Environmental Rights in Thailand: 
A Role for ‘Cause’ Lawyers?

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Prologue: Civil Society in Thailand

I have watched the new political context unfolding in Thailand with almost as much interest as I watched our recent presidential election. Even though my topic is not contemporary political conflict, we cannot ignore what is going on in the streets. Although comparisons have been made between the current conflict and the uprisings in Thailand in 1973 and 1992, things are very different. Those of us who are observing Thailand from abroad know people on both sides, supporters of the present government and PAD supporters. They all seem to be good people. It’s not the generals against the people, at least not as I write this.

Current events in Thailand may be part of a complex transition to a stronger democracy. After all, the present conflict would not exist without elections made possible by the 1997 constitution. The contrast between the opposing parties suggests a slow dance in the direction of a new system of politics – mass party versus older style moral leadership. The pull of the past is not easily rejected. Although there may be good reasons to be dissatisfied with both models, the mass party model for failure to limit corruption and the moral protest/civil disobedience model for its unprincipled rejection of constitutional limits, the current political scene offers new evidence of the growing strength of civil society.

My research is about public interest lawyers in Thailand. I call these lawyers “social justice lawyers” or “social cause lawyers” or simply “cause lawyers.” During the past year I have spoken with many cause lawyers in Thailand about their work. I have asked them about why they decided to become lawyers and activists. I have asked those in private practice how they are able to make a living in a career that is not well-paid or well-respected by the government or the public. And I have asked about details of their work over the course of their careers.

Interviews with cause lawyers have become the centerpiece of my attempt to understand the evolving role of law in Thai society. I am interested in whether law, and especially constitutional law, plays a role in the changing political and social order of Thailand. As a formal matter, Thailand has a great deal of “law on the books,” but we have very little systematic knowledge of the part law plays in shaping everyday lives of individuals, the progress of social movements, or how contention for political power is resolved conflicts such as those in progress today. In this paper, I draw on my research to suggest how advocacy for environmental rights
may reveal a role for law and lawyers in strengthening civil society under the emerging constitutional order.

II. **Why study ‘cause lawyers?’**

Lawyers for social causes are familiar in America. “Cause lawyering”—described as law practice “furthering a vision of the good society”—is also global. Although American scholars trace its origins to liberal legalism and movements for civil rights in the United States and Europe, cause lawyering has become increasingly visible on the world stage in societies whose legal traditions are very different.

Cause lawyers, of course, are not typical anywhere, and that is why they are interesting. In the U.S., cause lawyering is related to an important aspiration of client-centered professionalism—achieving justice for each client and placing that goal at times ahead of making money and personal benefit. Many lawyers who do not follow such an extreme career path recognize the importance and legitimacy of cause lawyering, if not the legitimacy of everything that cause lawyers do. Even lawyers who are not and will never be activists defend the profession’s activism, its involvement in public interest law, pro bono requirements, and law reform activity because these activities reflect the profession’s political independence and power as well as its entitlement to public respect. These symbolic resources are assets which legitimate the deep involvement of lawyers in policy making, international relations, and overall political life and development of the society. The viability of cause lawyering as a career may indeed be a good measure of the legal profession’s political independence and power. The viability of cause lawyering may illuminate the role and legitimacy of law in a society.

The strength of the American legal profession, and its cause lawyers, is closely related to America’s unique political institutions. Other societies, like Thailand, whose history and institutions create a different and more limited role for law in contention for power, provide less promising terrain for cause lawyers. No one doubts the power of lawyers in the United States. “In the US,” write scholars Yves Dezalay and Bryant Garth, “‘symbolic innovators’ gravitate toward ‘the powerful and relatively autonomous professional milieus.’” In other words, in the United State ambitious activists often pursue some type of public interest law practice. My study

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asks why, in spite of Thailand’s less promising terrain, Thai activists invest in law and what they achieve by doing so?

In the United States, “cause lawyers” are deeply involved in protecting environmental rights. Litigation by citizens to enforce environmental rights occurs frequently, and is viewed as an important strategy by environmental activists. Citizen suits, as they are called, 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 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.

But even in the United States, this kind of citizen litigation against regulatory agencies’ to ensure compliance with law is hotly debated. First, some scholars say such litigation is wasteful and inefficient. While empowerment of the people is important, they argue, efficient government is in everyone’s interest and market mechanisms are more efficient than litigation. Second, civil society advocacy is biased. The most wealthy, educated, and privileged citizens are most likely to take advantage of public participation requirements and to engage in citizen-suit litigation, while minority, less wealthy, and less educated citizens are less likely to take action, and as a result, to have their rights recognized or enforced. A separate “environmental justice” movement has arisen in the United States to fill the need to defend poor and minority communities, and one of its most frequently used weapons is litigation. This movement has received widespread publicity, but it has achieved limited success so far.

