1904 and 1909, the Greater *Pattani* was completely incorporated into the Thai state.<sup>24</sup> There followed a strategy to utilize education and language to integrate the Malay-Muslim population into Thai society. For this purpose, the Primary Education Act B.E. 2464 (1921) was enacted to make it compulsory education for the Malay children to study in Thai-styled schools; in the meantime, the Islamic schools known as “*Pondok*” were closed.<sup>25</sup>

The Thai state continued assimilating the Malay-Muslim population into Thai society even after the end of the absolute monarchy in 1932. When Field Marshal *Phibulsongkram* came to power (1938-1944 and 1948-1957), “[h]e developed Thailand’s fledgling democracy through authoritarian ‘policies of state’ (*Rathaniyom*), which were aimed at bringing all the peoples in the kingdom in line with a highly limited civic-totalistic order that was to generate a uniform democratic national-culture of civility.”<sup>26</sup> The Field Marshal also introduced a change of the kingdom’s name from *Siam* to Thailand to assert a sense of Thainess while the Malay-Muslim population had been forced to identify themselves as Thai-Muslim people ever since. Even worse, the

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<sup>22</sup> Ibid.

<sup>23</sup> Che Man (1990), *supra* note 20.

<sup>24</sup> Surin Pitsuwan, *Islam and Malay Nationalism: A Case Study of the Malay-Muslims of Southern Thailand* (Bangkok: Thai Khadi Research Institute, 1985).

<sup>25</sup> David Brown, *From Peripheral Communities to Ethnic Nations*, 61 *Pacific Affairs*, no. 1 (1988), 51-77.

<sup>26</sup> Nathan Porath, *Civic Activism Continued through Other Means: Terror-Violence in the South of Thailand*, 22 *Terrorism and Political Violence*, no. 4 (2010), 581-600, p. 588.

population in the former Greater *Pattani* region was also been compelled to abandon Muslim dress and to cease following sharia law.<sup>27</sup>

Over the course of the Second World War, the *Phibulsongkram* administration lent enthusiastic support to the Japanese troops while the Malays in *Pattani* rooted for the British army which was fighting the war in the Malay Peninsula.<sup>28</sup> Precisely for these reasons, the former *Pattani* elites organized a lobby against the Thai government after the Japanese were eventually defeated. They urged the British authorities to assist with liberation of their ethnic group from Thailand: the reasons were provided as follows: “...*Patani* is really a Malay country, formerly ruled by Malay rajas for generations, but has been a Siam dependency only since about fifty years ago. Now the allied nations ought to help the return of this country to the Malays, so that they can have it united with other Malay countries in the peninsula.”<sup>29</sup> However, the British’s initiative to restore the former Greater *Pattani* was abandoned as a result of the necessity of geopolitical reasons and the pressure from the new political and military powerhouse after the war – the United States.<sup>30</sup>

To their utter despair, the *Pattani* elites had resorted to forming a more complex form of organization to rebel against the Thai ruling elite. The first separatist organization – *Gabungan Melayu Patani Raya* or the Association of Malays of Greater *Patani* – (GAMPAR) was therefore set up in the late 1940s.<sup>31</sup> Later, many insurgent groups were subsequently formed from the 1960s onwards to galvanize support from the indigenous peoples and to use violence against Thai authorities.<sup>32</sup> In the late 1970s, the study of the National Security Council (NSC) came to a conclusion on a number of issues around the

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<sup>27</sup> Ibid.

<sup>28</sup> Clive Christie, *A Modern History of Southeast Asia: Decolonization, Nationalism and Separatism* (New York: I.B. Tauris Publisher, 1996).

<sup>29</sup> *Ibid.*, p. 180.

<sup>30</sup> H.E. Wilson, “Imperialism and Islam: The Impact of Modernization on the Malay Muslims of South Thailand,” in Andrew D.W. Forbes (ed.), *The Muslims of Thailand: Politics of the Malay - Speaking South* (Bihar: Centre of Southeast Asian Studies, 1989).

<sup>31</sup> Omar Farouk, “The Historical and Transnational Dimensions of Malay-Muslim Separatism in Southern Thailand,” in Joo-Jock, Lim and Vani S (eds.), *Armed Separatism in Southeast Asia* (Singapore: Pinter Publisher, 1991).

<sup>32</sup> Aurel Croissant, *Muslim Insurgency, Political Violence, and Democracy in Thailand*, 19 *Terrorism and Political Violence*, no. 1 (2007), 1-18.

government’s approach to the southern violence. It highlighted a lack of a clear strategy and a lack of unity among various government agencies as the main problems of the failure to tackle insurgency.<sup>33</sup> In the early 1980s, when the late General *Prem Tinsulanond* (1920-2019) took office, the new agencies of then – the Southern Border Provinces Administrative Centre (SBPAC), and the Civilian-Police-Military Command-43 (CPM-43) – were created to deal with the issues in the area.<sup>34</sup>

Under the *Prem* administration (1980-1988), a number of progressive changes were introduced to the region ranging from a clear endorsement of rights and freedoms of the Malay-Muslim population, the granting of a general amnesty for the insurgents, and the formulation and implementation of southernmost provinces’ economic development plan. After the democratically elected government of Prime Minister *Chuan Leekpai* (Democratic Party) had taken office in 1992, the Muslims in southernmost provinces were endowed with unprecedented opportunities for political participation (e.g. running for a seat in Parliament). The re-opening of *Pondok* which offered a curriculum combining the Thai and Islamic education could be witnessed throughout the 1980s to 1990s.<sup>35</sup> All of these contributed to the decrease in insurgent incidents; hence, this region became relatively peaceful during the late 1990s.

The renewed outbreak of hostilities, as noted, was triggered in 2004, the time when *Thaksin Shinawatra* was the country’s premier. It all began with the January 4<sup>th</sup> incident when the Fourth Development Battalion in *Cho-airong* district, *Narathiwat* was raided by a group of armed insurgents who later successfully plundered hundreds of firearms. *Thaksin* responded to the situation by dubbing the armed raiders “petty bandits,” and proclaimed that they would be under arrest within seven days. There followed the declaration of martial law in the province to pave the way for law enforcement personnel to suppress the perpetrators.<sup>36</sup> The situation deteriorated as a direct consequence of

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<sup>33</sup> Matt Wheeler, *People’s Patron or Patronizing the People? The Southern Border Provinces Administrative Centre in Perspective*, 32 *Contemporary Southeast Asia*, no. 2 (2010), 208-233.

<sup>34</sup> *Ibid.*

<sup>35</sup> Srisompob Jitpiromrsi and Duncan McCargo, *A Ministry for the South: New Governance Proposals for Thailand’s Southern Region*, 30 *Contemporary Southeast Asia*, no. 3 (2008), 403-428.

<sup>36</sup> Pathmanand (2006), *supra* note 1.

martial law being imposed. A few weeks later the insurgents carried out arson attacks on twenty schools. They also started guerrilla warfare in defiance of the Thai government, resulting in heavy casualties on both sides but mainly the insurgents. On April 28<sup>th</sup>, the situation escalated after the government ordered a military crackdown on the alleged offenders who attacked police checkpoints in many areas in *Pattani* earlier on. A group of soldiers besieged *Krue Se* mosque where the alleged offenders were holed up. There followed several hours of an exchange of gunfire before the soldiers stormed in the mosque. The incident left 113 people dead; most of them were the insurgents (Figure 2).



Figure 2: The *Krue Se* Mosque Massacre  
(Source: [www.bangkokpost.com](http://www.bangkokpost.com))

Even after the *Krue Se* massacre, *Thaksin* continued his hawkish approach towards the southern conflict. Having won a landslide victory in the 2005 general election, a harsher policy was introduced, which consisted in classifying districts in the three southernmost provinces (*Yala*, *Pattani*, and *Narathiwat*) into green, orange, and red zones, and terminating the allocation of the government budget in the districts labeled as disloyal “red” zones.<sup>37</sup> This undoubtedly created serious impacts upon the lives of the many in the area. During the *Thaksin* era, the southern conflict showed no sign of improvement.

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<sup>37</sup> *Ibid.*

When it comes to the analysis of the “Southern Fire”, many commentators have associated such a problem with Islamic fundamentalism and argued that insurgency in Thailand’s Deep South was driven by ethno-religious issues.<sup>38</sup> While our analysis, in part, resonates with such a view, we also argue that political grievances have predominantly occupied most parts of the conflict. Evidently, the onset of the conflict was directly related to *Siam*’s political and military aggrandizement towards the former *Pattani* state. It had been fueled by the nationalistic approach seeking to absorb the Malays into Thai society. Even though threats to group identity and religious faith were taken to the forefront of the conflict, they were primarily aimed at being the driving force to galvanize local support in the operation of resistance to the Thai state. With the benefit of hindsight, we conclude that the pre-2004 conflict in Thailand’s southernmost provinces was the product of ethno-political grievances. From 2004 onwards, however, it is worth noting that the strategic maneuver of the insurgents’ struggle for independence has changed. As Askew indicates, “many Malay Muslims of the borderland now accepted that they were “*Siamese*” [Thai-Muslims], highlighting that “Malayness” was no longer a sufficient ground for galvanizing resistance to the Thai state.”<sup>39</sup>

In the *Thaksin* era, a new phase of insurgent violence was arguably due to the government’s mismanagement, including the disbanding of the SBPAC and the implementation of confrontational policies. As suggested, the arrival of the SBPAC, together with the execution of development programs as a new approach to the Southern conflict, contributed substantially to peace and quiet in the region between the 1990s to the early 2000s. With regard to the SBPAC, although it was criticized by the technocratic elite as being a “paper tiger” given its structure and remit to deal with the southern insurgency, the indigenous peoples perceived it as being helpful in creating a political platform for the Thai-Muslim community.<sup>40</sup> However, the dissolution of the SBPAC was argued to be purely a matter of political ambition; that is, *Thaksin* was keen to destroy

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<sup>38</sup> See, for instance, Jitpiromsri Srisompob and Sobhonvasu Panyasak, *Unpacking Thailand’s Southern Conflict: The Poverty of Structural Explanations*, 38 *Critical Asian Studies*, no. 1 (2006), 95-117.

