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## Constitutional Reform, Legal Consciousness, and Citizen Participation in Thailand

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Frank Munger

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## Introduction

This essay was originally submitted to a workshop on Citizen Participation in East Asian Legal Systems held at Cornell Law School in late September 2006.<sup>1</sup> If the Korean and Japanese proposals discussed at the Conference represent the most advanced experiments in citizen participation in Asian legal systems,<sup>2</sup> Thailand's legal system, and its lack of citizen participation, may be more typical of the large majority of East and Southeast Asian legal systems, where the prospects for lay participation are bound up with globalization and progress toward democracy. These comments were inspired by Thailand's 1997 "People's Constitution."<sup>3</sup> This remarkable constitution emphasized democracy, the rule of law, and citi-

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1. I am grateful to Professor Valerie Hans for the opportunity to present this material and to learn from the distinguished scholars who attended the Conference which she organized. I would like to thank Robert Albritton, David Engel, Kevin Hewison, Fiona Haines, and Simon Singer for helpful conversations about material in the paper. I offer particular thanks to my two research assistants at Cornell University, Nuanchan Singkran and Poonrit Kuakul, for translations of Thai newspaper reports and for guidance in reading them, and to my New York Law School research assistant Cory Blitz for assistance with internet research. This material is based in part upon work supported by the National Science Foundation under Grant No. 0454690. Any opinions, findings, and conclusions or recommendations expressed in this material are those of the author and do not necessarily reflect the views of the National Science Foundation.

2. Sherry Martin, *Legal Consciousness and Political Socialization*, paper delivered at the Cornell Law School Conference on Citizen Participation in East Asian Legal Systems, September 22-23, 2006; Judge Rakwon Jang, *The Law Reform Process in Korea*, paper delivered at the Cornell Law School Conference on Citizen Participation in East Asian Legal Systems, September 22-23, 2006; Masahiro Fujita, *Planning for Lay Participation in Japan: Ideas from Research*, paper delivered at the Cornell Law School Conference on Citizen Participation in East Asian Legal Systems, September 22-23, 2006.

3. CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2540 (1997).

zen participation at many levels and in many forms. The new constitution was widely believed to mark an end to popular tolerance for extra-constitutional military rule.<sup>4</sup> The constitution, and the myth of its permanence, lasted nearly ten years.

On September 19, 2006, the Thai military seized power and repealed the constitution, taking particular care to note that the new constitutional court has been “terminated,” although all other courts remained open.<sup>5</sup> The coup is the eighteenth by the military since Thailand became a constitutional democracy in 1932, and it has dismayed those who had hopes for participatory representative democracy and the rule of law in Thailand.<sup>6</sup> Of course, that hope always depended on more than the constitution itself. Hope for a government more responsive to popular will and to rights grew with the globalization of Thailand’s economy, causing the simultaneous embourgeoisment and impoverishment of different groups of Thai, as well as a growing impatience with corrupt authoritarian military and civilian governments, and a shifting institutional and cultural context that supported a stronger demand for democracy. The constitution’s demise in September 2006 did not destroy the potent forces that led to its adoption in 1997. Indeed, coup leaders promised a quick return to constitutionalism and to democracy purged of corruption, even though they disbanded Parliament and censored the media and internet after the takeover.<sup>7</sup>

The coup underscores an important point about western expectations for the establishment of rights and participation in developing Asian societies. Western governments and international agencies closely tied to western interests often advocate for transplanting western regulatory and judicial institutions to remedy market failures. Such transplants, once in place, may function in ways that are quite different from their western models. More importantly, advocates often promote transplants for particular political or economic interests, rather than as elements of reforms intended to achieve broader civic goals. This makes the 1997 Constitution all the more unique and important. Ideas about civic participation are conveyed and received in many different ways. As Sally Engle Merry observes in her study of the implementation of the Convention on the Elimination of All Forms of Discrimination Against Women, the final step in conveying western ideas about law and rights—translation into the vernacular—depends on many factors, including preexisting cultures and institutions, translators, the apparent risks and benefits of “taking on rights,” and, more partic-

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4. PASUK PHONGPAICHT & CHRIS BAKER, THAILAND: ECONOMY AND POLITICS 417-418 (2d ed. 2002).

5. *Coup d’etat in Thailand*, BANGKOK Post, Sept. 20, 2006, available at [http://www.bangkokpost.net/breaking\\_news/breakingnews.php?id=113027](http://www.bangkokpost.net/breaking_news/breakingnews.php?id=113027); Bill Barnes & Amy Kazmin, ‘Empire Strikes Back’ As Thai Army Moves In, FIN. TIMES, Sept. 20, 2006, at 8.

6. Amy Kazmin, *Investors Express Hope on Economic Benefits From Bloodless Coup*, FIN. TIMES, Sept. 21, 2006, at 9 (reporting that there had been 17 previous coups); PHONGPAICHT & BAKER, *supra* note 4.

7. *Coup d’etat in Thailand*, *supra* note 5.

ularly, the right to participate in the political or legal system.<sup>8</sup>

The apparent coexistence of public approval for the military coup, overwhelming electoral mandate for the ousted prime minister, universal respect for the monarchy's moral leadership, and support for the coup illustrates the challenge for scholars attempting to understand the prospects for citizen participation in Thailand's political and legal systems.<sup>9</sup> The explanation for this bewildering coexistence of institutional forms partially lies in Thailand's long history of authoritarian government. Yet as the evolution of constitutionalism in the 1990s demonstrates, democracy and citizen participation have taken root. Before the coup, Thailand showed signs of developing at least two cultures of democracy and participation—one highly westernized and one decidedly more traditional. Both embrace “democracy” but interpret its essence in different ways. Rather than viewing one of these cultures as resistant to globalization, rights, or development and the other as facilitating adaptation, we ought to view the emerging cultures of democracy as adaptations to the unequal effects of globalization on different social groups in Thailand. These multiple, distinctive interpretations of democracy and the rule of law reflect in part different responses to the unequal effects of globalization and modernization that greatly complicate the future for citizen participation in Thailand.

## I. Globalization

Contemporary, “third wave” globalization is as much about ideas as it is about the direct flow of material and financial resources.<sup>10</sup> “First wave” globalization grew from the resource needs of industrialization and the expansion of global transport prior to the end of the nineteenth century.<sup>11</sup> “Second wave” globalization during the mid-twentieth century reflected the establishment of global financial institutions like the World Bank and the International Monetary Fund.<sup>12</sup> By the end of the twentieth century,

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8. SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING HUMAN RIGHTS INTO LOCAL JUSTICE* 215-17 (2006).

