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GLOBAL FUNDER, GRASSROOTS LITIGATOR – JUDICIALIZATION OF THE ENVIRONMENTAL MOVEMENT IN THAILAND

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I. Introduction

Why do activists commit themselves to pursuing *law* in the cause of human rights? The question has long been posed by left critics skeptical of law's effectiveness even in developed societies, where law has great legitimacy and successful legal entrepreneurs regularly enter the power elite.[2] In societies where politics undermine the legitimacy of law and courts are much weaker, the question is still more compelling.[3] Activist lawyers, lawyers for social causes pose the most compelling question: why devote a career to risky and rarely successful symbolic remedies for problems of social and political organization? Personal values may provide a partial explanation for commitment and sacrifice. But a career which sustains advocacy for human rights or other social causes over a long period of time requires another sort of biographical explanation. A career requires opportunities for legal entrepreneurship, and resources to pursue them, as well as intangible rewards.

Even where activist lawyers have emerged within legal systems that offer less protection and fewer advantages than the politics and courts of developed democracies, concerned observers have puzzled over the effectiveness of law and even whether turning to law weakens movements for fundamental political reform by affirming the legitimacy of undemocratic constitutional regimes and weak courts. The "judicialization" of human rights, a goal advocated by some human rights advocates, and considered the gold standard established by civil rights lawyering in the United States, has encountered growing skepticism abroad as promising relative weak groups a quicker route to reform while actually undermining the value and strength of grassroots mobilization.[4] Critics agree, however, that this complex question must be better understood by western advocates for the development of cause lawyering in the Global South.

My essay presents a case study of the relationships between lawyer activism, personal experience and opportunity, global funding for litigation, and indigenous legal development in Thailand. Parts II through IV provide background. Through the story of one grassroots environmental litigator's career, in Parts V and VI, I observe factors that influence the lawyer's choice of

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[2] The classic criticism of reliance on rights for social and political transformation is STUART SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (2d ed., Univ. of Michigan Press 2004).

[3] *See infra* Part III and references.

[4] The case for independent courts and judicial review is made by TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES (Cambridge Univ. Press 2003) and MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION (Oxford Univ. Press 2002). For critique, *see infra* Part III.

career, the methods and goals of his law practice, the purposes for which he invokes law, and his success as an advocate for the development of human rights and democracy. The case study is selected from over one hundred in depth interviews with cause lawyers (and their clients) in Thailand, and is informed by interviews with judges, academics and government officials. Following the case study, in Parts VII through IX, I return to the concept of "judicialization" to raise further possible meanings of the term which will move us away from condemnation or praise in abstract terms and toward a more complex and useful understanding of the functions of courts in developing societies and the opportunities and risks they pose for those who desire political change.

I. Setting the scene: Funding the litigator

In 1999, the New York based Blacksmith Institute announced that it was prepared to fund an environmental litigation project in Thailand.[5]

Blacksmith is the creation of Richard Fuller, CEO of Great Forest, a business consulting firm which profits from environmental sustainability consulting.[6] Services encompass both consulting on green construction and LEEDS[7] compliance, as well as ISO standards[8], and energy management, and include brokering energy supply contracts to maximize profits. Clients comprise a cross section of major developers in America and own more than half the office space in Manhattan, giving Fuller access to a vast array of potential corporate donors.

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[5] Interview with Pipob Udomittipong, a recipient of the email distributed by Blacksmith. *See also* Blacksmith Institute website http://216.235.79.157/projects/display/26 (last visited 9/6/09).

[6] Great advertizes itself as a "a leader in sustainability consulting and program management for clients in the property management, finance, government, retail, restaurant, and hotel sectors, active since 1989. While focusing on our clients' profitability, our success is in designing, implementing and managing programs that also enhance the public good." *See* http://www.ecofirms.org/ECO-SERVICES/Waste-Management/2-100-0-1665-0-0-GREAT-FOREST-INC.html (last visited 10/3/09). Fuller has an impressive success story. Fuller, who holds an engineering degree from the University of Melbourne, left his job at IBM in Australia in 1988 to work on rainforest preservation in Brazil. Two years later, he founded Great Forest, a "sustainability consulting company," which has become one of the giants in the industry. A brief biography of Fuller appears on the website of the Blacksmith Institute, discussed below. *See infra* note 9 and accompanying text.

[7] The Leadership in Energy and Environmental Design (LEED) Green Building Rating System is a widely accepted set of standards developed by the U.S. Green Building Council for evaluating environmental design. *See* http://www.usgbc.org/displaypage.aspx?CMsPageID=222.

[8] The International Organization for Standardization is a nongovernmental network of the standards institutes in over 160 countries, which establishes international standards in the area of business, governance, and public services. *See* http://www.iso.org/iso/iso_14000_essentials and http://www.iso.org/iso/iso_catalogue/management_standards.htm.

Fuller gathered grants and donations through his contacts to fund the Blacksmith Institute in 1999, the same year that the Thai RFP was released.[9] Fuller dedicated Blacksmith to cleaning up of the world's pollution "hot spots." Strategies include transfering "know-how" to local institutions to build capacity to cope with ongoing and "legacy" pollution problems. A network of "scientists, public health experts, environmental engineers, and academics and other experts" rounds out its support for local institutions.[10]

In Thailand, where for decades the Ford, Rockefeller, and Carnegie Foundations,[11] and more recently the Open Society Institute have become well-known as funders, no one had heard of Blacksmith, an anonymity which continues today. Thailand is on the radar of international organizations concerned about the environment, including the United Nations Environment Program (UNEP)[12], the World Bank[13], and the Asia-Pacific Centre for Environmental Law (APCEL).[14] Like Blacksmith, the websites of these programs list a variety of environmental problems created by rapid development – air quality, pollution from pesticides, deforestation, marine eco-system mismanagement, and general degradation of environmental quality. International conventions, to which Thailand is a party, require species preservation and forbid trafficking in wildlife.[15] Further, a number of privately funded international NGOs have been active for decades to preserve wildlife and reinforce international regimes protecting wildlife, waterways, and natural environments in Thailand.[16] Partly a result of international pressure, Thailand has had law on the books addressing many of these problems for some time.[17]

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9 The latest reported annual budget is just over three million dollars. *See* http://www.blacksmithinstitute.org/.

10 The stable includes such internationally recognized environmental law scholars as NYU's Professor Richard Stewart.

11 ROBERT MUSCAT, THAILAND AND THE UNITED STATES: DEVELOPMENT, SECURITY, AND FOREIGN AID (Columbia Univ. Press 1990).

12 *See* http://www.unep.org/.

13 *See* http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/ENVIRONMENT/EXTEEI/0,,contentMDK:21024221~menuPK:1187810~pagePK:210058~piPK:210062~theSitePK:408050,00.html.

14 *See* http://law.nus.edu.sg/apcel/.

15 United Nations Framework Convention on Climate Change; United Nations Convention on Biological Diversity.

16 Two of the larger and better-funded INGOs are the World Wildlife Foundation (WWF) and the International Union for Conservation of Nature (IUCN). WWF embraces a science-based approach to "sustainable development" emphasizing species and habitat preservation. *See* http://www.worldwildlife.org/who/. IUCN is a government and NGO member organization which promotes peer pressure for development of cooperative systems for preservation and compliance with international standards and conventions. *See* http://www.iucn.org/about/.

17 The United Nations Conference on Environment and Development held in Rio de Janeiro in 1992 promoted practices of sustainable development, including government management of the environmental impact of development. *See* http://www.un.org/geninfo/bp/envirp2.html

The transnational perspective on environmental concerns in Thailand and other developing countries communicated by the discourse of these governmental and international agencies is about the spillovers from development which affect the natural environment – the global commons. The goal of "sustainable resource management" embraced by each of these agencies, Great Forest, and Blacksmith itself, reflects central concerns of the movement for environmental quality in the US and Western Europe.

There is another face to international advocacy, one that is closer to the grass roots conflicts that development has triggered through the spillovers which are the primary environmental problems identified by major western funders.[18] The second face of international advocacy understands that deep political divisions and problems of governance lie just beneath the surface of environmental conflict in developing societies. The governance issues are often far more serious than "capacity building" needs articulated by, for example, the United Nations Environmental Project, or the Blacksmith Institute. For example, the Pak Mun Dam in northeastern Thailand – an infamous World Bank funded dam project in Thailand – is one among many large scale water management projects which displaced entire villages, destroyed local culture, and damaged ecosystems that sustained local populations. Imposition of central government planning on the local population ignited resistance. Rural Thailand has a long history of central government subjugation, exploitation, and non-participatory decision making involving projects that often advantaged privileged businesses or wealthy land owners and impoverished local people. The resistance of local groups has received international recognition and support.[19] In turn, international NGO advocacy contributed to pressure on the World Bank to alter its project funding to include input on

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(last visited 9/6/09). In 1992, Thailand was particularly sensitive to human rights issues, having just experienced a bloody confrontation between military dictators and pro-democracy demonstrators. Further, it's newly installed civilian government faced an increasingly powerful middle class environmental movement at home. In view of these external and internal factors, the 1992 date of its first comprehensive environmental legislation is not likely to have been a coincidence. *See* Douglas L. Tookey, *Southeast Asian Environmentalism at its Crossroads: Learning Lessons from Thailand's Eclectic Approach to Environmental Law and Policy*, 11 GEO. INT'L ENVTL L. R. 307 (1999). *See* the Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (NEQA 1992), *available at* http://www.pcd.go.th/info_serv/en_reg_envi.html (last visited 8/30/09).