Finally, critics of the so-called “myth of rights” have long argued that rights are merely symbolic because they do not alter the power structure of society. While citizens are encouraged to believe that rights are protected, the reality is that rights protect the powerful, and especially the private property of the powerful. Occasional victories by citizens arguing for redistribution, inclusion, or equality only strengthen the symbolic power of the myth of rights but do not change the overall outcome.

Some empirical research seems to support the “myth of rights” argument. Social movements for rights have achieved formal success, but rights have failed to produce social change, at least in the short run. Rights are difficult to enforce because the process of
enforcement is complex and slow moving, public resources for enforcement are lacking, and social movements cannot maintain political pressure on the government for long periods of time. Further research, including my own, suggests that rights may have positive effects on civil society in unexpected and indirect ways, but confirms that litigation may not be involved and is often avoided by rights beneficiaries. And so the debate rages on many fronts.

Of what relevance are such debates here in Thailand? The US and Thailand are very different societies, so any attempt to generalize from the US experience is fraught with problems.

II. More lawyers?

Although there is a great deal of debate about the meaning and importance of the rule of law in Thailand and its neighboring societies, one thing is clear, namely that lawyers are taking hold even where the “rule of law” remains a matter of debate. The most surprising example is your neighbor to the north. China has experienced a 50-fold increase in the number of lawyers in just 30 years, from 3,000 as recently as 1970 to more than 150,000 currently. Lawyers, it is now said, are the best paid profession in China. Similarly remarkable increases in the number of lawyers are found in Malaysia, Indonesia, Taiwan, Hong Kong, Korea, and Japan. The diversity of political regimes across these societies, from established democracies to socialist dictatorships raises challenging questions about what lawyers have to do with the rule of law and what effects they are having on each society.

Thailand has shared in this explosion of professionalism. From small beginnings at mid-century when the Thailand Yearbook reported 1700 lawyers in private practice, the number of private practitioners has risen to 54,000, a 25-fold increase as the population merely tripled. Thailand’s path to its present political crisis has been unique, displaying at times commitment to constitutionalism, professional administration of law, concern for human rights, and at other times displaying greater uncertainty about the rule of law or democracy. Some scholars in the United States argue that the presence of a viable legal system, more lawyers, and growing integration with capitalism all mean inevitable convergence among legal systems toward liberal legalism, the ideal of government under law together with guarantees for political and civil rights. Others are not so sure. China scholar Robert Alford notes the many things that lawyers might do to help an authoritarian government do business with international investors or manage its internal affairs while doing little to protect ordinary citizens from abuses of their rights.
Indonesia scholar Dan Lev acknowledges that many world societies, including Thailand as well as Indonesia, want to limit the power of government; nevertheless, he says, “…pressures toward constitutionalism and more effective legal process have advantages and suffer constraints quite different from those of old Europe…[I]deas, in Asia as in Europe or anywhere else, take hold only when they make sense domestically and are adapted to domestic purposes.”

Even though transplantation of legal institutions and policies from one society to another has a well-known history of problems and shattered expectations, there are many international advocates for environmental rights who promote their policies and points of view in countries like Thailand. International environmental advocacy ranges from the United Nations Environmental Project and the World Wildlife Federation, at its most powerful and influential, to smaller networks of activists and radical organizations like EarthFirst! and Greenpeace. There are many sources of international funding for civil society advocacy, including legal action to enforce rights. Even the World Bank has become a major advocate for establishing the rule of law by investing in programs to increase ordinary citizens’ capacity to mobilize the law. A recent collection of essays edited by a World Bank employee praises litigation as the key to social and economic rights enforcement in the developing world. Recommendations from the international community to increase the capacity of citizens to play a role in policy making and enforcement, especially through the courts, raises complicated questions about the implementation of environmental rights in Thailand.

The NGO movement is widely perceived in Thailand to be inspired, funded, and perhaps even kept alive by funding from these sources. Even if this is only partly true, how is such funding influencing the political economy of regulation in Thailand? How has it influenced advocacy for environmental rights and, specifically, the role of social justice lawyers?