9. The King has always been and remains an ambiguous figure—formally almost powerless but, in truth, revered beyond all others, as a person and institution, and holder of the trump cards. PAUL HANDLEY, *THE KING NEVER SMILES: A BIOGRAPHY OF THAILAND'S BHUMIBOL ADULYAJEJ* (2006). In 1992, following a bloody rebellion against the last military coup, the King required the leaders of the military and the rebellion to prostrate themselves before him and demanded that a resolution be reached. Kevin Hewison, *Introduction: Power, Oppositions, and Democratisation*, in *POLITICAL CHANGE IN THAILAND: DEMOCRACY AND PARTICIPATION* 1, 2 (1997). The military who conducted the recent coup formed a Democratic Reform Council with the King as its nominal head. *Coup d'etat in Thailand*, *supra* note 5.

10. Ammar Siamwalla, *Globalisation and its Governance in Historical Perspective*, in *SOCIAL CHALLENGES FOR THE MEKONG REGION* 13-22 (M. Kaosa-ard & J. Dore eds., 2003).

11. THE WORLD BANK, *GLOBALIZATION, GROWTH AND POVERTY: BUILDING AN INCLUSIVE WORLD ECONOMY* (World Bank Policy Research Report #23591) 24-25 (2002).

12. See, e.g., Ute Piper & Lance Taylor, *The Revival of the Liberal Creed: The IMF, the World Bank, and Inequality in a Globalized Economy*, in *GLOBALIZATION AND PROGRESSIVE ECONOMIC POLICY* 37, 38-39 (Dean Baker, et al. eds., 1998).

globalization depended on the flow of ideas and information that allowed multinational corporations to locate production and office facilities anywhere in the world. As a second-order effect, ideas about governance—in particular, concepts of participation and citizenship—are an important part of this flow.

The flow, historically from the global North to the global South, is more complicated now. Ideas, and the institutions they are intended to construct, may encounter established cultures and practices that leave little space for rivals, or greatly alter their meaning, creating a two-way flow.

A further dimension of this globalization of ideas is modernity. Sociologist Anthony Giddens characterizes modernity by referring to two types of movement away from the traditional. According to Giddens, social space and time are no longer defined by the physical space and time in which one moves (*disembeddedness*). Society also strives to become increasingly aware of itself through public and private systems of information control (*reflexivity*).<sup>13</sup> Greater mobility and interconnectedness made possible by technological progress permit individuals to understand themselves as part of a far wider range of contexts, ideas, cultures, and individuals than a century or even a few decades ago.

Access to information enhances control over our lives and influences how we see and understand ourselves. Public and private institutions have more information about us and process it through expert knowledge that links identity to behavior and policies. The rise of expert systems of knowledge is a key element of Giddens's modernity. What we have called globalization is in large part an intensification of both of the processes that Giddens describes, greatly extending boundaries of social space and time and subjecting more and more individuals to information control systems. Indeed, Giddens claims that "[m]odernity is inherently globalizing."<sup>14</sup>

The spread of ideas about governance is part of this transformation. As we consider replicating the jury system and lay judging in developing societies we should try to understand the spread of liberal democratic forms of citizen participation not only in terms of the politics of globalization, but also as an aspect of modernization, namely the potential of these participatory justice systems to create conflicts for individuals who are embedded in traditional practices of authority, knowledge, and dispute resolution.<sup>15</sup> Each of these legal practices furthers modernization that reduces the value of local knowledge while empowering expert systems—quite the opposite of our own folklore about citizen participation.

Globalization of participatory governance has contradictory implications for developing societies in part because it is both modernizing—disembedding individuals from their personal and familial relationships and reconstructing them as interchangeable citizens—and anti-modern—

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13. ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 21, 45 (1991).

14. *Id.* at 63.

15. MERRY, *supra* note 8, at 139-51 (describing this process in specific conflicts between traditional and rights-generated forms of social participation in five different societies).

through its apparent appeal to local knowledge. But that is only part of the story. As a general matter, there are at least two distinct but interrelated transnational sets of ideas about participatory democracy that heighten these contradictory effects by communicating somewhat different ideas about participation to different audiences. Global entrepreneurship on behalf of citizen participation risks further entrenching the pattern of uneven development and growing inequality.

Entrepreneurship urging governmental reform comes in two varieties, based on their intended effects. The first is “top down” in terms of intended effects—modernizing political systems and promoting elite-led development. “Structural adjustment” makes markets safer. Civic participation serves to control corruption and stabilize markets and political systems by making government responsive (but not too responsive).<sup>16</sup>

The second form of entrepreneurship seeks “bottom up” reforms that increase the well-being of individuals adversely affected by development, though some of these changes are engineered through international and governmental interventions from above. Western NGOs and activists have inspired a world-wide movement for rights. They are less concerned about institutional reforms, like juries and lay judges, than about quality of life and basic human rights. Their interventions are often at the grassroots level.<sup>17</sup>

The discourse about participation for the purpose of developing rights and capacities of individuals arises from both western and indigenous cultures of participation, which sometimes have quite different implications. Some universal human rights have strong indigenous parallels, such as environmental rights.<sup>18</sup> Others are more controversial; for example, the U.N. Convention on the Elimination of All Forms of Discrimination Against Women often conflicts with traditional practices and gender roles.<sup>19</sup>

One example of the potential conflict between “universal” and indigenous rights arises out of the contentious debate about “Asian values,” which pits advocates for Asian development under paternalistic leadership

16. “Stakeholder participation” is described as a principal goal in the most recent World Bank country dialog monitor on Thailand that reports on World Bank funded country development programs. *THE WORLD BANK, THAILAND-WORLD BANK GROUP PARTNERSHIP COUNTRY DIALOGUE MONITOR: JANUARY 2004-JUNE 2005* (2005). The report praises Thailand’s “emphasis on governance and decentralization” and urges further effort to improve the “quality of government services, right-size the government bureaucracy, increase the competency levels of public sector employees, and promote democratic governance.”

17. Amartya Sen argues that there is an important link between the realm of formal institutions such as democracy (and presumably other forms of participation that increase responsiveness) and quality of life. In turn, enhancement of fundamental qualities of life (health, education) leads to faster more equitable economic development because individuals are able and motivated to participate to the full extent of their capacities. *AMARTYA SEN, DEVELOPMENT AS FREEDOM* 15-21 (1999).

18. See, e.g., Peter Manus, *Sovereignty, Self-Determination, and Environment-Based Cultures: The Emerging Voice of Indigenous Peoples in International Law*, 23 *WIS. INT’L L. J.* 553, 592-96 (2005).