[18] *See* http://www.internationalrivers.org/en/node/567 (discussing the international anti-dam movement) (last visited 9/6/09) or Global Response, http://globalresponse.org/mission.php (whose mission is responding to environmental destruction worldwide) (last visited 9/8/09). *See also* the report of a global coalition of human rights groups protesting environmental destruction by Rio Tinto, and the organizations mentioned there, *available at* http://www.ekklesia.co.uk/node/9195 (last visited 9/8/09).

[19] BRUCE MISSINGHAM, THE ASSEMBLY OF THE POOR IN THAILAND: FROM LOCAL STRUGGLES TO NATIONAL PROTECT MOVEMENT (Silkworm Books 2003). *See* http://www.greenpeace.org/seasia/en/footer/search?q=thailand (last visited 9/25/09).

But Blacksmith did not consider why, given the apparent development of its courts and law, Thailand lacked an environmental litigator. Blacksmith proposed to put about none thousand dollars each year for five years toward this purpose in Thailand – by any measure a cheap fix and an incredible bargain if it worked.[28]

II. Cause lawyers as symbolic entrepreneurs

Scholars have turned to studies of "cause lawyers" to provide a new and important perspective on the rising emphasis on the "rule of law" in developing societies.[29] The spreading rule of law discourse, international rule of law aid, and rule of law institutionalization of human rights over the past half century are elements of what may be characterized as "third wave" globalization.[30] "Cause lawyering," defined by one team of American scholars as law practice "furthering a vision of the good society," drew interest because of peculiarly American professional values that require loyalty to clients but political neutrality, that is, loyalty to clients but not to causes beyond the law.[31] Cause lawyers traded off material and professional achievement for other, more political, goals and values, sometimes risking breach of the professional norm of client loyalty in the service of social movements.

But studying cause lawyers quickly encountered questions raised by contemporary globalization's emphasis on market development and stable governance. The ending of the cold war and surge in global market development has been accompanied by unprecedented emphasis on the development of constitutions, the transfer of regulatory technology, and international legalization of human rights.[32] Further, the legal profession has become a

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[28] Email communication from EnLaw on 9/29/09 in the possession of the author.

[29] *See, e.g.*, CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Austin Sarat & Stuart Scheingold eds., Oxford Univ. Press 2001) [hereinafter *Cause Lawyering*]; RICHARD L. ABEL, POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, *1980-1994* (Routledge 1995).

[30] *See* Ammar Siamwalla, *Globalisation and Its Governance in Historical Perspective*, in SOCIAL CHALLENGES FOR THE MEKONG REGION (Mingarn Kaosa-ard & John Dore eds., White Lotus 2003). Third wave globalization began after the cold war and rides the revolution in knowledge transfer – technological in the hard science sense but, equally important, two-way transfers of knowledge about governance at all levels of society. At the level of nation-states, the transfers include technologies for both production and democratization, including market stabilization, "citizenship," and limited government. In the rarified environment of the World Bank and its experts, limited government means the technology of constitutions and stronger courts which protect contract and property rights, and sufficient human rights and liberties to win support among non-elite who are essential both to production and political stability.

[31] Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3 (Austin Sarat & Stuart Scheingold eds., Oxford 1998) [hereinafter *Political Commitments*].

[32] PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE (Thomas Carothers ed., Carnegie 2006).

global growth industry, evidenced by sharply rising numbers even in societies where the rule of law, by any definition, has not become established.[33] While the concept of cause lawyer seemed at first to reflect an American obsession with the ideals of common lawyers, the practice of lawyer-assisted resistance to abuse of government power has been embraced in many societies in the Global South, not limited to the common law or common law-influenced world, raising new and challenging issues about the attraction of cause lawyering and its impact on societies where it is a cultural and political transplant.

Outside the so-called Global North, "speaking law to power" risks more serious reprisal than in western democracies. Professor Richard Abel's examination of the institutional sources of opportunity for cause lawyering worldwide suggests that liberal legal ideology is less important than the institutional and political framework of a society. [34] The United States' well-entrenched ideology of rights and relatively independent judiciary are important factors facilitating cause lawyering, but they, in turn, have developed in part *because of* the opportunities to challenge state authority created by federalism, separation of powers, and institutional support for professional autonomy. Abel examined societies that ranged from authoritarian to newly emerging democracies and corrupt dictatorships. He found that "speaking law to power" may occur elsewhere in the absence of significant support for liberal legalism but only when countervailing institutional and political factors enable lawyers to assert legal rights against a powerful government or powerful private actors. Even where courts and support are available, gains in the legal arena may be measured by quite different meanings and require very different strategies from those of the American civil rights lawyer, and they may be fraught with risk.

Critics have suggested that "judicialization" of human rights in societies with fundamental political and social inequities can transform a creative political movement into a passive client of the legal profession and the courts.[35] Critics have argued that litigation, especially *successful* litigation, has removed movement goals from the arena of politics, where inequality and power can be addressed directly, to the arena of law, in which the issues are abstract, technical, and depoliticized. Judicialization of a movement's human

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[33] RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA (William P. Alford, Harvard Univ. Press 2007).

[34] Richard L. Abel, *Speaking Law to Power: Occasions for Cause Lawyering*, in POLITICAL COMMITMENTS (Austin Sarat & Stuart Scheingold eds., Oxford 1998).

[35] *See* LAW AND DISORDER IN THE POSTCOLONY (Jean Comaroff & John Comaroff eds., Univ. of Chicago Press 2006) and Ran Hirschl, *New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721 (2006). *See also*, for helpful review of the literature, the article in this volume by Professor Mimi Ajzenstadt, *Judicialization, Neo-Liberalism and Foreign Workers in Israel*. *See infra* Part VII for a further discussion of judicialization.

rights issues, critics claim, ultimately threatens to undermine a social movement's agency to define its own goals and its power to claim new rights in the political arena. Resembling the deep skepticism of the "politics of rights" critique of American law, the "judicialization" critique of litigation on behalf of social movements in developing societies reinforces the importance of Abel's warning, making cause lawyering even more paradoxical.[36] Not only are the prospects for favorable rulings lower and the threat to the safety of lawyers themselves often significant, but even when legal strategies succeed, there is reason to fear undermining the progressive political potential of social movements.

Studies of cause lawyers, somewhat ironically, underemphasize the most puzzling aspect of public interest law practice in developing societies, namely why anyone would choose such a career? Relatively few studies of cause lawyers are about careers, much less about intergenerational changes in the evolving context of development and politics. What leads lawyers to pursue a career that involves infrequent success, limited material reward or recognition, and, possibly significant personal risk? Further, where success may carry some risk for the movement's political sustainability, as both lawyers and movement leaders surely understand, what creates such faith in the power of rights, and to what benefit or at what cost? Lastly, do the answers change in the shifting winds of symbolic and material international support for movements and rights? The goals of cause lawyers and the development of what they do, their "expertise," may be understood best in a generational, or intergenerational, context.

III. Litigating for environmental justice

In the United States, "cause lawyers" are deeply involved in protecting environmental rights.[37] Litigation by citizens to enforce environmental rights occurs frequently, and is viewed as an important strategy by environmental activists.[38] So-called "citizen suits" may be brought by ordinary citizens to force government agencies to follow the law, even though the agency has not taken any action that directly involves those particular citizens. For example, a citizen suit could be brought to force an environmental protection

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[36] Second thoughts about investing in litigation are pervasive even under the most favorable conditions. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (Univ. of Chicago Press 1993). Yet the hope of linking litigation to domestic political support still motivates the effort to achieve symbolic victories. *See* MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (Univ. of Chicago Press 1994); Jonathan Simon, *'The Long Walk Home' To Politics*, 26 LAW & SOC'Y REV. 923 (1992).

[37] *See* Barry Boyer and Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833 (1985).

[38] James R. May, *Now More Than Ever: Environmental Citizen Suit Trends*, (Envtl. Law Reporter, Vol. 33, 2003), *available at* http://ssrn.com/abstract=1334218.

agency to set pollution standards, or to require industry compliance with certain procedures, or to hold an open hearing on policy, as required by law. Many laws, including modern environmental rights laws, expressly allow citizen suits.