One way to find out about these influences, and to learn about the role of law, is to ask lawyers what they do. This paper provides a preliminary report of my research based on interviews conducted in Thailand with Thai lawyers and other who are activists on behalf of a wide variety of politically weak or socially disadvantaged groups seeking equality, power, or merely recognition for their causes. Between December, 2006 and June, 2008 I conducted over 100 interviews with lawyers, their clients, well informed scholars, government officials, and others in order to answer some of these questions. The multigenerational sample of lawyers

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involved in a wide variety of social causes permits comparison of the opportunities, limits, success and failure of law in many contexts increasing the likelihood of observing patterns. In my interviews, I asked when and how they use the law on behalf of their social movements and causes, about their methods of work and how they support themselves, the nature of their clients or other work if not for specific clients, and about their successes and failures. I chart their careers, how and why they entered the profession, their networks of collaborators, sources of income, and, as accurately as possible, the mentors, role-models, or institutions that taught them or suggested to them what to do. I pay particular attention to the networks and movements they attempt to build and to their own perceptions of their work.

III. The landscape of cause lawyering – a preliminary report

My interviews have identified several generations of lawyers and many different types of lawyers, some in traditional practitioner rules, but others whose human rights and social cause advocacy involves careers, as organizers, administrators, and especially scholars like many of you. As in many other countries where rule of law and human rights are emerging and gaining strength, many of the most important voices in the contemporary advocacy for limits on governmental power come from within universities where jobs are relatively secure. In Thailand, university faculty, including those who advocate for human rights, democracy, and greater political space, have enviable access to the media and are well-represented among those who help shape the public opinion.

The map I have created is a first step toward examination of the contributions of cause lawyers to the growing strength of civil society. A full report on my research is beyond the scope of this paper, but three of the most important findings are relevant here.

A. Generations

My interviews tell a story of at least four generations of lawyers: 1) lawyers under the military governments following World War II, 2) lawyers who are members of the October generation, 3) law students influenced by the October generation who entered the movement in the 1980s and 1990s, and 4) lawyers who graduated after the adoption of the 1997 constitution.

3 Answering this question fully requires looking at the work of lawyers in many roles other than representation of oppressed individuals, movements or NGOs. Business lawyers no less than social movement lawyers seek to open spaces for their clients, and although businesses want economic space, in end the scope of economic space, freedom from regulation or power to enforce agreements is ultimately also a political question.
Cause lawyering in Thailand began about mid-twentieth century when the first human rights lawyer successfully confronted a military dictator over the question of illegal arrest and incarceration. Over the half century since then, not only has the number of cause lawyers increased but the careers of cause lawyers follow different paths. The critical years in this chronology, years that you are all very familiar with, were the years around the time of the student uprising in 1973. In 1973, a generation of young Thai university students helped give voice to the people’s desire for constitutional government – a government under rules and responsive to the people’s needs, if not precisely representative democracy. A great many other things happened as well, as a result of the overthrow of the military dictatorship in 1973, its reimposition in 1976, and the return of the exiled idealists about 1979. Although Thailand’s economic boom had begun under the military governments supported by the United States, the private sector became deeper and more mobilized in the 1970s. One indicator of the effects of the economic take-off is sharp rise in number of lawyers beginning about 1976. New lawyers were admitted to the profession by the thousands. From a few thousand lawyers in the early 1970s, the Law Society registered a total of 19,000 in 1986 (including previously registered attorneys).

As the overall number of lawyers rose, the number of cause lawyers began to rise as well, but slowly. Some returning activists created NGOs in the countryside as well as in urban areas. International funding was available for a few of these NGOs, but while funding facilitated, it did not create the movement. The activists were well-acquainted with the problems of the countryside as well as the social issues of urban areas and were strongly committed to social action and movement building. The NGOs established during the 1980s and 1990s have become enduring models of social action, and they became training programs and entry level job programs for the next generation.

B. Changing career paths

Members of the oldest generation of cause lawyers were private practitioners in small firms. The firms remained small, and unless the lawyers found a way to mix social justice practice with a fee-based practice, they required a great deal of personal sacrifice. Some lawyers were sustained by labor unions. Others found a niche in business law which did not conflict with the interests of poor and marginal clients who were often affected by business expansion and development. Others were sustained, in part, by foreign funding for particular social justice
causes, but very little funding was available for the founding generation. The problems faced by small public interest law practitioners have not changed in nearly sixty years.

It may seem remarkable to observers from New York, Berlin, London, or Sidney that there is virtually no public interest law practice by large and global law firms in Thailand. Unlike lawyers careers in the United States and elsewhere, public interest credentials and values are never a stepping stone to large law firm practice.

In the 1980s, younger generations of law students were recruited to the cause of social justice through student organizations, networks of activists that reached into the law schools and inspired a few students and alerted them to job opportunities. Mentors at Thammasat and other law schools played a particularly important role in keeping the idealism of 1973 alive and channeling students interested in combining social justice ideals with law practice toward realistic possibilities.