19. MERRY *supra* note 8, at 90-91.

against proponents of western individualism and individual rights. Most of the proponents of Asian values are Asian autocrats. The dichotomy has been rejected by most scholars, but many recognize that the “civil society organizations” of Asian cultures may socialize individuals for civic participation in very different ways. While development has undermined the welfare of traditional communities, the best solution may be not to reconstruct civil society according to a western model. Any expectation that Asians, and Thai in particular, will readily join secular, western-style interest groups or readily engage in western forms of civic participation is unrealistic.<sup>20</sup>

## II. Participation as an American Ideal

In the United States, popular understanding of participation starts with de Tocqueville.<sup>21</sup> In 1830, de Tocqueville described the buzzing commerce of small town American life as the essence of civic participation. He perceived the central role of local courts and lawyers as an expression of interconnectedness and local regulation. De Tocqueville commented that every local political issue enters the courts.<sup>22</sup> In 1830s America, courts, in some sense, *were* “government by the people” because there was little other day-to-day government. Today, “adversarial legalism” is said to arise in the United States in part from the lack of responsiveness of governmental administration.<sup>23</sup> Courts are participatory, politically permeable, and seldom final because they can be overruled by a more refined, authoritative political will. Thus, courts function much like the original Madisonian design for government. Our courts are uniquely accessible and responsive to problems that are considered political, rather than judicial, in most societies.<sup>24</sup>

This is a vision of participatory governance that does not appear to allow for disembeddedness or to defer to expert systems of information gathering and control. On closer examination, however, the seeds of both are present. James Madison believed that the national legislature creates a space for genuinely disinterested consideration of the public good, precisely because the individuals are disembedded, and expert in governance because they are likely to be an elite. But Madison’s vision was not modern because he did not expect government at higher levels to do much. Now that national government is the center of action, modernization grows from Madison’s pre-modern institutional vision.

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20. See generally Randall Peerenboom, *Social Networks, Civil Society, Democracy, and Rule of Law: A New Conceptual Framework*, in *THE POLITICS OF AFFECTIVE RELATIONSHIP: EAST ASIA AND BEYOND* 249 (Hahm Chaihark & Daniel Bell eds., 2004).

21. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Bruce Frohnen ed., Henry Reeve, C.B. trans., 2004) (1889).

22. See *id.* at 73-79.

23. See Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (2003).

24. See, e.g., Marc Galanter, *Bophals, Past and Present: The Changing Legal Response to Mass Disaster*, 10 WINDSOR Y.B. ACCESS TO JUST. 151 (1990).

Today, developed democracies have institutionalized many different forms of citizen participation in governance, although they do not share all of them. Different forms of participation in governance have different origins, different effects, and depend on different clusters of perceptions and practices to support them. Instead of a general model, there are many particular forms of participation in particular locations. Although not all of them are successful, the idea of participation remains powerful and influential because we trust it.<sup>25</sup>

A positive perspective on participatory procedure is offered by Tom Tyler and his many collaborators who have shown that trust in judicial and policy decisions increases when procedures are perceived as fair.<sup>26</sup> Participation as an interested party is one of those procedural ingredients, but third-party citizen participation, through juries or lay judges, may also increase legitimacy under the right conditions.<sup>27</sup> Jury trials, though they are a rare event in our legal system, remain a powerful and important symbol, and an arguably important check on prosecutorial, litigant, and judicial power.

### III. Case study: Thai Institutional Change

Thailand has been influenced by both the top down and bottom up contemporary global flow of ideas about democracy and participation. The influence of western jurisprudence on Thai legal institutions, however, reaches back to the nineteenth century. Assimilation of European jurisprudence into Thai legal culture accelerated in the nineteenth century, incorporating various elements without losing its distinctive character. Thailand adopted the form of a modern administrative state, but power remained in the hands of an autocratic ruler and his royal family, who

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25. The modern development of the due process clauses in the Fifth and Fourteenth amendments of the U.S. Constitution is a powerful institutional legitimator of citizen participation in adjudications. Notably, the Supreme Court's decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970) guaranteed the right to participate in adjudication of one's property rights to the most poor and deeply subordinated members of society—welfare recipients. Yet how did it change outcomes, legal consciousness (of recipients), or U.S. culture? Increasing number of individual adjudications soon led to complex codifications of rules which, in practice, proved to be no less arbitrary and manipulable. The legal consciousness of welfare recipients tilted less toward empowerment than increasing recognition of need for the expertise of a legally trained advocate. While *Goldberg* recognized the growing significance of entitlements in modern society, it made entitlements a symbolic political target of conservatives. A conservative Congress eventually pushed for elimination all federal welfare entitlements. Thus, *Goldberg*, and related cases establishing a constitutional right to participation in adjudication, contributed to unexpected institutional consequences: increasing cost, complexity, subordination of lawyers, and ultimately declining political support for entitlements. How's that for a bumper of a message about participation?

26. See generally Tom R. Tyler & Yuen J. Huo, *The Overall Influence of Social Motives on Decision Acceptance*, in *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* 76–96 (2002), reprinted in *PROCEDURAL JUSTICE: VOLUME I* 143, 157 (Tom R. Tyler ed.) (2005).

27. This is a premise of the experimental introduction of lay judging in Korea and Japan. See *supra* note 2.



combined the absolute authority of the Monarchy (Mahakesat), symbolic representation of the Nation (Chat), and control over the central administration of Buddhism (Satsana).<sup>28</sup> The Thai monarchy's historical compromise with western power opened Thai legal culture to the influence of powerful new values, including the concepts of equality and human rights. These new values transformed Thai politics and contributed to the creation of a constitutional monarchy in 1932.<sup>29</sup>

Frank Reynolds contrasts Thai "civic religion" with the central values in American culture that Robert N. Bellah termed "utilitarian individualism."<sup>30</sup> While the American civic religion developed from a tradition of individual freedom of conscience and dissent, treating institutionalized authority with suspicion, Thai civic religion grew from a tradition far more respectful of the authority of traditional, moral, and spiritual leaders rather than the moral conscience of individuals.<sup>31</sup> Nevertheless, Thai legal culture valorized the people's welfare in a way that enabled advocates to leverage it on behalf of popular movements. Equality and democracy (if not precisely *representative* democracy) appealed not only to elites, but also to the Thai people generally, and observers credit growing support for these values with the strong rejection of military rule in 1992 followed by pressure for democracy and constitutional reform.<sup>32</sup>

In 1996, coincident with the final stages of constitutional reform, the Thai economy collapsed. The collapse created an opportunity for "structural adjustment"—a prototypical "top down" flow of ideas about governance—through pressure from the International Monetary Fund to increase transparency and market stability.<sup>33</sup> For several decades, the World Bank, the Asian Development Bank, and other powerful international financial actors with an interest in Thailand's economic development added their influential support for governmental reforms to increase market stability, including greater participation by citizens through decentralization and promotion of civil society organizations.<sup>34</sup> Thai public opinion attributed the crash to mismanagement and corruption, adding fuel to the constitutional reform movement.<sup>35</sup> Parliament approved the draft constitution and sent it to voters just as the effects of the crash reached their height in late 1996.