<sup>39</sup> Askew (2010), *supra* note 2, p. 128.

<sup>40</sup> Wheeler (2010), *supra* note 33.

what was generally perceived as a remarkable achievement of the old political network while endeavoring to introduce a new approach to the conflict as a legacy of his own.<sup>41</sup>

In addition, the implementation of confrontational policies to suppress insurgency clearly contributed substantially to the renewed outbreak of insurgency in the region. Not only the struggles between the Thai authorities and the insurgent groups, but also draconian measures to cut government spending in the so called disloyal red zones (districts) that led the whole conflict fell into what Kilcullen termed a circle of the “Accidental Guerrilla Syndrome”<sup>42</sup> – a situation where a “no-go zone” is established; that is, whenever the authority attempts to intervene, the paramilitary group in the area will then exploit such intervention as a condition to galvanize support from ordinary people to rebel against the authority as a result. To address instability, *Thaksin* had later ordered the founding of the National Reconciliation Commission (NRC). However, we argue that the now defunct NRC was merely a concession to criticisms of *Thaksin*’s mismanagement, as his double-dealing approach to the recommendations of the NRC reflected that he was not really sincere to improve the whole situation.<sup>43</sup>

Having been overthrown by a military coup in 2006, *Thaksin*, who has been living in exile, has later admitted through an exclusive interview that he regretted using the “iron fist” in solving the Southern Fire.<sup>44</sup> Nonetheless, his legacy of the southern conflict was the complete opposite of what he wished, the consequences of the mismanagement have apparently turned the southernmost part rich in natural resources into one of the most impoverished areas of the country.<sup>45</sup> In addition, as Askew points out, drug rings and other criminal gangs also took advantage of a state of disorder in this troubled part of Thailand for their vested interest,<sup>46</sup> adding more complexity to the already sensitive

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<sup>41</sup> Duncan McCargo, *Thaksin and the Resurgence of Violence in the Thai South: Network Monarchy Strikes Back?*, 38 *Critical Asian Studies*, no. 1 (2006), 39-71.

<sup>42</sup> David Kilcullen, *The Accidental Guerilla: Fighting Small Wars in the Midst of a Big One* (Oxford: Oxford University Press, 2009).

<sup>43</sup> Duncan McCargo, *Thailand's National Reconciliation Commission: A Flawed Response to the Southern Conflict*, 22 *Global Change, Peace & Security*, no. 1 (2010), 75-91.

<sup>44</sup> See, Tom Plate, *Conversations with Thaksin: From Exile to Deliverance: Thailand's Populist Tycoon Tells His Story* (Singapore: KWF Printing Ltd, 2011).

<sup>45</sup> Engvall and Andersson (2014), *supra* note 15.

<sup>46</sup> Askew (2010), *supra* note 2.

issue. We therefore argue that the southern conflict which was claimed to be of ethno-political orientation has shifted to focus on sociopolitical issues. Even though a number of social and economic development programs have been run in the region for almost two decades, and some of them have helped improve the situation, they do not put a stop to insurgency as can be seen from the attacks recently.

As has been indicated, we propose to address the conflict situation in the southernmost part of Thailand from a law and development perspective. The conflict has been looked at from many different fields, for instance sociology, criminology, and political violence, and what we have achieved so far is a fragmented picture of the situation. None of these disciplines has given us an overall view of Thailand's Deep South like the one we have obtained from the law and development perspective, which tries to see the situation in terms of how efforts to redress economic disparities and grievances are going in an interrelated manner. It is thus imperative that before we discuss and analyze the situation, we gain a fundamental understanding of this perspective. The next section therefore provides an overview of law and development, which will then be followed by a presentation of the law and development theory as formulated by Yong-Shik Lee. The theory lays a conceptual grounding for our framework of analysis.

### 3. Overview of Law and Development

The idea behind law and development can be traced back at least to Max Weber.<sup>47</sup> Even without invoking such an earlier root, we can say that law and development has a relatively longstanding disciplinary basis. Launched more than half a century – though as “more of an adjunct to development policy institutions than an autonomous academic field”<sup>48</sup> – law and development has now become, as Trubek characterizes it,

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<sup>47</sup> In Weber’s view, the operation of a capitalist market must be supported by a high level of predictability and calculability for actors in the market. This is the product of what Weber called “legal rationality”. See Tor Krevor, “The Rule of Law and the Rise of Capitalism”, in Christopher May and Adam Winchester (eds.), *Handbook on the Rule of Law* (Cheltenham: Edward Elgar, 2018).

<sup>48</sup> David M. Trubek, *Law and Development: Forty Years after ‘Scholars in Self-Estrangement’*, 66 *University of Toronto Law Journal*, No. 3 (2016), 301-329.

“alive and well” as a field of study.<sup>49</sup> However, its academic status has admittedly been far from well established. There is very little clarity as to what this field of study encompasses.<sup>50</sup> According to Tamanaha, law and development is better not seen as a field since its work is “more aptly described as an agglomeration of projects advanced by motivated actors and supported by external funding.”<sup>51</sup> It is therefore imperative that we make clear how law and development can serve as an approach for this study.

In doing this, we propose to provide a brief account of the evolution of law and development, which is generally understood as comprising three stages or “moments,” and assess its relevance to the subject matter of this study. The three-stage evolution of law and development has been well documented. Despite continuing contention over its disciplinary status, we will, following Trubek, designate law and development as a field of study. Trubek sees this academic field as getting started in the 1960s with the start of support for legal reform projects by international development agencies. Though its evolutionary path came to a halt in the late 1970s, the field experienced a revival in the late 1980s and early 1990s, before entering its current stage at the beginning of the twenty-first century.<sup>52</sup> He calls the three different stages moments, though the timeline of the evolutionary path has been differently identified in some of his other articles. This is a difference in minor detail.<sup>53</sup> The main contour of the timeline is unmistakably clear – the period starting roughly from the 1950s to the present.

We will not address the numerous issues being considered or debated in law and development, such as the question why a country like China has achieved impressive

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<sup>49</sup> *Ibid.*

<sup>50</sup> Mariana Mota Prado, *What is Law and Development?*, 11 *Revista Argentina de Teoria Juridica*, No. 1 (2010), 1-20.

<sup>51</sup> Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 *Cornell International Law Journal* (2011), 209-247, p. 220.

<sup>52</sup> Trubek has clearly presented the three different stages of the development of the field in Parts II, III and IV of his *Law and Development: Forty Years after ‘Scholars in the Self-Estrangement’*. Trubek (2016), *supra* note 48.

<sup>53</sup> David M. Trubek and Alvaro Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006). In this book, the “First Moment” was the period between the 1950s and 1960s; the “Second Moment” started in the 1980s; and the “Third Moment”, which appeared in the following decade, has continued to the present time.



economic growth despite its dismal rule of law situation<sup>54</sup> in this brief account of the evolutionary path of law and development. We will only roughly examine the three moments along this path, and the associated ideas and reform programs. The three moments have been known, respectively, as the “law and development movement,” the “good governance programs,” and the “rule of law and development,” among other designations.<sup>55</sup>

### 3.1 The Law and Development Movement

Known as the law and development movement, the first moment focused on the role of the state in managing the economy and transforming traditional societies. Conceived in this way, law simply served as a tool for economic management and a catalyst for social change.<sup>56</sup> The 1950s and 1960s witnessed rapid decolonization, from which an academic interest in the development of the newly independent states emerged. Also known as “modernization theory,” the academic interest focused on their economic and political development, with legal development forming an integral aspect of both.<sup>57</sup> According to Lawrence Friedman, the idea is that “a more highly developed legal system leads to a more highly developed economy and polity.”<sup>58</sup>

The idea led to the initiation of law reform projects, whose number was still small, and which targeted only a few parts of the world. The law and development movement thus took shape on the basis of the assumption that “transplanting law from advanced countries was a shortcut to legal modernization.”<sup>59</sup> This involved transplanting both legal institutions and codes into the developing countries, as well as establishing and/or reforming legal education and professional organizations in accordance with the western models.

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<sup>54</sup> Tamanaha (2011), *supra* note 51.

<sup>55</sup> *Ibid.*

<sup>56</sup> Trubek and Santos (2006), *supra* note 53.

<sup>57</sup> Tamanaha (2011), *supra* note 51.

<sup>58</sup> Lawrence M. Friedman, *On Legal Development*, 24 Rutgers Law Review, No. 11 (1969), p. 58.

<sup>59</sup> Trubek (2016), *supra* note 48, p. 5

The project came to a failure, for which various explanations have been offered.<sup>60</sup> However, it should be noted in this connection that the law and development movement already collapsed at the formative stage of its development as a field; that is, it had no chance to further develop. According to Trubek, “[t]he reason the field declined in the 1970s was that it lost the support of the development agencies before it could build a sustainable base in the academy.”<sup>61</sup> Moreover, in academia itself, the movement could not take hold as an academic field, given its tentative and experimental quality that did not fit the current models of authoritative legal scholarship. There was also an absence of an academic career path for this field in U.S. law schools, and students’ interest remained limited and critical, especially at the tumultuous time of students’ opposition to U.S. intervention abroad.<sup>62</sup>

### 3.2 The Good Governance Programs

The late 1980s ushered in new ideas, which moved law back to the center of development policy making. Under the influence of the neoliberal theory, what is called “the project of markets” came to the fore. Economists who stressed the importance of markets to development came to “rediscover” the significance of institutions;<sup>63</sup> this, in turn, led them to focus on legal institutions needed both to facilitate the operation of markets and limit state intervention in the economy.<sup>64</sup>

For many who promoted the project of the markets, growth would be best achieved if the state stayed out of the economy except to the extent that – through law – it now provided the institutions needed for the functioning of the

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<sup>60</sup> See *ibid.* Also, Trubek’s explanation for the collapse of the law and development paradigm, David M. Trubek, “The ‘Rule of Law’ in Development Assistance: Past, Present, and Future”, in Trubek and Santos, *supra* note 53.