Even in the United States, this kind of citizen litigation against regulatory agencies' to ensure compliance with law is hotly debated.[39] But skeptical assessment of litigation's contributions to greater social equity has not deterred environmental advocates from investing enormous amounts of money and other resources in litigation to influence policy because public interest litigation is an important career pathway to greater recognition and power. Cause lawyers exist both within and outside the government, and litigation for national environmental rights organizations attracts elite graduates eager to launch successful careers on a path to power, recognition, or material comfort. Environmental decisions by the Supreme Court remain an important scorecard for environmentalists.[40] The landscape of high profile litigation is dependent on the relationship between the American legal profession and the power-brokering role of courts that has permitted development of a powerful profession representing powerful clients. Even public interest lawyers gravitate to the powerful client; in this case, the powerful client is often a financially and politically well-supported organization, reflecting the capacity of national public interest movements to mobilize support. At the local level, citizen-advocacy for environmental causes is also well-established, and civil society or community groups seek lawyers to assist them in protecting environmental interests at every level. The litigation system, long dominated by lawyers' interests, is user friendly, providing a variety of citizen suit, class-action, fee-shifting,[41] and other mechanisms which facilitate litigation of important statutory and constitutional issues, including environmental rights.

Conditions for lawyers, and especially cause lawyers, in many developing societies are radically different. The more highly centralized and authoritarian the power of government, the more fractured and non-representative the institutions of political power, the more underdeveloped the popular capacity for politics, and the less receptive or effective the court system in holding the powerful accountable, the less a cause lawyer's working conditions resemble the advantageous circumstances of developed western democracies. In many developing societies, environmental issues – issues which in the first instance concern use of water, land, crops, wildlife, or hu-

[39] *See, e.g.*, Jim Hecker, *The Difficulty of Citizen Enforcement of the Clear Air Act* 10 Widener L. Rev. 303 (2003).

[40] *See, e.g.*, High Court Losses Stun Environmentalists, National Law Journal, Jun. 29, 2009, http://www.nlj-digial.com/nlj/20090629/?pg=10.

[41] *See* Robert Hogfoss, Comment, *The Equal Access to Justice Act and its Effect on Environmental Litigation*, 15 ENVTL. L. 533 (1985).

man resources - are fundamentally about *altering* the distribution of power. Environmental protection often means resistance to displacement by development projects and destruction of a traditional way of life. Protection of the "environment" means decentralization of power where power is highly concentrated or centralized and popular participation in policy making where there is no such expectation. While concern for water and wildlife may be important, the conflict may be only secondarily about protecting natural resources and species for their own sake. If, as some scholars maintain, cause lawyering in developing societies is dependent upon external support,[42] the differences between an INGO or international agency's interpretation of protecting "environmental rights" and domestic perceptions of those same conflicts is another potential source of problems for the cause lawyer or human rights advocate.

Recognizing that domestic advocacy and international pressure may operate at different levels , Kathryn Sikkink and her colleagues have proposed a "spiral model" which suggests that though different in emphasis and in timing, local and international advocacy may be mutually reinforcing, creating a "spiral" of progress towards human rights recognition in developing societies.[43] Yet the hypothesis that international pressure and domestic demand for human rights work hand in glove toward institutionalization of self-policing in accordance with international human rights regimes explains little. While it is often indisputable that domestic social movements for human rights, international pressure for related objectives, and government policy development may occur at about the same time, and even in sequence, the interrelationships between international discourse, local meanings, government capacity, and domestic politics in any particular society is uncertain and contextual, and makes a great deal of difference to the outcome, i.e. the devil is in the details. Anthropologist Sally Merry observes that the process of taking on rights is complex and full of risk, and in the last analysis international norms always require "translation into the local vernacular."[44] Her examples of CEDAW implementation in five societies show that translation of international norms into local terms has been only partial and no easy task at that. Preexisting continuing relationships, long understood by law and society scholars as potentially conflicting with law-defined relationships, create com-

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[42] Yves Dezalay & Bryant G. Garth, *Constructing Law Out of Power: Investing in Human Rights as an Alternative Political Strategy*, in CAUSE LAWYERING 354-357 (Austin Sarat & Stuart Scheingold eds., Oxford Univ. Press 2001).

[43] Thomas Risse & Kathryn Sikkink, *The Socialization of the International Human Rights Norms into Domestic Practices: Introduction*, in THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (Thomas Risse, Stephen C. Ropp, & Kathryn Sikkink eds., Cambridge Univ. Press 1999).

[44] SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 1 (Univ. of Chicago Press 2006).

peting values and interests, making simple evaluation of the benefits of new rights extremely difficult.

In sum, ambitious activists in the United States often pursue some type of public interest law practice. My study asks why, in spite of Thailand's less promising terrain, do Thai activists invest in law and what they achieve by doing so? The research project from which the following case study has been selected gathered information about the careers of social justice lawyers in Thailand. Biographical interviews with lawyers placed particular emphasis on what propelled each individual from family origins to university to becoming a lawyer, and from stage to stage over the arc of a career.[45] My interviews identified several generations and many different types of cause lawyers, some in traditional practitioner rules, but others whose human rights and social cause advocacy involves careers as organizers, administrators, and university faculty. The lifetimes of the interviewees span Thai history from the 1920s, when the oldest was born under the absolute monarchy, to the present, under Thailand's eighteenth constitution. The oldest began practicing law in 1951, under a military dictator, and the youngest in the first decade of the twenty-first century, in a democracy just a few years after the ratification of Thailand's acclaimed liberal constitution, the so-called "People's Constitution." Changes which occurred over this eighty-year period, in the structure and institutions of government, economy, and society, interweave the stories of the lawyers, shaping their careers.[46]

IV. The landscape of cause lawyering

The Blacksmith Institute never considered why there were no "environmental litigators" in Thailand prior to 1999, and judging by its search strategy – an email circulated to human rights organizations – it had no idea where one could be found.

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[45] The interviews emphasized the relationships and experiences that helped to locate each individual in a "field of power" – a social field comprised of knowledge and practices that shape the life courses of members of a generational cohort. *See* PIERRE BOURDIEU & LOÏC J.D. WACQUANT, AN INVITATION TO REFLEXIVE SOCIOLOGY 17-18 (Univ. of Chicago Press 1992). I have also gathered information about opportunities and resources that might have been available to an aspiring activist in order to explain why particular opportunities, resources, or limitations were present at certain times and under certain circumstances.

[46] This collective biographical and relational approach to studying advocacy, law, and social movements has suggested that there have been at least four broad time periods, determined by the changes which seemed most significant to the lawyers themselves, during which their careers assumed different patterns, which I call "generations:" 1) lawyers under military governments following World War II (1950-1970), 2) lawyers who are members of the 1973 October generation (1970-1980), 3) law students influenced by the October generation and drawn to activism in the 1980s and 1990s, and 4) lawyers who graduated after the adoption of the 1997 constitution. *See* Frank Munger, *Globalization, Investing in Law, and the Careers of Lawyers for Social Cause: Taking on Rights in Thailand*, 53 N.Y. L. SCH. L. REV. 745 (2009).

Until the nineteenth century, governance in the feudal society of Siam, renamed Thailand in 1939, was adapted to the needs of a powerful monarch and his local subordinates who exercised traditional authority. In the pre-constitutional era before 1932, King Chulalongkorn's (1853-1910) late nineteenth century "defensive modernization" of the Thai state included gradual Westernization of its legal institutions: establishment of courts, adoption of civil and criminal codes, and bureaucratic administration.[47] State administration remained highly centralized, answerable to the king, and remote from the vast majority of ordinary Thai. The legal system King was influenced by both civil and common law institutions, although the prevalence of code law, absence of citizen participation, and limited authority for judicial review suggests the predominance of civil law.[48] Thus, Thailand has had civil and criminal courts of general jurisdiction since the early twentieth century, but law and the courts remained remote from the lives of Thailand's mostly rural population until much later.

The 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.[49] These new values, along with other elements of European culture, were embraced by some members of the educated elite, but the attraction was by no means universal. Nevertheless, a slow transformation began which contributed to overthrow of the absolute monarchy in 1932 by a group of commoners educated in the West who rose to power in government, including a group of military leaders.[50]

Pridi Banomyong, the intellectual force behind the elite revolution that created a constitutional monarchy in 1932, made establishment of a public university to educate government officials one of his first priorities. In 1933, as Prime Minister, Pridi founded the University of Moral and Political Science (now Thammasat University), offering an undergraduate curriculum in law and other subjects. Pridi expected the majority of graduates to enter public service and to help establish a new mission for government—being responsive to the needs of the people—but his attempt to establish a Parliamentary democracy was short-lived.[51] Generals who made up the majority of the revolutionary party had ambitions of their own and soon pushed Pridi aside, promoting a new nationalism that combined the authority of the mon-

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47 BAKER & PHONGPAICHIT, *supra* note 24, at 47–80.