However, the Thai people generated the primary pressure for a more democratic constitution and for greater democratic participation. The new

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28. See Frank E. Reynolds, *Dhamma in Dispute: The Interactions of Religion and Law in Thailand*, 28 *LAW & SOC'Y REV.* 433, 442 (1994).

29. *Id.* at 442-43.

30. *Id.* at 441.

31. See *id.* at 441-43.

32. Phongpaichit & Baker, *supra* note 4, at 411-414 et seq.

33. *Id.* 430-436.

34. See Chantana Banpasirichote, *Civil Society and Good Governance: A New Chapter in Thailand's Political Reform?*, in 1 *DEMOCRACY AND CIVIL SOCIETY IN ASIA: GLOBALIZATION, DEMOCRACY AND CIVIL SOCIETY IN ASIA* 213, 225 (Fahimul Quadir & Jayant Lele eds., 2004).

35. See *id.* at 229.

Thai Constitution reflects not only the influence of western institutions on Thai political leaders and intellectuals, but also mass public opinion that favored democratic reforms. Whether the specific institutional reforms comport with popular understandings of democracy is an important and debatable question. In Part VI of this article, I describe democracy as it is viewed through the lens of traditional Thai culture. For instance, domestic and international NGO workers and activists, who have worked for decades with rural communities to protect their way of life, have also influenced the perceptions and values of rural Thai by promoting a “bottom up” understanding of democracy.<sup>36</sup> We are only beginning to understand the influence of both international and domestic advocacy on popular Thai values and legal consciousness.

In 1997, following protracted political struggle and with overwhelming public approval, a new constitution expanded individual and group rights, greatly extended popular participation in government, and created new institutions to insure accountability under law, including a politically independent constitutional court. The new constitution mandated participation in many different forms, including, for example, decentralization of power, fiscal control, and electoral democracy.<sup>37</sup> It also guaranteed individual rights that characterize the constitution of a modern liberal state, the right to information, and the ability to participate in government decisions affecting the “quality of the environment, health and sanitary conditions, the quality of life or any other material interest concerning him or her or a local community . . . as provided by law.”<sup>38</sup> Further, the constitution protected the right to “participate in the decision-making process of State officials in the performance of administrative functions which affect or may affect his or her rights and liberties, as provided by law.”<sup>39</sup> The constitution extended democracy to local offices and created an anti-corruption commission to ensure effective voting and make office holding easier for those who are not super-rich by attempting to reduce the importance of money in elections.<sup>40</sup> The constitution also established major court reforms, creating administrative courts to oversee the vast entrenched bureaucracy and a Constitutional Court, a majority of whose members are non-political.<sup>41</sup> Pro-participation reformers also demanded a provision for direct popular participation in oversight through a petition process that allowed 50,000 citizens to initiate both legislation and investi-

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36. Phongpaichit & Baker, *supra* note 4, at 436-39; Prudhisana Jumbala & Maneerat Mitprasat, *Non-governmental Development Organizations: Empowerment and Environment, in POLITICAL CHANGE IN THAILAND: DEMOCRACY AND PARTICIPATION 195, 214-15* (Kevin Hewison ed., 1997).

37. CONSTITUTION OF THE KINGDOM OF THAILAND, §§ 282-90.

38. *Id.* §§ 56, 59.

39. *Id.* § 60; see also *id.* § 76 (“The State shall promote and encourage public participation in laying down policies, making decision on political issues, preparing economic, social and political development plans, and inspecting the exercise of State power at all levels.”).

40. See *id.* §§ 297-302.

41. See *id.* §§ 276-80 (describing the administrative court); see *id.* §§ 255-70 (describing the Constitutional court).

gation of corrupt practices.<sup>42</sup>

Thailand's "People's Constitution," regrettably now repealed, represented the most extensive pro-rights, pro-participation public law reform in any emerging society, with the exception of South Africa.<sup>43</sup> But the practical effect of reform continues to depend not only on officials' respect for citizens' individual and participatory rights, but also on Thai citizens' willingness to invoke them.

Assimilation of western institutions has affected the form of the Thai legal system, which has both civil and common law elements; however, the prevalence of code law, absence of citizen participation, and historically limited authority for judicial review suggest that civil law predominates. Specialized courts have existed for some time in the areas of tax, intellectual property and international trade, labor, and juvenile and family justice.<sup>44</sup> Three of these, the Intellectual Property and World Trade Court, Labor Courts, and Juvenile and Family Courts empanel lay judges with career professionals.<sup>45</sup> Lay judges are experts appointed for a term of years. In family court, at least one of the lay judges must be a woman.<sup>46</sup> The forms of lay judging incorporated by the Thai courts are clearly one result of the growing influence of western ideas about law.<sup>47</sup> In the areas of intellectual property, world trade, and labor, involvement with the global market may have accelerated these developments. Lay participation in specialized courts in Thailand is ripe for study.

The importance of citizen participation in governance and in the unfolding developments in Thailand, including lay participation in the legal process, remains a question. In other societies, elites have introduced lay participation in courts as a means of increasing the legitimacy of courts and other institutions of government. In Thailand, the 1997 constitutional reform sprang not from elites' concerns about the legitimacy of a government that served their interests, but from widespread concerns about a government that, at times, served neither elite nor popular interests due to corruption and the absence of effective democracy. Court reform was perceived as a mechanism of corruption control and rights enforcement, while democracy was achieved through an expanded electoral system and direct citizen participation in policy making. Thus, a careful reading of the 1997 Constitution suggests that courts were to assume the role of guarantors of good government and popular rights, but remained the domain of elites.<sup>48</sup>

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42. *Id.* § 304.

43. See Andrew Harding, SOUTH EAST ASIA, 1997-2003: TWO CASE STUDIES ON POLITICS OF LAW AND DEVELOPMENT 14 (2003), available at <http://www.law.uvic.ca/seals/forums/attachment.php?attachmentid=6>.

44. Vichai Ariyanutaka, *Sophistication of Dispute Resolution in Special Courts: A Perspective from Thailand*, in LAW, DEVELOPMENT, AND SOCIO-ECONOMIC CHANGES IN ASIA (Naoyiki Sakumoto et al. eds., 2003).

45. The Judiciary of Thailand, Section 3.1 *The Courts of First Instance*, available at <http://www.judiciary.go.th/eng/thejudiciary.htm#t3>.

46. *Id.*

47. *Id.*

48. PASUK PHONGPAICHT & CHRIS BAKER, THAILAND'S CRISIS 118-19 (2000).

Unsurprisingly, court reform in developing societies is typically a top down enterprise, and, characteristically, the domain of experts influenced by western values and ideas. Where this leaves courts and the rule of law in popular consciousness as sources of political legitimacy remain to be seen.