<sup>61</sup> Trubek (2016), *supra* note 48, p. 8.

<sup>62</sup> *Ibid.*

<sup>63</sup> The “rediscovery” of law by economists coincided with the emergence of the New Institutional Economics (NIE), which incorporates a theory of institutions – laws, rules, customs, and norms – into economics. See the relevance of NIE to law and development in Kevin E. Davis and Michael J. Trebilcock, *The Relationship between Law and Development: Optimists and Skeptics*, 56 *The American Journal of Comparative Law*, No. 4 (2008), 895-946.

<sup>64</sup> Trubek (2016), *supra* note 48.

market. These include guarantees for property rights, enforcement of contract, protection against arbitrary use of government power and excessive regulation. All this was packaged as “good governance” and deemed important both to stimulate domestic growth and attract foreign investment.<sup>65</sup>

During this second moment, the idea was clearly for law to foster private transactions. The focus was naturally on private law that would protect property, facilitate contractual exchanges, impose strict limits on state intervention, and ensure equal treatment for foreign capital. Most notably, this was the moment of a massive increase in both the size and scope of investment and projects to support legal reform: law and development indeed became a “big business.”

The projects of this new second moment in law and development covered all aspects of the legal system from courts and legislatures to bar associations and law schools with reform of the judiciary the top priority. The size and scope of these projects dwarfed the investments in the L&D in the first moment.<sup>66</sup>

Many developing countries actually suffered from the neoliberal policy prescriptions they had to adopt as a condition for receiving development assistance. On the intellectual front, critiques of the neoliberal perspective on development resulted in new ideas about development, particularly the recognition of the limits of the markets and the expansion of the definition of development. Markets could fail and compensatory intervention was required, and development came to mean more than economic growth.<sup>67</sup> Such new ideas partly provided a basis for the third moment in law and development, which will be dealt with below.

### 3.3 The Rule of Law and Development

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<sup>65</sup> Trubek (2006), *supra* note 60, p. 85.

<sup>66</sup> Trubek (2016), *supra* note 48, p. 12.

<sup>67</sup> Trubek and Santos (2006), *supra* note 53.

The third moment in law and development may be regarded as still being in its formative stage,<sup>68</sup> especially in the sense that it has not yet been well established as an academic field. However, though the law and development scholarship is still bound up with a mix of different ideas for the role of law in development, the change of our view and understanding about law as well as development in the 1990s has significantly transformed the scholarship, making it more relevant to the problems and needs of today’s world other than just economic growth. This practically involves going “beyond the instrumental view of law as a tool for development and treat a functioning legal system with basic guarantees as an element of what should properly be called ‘development’.”<sup>69</sup>

The change leading to our current understanding of development is of particular importance. A highly influential view has been presented by Amartya Sen, whose conception of development shifts our focus from economic growth to “freedom.”<sup>70</sup> Prado has concisely summarized Sen’s conception of development as follows:

[Proceeding from the] idea that wealth is not an end in itself but a means to realize more choices and therefore more freedom, Sen elaborates on the distinction between the ends and means of development. Thus, economic growth is important because it allows us to live the lives we have a reason to value, which is the end of development. But wealth alone does not guarantee that we will be free. Indeed, there is a series of instrumental freedoms that directly or indirectly allow people to choose to live as they would like. According to Sen, development as freedom requires political freedoms, economic facilities, social opportunities, transparency guarantees, and protective security.<sup>71</sup>

In roughly the same period of time, the legal scholarship also underwent very significant change. In particular, there was a move away from “one-size-fits-all” recipes based upon

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<sup>68</sup> *Ibid.*

<sup>69</sup> Trubek (2016), *supra* note 48, p. 18.

<sup>70</sup> Amartya Sen, *Development as Freedom* (New York: Anchor Books, 1999).

<sup>71</sup> Prado (2010), *supra* note 50, pp. 5-6.

western models. This led to the broadening of the scope of the legal scholarship to include “socio-legal studies” of all kinds and the “law-and-society” idea – the idea that “law must be studied in its social context using tools of the social sciences.”<sup>72</sup> This change in the legal scholarship also significantly resulted in a shift in the role of law, which had traditionally been a tool for attaining some other goal, such as economic growth, individual liberty, or social protection. As a result of this important change, law has become an integral part of the new conception of development – this is what we call “law as development.”<sup>73</sup>

Clearly, the new law and development doctrine accepts the role of law not only in creating and protecting markets but also in limiting market excess, as well as providing social benefits and relief to the poor. Of course, the neoliberal project of private law and development would still be supported, but the new law and development vision also seeks to develop appropriate regulatory frameworks for market behavior.<sup>74</sup> Most significantly, it must be emphasized that law as development is intrinsically connected with the concept of development as freedom. As such, legal reforms and rule of law become ends in themselves.<sup>75</sup> Citing Trebilcock and Daniels, Prado provides the following elaboration on this point:

[In so far as] freedom, in its various dimensions, is both the end and means of development, various freedoms, such as freedom from torture and other abuses of civil liberties by tyrannical rulers, freedom of expression, freedom of political association, freedom of political opposition and dissent, are defining normative characteristics of development; rule of law, to the extent that it guarantees these freedoms, has an intrinsic value, independent of its effect on various other measures of development and does not need to be justified solely on instrumental terms.<sup>76</sup>

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<sup>72</sup> Trubek (2016), *supra* note 48, p. 14.

<sup>73</sup> *Ibid.*

<sup>74</sup> Trubek and Santos (2006), *supra* note 53.

<sup>75</sup> Prado (2010), *supra* note 50.

<sup>76</sup> *Ibid.*, p. 5.

It is law and development conceived in this manner that we consider particularly relevant as an approach to the study of the situation in Thailand’s Deep South. We will next briefly explore this relevance as a basis for the development of the conceptual framework for this study, which will be the subject of Section 4.

### 3.4 For a Law and Development Approach

We have seen that the conflict situation in Thailand’s Deep South, already briefly explored in Sections 1 and 2, is a highly complicated and volatile one. The problem in this part of the country is not that it remains “underdeveloped” in any way – even though in some parts of the region, poverty is rampant. The problem is more of social, cultural and political nature.

The view of an instrumental role of law in promoting economic growth is clearly not particularly applicable to the situation in the southernmost part of Thailand. The region does not simply require either “legal development” or “economic development” as such. While economic growth might depend on some other factors other than legal development (such as the government’s development initiatives and market conditions for the region’s certain economic crops, most notably rubber and oil palms), legal development either through legal transplants or the development of laws for market transactions is especially irrelevant. The southernmost region may be characterized as, in Tamanaha’s words, being plagued by “the conflict and tensions created by the presence of competing and overlapping cultural, ethnic, religious, and legal orders.”<sup>77</sup> This certainly does not mean that the region does not require development in either respect. On the contrary, it needs both, but rather in the form of what may be referred to as a “law as development package” that includes “economic development, poverty reduction, democracy, human rights, due process, equity, etc.”<sup>78</sup>

It is such a “package” that we will adopt as an approach for this study. In doing this, we must emphasize that the approach, at least at this stage, is not meant to provide a

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<sup>77</sup> Tamanaha (2011), *supra* note 51, p. 244.

<sup>78</sup> *Ibid.*, p. 233.

“solution” to the conflict in the southernmost part of Thailand, which, in modern times, has been going for more than a century. However, we argue that this kind of holistic “law as development” perspective on the conflict situation is needed, and we strongly believe that a clearer understanding of the situation is a crucial first step in the search for a sustainable solution. Hence, our primary goal here is to provide such an understanding. The law as development package cannot in itself serve as a conceptual framework for our study. For this we have looked further and found that Yong-Shik Lee’s general theory of law and development can serve our purpose. The next section is therefore devoted to the development of our conceptual framework, which significantly draws upon this very important work.

#### 4. Yong-Shik Lee’s General Theory of Law and Development

As mentioned in the previous section, the ultimate goal of law and development, particularly the current third moment, is to prove that the role and impact of law are relevant to sustainable development. Despite five decades of efforts to do so, law and development has yet to become a robust academic field. According to Yong-Shik Lee, the failures of law and development is partly but significantly caused by the lack of an adequate analytical framework and empirical evidence.<sup>79</sup> One major difficulty in creating such a framework is that it requires what Tamanaha calls the “connectedness of law principle.”<sup>80</sup> In other words, the success of law and development does not rely only on law and legal institutions, but also on a variety of factors including

[...] the history, tradition, and culture of a society; its political and economic system; the distribution of wealth and power; the degree of industrialization; the ethnic, language, and religious make-up of the society (the presence of group tensions); the level of education of the populace; the extent of urbanization; and the geo-political surroundings (hostile or unstable neighbors) – everything about a particular society matters.<sup>81</sup>

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<sup>79</sup> Lee (2015), *supra* note 16.

<sup>80</sup> Tamanaha (2011), *supra* note 51, p. 214.

<sup>81</sup> *Ibid.*

Though Tamanaha believes that law and development is misleading and fated to fail,<sup>82</sup> we share other scholars’ views that the law and development discourse is still worth the effort.<sup>83</sup> As shown in the evidence of the successful cases of Japan, South Korea, and Taiwan, law and development is not a complete disappointment. What we need is an exploration of alternative methods and more empirical studies. Lee’s recently developed general theory of law and development is one good example.<sup>84</sup> This section thus considers an alternative law and development model proposed by Lee and how the instability in Thailand’s Deep South could be used as its testing ground.

In 2015, Yong-Shik Lee called for a new and comprehensive analytical model for law and development, which assesses the impact of law, legal frameworks, and institutions (LFIs) on development, in response to decades of unsuccessful attempts to advance the law and development discourse.<sup>85</sup> The justification for developing such a model, which works as a legislative and institutional guidance rather than a rigid legal transplant framework adopted in the first law and development movement (Sub-section 3.1), is to “bridge the gaps and to establish the field more firmly as an academic discipline that contributes to the economic progress of developing countries.”<sup>86</sup> He thus proposed the Analytical Law and Development Model (ADM), which has later been further developed into a general theory of law and development (hereafter the “general theory”).<sup>87</sup>

The main purpose of the general theory, which is shared with other law and development concepts, is to prove that the role of law is relevant to development. In doing so, the general theory provides a theoretical framework equipped with certain mechanisms explaining “dynamics among law, institutions, and the existing political, social, and economic conditions.”<sup>88</sup> What makes Lee’s general theory different is that such a

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<sup>82</sup> *Ibid.*

<sup>83</sup> See Trubek and Santos (2006), *supra* note 53; and Davis and Trebilcock (2008), *supra* note 63.