48 *See* Frank C. Darling, *The Evolution of Law in Thailand*, 32 REV. OF POL. 197 (1970); Borwornsak Uwanno & Surakiart Sathirathai, *Introduction to the Thai Legal System*, 4 CHULALONGKORN L. REV. 39, 40–50 (1986).

49 *See* David M. Engel, *Law and Kingship in Thailand During the Reign of King Chulalongkorn* (Univ. of Michigan Center for South & Southeast Asian Studies, Paper No. 9, 1975).

50 BAKER & PHONGPAICHIT, *supra* note 24, at 109–21.

51 *See id.* at 123, 143–144

archy, the symbolic representation of the nation, and the sacred power of Buddhism under a central administration. From 1947–1973, Thailand was ruled by military dictators.[52]

Graduates of Thammasat University who aspired to practice law on behalf of marginal or dissenting groups in the 1950s and 1960s confronted a ruthless dictatorship, survival in an era of virulent anti-communism, and eking out a living in a small law practice without the protection of an organized, sympathetic profession. A second generation of social justice lawyers entered the legal profession under radically different circumstances. In the 1960s, a rapidly growing economy and an expanding university system (supported in significant part by American philanthropies) created an upwardly mobile generation of university students. The defining moment in their identities as members of an important generation occurred on October 14, 1973, when a student-led uprising toppled the American-backed military dictators.[53] The uprising – really a series of peaceful, though strident, demonstrations which the military unsuccessfully attempted to suppress – and its aftermath became a watershed for organized activism, including cause lawyering. The events of the so-called "October revolution" also marked a moment of public awareness of the importance of constitutionalism and responsive government. The years 1973-1976 became a true "constititonal moment." Military rule returned in 1976 after a second bloody confrontation between the military and students because, in part, a wavering middle class favored stability, even if it meant authoritarian government. Government persecution of the October activists drove many student radicals to join the communists in the countryside. But by the end of the 1970s, a more moderate authoritarian regime attempted to heal this rift by welcoming the dissidents back into Thai society.[54]

The NGO movement was a product of Thailand's watershed student-led overthrow of a US backed dictatorship in October, 1973. Denied support for human rights that American philanthropies provided to resist Latin American dictators during the same decade, Thai aspirations for responsive government were often shaped by readings drawn less from western ideals of liberal democracy and human rights than from European socialism or Marxism and from examples of militant populism nearer at hand, namely China. The "October generation" committed itself to learning about Thailand's vast, oppressed rural majority, its slums, its social and economic inequalities, and its desires for greater popular participation in government. Learning about

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[52] *See* DAVID MORELL & CHAI-ANAN SAMUDAVANIJA, POLITICAL CONFLICT IN THAILAND: REFORM, REACTION, REVOLUTION 5 (Oelgeschlager Gunn & Hain 1988). At the beginning of World War I, a strongly nationalist and military dominated government renamed the country Thailand. BAKER & PHONGPAICHIT, *supra* note 24, at 132.

[53] BAKER & PHONGPAICHIT, *supra* note 24, at 185-190.

[54] BAKER & PHONGPAICHIT, *supra* note 24 at 196–97.

Thailand's social problems, power, and inequality was encouraged through visits to the countryside to study and help, and by Thammasat University's liberal rector who established a program which placed graduates in positions with NGOs.[55] Driven to the jungles when the dictators returned for a brief time, the student activists returned to take the lead in building a "people's sector" which Thailand's polity lacked.

Equality, anti-authoritarianism, and social justice are ideals that have particular appeal for the generation of Thai who lived through the end of the era of brutal military rule and October, 1973 student-led uprising, and many members of the "October generation" continue in active roles in universities, government, and private enterprise. Not only was the rising tide of discontent and idealism among students validated in 1973, shaping the careers of many, but Pridi's public service ideals for legal education were reinforced and reshaped for some, especially at Thammasat, now emphasizing transformation of civil society as well as government. For later generations Thammasat became the most desirable law school for candidates with a commitment to social causes and the source of a disproportionate number of new cause lawyers.[56]

The political consciousness of generation social justice lawyers was deeply influenced by the uprising and what came after it. Some became teachers and organizers in the countryside. Those who fled in 1976 returned from the jungle in 1979 to a greatly altered political landscape. During the 1980s, under stable, military-led governments, the economy again grew rapidly, attracting Japanese and Western investors. The October generation's legacy grew through the efforts of the returning activists who helped build a vibrant NGO movement in both the poorer parts of the countryside and in urban centers. Later generations of social justice lawyers entered a field of activist law practice with the legacy of a small, but courageous first generation – already aging and remote – and a growing NGO movement assisted by the work of lawyer/organizers who lived through the uprising.

V. Origins of a cause lawyer

Surachai Trong-ngam is a "third-generation" cause lawyer who graduated from Thammasat University law school in 1987. Surachai entered law

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[55] *See id.* at 180–89; CRAIG J. REYNOLDS, THAI RADICAL DISCOURSE: THE REAL FACE OF THAI FEUDALISM TODAY (Cornell Univ. Southeast Asia Program 1987).

[56] Graduates from Thammasat University form the largest group among my interviewees, but the second largest group graduated from Ramkamhaeng University. Cause lawyers who graduated from Ramkamhaeng may be numerous in part because the university is very large, and many more law students graduate each year from Ramkamhaeng than from other universities in Bangkok. More significant for purposes of my research, virtually all cause lawyers from Thailand's Muslim south attended this law school.

school with no particular understanding of the October revolution and no commitment to activism, but after entering Thammasat as a student he was greatly influenced by the traditions, extracurricular activities, and mentoring that embodied the continuing spirit of student service. There he learned about the problems of the people and about activism. Other students exposed to the same influences may have acquired an appreciation for social issues and public service but most did become social justice lawyers. Surachai was caught up by the ideals of the revolution and the social problems he saw on his visits to the countryside as a student. He read voraciously in the radical literature popularized by the revolutionary generation – Marxist and socialist theory, the works of Mao, writings by the Thai Marxist Jit Phumisak, and others. He became committed to activism, but he was also pragmatic, quickly realizing that law school alone provided poor preparation for serving other people. His visits to the countryside as a student taught him about social problems, but his undergraduate legal education had provided him no knowledge about law that could be useful to villagers denied access to land, were abused by police, lacking government services, or who had other problems experienced by the rural poor.[57]

When law students drawn to cause lawyering, like Surachai, graduated from Thammasat University in the 1980s, they entered a field that had taken shape through the work of the October generation, especially Thammasat University's own graduates. Surachai's career provides an illustration. The handful of small law offices of first generation social justice lawyers were unable to absorb many young law graduates, if indeed they had any desire to do so. Establishing a new practice with no experience would have been nearly impossible given only an undergraduate legal education, and licensing required an apprenticeship in any event. Instead, like many third generation cause lawyers, Surachai began his career by working for an NGO.

After declaration of an amnesty for those allegedly involved in criminal or communist activity during the 1976 conflict with the military, many activists returned to work with foreign NGOs or to establish their own projects, some with foreign funding, to address problems of the rural and urban poor.[58] Surachai's first job did not involve conventional legal work at all, but rather "community research" for an NGO concerned about the problems of

[57] Interview with Surachai Trong-ngam 6/16/07.

[58] Foreign funding, when available, came mostly from European philanthropies concerned about poverty. None of the private US philanthropies took up the challenge of human rights development in Thailand in the 1960s and 1970s, as the Ford Foundation had in Latin America, reflecting a near consensus on anti-communism and development policy in Asia in contrast to the conflict within the US over dictatorships in Latin America. Even though support for the much-hated dictators placed the United States in an awkward position on the issue of human rights, dissenting elites in the US focused on Vietnam, not on Thailand, where development soon became a showcase for capitalism but not democracy.

youth in Thailand's northern communities. Nevertheless, he learned about the legal problems of the rural poor, for example, corrupt transfer of land titles to wealthy families or speculators. He began to see a role for a cause lawyer who knew about these problems, but he himself lacked knowledge and experience as a lawyer.

Within a few years, though his network of law school and NGO friends, he found a job as a litigator with the Friends of Women Foundation (FOW), one of the first and best funded of a number of organizations founded by members of the October generation.[59] Joining FOW in the early 1990s, Surachai learned about litigation and took the first step toward becoming an accomplished litigator.