#### IV. Legal Consciousness

The 1997 Thai Constitution mandated participation in many forms, but traditional Thai civic culture as described by Frank Reynolds does not emphasize participation so much as responsive authority. The question is: what forms of participation are valued and trusted by the Thai? What effect has the opportunity to participate directly or indirectly (through representatives) had on perceptions of rights and the way "rights become active" in daily life?

James Klein has noted that the 1997 Constitution facilitated popular participation in government on at least five different "levels," including (i) "cognizance" or consciousness of rights to participate, (ii) voting in elections, (iii) providing input into policy formulation, (iv) initiating oversight through appeal or litigation, and (v) direct participation by running for office.<sup>49</sup> Provisions of the Constitution enhanced every level of participation. In 2003, the Thai government drafted a law giving effect to the new Constitutional rights to participate that elaborated citizens' rights to participate in administrative decision making.<sup>50</sup> Notwithstanding the Constitution's emphasis on participation, Klein is not optimistic about the likelihood that the law will have any immediate effect on widespread resistance to public participation by administrative agencies themselves.<sup>51</sup> An important question for the longer term is what value the Thai themselves place on these forms of participation, a fortiori, what appeal do more specialized forms of citizens participation have such as juries and lay judges?

Law and society scholarship has drawn attention to interpretive processes that accompany involvement with law, referring to the mental states of those influenced by law as "legal consciousness." Social scientists who study juries or lay judges have known for some time that wealth, education, specific experiences, value orientations, or attitudes may be predictors of perceptions of injury or wrong doing and appropriate legal remedies. In contrast to studies of predictors of perceptions and actions of citizens participating in the legal process, research on legal consciousness embraces more than fixed attitudes or demographic indicators and considers a broad range of social action in everyday life contexts. Research on legal consciousness draws attention to cognition, the process by which

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49. James Klein, *Public Participation and Hearings in the New Thai Political Context*, in LEGAL FOUNDATIONS FOR PUBLIC CONSULTATION IN GOVERNMENT DECISION-MAKING (Kenneth Haller & Patcharee Siroros eds., 2003).

50. See generally CONSTITUTION OF THE KINGDOM OF THAILAND.

51. See Klein, *supra* note 49, at 122-29.

individuals come to know the social world and give it meaning.<sup>52</sup> One important conclusion reached through such research is that cognition influenced by law may affect an individual's self-perceptions, social relationships, and selection of interpretive frameworks for interactions in the everyday world, as well as one's interactions with formal legal institutions. Legal consciousness may not only influence individuals in "taking on rights" (to use Merry's suggestive phrase<sup>53</sup>) as a good bet or leaving them alone in interactions with authorities or power holders, but may also influence expectations for daily interactions with family and social intimates.<sup>54</sup> Through such subtle and indirect effects on experience and perception law influences both deliberate choices and unselfconscious conduct that gives any form of authority or social order its meaning.<sup>55</sup>

Further, research on legal consciousness has suggested the importance of multiple discourses of interpretation that guide both perceptions of what is and of what ought to be.<sup>56</sup> Where a discourse of rights prevails in individuals' narratives of social relationships and conflict, we might say that an ideology of legality has become established. Where other discourses are chosen to explain the occurrence or resolution of conflict, legal consciousness recedes in importance.

## V. Thai Legal Consciousness and Participatory Governance

Proposals to introduce lay judging in Korea and Japan on an experimental basis are intended to strengthen the legitimacy of courts that are perceived as elite, authoritarian, and non-transparent. These experiments in lay participation appear to be responsive to broader social changes in the two democracies, namely deepening liberal democratic values. The proposals for symbolic participation in the legal system through the presence of a handful of lay judges suggests not only a demand for participatory representative institutions of governance but also the importance of courts and, by inference, the transparent rule of law. Courts matter where the rule of law matters. Where legitimacy is grounded in something other than participatory representation and the rule of law, courts are unlikely venues for such symbolic reforms.

Thailand's recent history of popular support for monarchy, authoritarian civilian or military rulers, and parliamentary democracy is puzzling for scholars attempting to understand the importance of law and democracy. In many respects, Thailand's repeated return to authoritarian rule is more like the experience of its authoritarian neighbors, Singapore, Malay-

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52. Frank Munger, *Culture, Power, and Law: Thinking About the Anthropology of Rights in Thailand in an Era of Globalization*, N.Y. L. REV. (forthcoming 2007).

53. Martin, *supra* note 2.

54. *See id.*

55. *See* DAVID ENGEL & FRANK MUNGER, *RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIVES OF AMERICANS WITH DISABILITIES* (2003).

56. *Id.* *See* chapter four for examples, narratives of persons with disabilities about social injustice included discourses of religion, the market, or family obligations as well as a variety of discourses about rights.

sia, and Indonesia than the more advanced democracies of Korea and Japan. Yet the public's assumption that many of the principles of the 1997 Constitution will be retained, together with a history of popular movements for social justice and a legal profession that is both increasing rapidly in size and has at times defended human rights, suggests a continuing opening for participatory governance.

In this part of the article, I consider evidence bearing on the aspects of Thai legal consciousness most relevant to citizen participation and the rule of law. High quality surveys of public opinion now available in Thailand provide some help in identifying key elements of legal consciousness,<sup>57</sup> and a recent analysis of this data examines the breadth and strength of support for democratic institutions and acceptance of control by laws, procedures, and institutions created through democratic processes.<sup>58</sup> Data from the 2001 Asian Barometer survey shows Thai citizens' strong preference for democracy over all other forms of government.<sup>59</sup> For example, 83.8 percent said that democracy is always preferable to authoritarian forms of government.<sup>60</sup> Although Thai express a strong preference for democracy, the meaning of "democracy" cannot be taken for granted, nor can support for participatory representative institutions and the rule of law, assumptions that might be made safely in a survey conducted in the United States or Europe. Just a few decades ago, historian David Wyatt reported that some rural people thought that the Thai words for democracy and constitution were the names of members of the King's family.<sup>61</sup>

In 2001, about 70 percent of Thai surveyed could name at least one specific characteristic of democracy and 25 percent two or more. Most frequently mentioned were protection of freedom and civil liberties (38% of the 70% or 28% of all surveyed), equality (10.5% of all surveyed), and individualism (7.7%).<sup>62</sup> There was little support for "Asian values" such as social responsibility or communalism.<sup>63</sup> More important for the future of western-style liberal democracy, there was little evidence that the Thai associate democracy with political and participatory elements that West-

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57. The Asian Barometer describes itself as "an applied research program on public opinion on political values, democracy, and governance" encompassing survey data from twelve East Asian political systems and five South Asian countries on "citizens' attitudes and values toward politics, power, reform, and democracy in Asia." See generally, The Asian Barometer, available at <http://www.asianbarometer.org/newenglish/introduction/> (last visited Nov. 17, 2006).