<sup>84</sup> Yong-Shik Lee, *Law and Development Theory and Practice* (London and New York: Routledge, 2019).

<sup>85</sup> Lee (2015), *supra* note 16.

<sup>86</sup> *Ibid.*, p. 2.

<sup>87</sup> Yong-Shik Lee, *General Theory of Law and Development*, 50 *Cornell International Law Journal*, No. 3 (2017), 415-471; and Lee (2019), *supra* note 84.

<sup>88</sup> Lee (2019), *supra* note 84, p. 38.



framework is flexible and analytical, rather than prescriptive like the legal transplant model.<sup>89</sup> To be more specific, though the general theory has been developed based on the investigations into the successful development case of South Korea, it does not support the idea of transplanting laws and regulations which worked effectively in South Korea into other countries’ legal systems.<sup>90</sup> Rather, the Korean case should be used as a working reference for legislation.

What is significant is that the general theory aims to develop a “general” framework and mechanisms which could work even in other countries adopting different laws, legal frameworks, and institutions (LFIs) in their specific socioeconomic contexts. Though this definitely sounds difficult and needs empirical evidence, the general theory is not trying to dictate what LFIs must be designed and operated. It instead provides a guidance or a structure on how to determine what adjustment should be made in accordance with local contexts.<sup>91</sup> Of course, these local conditions, particularly those relating to non-economic values, involve many things socially, culturally, and politically related, which are not easy to assess. Instead of making a reluctant effort to explain the whole thing, the general theory, justified by the effective implementation basis, focuses on the economic objectives as a “necessary condition” to achieve non-economic ones. What differentiates the general theory from the approaches adopted during the first and second law and development moments is that it embraces both economic and social values. In theory, they are both equally important, but to make it work practically, we probably need “short-term economic gain in order to meet long-term development objectives.”<sup>92</sup>

The general theory does not provide the default answers to all contexts but rather offers a guiding principle which allows flexibility and adaptability. Some might consider these flexible and adaptable features as limitations. There is in fact no one size that fits all. The

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<sup>89</sup> Lee (2015), *supra* note 16.

<sup>90</sup> According to Lee, several developing countries, including Vietnam, Cambodia, Myanmar, and Bangladesh, have adopted certain Korean laws such as the Code of Ethics for Government Officials and the Information Disclosure Act. Lee (2017), *supra* note 87. Thailand’s most recently enacted Social Enterprise Promotion Act B.E. 2562 (2019) also has been heavily influenced by the Korean Social Enterprise Promotion Act No. 8217 of 2007.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*, p. 456.

general theory developed by Lee is not a means to *solve* developmental issues, but rather to shed some light on what we lack and where we should improve, which could probably lead us to a new framework that fits our own local contexts.<sup>93</sup> In particular, as Lee has asserted, “the [law and development framework], if it is to be useful for developing countries, needs to be dynamic, rather than static, in the sense that it should be able to present different sets of LFIs adoptable in different stages of economic development.”<sup>94</sup> This is thus an alternative model of law and development which is worth testing. Before considering how this approach is relevant to the specific conflict situation in the southernmost provinces of Thailand, let us look at the conceptual framework of the general theory.

The general theory is based on a perspective on the relationship between law and development viewing that “law, as well as policy that it advances, is relevant to development and is subject to a separate analysis.”<sup>95</sup> Law is neither a mere policy tool to achieve development nor an inevitable development objective by itself. In other words, law is not subordinate to policy, while at the same time it does not mean that law, the rule of law in particular, will always lead to expected results. Lee develops the general theory with a view that the impact of law on development is real (as evidenced in South Korea), but the level of development varies depending on various factors, including the determining and the variable elements. The determining factors are the disciplinary parameters of “law” and “development” whereas the variable factors involve what Lee calls the “regulatory impact mechanisms,” aimed to explain the existing political, social, and economic conditions. These mechanisms involve the design, the compliance and the implementation of development-facilitating policies and laws.<sup>96</sup> Nonetheless, the determining and the variable elements are not exclusively separate from each other (Diagram 1).

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<sup>93</sup> Lee (2015), *supra* note 16.

<sup>94</sup> *Ibid.*, p. 30

<sup>95</sup> Lee (2019), *supra* note 84, p. 3.

<sup>96</sup> *Ibid.*

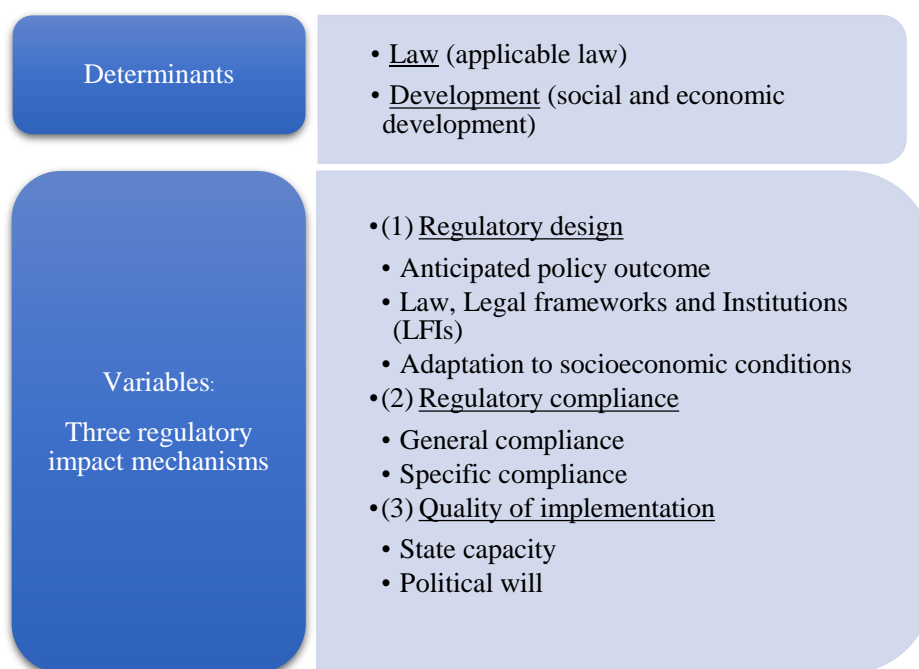


Diagram 1: Yong-Shik Lee’s general theory of law and development framework

#### 4.1 Law and Development

To understand law and development, the first thing to understand is what should be considered “law.” In fact, it is not at all easy to answer what law is considering different legal systems, legal structures, and legal institutions among others. As Posner says, “trying to define ‘law’ is futile, distracting, and illustrative of the impoverishment of traditional legal theory.”<sup>97</sup> If the question “what is law?” cannot be clearly answered, the question “what kind of law contributes to development?” is accordingly very difficult to answer. Clarifying the complex relationship between law and development is the same as making sense of the relationship between law and justice since not all laws are just laws.<sup>98</sup>

<sup>97</sup> Richard A. Posner, *Law and Legal Theory in England and America* (Oxford: Clarendon Press, 1997).

<sup>98</sup> For a very brief overview of the concept of law, see Mark Tebbit, *Philosophy of Law: An Introduction* (3<sup>rd</sup> edition, London and New York: Routledge, 2017).

In the context of law and development, “law” does not simply refer only to “a formal law such as statutes and judicially binding precedents but also includes informal norms to be identified through empirical research in accordance with its applicability and effectiveness on the grounds.”<sup>99</sup> As shown in Section 2, successive Thai governments have introduced various legislations and non-state laws to manage the southern conflict. Customary law and communal norms are particularly relevant to the Muslim community in the region. When the *Phibulsongkram* government banned Islamic clothing and sharia law, it caused deep resentment. This is an example of a poorly-designed law that affects development instead of promoting it. Thus, not every law contributes to development. The general theory framework will help identify applicable laws, which are considered development-facilitating laws, and assess their performance. However, in order to identify such laws, we need to understand what “development” means.

In addition to “law,” “development” is the other pillar concept of law and development.<sup>100</sup> Like the definition of law, the definition of development is also the subject of heated debate, for instance over the distinction between development and growth (wealth). According to Amartya Sen,

[T]he success of all [economic growth] has to be judged ultimately in terms of what it does to the lives of human beings. The enhancement of living conditions must clearly be an essential – if not *the* essential – object of the entire economic exercise and that enhancement is an integral part of the concept of development.<sup>101</sup>

As already explained in Section 3, the first and the second law and development moments, which primarily focused on economic growth alone, proved to be unsuccessful. They seemed to move away from non-economic values such as poverty, misery and well-being since their impact is hard to measure. They also ignored the

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<sup>99</sup> Lee (2015), *supra* note 16, p. 8.

<sup>100</sup> Lee (2019), *supra* note 84.

<sup>101</sup> Amartya Sen, “The Concept of Development”, in Hollis Chenery and T.N. Srinivasan (eds.), *Handbook of Development Economics Volume 1* (Amsterdam: North-Holland, 1988), p. 11.

fulfilment of basic needs and enhancing the quality of life. The general theory instead reflects the third moment of law and development which aims at a holistic and sustainable development. Its framework thus attempts to accommodate both economic and social development objectives since they are equally necessary. Such objectives are the anticipated policy outcomes which development-facilitating laws desire. The question today is not whether we need either economic or social development because obviously we need both. The question is rather directed at how to set those goals and more importantly how law can achieve them. To be more specific, how should a law be designed to enhance both economic and social development? And how can we prove that? To investigate the impact of law on development, Lee has developed a regulatory impact assessment framework called “regulatory impact mechanisms,” which assess three main areas: regulatory design, regulatory compliance, and the quality of implementation.