At FOW Surachai learned about litigation in order to defend women in criminal court, but FOW was not primarily engaged in litigation for its client community. FOW is a typical "Thai-style" NGO,[60] in part acting as advocate for the interests of an oppressed group and in part supplementing inadequate government services for the needy. Viewed as an activist organization, a Thai-style NGO educates and, thus, empowers its clients, and at the same time disciplines lower level government officials not fully under the control of higher level administrators. Viewed as a comprador organization, a Thai-style NGO arguably legitimates inadequately responsive governmental policies.[61] However we view the work of FOW, its influence must be judged through a longer lens which includes training lawyers, the lawyers' subsequent careers, and its role in enabling other activity peripheral to its own stated mission.

While at FOW, Surachai again became involved in community conflicts like those he had seen in the north.[62] Surachai learned more about the courts

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[59] Friends of Women was founded in the early 1980s by women activists, including academics from Thammasat University, with funding from Oxfam Netherlands [NOVIB]. Interview with Chadet Chawilai, direction of Friends of Women Foundation, February 8, 2008. As it flourished, FOW spun off related projects, including the Child Rights Protection Center, another well-known NGO which has provided employment for several generations of young cause lawyers and human rights activists.

[60] Interview with Khun Yupa Phusahas, Asian Foundation staff member, December 21, 2006.

[61] This challenge is posed directly by a noted Thai scholar. Amara Pongsapich, *Thai Political Space for Advocacy*, in BREAKING THROUGH: POLITICAL SPACE FOR ADVOCACY IN SOUTHEAST ASIA 216 (Paredes et al. eds., 2007).

[62] For example, one of the NGOs which drew Surachai into its work, the Alternative Energy Project for Sustainability [AEPS], supported communities threatened with environmental, social, and economic disruption by Thailand's program for building new power plants, typically at sites selected by a private company with government cooperation but without prior notice to the community and without regard to its impact. AEPS, in turn, was a spin-off from the Foundation for Ecological Recovery [FER]. FER, later the Project for Ecological Recovery, was formed by a member of the October generation in response to a 1981 meeting among NGOs and activists concerned about the impact of development projects in the 1970s and early 1980s. Interview with Premrudee Daoroung July 1, 2009. Massive projects included clearing land for

and litigation, but he also considered himself a community organizer and educator. NGO staff members, for their part, worked with communities by organizing and guiding them toward collective decision and action, but sometimes they did not share Surachai's belief that law was always an important potential resource. After working for the Friends of Women Foundation for a year, Surachai joined a small law firm with partners experienced in working for labor organizations, slum movement groups, and other social causes.

A few years after joining the firm, Surachai's network brought him another opportunity, an American foundation willing to fund an environmental litigation NGO in Thailand. The Blacksmith Institute had sent an email to international NGOs in Thailand describing its interest in funding an environmental litigation project in Thailand. A Thai staff member of Human Rights First based in Chiangmai who saw the email was in the network of Thammasat University graduates and activists who worked on community development issues, a network which included Surachai. Soon directors of a number of environmental NGOs, began a search for a coordinator of the new NGO to be funded by Blacksmith. Surachai's prior litigation experience and working relationship with the network of NGOs, academics, activists, and human rights lawyers made him an attractive candidate. EnLaw was created to receive the Blacksmith funds, and any other funding, and to direct the work of its litigation coordinator, Surachai. The governing board of EnLaw is comprised of long-time friends and collaborators in the network of NGOs, including some of Surachai's law school classmates and mentors as well as the directors of several important NGOS. EnLaw is thus a collaboration among mutually committed colleagues as well as a formal organization, and reflects one of the important intangible by-products of the NGO network which began to take shape in the 1980s.

VI. Becoming a symbolic entrepreneur

Cases in which Surachai was already involved through his network became the first projects handled by the new NGO. One of the earliest cases concerned improper disposal of radioactive Cobalt 60 hospital waste and subsequent serious injury to workers who removed the waste. Thai law provided

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export cropping and relocation of entire communities for waterway projects, such as the Pak Mun Dam. See Jumbala & Mitprasat, supra note 25. The projects displaced large numbers of people, threatening their access to land, livelihood, and the natural resources which sustained many traditional communities. The meeting among Thai activists chose "ecological recovery" as their focus, bridging western funders' environmental sensibilities and Thai concerns about community sustainability. FER proposed a method of conflict resolution which addressed underlying political imbalance in representation in policy making through public demands for negotiations among stakeholders. Resistance to land-grabs and development was by no means unknown in Thailand, but resistance had typically resulted in violence and brutal repression. The new approach was more sophisticated, long-term, and political.

for compensatory damages from the private corporation responsible for the waste through the civil courts, a remedy seldom sought because there is no plaintiffs bar analogous to the plaintiff's bar in the US.[63] Thailand does not permit contingent fee tort litigation and there is no fee shifting provision in Thailand's environmental laws.[64] As a practical matter, litigation costs bar access to the courts in most cases. Surachai's litigation broke new ground in another way as well. The 1997 constitution established an administrative court system to facilitate claims against the government.[65] Surachai's suit against the Kamol Sukosol Company which had failed to dispose of the waste in a proper manner was unprecedented – literally. The case was one of the first filed with the new administrative courts in 2001, and the judgment entered against the company in March 2004 for approximately 600,000 Baht was the first of many victories that EnLaw achieved.[66]

Surachai's "Cobalt 60" victory is famous in Thailand. The decision by the Appellate Court may be understood as the beginning of a new era in environmental rights enforcement. Surachai's achievement reflects both his skill as a litigator and the development of expertise in administrative law litigation developed in collaboration with scholars at Thammsat University. However, full understanding of the significance of the litigation victories for Surachai, the rule of law, and "judicialization" requires more context. Surachai's role in the litigation is the result of his maturing understanding of the role of law in relationship to social movements and community empowerment – an evolving blend of radical ideology and superior technical skill. Surachai has "attitude" that is expressed in his class-conscious description of his family, his admission of his own naiveté and that of other law students who went to the countryside to lecture villagers on politics unprepared to help with their legal problems, his continuing commitment to represent social causes, even though his commitment has meant a life in poverty, and his belief in the causes of the clients he represents in their fights against the private companies and the government. Observing the land title problems of the rural poor in the north

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[63] Surachai Trong-ngam is an exception in many way, as a cause lawyer but also as a plaintiffs' lawyer. My interviews with more than a hundred lawyers for people's causes revealed that there is little interest among members of the profession in seeking out new causes of action for plaintiffs, precisely because conditions are so unfavorable, among them the lack of fee generating potential in most cases and their general unfamiliarity, i.e. riskiness.

[64] Prasit Kovilaikool, ASEAN Law Ass'n, Part VI The Legal System of Thailand 526 (1995); Enhancement and Conservation of National Environmental Quality Act of B.E. 2535 (1992) see http://www.pcd.go.th/info_serv/en_reg_envi.html (last visited 10/3/09).

[65] *Constitution of the Kingdom of Thailand* (B.E. 2540) [Thailand], B.E. 2540 (1997), 11 October 1997, *available at* http://www.unhcr.org/refworld/docid/3ae6b5b2b.html. *See* Borwornsak Uwanno & Wayne D. Burns, *The Thai Constitution of 1997: Sources and Process*, 32 U. BRIT. COLUM. L. REV. 227, 243 (1998).

[66] EnLaw Report to New World Foundation, June 2008-April 2009: 1.

early in his career led to a commitment to develop expertise that would help them with their struggles.

Surachai thinks litigation has become increasingly important for lawyers working with social movements after the ratification of the 1997 constitution.

> Ratification of the constitution in 1997 including the trend toward development of administrative law, these make it easier for the people to oversee the state's power.... Until now, the legal process has been employed to limit the people's rights. Now, people have their own rights to assert in the legal process. The legal process is a channel for people to fight. And we think we can back them up on this part.[67]

As a matter of principle, Surachai does not consider litigation an end in itself. He says litigation is a movement strategy used for movement goals.

> It's true that these groups [supporting litigation] arise as a result of our explanations about how to exercise their rights, letting them see the benefit of legal ways of fighting, both to protect and to reclaim. If they see the benefit, they can have us work on litigation. This is the work of networks of villagers, NGOs, and lawyers, right? They have to understand their movement's friends... Mostly, if they are strong, they tend to be sued anyway...They already tend to be involved in many risky actions. Most of our work supports villagers when they are about to be sued.

Thus, Surachai's view of his mission and EnLaw's is quite different from Blacksmith's emphasis on the natural environment. Surachai's mission is supporting community self-determiniation, and as a practical matter, as well as in principle, the starting point is always a community movement.