Most cause lawyers in these later generations have been employed by the NGOs which flourished when many October generation activists returned from the jungle to ordinary social life. The Thai Volunteer Service has recently begun placing law graduates with NGOs, and the Lawyers Council of Thailand Human Rights Committee has attempted to create both networks of support and mentoring for as many of them as possible. Where these lawyers will go in the later stages of their careers remains an open question and a problem for the reproduction of the group of lawyers who practice for social justice.

C. The future of cause lawyers

A persistent theme of the interviews was the uncertain future of cause lawyering in Thailand. In the final part of this talk I return this concern and offer some suggestions. But before returning to this theme, it may be useful to provide a case study of an environmental rights lawyer selected from my interviewees. The case study illustrates some of these patterns as well as the issues that they raise. For some of my interviewees, confidentiality is important, but the lawyer I have chosen to talk about is well-known to many members of the public and familiar to most of you, I am sure. I hope my discussion of his law practice will bring him more recognition and support!
IV. An environmental rights litigator – a model for martyrs?

As a case study of the evolution of cause lawyering in Thailand, which illustrates some important barriers that cause lawyers encounter as well as their accomplishments, I have selected a lawyer for environmental rights who has begun to achieve public recognition but who is still struggling to establish a viable financial model for his law practice. Surachai Trong-ngam is one of a small number of cause lawyers in private practice. Other small firms have been established, and have achieved success by making different choices about clients, cases, and career. But Surachai’s story illustrates some of the important factors influencing a law graduate’s decision to become a cause lawyer.

Surachai Trong-ngam is a “third-generation” cause lawyer. He graduated from Thammasat law school in 1987. During law school he was greatly influenced by Thammasat’s student traditions, extracurricular activities, and academic mentoring that still embody the spirit of democracy, the value of service, and the practice of learning about the problems of the people. Other students are exposed to the same influences may have acquired a greater appreciation for social issues and public service but most did not orient their careers toward social justice law practice. Surachai was caught up in the excitement and challenge of doing something about the social problems he saw on his visits to the countryside, and he followed the lead of earlier generations of cause lawyers.

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. Surachi’s career provides an instructive illustration, because the network of student and faculty ties formed during law school continued to influence Surachai’s career long afterward, helping to direct him to jobs and funding for his practice.

Like many third generation cause lawyers, Surachai began his career as a salaried staff member of an NGO rather than struggling to establish a private law practice. He worked first for a “community research” NGO in the north, and within a few years, though his network, he found a job as a litigator with the well-established Friends of Women Foundation. Through his network of friends he was soon also working with other NGOs, including AEPS [Alternative Energy Projects for Sustainability], an NGO which supported communities threatened with environmental, social, and economic disruption by Thailand’s program for building power...
plants. This work for NGOs was a productive apprenticeship for developing litigation skills and learning about the roles a cause lawyer might play in private practice. 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. The Blacksmith Foundation, based in New York, emailed its contacts in the human rights community about establishing an environmental litigation NGO in Thailand. A staff member of a human rights organization who was well-connected to the NGO community here saw the email, and soon directors of a number of environmental NGOs, including AEPS, began a search for a coordinator of the new NGO to be funded by Blacksmith. Eventually they set up an NGO called EnLaw and selected Surachai as its coordinator because of his prior work with AEPS and reputation as a litigator. Cases which he had begun for AEPS became the first projects handled by the new NGO.

As a further consequence of the establishment of EnLaw and its growing caseload, Surachai was drawn more deeply into the work of the environmental subcommittee of the Lawyers Council of Thailand. He 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. Because of his reputation based on victories in the coal-fired plant case and others handled through 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.

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 own 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. An aging core of radical lawyers in small firms constituted the core of Somchai’s Homla-or’s country-wide network, but the number of small firms in the network has not increased significantly. Somchai depended on

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4 It is possible that a few new cause lawyering firms have formed outside of Bangkok For example, I recently learned of another “environmental” law firm like Surachai’s, less well known, and which has kept the Bangkok
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. This loop between human rights activism by lawyers and NGOs has tightened in recent years because most of the youngest members of his network are associated with NGOs or work with NGOs.

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. 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 often means a great deal of self-sacrifice unless a lawyer can make a wealthy opponent in a lawsuit pay his fee.