## 4.2 Regulatory Design

### 4.2.1 Anticipated Policy Outcome

Before designing any law, a clear and purposeful anticipated policy outcome is required. The regulatory design mechanism under the general theory examines the anticipated policy outcomes of development-facilitating laws. In other words, what are their regulatory objectives? The anticipated outcomes are “the specific outcomes that are anticipated as a result of the implementation of [economic and social development] policies.”<sup>102</sup> This criterion is an important factor in understanding the impact of law on development because it clarifies the development objectives of applicable laws and analyzes whether such objectives will advance the development expectations. If both policy and law are clear and consistent in achieving the anticipated outcomes, it is reasonable to assume effective compliance and implementation, resulting in successful development goals.

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<sup>102</sup> Lee (2019), *supra* note 84, p. 46.

#### 4.2.2 Law, Legal Frameworks and Institutions (LFIs)

Good laws need to have institutional support. The general theory provides the organization of law, legal frameworks, and institutions (LFIs). This helps assess whether the applicable laws and their legal frameworks are flexible enough for future amendments, and whether legal institutions are supportive of the laws as well as effective in operating them. Lee adds that it is “the quality of the institutions that administer law and not the law *per se*, that offer a chance for development.”<sup>103</sup> In addition to the anticipated policy outcomes, LFIs are used to determine the effectiveness of regulatory design to see whether the institutional support in the forms of legal frameworks and institutions could help the laws achieve the development goals. The Thai legal system is a civil law which is mostly based on a comprehensive compendium of legal codes and statutes. For a baseline, Thailand has both legal frameworks and legal institutions in place. The problem rather concerns whether they are adequate and effective enough for achieving development outcomes. This will be further discussed in Section 5.

#### 4.2.3 Adaptation of Law to Socioeconomic Conditions

Apart from the anticipated policy outcome and the LFIs used for determining the effectiveness of the regulatory design, there is another element, that of the adaptation of law to socioeconomic conditions.<sup>104</sup> As Lee insists, it is important that the law and development theoretical framework be flexible and adaptable to the changing environment of a range of social, political, economic, and cultural conditions. The focus here is not to identify what the socioeconomic conditions are, but rather to assess the dynamic quality of applicable laws. However, the assessment is not only about whether the more dynamic a law is the better. Obviously, it is not possible to design a law that is adaptable to any changes. Law that supports social and economic development should be dynamic, meaning that it evolves over time in response to local and changing conditions.

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<sup>103</sup> Lee (2015), *supra* note 16, pp. 18-19.

<sup>104</sup> *Ibid.*

According to Hadfield, “the key insight here is that the capacity for a legal regime to generate value-enhancing legal adaptation to local and changing conditions depends on its capacity to generate and implement adequate expertise about the environment in which law is applied.”<sup>105</sup> Such expertise (or socioeconomic conditions) involves legal systems, the judiciary and legal human capital.<sup>106</sup> This is in fact the same as Lee’s LFIs. The adaptation of law to socioeconomic conditions thus cannot be analyzed separately from the other elements: the anticipated policy outcome and the LFIs. In the context of southern Thailand, the regulatory design, together with an anticipated policy outcome analysis covering all interconnected factors, the LFIs and the adaptation of law, is highly relevant to promoting its development. In addition to national policies and laws, Thailand’s southernmost part has its own specific socioeconomic environments, including specific development policies, specific laws, and specific institutional frameworks among others.

#### 4.3 Regulatory Compliance: General and Specific Compliance

The second impact mechanism developed under the general theory is the regulatory compliance, which refers to “compliance with law by those who are subject to the application of law.”<sup>107</sup> Regulatory compliance is a precondition for the success of law and development. To put it simply, even if a country could design a perfect development-facilitating law with strong legal frameworks and institutions, it would mean nothing if the public do not comply with such law or are not aware of its objectives and benefits. As Lee justifies, “a [legal] reform that does not take regulatory compliance into consideration may end up a hollow declaration without real impact...regulatory compliance is [thus] one of the key elements in determining regulatory impact on development.”<sup>108</sup>

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<sup>105</sup> Gillian K. Hadfield, *The Quality of Law: Judicial Incentives, Legal Human Capital and the Evolution of Law*, University of Southern California CLEO Research Paper No. C07-3 (February 2007), p. 4.

<sup>106</sup> *Ibid.*

<sup>107</sup> Lee (2019), *supra* note 84, p. 50.

<sup>108</sup> *Ibid.*

The general theory examines two types of regulatory compliance: general and specific compliance. The general compliance looks at the overall level of compliance with law by the public, whereas specific compliance examines the strength of public compliance with a particular law, which is generally imposed under certain circumstances, for example a law specially enacted to control drug trafficking in southern Thailand. Even though it could safely be assumed that a high level of overall regulatory compliance is likely to result in effective regulatory impact, it does not always mean that specific regulatory compliance will be strong. Therefore, effective legal impact on development requires that both general and specific compliance be coherent. The question is how to determine the effective level of regulatory compliance.

Despite a lack of a single well-accepted definition in the literature, the rule of law is widely used as an index to measure the overall regulatory compliance and development progress.<sup>109</sup> Some aid donors such as the European Union also use the rule of law compliance as a condition to grant funding.<sup>110</sup> Nevertheless, measuring the rule of law could be difficult and challenging since it involves complex socioeconomic factors such as legal culture, public knowledge and understanding of law, public education, confidence in government, general quality of law, strength of regulatory enforcement, and threat of penalty among others.<sup>111</sup> In addition, there are more than 150 indicators of the rule of law.<sup>112</sup> Each indicator generally involves a legal system which embraces democracy, human rights, good governance and anti-corruption. Versteeg and Ginsburg compared and contrasted the rule of law indicators proposed by four influential international organizations, namely the World Bank,<sup>113</sup> the Heritage Foundation,<sup>114</sup>

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<sup>109</sup> The rule of law, embodied in Goal 16 (peace, justice and strong institutions) of the United Nations’ 2030 Sustainable Development Goals (SDGs), is a necessary element to achieve sustainable development.

<sup>110</sup> Rafał Mańko, *Protecting the EU Budget Against Generalised Rule of Law Deficiencies*, Briefing EU Legislation in Progress 2021-2027 MFF (2018).

<sup>111</sup> Lee (2019), *supra* note 84; and Tom Ginsburg, *Pitfalls of Measuring the Rule of Law*, 3 *Hague Journal on the Rule of Law*, (2011), 269-280.

<sup>112</sup> Mila Versteeg and Tom Ginsburg, *Measuring the Rule of Law: A Comparison of Indicators*, 42 *Law and Social Inquiry*, No. 1 (2017), 100-137.

<sup>113</sup> World Bank, *Worldwide Governance Indicators*, available online at: <<https://info.worldbank.org/governance/wgi/#home>>, accessed August 2, 2019.

<sup>114</sup> Heritage Foundation, *2019 Index of Economic Freedom*, available online at: <[www.heritage.org/index/](http://www.heritage.org/index/)>, accessed August 2, 2019.



Freedom House,<sup>115</sup> and the World Justice Project (WJP)<sup>116</sup> in order to identify underlying concepts of the rule of law. It was found that all four sets of indicators were remarkably similar to one another, suggesting that they are all valid proxies of the rule of law.<sup>117</sup>

Obviously, the rule of law is only one (but widely accepted) indicator to determine the overall level of regulatory compliance. However, considering only general compliance, we will not be able to confidently conclude that a country is endowed with a good regulation. In principle, to have an effective evaluation of regulatory compliance, each and every one of the regulations should be measured *ex ante* and *ex post*, taking into consideration various factors, for instance, its objectives, the comprehension by the target group, and the willingness and the ability of the target group to comply with each rule and regulation.<sup>118</sup> However, the problem is that “the purposes of individual regulations and regulatory policies will be as varied as the problems that motivate regulatory interventions in the first place; consequently, in the absence of a specific regulatory problem, this discussion of indicators for regulatory evaluation will by necessity be somewhat abstract.”<sup>119</sup>

In reality, choices need to be made depending on socioeconomic conditions as well as regulatory goals, regulatory benefits and data availability. As a result, governments have to prioritize laws for enforcement.<sup>120</sup> The law that is enacted in consideration of its importance or urgency priority is actually indicative of the political will the government enacting it. If its political will is strong, we can expect that it will devote its manpower and time to the law being considered. In such a case, it is highly probable that a strong regulatory compliance will result, showing the consistency between a particular law and

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<sup>115</sup> Freedom House, *Freedom in the World Countries 2019*, available online at: <<https://freedomhouse.org/report/countries-world-freedom-2019>>, accessed August 2, 2019.

<sup>116</sup> World Justice Project, *WJP Rule of Law Index 2019*, available online at: <<https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019>>, accessed August 2, 2019.

<sup>117</sup> Versteeg and Ginsburg (2017), *supra* note 112.

<sup>118</sup> OECD, *Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance* (Paris: OECD, 2000).

<sup>119</sup> Cary Coglianese, *Measuring Regulatory Performance: Evaluating the Impact of Regulation and Regulatory Policy* (Paris: OECD, 2012), p. 17.

<sup>120</sup> Lee (2019), *supra* note 84.

the socioeconomic conditions.<sup>121</sup> This is relevant to the problem in southern Thailand where the governments have imposed many specific laws (as a priority) to stabilize the conflict, but failed to recognize the local context, resulting in poor regulatory compliance and the problem remains unsolved. This will be further discussed in the following section.

#### 4.4 Quality of Implementation: State Capacity and Political Will

We have discussed two of the three regulatory impact mechanisms, namely the regulatory design and the regulatory compliance. The third mechanism of the general theory is the regulatory implementation comprising two main factors: state capacity and political will.<sup>122</sup> The quality of implementation is important for determining the impact of law on development because it shows the actual effectiveness of the laws whether they have achieved the anticipated policy outcome. In other words, even though a development-facilitating law has been designed perfectly, there will be no real impact if its implementation is ineffective, resulting in violations, omissions and incomplete enforcement.<sup>123</sup> A good quality of regulatory implementation will need a capable and accountable state, adequate financial resources, independent judicial system, educated and incorruptible government officials, consistent government policies and public trust and confidence in LFIs among others.<sup>124</sup> Lee categorizes these various factors into state capacity and political will and insists that the regulatory design and the regulatory compliance also affect the effectiveness of regulatory implementation.<sup>125</sup>

“State capacity” means the state’s ability to accomplish its anticipated policy objectives – economic, social, fiscal, political and so on. According to Dincecco, his research result suggests that greater state capacity can facilitate economic development, but it is not easy

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<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> Charles Barker, *Good Regulatory Practice Guidelines* (European Union, 2016).

