

C. *What is law in non-state legal orders?*

1. Clarifying what constitutes law outside of state law, and its sharp distinction from social norms (as a form of social control) is part of the research inquiry in Southeast Asia's plural legal orders. As one socio-legal scholar asks, "where do we stop speaking of law and find ourselves simply describing social life?"⁴⁶ One scholar offers a definition of law that centers solely on its dispute resolution function: "a body of regularized procedures and normative standards, considered justiciable in any given group, which contributes to the creation and prevention of disputes, and to their settlement through an argumentative discourse, coupled with the threat of force."⁴⁷ Another, Tamanaha, offers what he calls a non-essentialist approach to identifying and delimiting law: "Law is whatever people identify and treat through their social practices as 'law.'" He proposes to examine the social practice of the community to identify from the body of social norms those that are considered law by the community. This would require a social practice that is sufficiently shared by the community where the "meaning and (material) activity are inseverably connected, giving to the manifestation of what is 'law'."⁴⁸
2. If law is a social practice, understanding women's access to justice in plural legal systems can be understood by examining the social practice of 'law' in communities. It will show us what constitutes law to people, the source of its authority and legitimacy, its dispute resolution mechanisms, how those mechanisms function, their normative standards, and how the system of legal regulation is maintained. A community's social practice of law is a dynamic process that also evolves, and may be influenced by external factors such as the mass media.
3. The social practice of law may reflect a gender power structure and other hierarchies. For example, in some communities, male traditional leaders and religious scholars wield power over norm-setting and other decision-making processes. The construction and distilling of knowledge, including of what is customary, has to be examined in how it has excluded women.
4. Cultural or social norms are involved in the social practice of law in both state and non-state mechanisms. Sometimes this results in practices that are harmful or discriminatory to women under international human rights standards. Even the application of state law may be infused with the dominant cultural norms in the community. For example, while rape is considered a crime under state law, the accepted cultural practice in many communities is to marry off women rape victims to their rapists to avoid social embarrassment for the victim and punishment for the rapist. Forced marriage and kidnapping of women for marriage is also accepted in some cultures. Getting married or securing a divorce,

46. Sally Merry, cited in Tamanaha 2000, p. 298.

47. Boaventura de Sousa Santos, cited in Tamanaha 2000, p. 302.

48. Tamanaha 2000, pp. 302, 313-314.