The understanding which subordinates law to social movement goals is reinforced by Surachai's NGO collaborators. Early in the process of establishing EnLaw, a disagreement arose over funding for the project. Surachai proposed taking on business clients to try to make the project self-sustaining because foundations were not a secure source of funding over the long term. His proposal was vetoed by his board, which not only understood that EnLaw could be caught between conflicting interests, but also believed that EnLaws' clients, villagers inclined to mistrust law and lawyers, would not accept a lawyer who was not perceived as sharing the villagers interests. For example, a Surachai himself explained, they would not trust him if he at-

[67] All quotes are from interviews with Surachai Trong-ngam between 6/16/07 and 6/30/09.

tempted to claim a part of a civil court monetary award as compensation for his own efforts.

Yet, Surachai also views litigation in another light, as a means of achieving government accountability independent of community collective action. Whenever possible EnLaw continues to focus litigation on establishing new interpretations of law which fill gaps, rationalize constitutional principles and positive law, and extend government accountability. So far, his litigation has always linked to ongoing community mobilization. As a consequence of the establishment of EnLaw and its growing caseload, Surachai has become better and better known to the cause lawyering community and to the public at large through his cases and through publicity arranged, in part, by the Lawyers Council.[68] Because of his reputation based on his early victories in cases handled by EnLaw, and the close relationship between the Human Rights Committee and the NGO community, Surachai is the "go to" lawyer for communities resisting development projects by private companies and government which threaten their natural environment and their quality of life. Their expertise extends far beyond cases which could be called "environmental." The four original partners had a varied social justice practice including labor, slum eviction cases, and criminal defense cases. More recently, the firm has formed a working group to defend political crime cases brought under the computer crime and lese majeste laws.[69]

Blacksmith's website describes the impressive litigation victories that Surachai has achieved, such as forcing government to establish standards for levels of pollution or winning compensation for victims of the government's negligent remediation of environmental hazards.[70] But the website says no more about Surachai. Blacksmith has always assumed that its own goal of enforcing environmental law to protect the natural environment is the primary purpose of environmental litigation. Its website implies that this is also Surachai's goal, and it is. Surachai has established to all appearances an "American-style" environmental litigation firm that "plays for rules." But that is not Surachai's only goal or necessarily his most important objective. Surachai's interest in "environmental" issues, especially those caused by the exploitation of rural communities and government failure to protect them, has developed over the length of a career that began long before Blacksmith influenced his law practice. "Playing for rules" is one particular type of environmental litigation, a resource draining style requiring investment in the development of expertise and litigation costs. Other ways of deploying law and

[68] Interview with Somchai Homla-or12/31/06.

[69] They are currently defending charges against the webmaster of Thailand's most progressive internet news service and the famous engaged Buddhism leader, Sulak Sivaraksa. Interview with Surachai 6/30/09.

[70] *See* http://216.235.79.157/ (last visited 10/3/09).

courts may also be effective and more sustainable where cause lawyers represent desperately poor clients before judges who lack initiative and independence—characteristic of civil law courts and authoriatian political systems that exist in many developing societies.

VIII. Reproducing the experiment

Blacksmith's proposal to fund only litigation, and for a relatively short period, suggested a lack of knowledge about the finances which support the practices of cause lawyers outside the US. While much needed funding is sometimes available from global funders of advocacy for rights, international funders often do not fully understand the indigenous advocates' strategies for advocacy and their limitations. Surachai says that Blacksmith terminated its support for him after five years. At least one EnLaw board member has concluded that Blacksmith assumed, without saying, that the project should quickly become a self-sustaining legal practice.[71] In the United States, a similarly funded environmental litigation project might have become self-sustaining within five years, aided by civil society groups with resources of their own and by U.S. laws providing for citizen suits and fee-shifting. Communities represented by Surachai are often poor, and, he says, would not trust a lawyer who took as his fee part of their compensation for injuries by a power plant because the community members themselves are so needy. Maintaining trust has required a great deal of self-sacrifice and a struggle to find alternative strategies to sustain his project.

Surachai himself has been concerned about the fact that so few young public interest lawyers seem to be able to form their own firms, although his law firm has encouraged younger associates to establish practices of their own. Reproduction and expansion of the number of public interest lawyers has long been a concern of Somchai Homla-or former chair of the Human Rights Committee of the Lawyers Council of Thailand.[72] Somchai depended on contacts with NGOs to channel the most important cases to the Committee for consideration, but there are too few lawyers to handle all of them. The reasons for slow expansion of the number of private practitioners pursuing public interest work are easy to understand and are principally financial. Most of the clients who need representation by a human rights lawyer cannot afford to pay. NGOs themselves operate on small, marginal budgets, when they have a budget.

Surachai's law firm, which does the legal work for EnLaw, was established in an attempt to demonstrate that a social justice practice could become self-sustaining and train a new generation of public interest lawyers. But the

[71] Interview with Surachai 6/28/08.
[72] Interview with Khun Somchai Homla-or 12/31/06.

model he promotes has encountered problems, which he readily acknowledges. The firm is unable to provide lawyers with a sustainable income.

> We provide opportunities to learn. Most of the people here were involved in social activities. We might not be able to fully support the next generation lawyers. If they can survive here, they must have fewer financial constraints and family obligations...Many might not be able to continue to be here and will have to leave.

Surachai himself earns very little from his practice. His firm cobbles together income from a variety of sources, including small grants, research work for the Thailand Social Research Institute, and from a small number of private fee-for-service cases in areas of practice which do not conflict with EnLaw's work. His firm is almost self-sustaining, but his practice may be a model for martyrs that lacks broad appeal for a younger generation.

IX. Myths about transplants

One possible response to Surachai's efforts to drive national policy making, politics and grass roots community mobilization through environmental litigation is that attempting to use the courts this way is simply not appropriate for Thailand, and, therefore, doomed to failure. From the beginning of the environmental movement in the United States, civil society activism and citizen enforcement of the law through litigation has played an important role. Activism forced a conservative administration to pass the National Environmental Protection Act in1970.[73] But the Act had vague language, no standards, and no means of enforcement. The environmental impact statement requirement could have been interpreted in many ways, including ways that would have rendered it ineffective. On interpretation is that the Act, put forward by a conservative administration, was intended to fail, to have no effect whatsoever. Only litigation, and the support of federal judges who saw merit in the policies, made the law effective by interpreting the vague statutory language to create standards and remedies.

Since 1970, legal authority for citizen suits has been incorporated expressly into many US environmental laws.[74] Environmental litigation transfers a great deal of power to citizen activists. The power of the Sierra Club, National Resources Defense Council, and other groups is based in part on their ability to draw support for well publicized litigation to compel government compliance with environmental law. Thousands of local citizen groups routinely use the Environmental Impact Statement requirement to resist local and national government decisions about development, gaining leverage to

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[73] KIRKPATRICK SALE, THE GREEN REVOLUTION: THE AMERICAN ENVIRONMENTAL MOVEMENT, 1962-1992 (critical ed., Hill and Wang 1993).

[74] *See supra* note 37.

negotiate or block government decisions. Thus, it is clear that in the US, decisions by courts have had important consequences for the development of civil society's access to government decision making.

Is the American model of citizen enforcement of environmental policy through the courts appropriate for Thailand?

The relationship between civil society empowerment and government authority has been a live issue in the United States from the moment its constitution was drafted. The Federalist Papers discuss the relationship between national and local policy making. James Madison argued that an all-powerful national legislature was needed to control the tyranny of local majorities.[75] Tyranny was feared most, he said, at the local level, where the majority might shut out the minority (for example, through race or class biased local policies), or where the most influential power-holders, such as land owners, or businesses, might control local government. Madison's argument for a strong national legislature was necessary because of strong traditions of local self-governance which existed long before the American Revolution. In practice, Americans had been governing themselves for years and had to be persuaded to give up some of that power.[76] Belief in local governance, and in the rights of individuals to govern themselves, is deeply rooted.

Because the United States had a tradition of local self-governance and has created a national government to regulate, but not displace, local decision making, legal practices in the United States may not provide a good example for other societies. In the U.S., national policy making may be uniquely symbiotic with direct citizen input through litigation and by other means. Three differences might make litigation more appropriate in the US than in a centralized bureaucratic state like Thailand.

First, Professor Frank Reynolds contrasts fundamental values underlying the political discourse of constitutional monarchy in Thailand—often described in terms of a trilogy of concepts: Monarchy, Nation, Religion—with the underlying values that dominate American political culture, termed "utilitarian individualism."[77] While American political culture grew from a tradition of individual freedom of conscience and dissent, treating institutionalized authority with suspicion, Thai political culture grew from a tradition far more respectful of the authority of traditional and spiritual leaders. Some have argued that Thai civic culture, perhaps when combined with the hierarchical

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[75] THE FEDERALIST NO. 10 (James Madison).
[76] GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (Vintage 1993).
[77] Frank E. Reynolds, *Dhamma in Dispute: The Interactions of Religion and Law in Thailand*, 28 LAW & SOC'Y REV. 433 (1994).

social order of Thai society, have made Thai reluctant to litigate.[78] Some Thai spiritual leaders suggest that western law may be fundamentally at odds with Buddhist principles of mindfulness.[79]

Second, the federal structure of the U.S. creates a weak, decentralized political system and weak, decentralized policy making. Therefore, civil society groups have opportunities to influence government at many levels, and to use the political power of government at one level to push for policies at a higher level of government.