<sup>125</sup> Lee (2019), *supra* note 84.

to achieve because the success depends on many factors.<sup>126</sup> The core duty of the state is to provide three basic public goods: domestic law and order, secure private property rights, and military defense against external attack threats.<sup>127</sup> However, even though the state can properly provide all resources necessary to implement laws, it does not always guarantee the effective implementation. As we will later see in Section 5, the Thai government is capable of providing adequate human, financial, technological, and administrative resources for implementing the laws necessary for development in the Deep South, but its quality of implementation remains relatively low due to corruption and opportunistic violence.<sup>128</sup> This means “state capacity alone does not determine regulatory impact on development.”<sup>129</sup>

Besides the state capacity factor, “political will” is another important element in Lee’s implementation analysis. Political will is the term generally used to describe the success or failure of development policies whereas its definition is still unclear. Manor defines the term as “the determination of an individual political actor to do and say things that will produce a desired outcome”<sup>130</sup> while Lee refers to it as “the commitment and devotion of a country’s political leadership to the implementation of law...[it] is more than a mere interest, which may be demonstrated by the continued implementation of consistent development policies for an extended period of time, allocating substantial political and economic capital.”<sup>131</sup> Policy inconsistency has been a major problem in Thailand for a long time. A new government always comes with a new political will in managing the southern conflict, which greatly affects the economic and social development in the area. Hence, continued, unflinching political will inculcates consistency in regulatory implementation and enforcement.

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<sup>126</sup> Mark Dincecco, *State Capacity and Economic Development: Present and Past* (Cambridge: Cambridge University Press, 2018).

<sup>127</sup> *Ibid.*

<sup>128</sup> Askew, *supra* note 2.

<sup>129</sup> Lee (2019), *supra* note 84, p. 58.

<sup>130</sup> James Manor, *Appendix 3 Understanding ‘Political Will’* in ‘Politicking for the Poor’: Final Report to the U.K. Department for International Development (2004), p. 1, available online at: <[www.gov.uk/dfid-research-outputs/appendix-3-understanding-political-will](http://www.gov.uk/dfid-research-outputs/appendix-3-understanding-political-will)> accessed July 27, 2019.

<sup>131</sup> Lee (2019), *supra* note 84, p. 58.

The next section represents our effort to apply the general theory of law and development to the conflict situation in the southernmost part of Thailand. Given the highly complicated and volatile nature of this situation, the relevance of the theory being used as a conceptual framework for this study should be reaffirmed before we proceed with its application. Only two aspects of the framework will be highlighted here. First, the conflict situation requires a “law as development” package explaining, to use Lee’s words already quoted, the “dynamics among law, institutions, and the existing political, social, and economic conditions.”<sup>132</sup> Second, we firmly believe that economic and social objectives are equally important. However, again to recite Lee, we need “short-term economic gain in order to meet long-term development objectives.”<sup>133</sup> In Thailand’s Deep South, the majority Muslim population strongly resents the economic disparities they have been suffering for a long time. Indeed, their economic well-being must be significantly elevated while other conditions, including the maintenance of the rule of law, are being attended to.

## 5. Application of the General Theory of Law and Development to the Conflict in Southern Thailand

### 5.1 Regulatory Design

#### 5.1.1 Anticipated Policy Outcome

The historical accounts of the Southern Fire during the *Thaksin* administration explicitly highlight how the hawkish approach towards the conflict (e.g. military crackdowns, budget cuts) has effectively given rise to the inhuman and degrading treatment of the indigenous peoples. For these reasons, successive Thai governments have always placed peacebuilding and economic regeneration at the heart of the country’s development policy vis-à-vis the insurgency-prone area down south. Legal instruments occupy a pivotal role in propelling policy implementation in Thailand. In the past, there was not any specific law on the development of southern border provinces. In 2010, however, the

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<sup>132</sup> *Ibid.*, p. 38.

<sup>133</sup> Lee (2017), *supra* note 87, p. 456.

Parliament of Thailand had passed the Southern Border Provinces Administration Act B.E. 2553 (2010) (hereafter the “SBPA Act”) to become an important device that enables the government to deal with not just violent situations but also the issues of socioeconomic development in a more systematic way.

The SBPA Act paves the way for the formulation of development strategies and action plans. In light of the Act, millions were injected into various development programs mainly in the field of educational, religious and cultural affairs, and agriculture.<sup>134</sup> The implementation of development programs brought about some promising results even though the situations remained volatile. Equally important, the SBPA Act requires the government to set up the mechanisms for addressing administrative shortcomings as well as dealing with complaints.<sup>135</sup> The Constitution of Thailand B.E. 2560 (2017) also prescribes that there needs to be a national strategy as a common goal for facilitating sustainable development in the country. The whole regulatory design so far developed is aimed at “solving” the conflict situation perceived as posing a security threat to the Thai state. Even though policies and strategies for the development of this region have formed part of the regulatory design, their anticipated outcomes are conceived of as contributing to the resolution of the conflict. Given our focus on law and development, the issue we aim to clarify is whether or not, or to what extent, the policy, administrative, and legislative measures taken by the Thai state have facilitated the development of its southernmost region, especially insofar as this involves helping “reverse inequalities and offer opportunities for local elites as well as the wider majority of Malay Muslims.”<sup>136</sup>

What is most notable about the regulatory design (particularly LFIs) for the Thailand’s southern border provinces is the recognition of the complexity of the conflict in this part of the country. To address this situation, a holistic approach remarkably in line with the “law as development” package is admittedly required. Such a vision is evident, in

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<sup>134</sup> See Table 2: Annual Government Spending on Addressing Instability in Thailand’s Deep South from 2004 to 2018.

<sup>135</sup> SBPA Act, art. 4.

<sup>136</sup> Adman Burke, Pauline Tweedie, and Ora-orn Poocharoen, *The Contested Corners of Asia: Subnational Conflict and International Development Assistance – The Case of Southern Thailand* (San Francisco: The Asia Foundation, 2013), p. 36.

particular, in the government’s National Strategy (2018-2037),<sup>137</sup> comprising six strategic goals: (1) bolstering security, (2) increasing competitiveness, (3) developing human capital, (4) promoting equality and opportunity, (5) safeguarding environment, and (6) improving public management. A ramification of this is that the national strategy becomes a road map for Thailand’s development where the government and its agencies are bound to act upon.

It contains a specific sub-section on “Creating Permanent Safety and Peace in the Southern-Border Provinces,” which sets out measures comprising a holistic approach of the type described above. Some of these measures include those aiming at:<sup>138</sup>

- providing the people with safety to life and property, and possibility for peaceful co-existence in a multicultural society;
- redressing inequalities in development, such that the development level of this region is on par with those of other parts of the country;
- promoting and developing justice, enhancing its efficiency in solving problems;
- creating an environment conducive to the reduction of violence, as well as appropriate participation by the people and the civil society sector;
- focusing on truly and permanently eliminating conflict and injustice;
- strengthening multiculturalism in the local area, such that it becomes a strong force in preventing and solving any emerging problem;
- encouraging strong and continual cooperation between the state and civil society sectors that meets the demands of all groups of people, especially the youth – i.e. in accordance with the “understanding, reaching out, and developing” approach.

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<sup>137</sup> Following a series of public hearings, the National Strategy (2018-2037) has come into force upon its publication in the Government Gazette in October 2018. For a brief overview of this strategy in English, see Bangkok Post, *20-year National Strategy Comes into Effect* (Bangkok, October 13, 2018), available at: <<https://www.bangkokpost.com/thailand/general/1557462/20-year-national-strategy-comes-into-effect>>, accessed July 28, 2019.

<sup>138</sup> National Strategy B.E. 2561-2570 (2018-2037), Royal Gazette, Book 135, Part 82 A (October 13, 2018), p. 15

The national strategy inevitably defines a statutory framework for pushing development in Thailand’s southern border provinces. Politically, it underlines the importance of establishing a pluralistic society in the insurgency-prone area in response to the instability. It also emphasizes an economic revival of the southern border provinces plagued with violent situations. For example, the Thai government has been promoting the southernmost part of the country as a halal food production base in the region.<sup>139</sup> In addition, the construction of the *Betong* international airport in *Yala*<sup>140</sup> with a view to support the progress of the so called “stability, prosperity, and sustainability triangle” (SPST) project<sup>141</sup> also indicates how the national strategy contributes to the development in this part of the country.

At least in principle, the desirability of such a holistic approach is without doubt. Promoting only economic growth does not help much. As a recent study has pointed out, “[o]n their own, socioeconomic development initiatives or economic stimulus packages are unlikely to fundamentally change the dynamic of violence and may continue to act as a justification for the government to avoid undertaking more significant reforms.”<sup>142</sup> It has indeed been shown that the rise in violence starting from 2004 coincided with historically-high prices for rubber, the area’s main cash crop.<sup>143</sup> It is not economic development in itself, but rather economic disparities both within the southernmost region (especially between the majority Muslim population and the minority Buddhist community), as well as between the Deep South and other regions of the country, that really matter. There is thus the need to redress these inequalities while at the same time attending to other local grievances, such as injustice and the feeling of being marginalized. This certainly does not ensure success in solving the conflict, but failure

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<sup>139</sup> Pakorn Priyakorn, *The Evolution and Future Trends of Halal Standard Development and Halal Certification Process in Thailand*, 25 *Journal of Public and Private Management*, no.2 (2018), 151-181.