58. See generally, Robert Albritton & Thawilwadee Bureekul, *Developing Democracy under a New Constitution in Thailand* (2004), available at <http://www.asianbarometer.org/newenglish/publications/workingpapers/no.28.pdf> (last visited Nov. 18, 2006) (discussing the Asian Barometer data drawn from a survey conducted in 2001).

59. *Id.* at 15 and Table 2.

60. *Id.* at 45.

61. *Id.* at 10.

62. *Id.* at 11 and Table 1.

63. Robert Albritton & Thawilwadee Bureekul, *Social and Institutional Supports for Plural Democracy in Eight Asian Nations: A Cross-National and Within-Nation Analysis*, 16 (2005), available at <http://www.asianbarometer.org/newenglish/publications/workingpapers/no.31.pdf> (last visited Nov. 19, 2006).

ern conceptions take for granted.<sup>64</sup> Indeed, there was strong support for abolishing opposition parties.<sup>65</sup> Overall, 76 percent said diverse views made society chaotic, and 45 percent said they should not have to tolerate views that differed sharply from their own.<sup>66</sup> These views, combined with a strong belief in traditional civil liberties such as freedom of speech, yield a complex picture of independence and intolerance, direct majoritarian democracy, and rejection of the conflict and contention of party politics and representative democracy.<sup>67</sup>

While parties and party politics face great skepticism in Thailand, the highly popular 1997 Thai Constitution provided for direct participation in many ways—extending electoral democracy to local government, providing for public participation in administrative decision-making, and direct referenda by petition.<sup>68</sup> The constitution mandated non-partisan oversight to protect the people's rights (including rights to participate).<sup>69</sup> Yet inclusion of constitutional provisions guaranteeing the right to participate must be reconciled with seemingly contradictory tendencies. For example, Thai citizens gave mass support in recent elections to the authoritarian Prime Minister Thaksin Shinawatra, and later apparently approved the bloodless military coup that sidelined him in September 2006.

Further qualifying Thai support for democracy is the trust in traditional, non-partisan, and undemocratic institutions. The Constitutional Court is the institution that enjoys the most trust—over 82 percent of respondents.<sup>70</sup> Other non-partisan governmental agencies also have gained trust. The military is trusted by 80 percent of the respondents, however, second only to the Constitutional Court.<sup>71</sup> By contrast newspapers, parties, and NGOs receive low ratings, even lower than the much-feared police.<sup>72</sup>

The apparently contradictory tendencies of Thai popular support for different forms of government may be explained in part by a pronounced difference in the perceptions, and legal consciousness, of two important groups in contemporary Thai society. Albritton and Bureekul argue that there is a pervasive split between two groups of Thai citizens characterized by three overlapping differences: urban and rural, more educated and less

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64. For example, few respondents mentioned parties, elections, or parliamentary decision making. *Id.* at 14.

65. *Id.* at 16-17.

66. *Id.* at 19.

67. The meaning of an apparently strong preference for democracy over other forms of government is also tempered by the fact that about fifty percent would prefer economic development to having a democratic government. *Id.* at 16.

68. *Id.* at 18-19.

69. In addition to creating a non-partisan constitutional court and administrative courts, the 1997 constitution created a non-partisan National Election Commission and a non-partisan National Counter Corruption Commission. CONSTITUTION OF THE KINGDOM OF THAILAND, § 136 et seq. and § 297 et seq.

70. Albritton & Thawilwadee, *supra* note 58, at 27, Table 10.

71. *Id.* at 28.

72. *Id.*

educated, and “modern” values and “traditional” values.<sup>73</sup> Driving the differences, they argue, is acceptance or rejection of traditional values. The survey measured acceptance of traditional values by the respondent’s agreement with the importance of obedience to parents, a hiring preference for friends and relatives, family interest taking precedence over the individual, the loss of face by a male who works for a female boss, the belief that elders should resolve disputes, and the idea that husbands should persuade daughters-in-law to obey their mother.<sup>74</sup> Acceptance of traditional values was in turn highly correlated with low respect for minority rights, high trust in social and political institutions, and weak support for the rule of law.<sup>75</sup> Not surprisingly, embracing traditional values was more characteristic of rural Thai, while rejecting traditional values and embracing “modern” values was strongly associated with urban residence and more education.<sup>76</sup> Albritton and Burekul point out that apparently there is an ironic concluding twist to the tale of two democracies. While a modernizing bourgeoisie should in theory be the vanguard of participatory representative democratization, precisely the opposite seems to be true in Thailand. Urban, educated Thai now seem to mistrust democracy precisely because rural Thai embrace it uncritically and without expectation of controlling their corrupt political representatives.<sup>77</sup>

We might compare the values of the rural majority in Thailand as revealed by the survey data with de Tocqueville’s description of citizen participation, still a principal source of Americans’ continuing vision of governance. Participatory governance in America is associated with belief in civic (if not social) equality, tolerance of conflict, accountability to local communities of electors, and distrust of traditional hierarchy, large institutions, and expert administrators. In almost every respect, the rural Thai majority’s traditionalism influences them to hold an opposing view. The powerful urban, educated minority are more sympathetic to modernism and participatory representative governance when it reflects their values, but they are skeptical of any form of participatory governance dominated by the rural electorate. Further, the strong aversion of both urban and rural Thai to conflict and intolerance of opposing political views evidenced by the survey data strongly suggest a lack of trust in fellow citizens. In contemporary Thailand, it is hard to imagine that lay participation in the legal process—especially by average citizens rather than experts—would increase the legitimacy of courts or the rule of law.<sup>78</sup>

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73. *Id.* at 22-26, 29ff.

74. *See id.* at 43 (Appendix 1).

75. Acceptance of the rule of law is defined by level agreement with seven propositions: government should decide what can be discussed; government leaders should be followed like heads of a family; judges should defer to the executive; political leaders should be able to ignore procedures; with support, a leader should ignore minority views; if the country is in difficulty, it is OK to disregard laws. *Id.* at 43 (Appendix 1).

76. *Id.* at 22-26.

77. *Id.* at 23.

78. Further, the Asian Barometer data for other countries included in the survey suggest that the same pattern exists in many developing Asian societies, namely the existence of two cultures (and perhaps two ideals of democracy or rule of law) character-



Surveys of public opinion offer one kind of evidence of the prospects for participatory forms of governance and the rule of law, but other forms of evidence help us understand how these orientations toward democracy and law may influence daily social life as well as interactions with legal and political institutions. A recent ethnographic study of the way that ordinary Thai respond to injuries caused by strangers (for example, an auto accident) illustrates how traditional values and globalization have combined in a unique way to reduce the likelihood of accountability under the law.<sup>79</sup> Contrary to expectations, globalization has led to a decline in willingness among Thai interviewed in this study to invoke rights in response to injury. This is because changes associated with globalization uprooted traditional forms of dispute resolution that operated in the shadow of law by destroying the relationships that made them meaningful.<sup>80</sup> Instead, injured individuals found resolution in an evolving form of Buddhist practice. The return to Buddhism in a new form suggests the continuing impact of the modern Thai civic religion on legal consciousness.