Third, the gaps between local, state, and federal policy making and the many conflicts among the fifty states have created an ideal opportunity for common law courts to make policy. Courts have become politicized and courts have become powerful because of the loosely articulated structure and poorly coordinated policies, unlike other countries, for example in Europe, where there is far less litigation of this type.

Yet the contrast between Thailand and the United States is misleading. If Thai civic culture values conflict avoidance, the Thai people are not very good at it. Political and social conflicts are among the most important facts of modern Thai history, and many of them concern the use of government power. Different kinds of conflicts dominate the political and social landscapes of the United States and Thailand, so the question may still be whether law, and litigation, is an appropriate tool, but not whether there is any need for conflict resolution or institutionalized limits on government. Political dissent is becoming stronger and more effective in Thailand. The important question is whether there is political space for new social issues, issues being raised by groups who have not already achieved power. Groups attempting to defend human rights often fall into this category, as do groups protecting environmental rights.

Second, the unified structure of the Thai administrative state confronts many of the same kinds of conflicts between national and local priorities that tend to make the U.S. political system dynamic and democratic. While national control (e.g., over the police) has rightly been perceived by some human rights advocates as one answer to local corruption in Thailand,[80] national policy making nevertheless requires input from local citizens about

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78 Such sentiments are part of the folk wisdom of Thai opinions about their own society, and reflect the view that hierarchy reduces the legimacy of acting on the basis of rights. On the latter point, *see* Thanet Aphornsuvan, *Sitthi in Thai Thought*, 6 THAI CULTURE 273, 288- 89 (2001).

79 Interview with Ajarn Sulak Sivaraksa 2/14/08.

80 *See* the Asian Human Rights Commission comment on the UNHCR policy recommendation to decentralize control over the Thai police, *available at* http://www.ahrchk.net/statements/mainfile.php/2006statements/860/ (last visited 9/25/09).

failures in compliance and about tailoring standards to local needs. This is not so much a question of constitutional or administrative structure but of responsiveness to needs of the people.

Finally, courts in Thailand have traditionally played a different role in policy making from courts in the United States. While substantive legal policies have been influenced by a wide variety of international examples, the structure of the judicial system was inspired mostly by the civil law tradition. Beyond its historical structural role as subordinate to Parliament and the bureaucracy, Thai judges are themselves bureaucrats and deeply conservative. Bureaucrats historically considered themselves servants of the King and above the people. While this view is, no doubt, changing, judges enjoy a special relationship to the King.[81] Finally, the judiciary has little experience enforcing affirmative constitutional principles and little knowledge of human rights.[82]

Yet the activism of courts and judges has been slowly growing. There are good reasons for this, and in 2006 the King reminded the judiciary about them. The 1997 and 2007 constitutions place a growing burden on the courts to act as honest brokers for the political and administrative systems, in sharp contrast to the French system of separation of powers with its restricted role for ordinary courts (by comparison with common law courts) and the extremely limited jurisdiction of its constitutional court. Until 1997, Thailand lacked a system of administrative courts to supervise its large, tradition-bound bureaucracy. The 1997 constitution created such an administrative court system, and as Surachai has demonstrated, administrative courts can be an effective weapon against the government. Eventually, the Thai judiciary may come to believe that it has a role to play in Thailand when civil society concerns go unrecognized by the political and bureaucratic branches of government because of a failure of due process (as judged by constitutional requirements), private influence, or bureaucratic and legislative gridlock.

Surachai's litigation experience suggests that the Thai courts will occasionally fulfill this role, especially when the positive law is relatively clear or the constitutional mandate unavoidable (as with highly publicized cases). Until the courts fulfill this role on a regular basis, however, discussion of Surachai's strategy must move beyond the prospect for incremental legalism. And indeed, in Thailand and elsewhere, a broader perspective on the func-

[81] For example, they are the audience for an annual address by the king, a privilege enjoyed by no other group of bureaucrats. Prasit Kovilaikool, *Asian Law Ass'n, Part VI The Legal System of Thailand* (1995).

[82] Interview with member of the Appellate Division of the Thai Supreme Court (name withheld) July 1, 2009.

tions of judicialization may be more useful than focusing on development of the content of the law itself.

X. The functions of judicialization – the case study revisited

Why would we want the judiciary to play a more active role in the resolution of social conflict? The global trend toward judicialization of politics is highly controversial. Critics characterize greater judicial control of potentially political issues as a snare which stifles genuine popular politics.[83] Enthusiasts for judicialization of human rights often seem to ignore the limitations of both judiciaries and politics in developing societies.[84] More recently, scholars have urged a more nuanced view than either the skeptics or the enthusiasts, suggesting that there may be both benefits and risks, and that outcomes are contextually determined.[85] There is a great deal to be learned from this view, but between the extreme views of critics and enthusiasts on one hand and the indeterminate contextual view on the other, there is room for theory if we examine more closely what courts actually do and the functions they serve when they intervene in social conflict.

Development of a middle ground for theory about judicialization has been undertaken by Michael Dowdle, who begins by recognizing that judicialization, as used by critics and proponents alike, means expansion of the role of the courts at the expense of other forms of governmental authority.[86] The key, according to Dowdle, is to attend to what comes next—the functions that the courts perform by assuming more power. He identifies four different functions. The first is *centralization* of government power over unruly subordinates. The presence of courts establishes a claim to power on behalf of the central government, or on behalf of a centralized international regime of rights. This function may be apparent in inverse relationship to the strength of government administration – more important where central government is weak and far less important where a French-style bureaucratic administration dominates, as in Thailand.

The second function, which Dowdle calls the *convening* power, has a decentralizing effect, bringing local and contextual stakeholders together for conflict resolution. The Ango-Saxon jury is an extreme example, but other court actions also encourage negotiation of local governance. Third, court

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83 *See supra* note 35 and associated text.

84 *Id.*

85 Mimi Ajzenstadt, *Judicialization, Neo-liberalism and Foreign Workers in Israel*, 9-1 INTERNATIONAL REVIEW OF CONSTITUTIONALISM 101 (2009).

86 Michael Dowdle, *On the Regulatory Dynamics of Judicialization: The Promise and Perils of Exploring 'Judicialization' in East and Southeast Asia*, in ADMINISTRATIVE LAW 23-37 at 34 (Tom Ginsberg & Albert H.Y. Chen eds., Routledge 2008). I draw upon Dowdle's insightful conceptualization throughout this section.

intervention serves an *expressive* function. Political trials serve an expressive purpose, reinforcing authority in Burma, for example, where the outcome itself is nearly predetermined. Lese majeste prosecutions in Thailand, deplored as an anachronism by western critics, serve a similar function, and in western societies, civil disobedience trials may serve a different expressive purpose. Finally, judicial determinations are coercive and difficult to change, promising benefits to parties who have little basis for reaching compromise cooperatively (as in the case of very strong or very weak parties). Dowdle calls this the *resistance* function. The perceived importance of each function depends on one's position relative to alternative regulatory systems. Local civil society groups and national Parliamentary groups will have different perspectives on which functions are most important in a given dispute. Likewise national and local government officials will differ in their demands for different functions performed by courts.[87]

Surachai Trong-ngam believes in involving the courts in people's movements for recognition and expansion of their rights, and he maintains that his practice gives voice to important civil society concerns.[88] Dowdle's elaboration of the functions of judicialization provides a starting point for closer examination of the benefits (and risks) of his enthusiasm for litigation.

Surachai's understanding is that the most important effects of his use of law, courts, and litigation are achieved through the expressive and convening functions. Many of his cases require a collective decision by a group or community to use the courts, encouraging civil society groups to form and to take action and strengthening them for direct negotiations as well. Much of his time is spent on public education, speaking at meetings to teach citizens about their rights, but also counseling them on possible courses of action to solve problems raised by the community. As the litigation brought by EnLaw has begun to achieve well-publicized successes, EnLaw has also used the growing importance of litigation and the courts to convene governmental officials, legal experts from the universities to talk about the state of the law, the responsibilities of the government, likely outcomes of litigation, and policy change. Collaboration has begun to grow in the "shadow" of the courts. Although little policy change has occurred by this means, community advocates are playing new roles, policies are being scrutinized in ways they were not previously examined, and EnLaw's reputation is growing inside as well as outside the government.[89]

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[87] *Id.* at 35

[88] *See supra* text accompanying note 67.

[89] Interview with Director of the Policy Department of the Pollution Control Division, June 2009.