<sup>140</sup> Thodsapol Hongtong, *Three Airlines Eyeing Betong Airport*, (Bangkok Post, July 4, 2019), available online at: <<https://www.bangkokpost.com/business/1706802/several-airlines-eyeing-betong-airport>> accessed June 2, 2019.

<sup>141</sup> Supawadee Wangsri, *ISOC follows up on Narathiwat Model City Project*, (National News Bureau of Thailand, Narathiwat, May 25, 2019), available online at: <<http://thainews.prd.go.th/en/news/detail/TCATG190525123851094>> accessed June 2, 2019.

<sup>142</sup> Burke, Tweedie, and Poocharoen (2013), *supra* note 136, p. 36.

<sup>143</sup> *Ibid.*

to approach the situation in this way only ensures the continuation of conflict and violence.

### 5.1.2 Law, Legal Frameworks, and Institutions (LFIs)

Institutional support is instrumental in enhancing effective enforcement of development-facilitating legislation. Prior to the promulgation of the SBPA Act, tackling insurgency in the southernmost provinces fell within the remit of the National Security Council (NSC). It should be noted however that the NSC had worked principally within the security frameworks. It was not until the arrival of the SBPA Act that the NSC has since been mandated to formulate administration and development policy in relation to the southern border provinces. Furthermore, the SBPA Act led to the re-establishment of the Southern Border Provinces Administrative Centre (SBPAC). The SBPAC has responsibility for devising strategic and action plans that are in compliance with the national strategy to promote development in the area. It is also its duty to serve as “political space” where local people could seek assistance as well as could have their grievances settled.<sup>144</sup> The Committee on Development Strategy in the Southern Border Provinces is another key institution for the administration of the southern border provinces. According to the SBPA Act, this committee discharges a duty to consider and approve development strategies and plans submitted by the SBPAC.<sup>145</sup>

### 5.1.3 Adaptation of Law to Socioeconomic Conditions

Whether the adopted regulatory frameworks conform to sociopolitical and economic conditions of the area is vital for policy implementation in Thailand’s Deep South. In this respect, the SBPA Act regulates that the NSC’s development policy is subjected to periodic review, at least once every three years to ensure that they respond properly to any changes of local conditions. The Advisory Council for Southern Border Provinces Administration and Development was also set up within the framework of the SBPA Act. The Council is comprised of local administrators, religious leaders, journalists and

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<sup>144</sup> SBPA Act, art. 9.

<sup>145</sup> SBPA Act, art. 7.



teachers and is authorized to help review the NSC’s policy and the SBPAC’s strategies and plans in order to ensure timely adaptation of legislation and policy to local conditions.<sup>146</sup>

## 5.2 Regulatory Compliance

In addition to national policies, strategies and laws that also address the southern problem, policy, administrative, as well as legal measures have also been issued to specifically deal with this problem. Only this part of the country has consistently been attended to in this way. A major difficulty in adopting a law and development approach involves the existence of numerous components in the regulatory design for the solution to the southern conflict. We have identified some of these components, notably in the form of laws and institutions, the SBPA Act and the SBPAC in particular. Other types of regulatory measures are also relevant, including administrative orders and development strategies. All these regulatory measures, legal or otherwise, have been specifically crafted for the purpose of “solving” the overall conflict situation. The problem arising from this kind of regulatory design is that it is extremely difficult to link its components to particular aspects of the situation with a view to seeing if these components yield any anticipated outcomes. During the past years we have seen few reports on the “success” of the government’s regulatory efforts. This is understandable, given the fact that the conflict situation has continued unabated almost through the past century. However, from a few available documents, we have gained some limited information that enables us to grasp rough pictures of both the overall situation and some particular aspects of it.

### 5.2.1 General Regulatory Compliance

Given the limited space available, we will again refer to a number of acts and administrative orders, but will focus on one specific act, the SBPA Act. We will see how this Act has induced compliance in the form of development strategies, including those for development of the educational sector and justice delivery.

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<sup>146</sup> SBPA Act, art. 23.

The conflict situation in the southernmost part of Thailand is under the control of the highest regulatory mechanism – the Internal Security Act B.E. 2551 (2008).<sup>147</sup> This Act is mainly involved with the organization of security operations orchestrated by the Internal Security Operations Command (ISOC). An amendment to the Act was issued by the order of the National Council for Peace and Order (NCPO) in November 2017, which mainly involves an adoption of a new definition of “internal security,” making it more suitable for the prevalent situation, together with reorganization of the concerned personnel and tasks at different levels for more effective internal security operations.

The legislative mechanism representing a specific regulatory measure for the country’s southern situation is the SBPA Act mentioned above. The Act lays down the policy, designates the institutions as well as the personnel at various levels in charge of the administration of the security situation in the southern border provinces. Also, it clearly lays down the authority and responsibilities of the SBPAC, which include the preparation of development strategies for this region promotion of rights and liberties and delivery of justice, and educational development – education being one of the most critical issues relating to the conflict situation. We consider the government’s undertakings in these domains (and many others) as representing its compliance with legal responsibilities under this Act.

As laws, all these acts and orders require compliance by the relevant institutions and personnel at all levels. However, an analysis of the overall regulatory compliance is beyond the scope of this paper. Insofar as general regulatory compliance is concerned, we will only point out how the government’s undertakings in various policy areas are in compliance with the regulatory design. The SPBA Act, in particular, provides for security operations, especially by the SBPAC, in numerous policy areas.<sup>148</sup> Without delving into the detail on how, or whether or not, compliance has obtained in any or all of these policy areas, we *presume* that the overall “results” are indicative of general compliance with a general provision of the Act:

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<sup>147</sup> Internal Security Act B.E. 2551, *Royal Gazette*, Book 125, Part 39 A, (February 27, 2008).

<sup>148</sup> SBPA Act, art. 9.

The policy on the administration and development of the southern-border provinces stipulated in paragraph 1 [of Article 4 of the Act] must at least contain arrangements covering both the development and security aspects [of the region], and in order for these arrangements to meet the people’s needs, suit their way of life, as well as the religion, culture, identity, ethnic and historical roots of the southern-border provinces, and comply with the basic policies of the state, the formulation of a policy or strategy as required under paragraph 1 and its revision as provided for under paragraph 3 must take into consideration the opinions of the people in all sectors.<sup>149</sup>

Numerous strategies and measures have been initiated in compliance with this provision. Such strategies and measures have mostly been incorporated in *Policy on the Administration and Development of the Southern-Border Provinces* (hereafter the “2017-2019 Policy”) prepared by the National Security Council. The current policy covers the period of 2017-2019.<sup>150</sup> It sets out six targets, each of which comprises several measures and plans. We will consider some of these in the next sub-section.

In addition to cases of specific regulatory compliance, evidence is also available, which shows the overall “results” of the government’s efforts to solve the conflict in southern Thailand. Apart from other factors, such results are a consequence of the unity in the operations of military, police and civilian units, which have integrated their efforts in dealing with the security situation and promoting socioeconomic, cultural and other activities. In particular, the incidence of violence has declined in recent years, though the conflict situation is still continuing.<sup>151</sup> As already stated, this paper is focusing on only a few cases of regulatory compliance, which is the subject of the next sub-section.

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<sup>149</sup> *Ibid.*

<sup>150</sup> National Security Council, *Policy on the Administration and Development of the Southern-Border Provinces B.E. 2560-2562 [2017-2019]* (Bangkok: Office of the Prime Minister, 2017). The earlier version of this policy was issued in 2012 for the period 2012-2014.

<sup>151</sup> Southern News Center, *Extending the Emergency Decree on Public Administration in Emergency Situation on its 14<sup>th</sup> Anniversary! Statistics on Insurgency Look Good, but the Conflict Continues* (Isranews Agency, August 23, 2019), available at: <<https://www.isranews.org/content-page/67-south-slide/79718-years-79718.html>>, accessed August 28, 2019.

### 5.2.2 Specific regulatory compliance

This sub-section looks at two important aspects of the conflict situation in the southernmost part of Thailand. The purpose is to see how compliance has obtained in these specific domains, which include economic development initiatives and the state of the rule of law and justice delivery. These are among the types of activities the SBPAC has been authorized by the SPBA Act to engage in with a view to promoting peace and order in this part of the country. We rely mainly on the 2017-2019 Policy and the *SBPAC Performance Report of the Fiscal Year 2018*<sup>152</sup> (hereafter the “SBPAC Report 2018”) on its implementation of the Act’s provisions for our analysis of the regulatory compliance in these three policy areas. These two main sources will be supplemented by other available data.

#### *Economic development initiatives in compliance with the SPBA Act*

Target No. 4 of the 2017-2019 Policy focuses on developing the potential of the people, society, and the economy in accordance with local cultural diversity and wisdom.<sup>153</sup> The goal is to redress inequalities and uphold social justice, so that this part of the country becomes a livable region that is attractive to tourists and investors. Under this topic we will focus on the creation of opportunities for economic development, which will presumably have significant implications for other development aspects, particularly the development of the people’s well-being and quality of life.

The creation of economic development opportunities covers the development of infrastructure, border trade, and human resources to accommodate local economic growth. Agriculture still remains the region’s economic mainstay; therefore, it is important to promote agricultural production, including the rubber and fishery sectors. Moreover, the Halal Industrial Estate in *Pattani* province, which was set up in 2004,

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<sup>152</sup> SBPAC, *SBPAC Performance Report of the Fiscal Year 2018* (2018).

<sup>153</sup> National Security Council (2017), *supra* note 150.

requires further development and promotion.<sup>154</sup> Other development efforts include the local sufficiency economy projects, the distribution of service industries, including tourism, creation of investment incentives, promotion of the private-sector role to accommodate the ASEAN Economic Community (AEC) expansion, and reduction of unemployment.

It must be admitted that information is generally unavailable on the impacts of the government’s development efforts on the local area and its population. The SBPAC Report 2018, for example, tells us simply *what has been done* to develop the potential of the local area and the people’s quality of life, such as promoting the development of the grassroots economy, trade and investment. Efforts have certainly been made by other sectors and agencies to develop southern Thailand. Notable examples are, as noted, the construction of *Betong* international airport, the SPST project, and also the Narathiwat Special Economic Zone Project, which was initiated in March 2015.<sup>155</sup> However, the problem is that there has been only limited research on the economic aspect of the southernmost region: research has been concentrated on its political, cultural, religious and other related aspects. Hence, without a much greater effort to research the real impacts of development initiatives, it is impossible to assess the anticipated outcomes of all these initiatives.