Scholar Peter Jackson, who has studied Buddhist influence on contemporary Thai social movements,<sup>81</sup> concludes that while religious diversity has increased in Thailand, and the state has become secularized because Buddhism itself is no longer controlled by the state, Thai society remains deeply religious, strongly suggesting that legal consciousness will continue to be influenced by elements of Thailand's "civic religion."<sup>82</sup> Even if other institutional elements favor greater reliance on law or the court system for addressing injuries, Buddhism may well have its impact on the meaning of injury or injustice and the adequacy of remedies offered by law.

Globalization and differences between rural and urban social organization and values have intertwined in other ways to create a two-track environmental movement in Thailand. The engine of social change has been Thailand's booming economy following the end of the Vietnam War, and the subsequent decline of communist influence in the rural areas of North-eastern Thailand.<sup>83</sup> Rapid growth accelerated exploitation of timber, waterways, and other natural resources, with two profound political effects. First, the former political periphery, including the rural poor and

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ized by modern versus traditional values, urban versus rural cultures, more education and western acculturation versus less education and traditional acculturation. Albritton & Bureekul, *supra* note 58.

79. David Engel, *Globalization and the Decline of Legal Consciousness: Torts, Ghosts, and Karma in Thailand*, 30 LAW & SOC. INQUIRY 469 (2005).

80. *Id.* at 469, 502.

81. Peter Jackson, *Withering Centre, Flourishing Margins: Buddhism's Changing Political Roles*, in POLITICAL CHANGE IN THAILAND: DEMOCRACY AND PARTICIPATION (Kevin Hewison, ed., 1997).

82. Frank Reynolds, *Dhamma in Dispute: The Interaction of Religion and Law in Thailand*, 28 LAW & SOC'Y REV. 433 (1994).

83. Philip Hirsch, *The Politics of Environment: Opposition and Legitimacy*, in POLITICAL CHANGE IN THAILAND: DEMOCRACY AND PARTICIPATION (Kevin Hewison ed., 1997). See also Philip Hirsch, *Environment and Environmentalism in Thailand: Material and Ideological Bases*, in SEEING FOREST FOR TREES: ENVIRONMENT AND ENVIRONMENTALISM IN THAILAND (Philip Hirsch ed., 1996).

ethnic minorities living within the forests, or on its margins, or whose villages were in the future floodplain of a proposed dam, has become politically active. After years of contact with activist NGO workers, they have been motivated to seek redress from the government, and if none is forthcoming, to undertake direct action to save homes and livelihoods.<sup>84</sup> They have been supported by international human rights and environmental NGOs opposing massive development projects worldwide that are planned and implemented without input from the affected communities. The World Bank, one of the world's chief dam builders and a source of funding for the Pak Mun Dam in Northeast Thailand, is a particular target of NGO opposition. The Pak Mun Dam project threatened to inundate many villages and became the focus of the Assembly of the Poor's most widely known campaign.<sup>85</sup>

The Assembly of the Poor, an important rural movement in opposition to destructive government-sponsored development projects, has constructed its claims for justice from traditional concepts of popular welfare and moral accountability. Rather than formal law and litigation, its leaders deployed demonstrations, petitions to government officials, and media campaigns.<sup>86</sup> In rural Thailand, where adversarial legalism is less familiar or common, Thai social movements have seldom relied on litigation to advance their goals. Both before and after the ratification of the "People's Constitution," many groups of rural Thai citizens have preferred to take their grievances directly to government officials and the King by means of petitions and demonstrations at Government House, rather than by invoking political and legal means afforded by law or by the Constitution. As recently as April 2006, the King departed from prepared remarks to admonish petitioners to use their constitutional means of redress. These remarks served as a monarchical reminder about the power afforded by law: use it or lose it.<sup>87</sup> Even the rights-advocating Lawyers Council of Thailand has encouraged such traditional appeals to the paternalism of government bureaucrats by acting as a go-between for petitioners on behalf of traditional communities but rarely using the courts to seek redress on their behalf.<sup>88</sup>

The second effect of development on environmentalism has occurred because Thailand's boom has expanded greatly Thailand's "middle class." Thailand's varied social strata do not correspond to Europe and America's classes of property-owners and salaried tiers. Instead, an emerging middle class, comprised of salaried and professional workers in government, universities, and industries, together with a rapidly growing number of entrepreneurs, is beginning to flex its political muscle. This middle class

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84. Jumbala & Mitprasat, *supra* note 36. See also BRUCE MISSINGHAM, *THE ASSEMBLY OF THE POOR IN THAILAND* (2003).

85. See Missingham, *supra* note 84, at 38-41.

86. See generally, *id.* at 38-41.

87. See *Roundup: Thai King Criticizes Current Political Mess*, PEOPLE'S DAILY ONLINE, April 26, 2006, available at [http://english.peopledaily.com.cn/200604/26/eng20060426\\_261157.html#](http://english.peopledaily.com.cn/200604/26/eng20060426_261157.html#).

88. *Id.*

supports causes that express their values and, frequently, take critical views of government. On the one hand, the environmental movement has been characterized by rural activism, supported by transnational and Thai NGO's and, significantly, activist monks whose actions and words mobilize the Thai civic religion with great power.<sup>89</sup> On the other hand, a more technocratic, nonconfrontational environmentalism is supported by the contributions of the "salariat,"<sup>90</sup> including entrepreneurs who have found environmentalism a useful accommodation, and by transnational NGOs advocating "sustainable" or "responsible" development.<sup>91</sup>

Willingness to "take on" participatory rights may be influenced by culture—the framework of values and expectations created through shared experience, but also, as the study of Thai injuries showed, by changing patterns of opportunity and risk. The government has used force against peaceful resistance to its authority. For example, the administration of ousted Prime Minister Thaksin Shinawatra faced serious charges of human rights abuse for his administration's treatment of protesting Muslims in Southern Thailand and other groups.<sup>92</sup> His government also faced accusations of widespread corruption that undermined responsible public administration.<sup>93</sup> James Klein's review of the prospects for increased public participation after the 1997 constitution concludes by observing that there was an unbroken pattern of indifference by bureaucrats to the legal rights of the public to participate in government decision making.<sup>94</sup> Local politics was long renowned for the use of strong-arm tactics to induce compliance with the wishes of the powerful, a practice which also continued after the reaffirmation of local democracy and participation rights in 1997.<sup>95</sup>

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89. See generally Susan M. Darlington, *The Ordination of a Tree: The Buddhist Ecology Movement in Thailand*, 37 *ETHNOLOGY* 1, Winter 1998; Philip Hirsch & Larry Lohmann, *Contemporary Politics of Environment in Thailand*, 29 *ASTON SURVEY* 439 (1989).