Second, Surachai, as explained previously, "plays for rules," that is, he litigates in part to persuade courts to accept interpretations of ambiguous laws which expand protection for his clients' rights.[90] This is an example of the resistance function of courts – deploying coerciveness and finality. By presenting courts with information about the social impact of their decisions, he believes they will establish interpretations which will influence both bureaucrats and other courts. Litigation helps clarify rules governing public policy. In some cases the rules themselves are ambiguous. In some, the scope of government enforcement powers may be in doubt, but where it is not, the courts have forced an agency to fulfill its responsibilities. Victories in these cases have opened new possibilities for community action, not to mention the ground-breaking implications they have for the courts themselves. Of course, some of his litigation also helps compensate a community for violations of its rights and it makes violators pay for their abuse of rights.

Further, court rulings clarifying standards or forcing an agency to act simplify the role of a bureaucrat. Lower level government officials are sometimes reluctant to enforce clear rules that protect citizens' rights because the outcome will be contrary to the expectations of higher officials or some segment of the public. By using the court's function as an administrative centralizer, litigation may not only force compliance but actually empower public servants to enforce the law as written under similar circumstances.

"Playing for rules" also involves a still more expansive effect of the convening and expressive functions of courts. Somchai Homla-or and other senior attorneys associated with the Human Rights committee have mentored young attorneys to raise constitutional issues at every possible opportunity in order to educate judges about the meaning and interpretation of rights. Surachai's work thus contributes to efforts to create an "epistemic community" of social justice lawyers, in other words a community of recognized experts who are valuable both to their clients and to bureaucratic or legislative policy makers. Members of the Lawyers Council network are slowly achieving recognition and influence as experts in rights-oriented fields of law.

Finally, the resistance function of courts has a further potential political consequence, namely repoliticization of important social issues. Litigation, independently of strengthening the capacity of civil society groups, can have the effect of putting important social issues on the public political agenda for further consideration by politicians and policy makers.

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[90] *See* sources cited *supra* note 66.

XI. Conclusion – the repoliticization of law

Surachai is careful to point out the role of strong communities and effective NGO facilitators in making his litigation possible, and, in turn, giving it a purpose. But the day may be approaching when courts will issue decisions in a community's favor more frequently. The organization of a "Green Bench" to permit handling of environmental cases by a group of experienced and specially trained judges has already shown signs of the coming changes. In 2006, in a suit brought by EnLaw, a provincial court ordered the Lead Concentrate Company to pay more than four million baht in damages for damage to the health of Klity Land villagers for releasing toxic waste into the water supply. In August 2008, the Environmental Division of the Court of Appeal increased that award to more than twenty-nine million baht, a seven-fold increase.[91] If the decision by the Environmental Division is a foretaste of the role it will play, and lower courts are encouraged to award larger sums in compensation for environmental injuries, the capacity of clients to pay attorney's fees will improve, and other litigators will join the queue, looking for cases promoting environmental compliance.

It is fair to ask whether the role of strong communities, and strategies emphasizing stakeholder negotiations at the local and national level, will decline for precisely the reasons that critics of judicialization have feared. First, Surachai's spectacular litigation record may be illusory, because many of his cases are on appeal where success is by no means guaranteed.[92] He has lost some important cases as well, where courts have not been persuaded by the theories carefully worked out with the advice of EnLaw's scholar collaborators from Thammasat and other Thai universities.[93]

Second, it is too soon to understand the disempowerment or delegitimation which might occur when a budding movement pressuring officials to rethink a policy is declared to have no rights by the courts. In Thailand, as in other developing countries, participation in political decision making, as well as the distribution of wealth and opportunities created by the growing economy, is enormously uneven. Thailand has by far the greatest wealth inequality of any Southeast Asian economy, having favored an educated, largely urban middle class while, without much exaggeration, urging the rural poor to be satisfied with the fruits of a "sufficiency economy." Struggle over the "environment" by rural, relatively poor communities, therefore, often has much

[91] Interview with Surachai 6/31/09. The revised award amounted to nearly $880,000 for each of the eight plaintiffs.
[92] Report, *supra* Note 66 at 1-12.
[93] *Id.*

more at stake than environmental quality. Litigation which depoliticizes a broadly politically confrontational initiative discourages an important and fundamentally political struggle.

In contrast to this discouraging interpretation of the potential long-term impact of litigation, several of Surachai's cases have broaded, rather than narrowed, the power base of the communities he represents. When his cases lead to collaboration with government ministries to develop policies, [94] or engage international experts on pollution standards,[95] or have been recognized by foreign experts who train and advise the new Environmental Division of the Appellate Division of the civil courts,[96] government policies will change – an essentially political outcome. Most importantly, perhaps, Surachai's cases, and the outreach by lawyers and community organizers he has influenced, have encouraged mobilization by other communities.[97]

Invisible to the Thai courts, to international funders, and even to many government officials, the dense network of NGOs, involving even seemingly unrelated NGOs, has created a system which, like the courts themselves, can distribute and magnify the influence of change. Surachai has trained a younger generation of lawyers, a few of whom have become more or less self-sustaining and entrepreneurial cause lawyers. Community organizers in remote parts of Thailand are never isolated from new developments in other parts of the NGO world. An organizer in Thailand's northeast is connected to a Northeast Coordinating Committee of NGOs, in turn an important part of a national network based in Bangkok and connected to a training program for young lawyers. Organizer, graduate lawyer trainees, and a young cause lawyer quickly connect to help a community concerned about nearby government projects find a voice. Other environmental NGOs, committed to building community capacity and which specialize in pushing reluctant government and company officials to engage in stakeholder negotiations also enter the scene. Litigation is a later element, but available when needed with the help of the young cause lawyer.[98] This scenario, now playing out in a confrontation

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[94] The Cobalt 60 decision led to collaboration with three agencies on improved monitoring at the site, and potentially, other sites. Interview with Surachai 6/31/09.

[95] According the Blacksmith Institute website, Professor Richard Stewart has been a consultant for EnLaw's research on policy recommendations to the Thai government. EnLaw confirms contact with Professor Stewart but said that contact ended quickly because of the difficulties of communication between Professor Steward who speaks no Thai and EnLaw staff whose English is limited (email from EnLaw 9/29/09, on file with author).

[96] USAID, *Strengthening Environmental Adjudication in Thailand, Judicial Workshops and Roundtables*, Bangkok Thailand. June 22-26, 2009 (workshop program on file with author).

[97] Interview with Surachai 6/31/09. Interview with Premrudee Daoroung July 1, 2009.

[98] It will come as no surprise that the young (female) lawyer trained in Surachai's office and is attempting to establish her own law practice. She was aided recently by being awarded an Ashoka fellowship to train as a staff member of the Asian Human Rights Commission. This

between communities and government over development of a power grid in Thailand's northeast, is possible because of the linking among Thai NGOs. A similar process led to many of Surachai's cases.

The litigator, Surachai Trong-ngam, has achieved more than Blacksmith could have wished. Blacksmith could not have foreseen, nor is it likely to understand, the importance of his litigation when viewed as a part of a process of political change. The last is the measure of success that is important to him and the NGO network upon which he relies. Dispute resolution by courts has often been described by law and society scholars as a process of transformation – transforming the meaning of a dispute, the identities of parties, and the relative powers of officials and citizens or among branches of government.[99] Courts, whatever they choose to decide, pry government decisions and deals from their obscure political channels, making them more transparent and opening doors for new political participants. Courts in Thailand, too, create risks for the powerful as well as the weak.

Judicialization is a complex process because courts perform many functions simultaneously, and among the most important may be their potential repoliticization of conflict and conflict regulation on new terms. Of course, organizations and agencies are experienced political infighters, too, and creating opportunities for negotiation and other forms of engagement with them through litigation guarantees little. Surachai's litigation successes have been made possible not only by the encouragement of Blacksmith, but also by his expert networks and his rapport with his clients. However, the longer term success of his efforts – shifting the balance of power in favor of communities – depends on many factors, including political and economic changes which set the terms for local political negotiations. While the involvement of courts makes the struggle for local empowerment more complex; it does not preordain the outcome. A more refined understanding of different power-shifting roles of courts has revealed some of the factors which may make litigation a useful strategy for the cause lawyer even in legal cultures where it is still an exotic and difficult strategy for grassroots activists.

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honor is not likely to affect her financial security as a cause lawyer in Thailand, however, because there is no public interest law career ladder in Thailand other than the difficult and minimal positions as NGO or struggling private attorney, which she has already experienced. Conversation with project organizer and author David Streckfuss 6/11/09. Interview with Surachai 6/31/09.

[99] *See, e.g.*, Barbara Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture*, 98 YALE L. J. 1689 (1989); John M. Conley & William M. O'Barr, The Ethnography of Legal Discourse (Univ. of Chicago Press 1990).