#### *Upholding the rule of law and justice delivery*

This is a very important issue in the conflict in southern Thailand. Point 4 of the Target No. 1 in the 2017-2019 Policy reaffirms the need to strengthen the people’s confidence in the justice system.<sup>156</sup> This need requires just and efficient delivery of justice and enforcement of law. It also involves non-discrimination and equality before the law, as well as elimination of conditions for all forms of injustice.

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<sup>154</sup> SBPAC (2018), *supra* note 152.

<sup>155</sup> Narathiwat One Stop Service, *Narathiwat Special Economic Zone* (2016), available at: <<http://www.narathiwatoss.go.th/frontpage>>, accessed August 28, 2019.

<sup>156</sup> National Security Council (2017), *supra* note 150.

In practical terms, it is necessary to develop laws that suit the way of life and culture of the local people, enhance their knowledge and understanding of law, and promote their participation in the justice delivery process. The effort to achieve this goal also requires the strengthening of the potential, capacity and effectiveness in maintaining safety to life and property. Efforts must also be made to suppress the spread of narcotics, illegal businesses, local influential groups connected to organized crimes and insurgency, provide protection for the people, and keep surveillance on potential threats to vulnerable targets and risk groups in society.

This is actually a longstanding problem in the southern-border region in Thailand. According to the SBPAC Report 2018, many measures have been introduced to protect the rights and liberties of the people and to provide them with fair and efficient justice. The idea is to quickly and efficiently attend to their grievances at the very beginning. Those involved in this process of justice delivery include lawyers, coordinators attached to the Ministry of Justice, as well as professional personnel providing services at prisons. There are also Islamic lawyers attached to the Provincial Islamic Committees to facilitate communication and serve as a link between the state and the people in local Malay. The report provides detailed information on the numbers of services that have been rendered and matters dealt with, together with settlements of cases and disputes and a number of other undertakings.

Despite continual efforts all through these years to solve the problem relating to the failure to deliver fair and efficient justice, it is still plaguing, and thereby worsening, the conflict situation in southern Thailand. Even so we must recognize the strong intention of the Thai state to effectively deal with the problem. Therefore, we can expect that, if we succeed in our efforts to redress economic inequalities and other local grievances, a basis might be strengthened for the search for a sustainable solution to the conflict.

### 5.3 Quality of Implementation

Now we come to the final component of our law and development framework for the study of the conflict situation in southern Thailand – the quality of implementation. This

component consists of two parts, namely, state capacity and political will. This component of the framework directs us to a very crucial aspect of the effort to solve the conflict in the country’s Deep South: it enables us to clearly see that the quality of implementation represents a major condition for the failure in this effort so far. From our law and development perspective, this essentially involves the failure to achieve the anticipated outcomes, especially the reduction of economic inequalities and the achievement of effectiveness in attending to local grievances.

### 5.3.1 State Capacity

The Thai state has actually faced no major problem of capacity particularly in terms of resources for both its security and development operations. As shown by the evidence in Table 2 of this paper, the government has already committed huge financial and human resources to its effort to tackle the conflict situation. Of course, we must mention again that the enormity and complexity of the situation makes it almost insusceptible to any solution: it indeed cannot be easily dealt with especially by such “raw” resources. A whole range of sensitive issues – political, cultural, religious – has also been involved, and this still not to mention possible external influences and interference. However, corruption, and opportunistic violence which resulted in confusing overlaps between insurgency and ordinary crime,<sup>157</sup> are the main problems seriously undermined the capacity of the Thai state to deal with the conflict.

According to a recent press report, the government has since 2004 committed US\$10 billion to security operations and infrastructure development to spur the economy and fight insurgency. However, “locals have complained that the projects were tainted by corruption or did not respond to the region’s needs.”<sup>158</sup> Though we still do not know the whole truth of the corruption case, it has already had a crucial “social impact” – one that has undermined the people’s confidence in, and, as a consequence, the credibility of the Thai state. According to a *Pattani* resident,

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<sup>157</sup> Askew (2010), *supra* note 2.

<sup>158</sup> Mariyam Ahmad, *Thailand: Panel will Probe Graft Complaints in 4 Deep South Projects* (Pattani, August 8, 2017), available at: <<https://www.benarnews.org/english/news/thai/thailand-corruption-08182017174955.html>>, accessed July 28, 2019.

...they [the government officials] claim that they develop the area for locals...but the full budget never reaches the area. Some projects arrive at less than 30 percent. Before it hits the ground, it has passed through many units, provinces, districts, villages on the way – everybody needs to cut cake and eat until full.<sup>159</sup>

The point, as indicated, is not whether such a story is true; it is rather the local perception and understanding that really matter. As the same local resident asserts, “[t]his is one of the factors that people find unjust...”<sup>160</sup> And this is still not all. Criminal activities connected with local (or even national) vested interests have worsened the conflict situation.<sup>161</sup> As a local academic has pointed out, this part of Thailand has been known as a transit route for cross-border smuggling into Malaysia of both narcotics and undocumented migrants and Muslim Rohingya refugees from Myanmar.<sup>162</sup> A human trafficking ring involving high-ranking army officers has only recently exposed and prosecuted. The academic thus simply confirms what has already been known among many that “underground syndicates hire separatist groups to carry out attacks to divert the real attention from them.”<sup>163</sup> What nevertheless has not yet been confirmed is the case of local and/or national politics being involved in politically motivated attempts to create disorder in the southernmost part of Thailand. Such a possibility has been in the mind of the Thai people not only in this part of the country but also all those caring for its political stability.

### 5.3.2 Political Will

Policy inconsistency actually characterizes Thai politics in general. A government that comes to power brings with it its own policy initiatives and plans. It is natural – and actually admirable – for a government to do so, if it is not also inclined to revoke the

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<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*



policies of the previous government – especially the good ones. This clearly results in inconsistency in the pursuit of national policies. A case of inconsistency in pursuing the policy towards Thailand’s Deep South is that of the *Thaksin* government, which first came to power in 2001. He wanted to create his own policy infrastructure for the south, especially by phasing out the SBPAC and introducing his own way of dealing with the situation. The result was an increase in violence that caused a large number of deaths. We have already provided some facts and figures on the situation during that time in Section 2. So we would like to conclude this brief analysis of the political will of the Thai state by emphasizing that, in much the same way as corruption and graft that saps the state’s capacity policy inconsistency seriously undermines its political will.

## 6. Conclusion

What we have achieved from our study is a clearer picture of the conflict situation from a law and development perspective. Our position, also put forward at the beginning, is that “addressing the chronic economic disparities and injustice in an interrelated manner at least clarifies the nature of the conflict and hopefully contributes in a meaningful way to the ongoing search for a sustainable peace” in Thailand’s Deep South.

As evident in our study result, neither economic development initiatives nor legal measures and institutions are lacking in the Thai government’s strategies for tackling the conflict in this part of the country. However, to our knowledge, there has been little, if any, research that provides a theoretical perspective on the relationship between these two domains – law and development. Our study has at least partially provided such a perspective. The following is a discussion, by way of concluding remarks, of what we have presumably achieved.

We can confirm that the effort of the Thai state to address the conflict situation in its southern border provinces has been based on regulatory designs. The legal basis for the current regulatory design is the SPBA Act, under which the principal institutional mechanism, the SBPAC, has been created. As provided for under the SPBA Act, a policy framework has been developed – the Southern Border Provinces Administration and

Development Policy 2017-2019. Given its strong legal underpinning, this Policy can be regarded as the legal framework for both security operations and development initiatives. As we have seen, other relevant legal, administrative and policy measures are also available, but it is the SPBA Act, the SBPAC, and the 2017-2019 Policy that have particularly been developed for the conflict situation in the Deep South. The Thai state’s current strategy to tackle the conflict in this regional area is thus fully supported by law, legal frameworks, and institutions (LFIs).

Numerous administrative and development measures have been generated in compliance with the main legal and policy frameworks by both the SBPAC and other state agencies and even private-sector organizations. However, insofar as their “outcomes” are involved, these measures have been almost invariably anticipated to solve or at least reduce conflict and tensions in this region. How, or the extent to which, they have contributed to redressing economic inequalities and the development of fair and efficient justice has been truly under-examined. The problem of justice delivery has admittedly received extensive attention by the relevant state agencies and numerous civil society organizations. The causes of the failure to induce confidence and trust in the justice system even seem to have been widely understood (only recently a controversy arose over the case of an insurgent suspect who died while he was in custody). However, in both development and justice domains, anticipated specific outcomes need to be more specifically designated and the causes of success and failure in achieving the anticipated outcomes more clearly understood.

The strategies, especially in the form of regulatory designs to deal with the conflict situation in Thailand’s Deep South, have presumably been crafted in full cognizance of the prevailing socioeconomic conditions in the region. However, we have witnessed the cases of “mismanagement” resulting from underestimation of the situation (seeing the insurgents and “petty bandits”) or a personal desire of political leaders to create their own “legacy” without proper attention to the real socio-economic conditions in the southern-border provinces. Among other factors, this is a major cause of policy inconsistency, which, in turn, has been one of the major conditions for the failure to solve the southern conflict. Together with the problem of corruption and graft, this represents a crucial

weakness in the implementation of the state’s strategy or regulatory design. With this observation, we now come to the conclusion of this study.

Thailand is actually a legalistic state. Constitutionalism has shaped its politics and public affairs, including national development, since the change in political rule from absolute monarchy to constitutional monarchy in 1932. The state has never been in short of laws; on the contrary, it now suffers from the abundance of laws – many of which actually need to be thoroughly revised or revoked. However, despite its legalistic mindedness, it has also been facing the problem of implementation and enforcement of laws. This is particularly true of the implementation of “law and development” in the country’s Deep South.