90. Pasuk and Baker use this term to describe one of the relatively educated and well to do groups that make up the middle class in Thai society. Pasuk Pongpaichit & Chris Baker, *Power in Transition: Thailand in the 1990s*, in *POLITICAL CHANGE IN THAILAND: DEMOCRACY AND PARTICIPATION* 32-35 (Kevin Hewison ed., 1996).

91. Jumbala & Mitprasat, *supra* note 36, at 196.

92. See generally HUMAN RIGHTS WATCH 2006 REPORT ON THAILAND, available at [http://hrw.org/english/docs/2006/01/18/thaila12251\\_txt.htm](http://hrw.org/english/docs/2006/01/18/thaila12251_txt.htm); THE ASIAN HUMAN RIGHTS COMMISSION REPORT, available at <http://www.ahrchk.net/pr/mainfile.php/2006mr/356/>.

93. Specific charges of corruption have included deals that favored members of the Prime Minister's family, but corruption reached as far as the non-partisan National Election Commission and led to the invalidation of an election. For a discussion on Thaksin's money policies see Pasuk Phongpaichit & Chris Baker, *THAKSIN: THE BUSINESS OF POLITICS IN THAILAND* 197-224 (2004).

94. See Klein, *supra* note 49.

95. *Id.* Klein describes skillful disrespect for the right to participate in government decision making: narrow interpretation of prior law, perfunctory hearings without significant effect, SLAPP litigation against critics of private development, resulting riots and demonstrations outside government offices. Where the power of government officials and private power-brokers has been seriously challenged, violent reprisals are not unknown.

## Conclusion

Studying the prospects for citizen participation in the legal systems of Asian societies reminds us of the unique nature of the liberal European-American legal system, and how important its historical and cultural antecedents are to the establishment of its particular forms of citizen participation and empowerment.<sup>96</sup> The effects of political and legal institutions depend upon the symbolic and social resources that a society offers. Juries function because courts work in certain ways in Europe and the United States. The impact of lay judges on popular perceptions of courts is important where courts themselves are regarded as playing an important, if complex, role in protecting democratic values. The unique virtue of a liberal legal system is that it is perceived as supporting democracy (by guaranteeing the rules of democracy) while also acting independently of majoritarian or popular justice. An independent judiciary can protect individuals against abusive officials or an abusive public. The very independence of liberal legal institutions often makes them appear remote and sometimes unpopular. Lay participation is one mechanism that arguably helps close the gap between judicial independence and popular legitimacy.

The preconditions for citizen participation are not met, however, where the law seems irrelevant to everyday practices of redressing injustice perpetrated by other citizens and government officials. Legal consciousness is one aspect of globalization. Legal consciousness linking the legitimacy of governmental institutions to citizen participation cannot develop unless rights and participation appear to be good bets. For some—primarily those benefiting from globalization—they often are. Others who have not benefited from globalization may not perceive their rights and participation the same. Our brief look at Thailand shows that the effects of globalization are more complex than such a simple economic or social calculus could predict. A large majority of Thai trust traditional authorities and mistrust conflict resolution through partisan political institutions. For them, traditional authority may seem to be the only thing that works. The context is critical. Global development creates a motive for change, but existing institutions and available resources shape the direction of change. It is hard to imagine common people, who may perceive themselves marginalized by the politics of development and globalization, investing legitimacy in criminal juries where the military and police are trusted to take care of the nation but are often perceived to be lawless. It is equally difficult to imagine common people investing legitimacy in civil juries and lay judges where ordinary citizens do not think law offers a meaningful solution for conflict.

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96. See generally Bernadette Meyler, *The Trials and Tribulations of the English Jury: Some Lessons for Emergent Systems of Lay Participation*, paper delivered at the Cornell Law School Conference on Citizen Participation in East Asian Legal Systems, September 22-23, 2006.

## Afterword

And what about Thailand's "September surprise?" The unexpected military coup placed hopes for constitutionally-grounded citizen participation in Thailand's political and legal systems in a new light as old patterns reappeared. Many saw the hand of the King behind the military coup and a general vote of "no confidence" in democracy by the traditional elite. This discouraging perspective, although supported by the evidence of contact between coup leaders and the King prior to the coup, may overestimate the power of such traditional elites to veto democracy for the foreseeable future. An alternative, institutional perspective would emphasize instead a cyclic pattern caused by the rivalry among competing groups with power to veto each other's designs for long-term hegemony. A proposition called Arrow's Theorem, which emphasizes the effects of competing, non-overlapping majorities, is well-known among theorists of legislative decision-making, and might explain why neither democracy nor extreme authoritarianism prevails for long in Thailand.<sup>97</sup> Although majorities oppose corruption, favor economic development, and embrace democracy, they are non-overlapping majorities that are often divided on other issues. Thus, rural and urban Thai oppose corruption but are divided on questions of economic development and, for now, democracy. Urban middle class and traditional elites, such as royals, bureaucrats, and the military, agree on stability but are often at odds about corruption and democracy. Rural Thai have been courted by the King's development projects but often seem to have different views of democracy and corruption, though they are rarely in open conflict because the King is revered and royal influence in politics is seldom made public. Yet, this perspective also seems to condemn Thailand to a stalemate that is inconsistent with the rapid economic and social change that Thailand has experienced over the past half century.

A third interpretation is that the coup does not signal a return to cyclic instability at all. Although the initial deadline set for restoration of constitutional democracy has passed, coup leaders have publicly acknowledged the importance of expectations unleashed by the 1997 Constitution. It is difficult to imagine that these leaders will reject principles such as individual liberties, non-partisan anti-corruption institutions, and a constitutional court, which are so strongly embraced by a large majority of the people. Placing genuine political control in the hands of elected representatives will be contentious, although restructuring the power of the elected Prime Minister will be the most difficult task. All agree on corruption control, but the gap is wide between the populism of the rural majority and the preferences of urban Thai for pliable electoral politics responsive to aspirations of the middle class. Nevertheless, if Thailand's constitutional restoration includes more effective guarantees of civil and political liberty, then electoral politics, fueled by Thailand's successful economic development, is

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97. See generally KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1970) (establishing the principle of "Arrow's Theorem").

likely to continue to grow in importance, and Thailand's political and legal systems will evolve along a new, as yet, unpredictable path where the social and political rights of the majority will become an increasingly important focus in the effort by the government to achieve stability and legitimacy.