While much needed funding is sometimes available from global funders of advocacy for rights, international funders often do not understand conditions in Thailand or the goals of activists who use the law. Surachai says that Blacksmith terminated its support for him after five years, assuming that he would have established a self-sustaining legal practice within that time period. In the United States, a similar environmental litigation project might have become self-sustaining within five years, aided by the presence of civil society groups with resources of their own and by U.S. laws providing for citizen suits and fee-shifting (requiring a defendant who loses to pay a fee to the winners’ lawyer).

Further, 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. But the website says no more. Blacksmith assumes that its own goal of protecting the natural environment is Surachai’s goal, and it is. But that is not Surachai’s only goal or his most important objective. Surachai has established to all appearances an “American-style” environmental litigation firm that “plays for rules.” But Surachai’s view of his mission and

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5 The term was given meaning by Marc Galanter’s seminal essay, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change,” in 8 Law & Society Review 95 (1974). The concept refers to use of the court’s
EnLaw is quite different from Blacksmith’s emphasis on the natural environment. Surachai’s mission is supporting community self-determination, and the starting point is always a community movement.

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. Even though we definitely do reactive cases, we also want to do proactive cases… It’s the movement’s action, so we have to do it in the form of a group.

Although Surachai maintains his own view of the goals of his legal work, did global funding make him a success? Do global funders choose the winners and losers among possible social cause advocates? It is true that global funders reshaped Surachai’s career, encouraging him to litigate pollution violations under Thailand’s environmental laws. But here, too, Surachai has maintained independence. The Blacksmith funding stopped long ago, but his law practice continues.

He says about establishing his firm:

The purpose was to help the lawyers survive well in their profession and so continue to do social [cause] work. They did not want to rely on sources of funding from foreign countries or on being an NGO in order to do social work. They wanted to find some other ways through being in the legal profession to do social work.

We try to get some work from the business sector but by nature the business is about problems related to villagers’ cases. We found it difficult to build good connections with business. We could make money from cases that were passed on by other lawyers or through a network of relatives and friends. We thought that if our strength was doing socially important work we should create this image and try to [sell] it to the public.

Further, the firm should train a new generation of public interest lawyers.

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.

policy making authority by choosing to litigation for the purpose of establishing precedent rather than merely resolving a conflict or seeking a specific remedy.
Surachai makes very little income from fees for his environmental litigation. Nevertheless, he cobbles together income from a variety of other sources, including small grants, research work for the Thailand Social Research Institute, and from private fee-for-service legal work. He has become self-sustaining, but his practice may be a model for martyrs that lacks broad appeal for a younger generation.

V. Myth and reality about the problems of transplants

One possible response to Surachai’s efforts to drive national policy making, politics and grass roots community mobilization through environmental litigation is that his use of the courts on behalf of citizens is not appropriate for Thailand. I am on risky ground here, because I do not have the knowledge necessary to address this question completely. But I will offer some observations for your consideration.

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 Protections Act in 1970. 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. The Act 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 environmental laws or implied by courts through statutory interpretation. 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 grounded ultimately on their ability to compel governments to comply with law. Further, thousands of local citizen groups routinely use the EIS requirement to resist local and national government decisions about development, gaining leverage to negotiate or block government decisions.

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.” 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), where the most influential power-holders, 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 for two centuries before the American Revolution. Americans had been governing themselves for years and had to be persuaded to give up some of that power. Belief in local governance, and in the rights of individuals to govern themselves, is deeply rooted.

Because of its unique tradition of local self-governance and a national government created 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.” 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 social order of Thai society, have made Thai reluctant to litigate. Some Thai spiritual leaders suggest that western law may be fundamentally at odds with Buddhist principles of mindfulness.

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. Politicized courts and powerful lawyers grew because of the loosely articulated structure and poorly coordinated policies, unlike the states in Europe, where there is far less litigation of this type.

Yet the contrast between Thailand and the United State’s civic culture, federal structure, and history of professional and judicial activism 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 been perceived by some human rights advocates as the answer to local corruption in Thailand, national policy making nevertheless requires input from local citizens about 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. Yet the activism of courts and judges has been slowly growing. There are good reasons for this, and in 2006 your wise 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 diminished role for ordinary courts and the extremely limited jurisdiction of its constitutional court.

Just as it does in the United States, the judiciary 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.

Thailand’s regulatory system is closer to the early stages of policy development in the United States and Europe, and thus, the role of its judiciary should be compared to the early stages of the environmental movement or civil rights movements there and not to the more cautious approach to judicial review which emerged subsequently. The environmental laws and constitutional principles may not be identical, but the constitutional role of the courts in Thailand may be the same in Thailand and in the United States when social change gave importance to new perspectives on government regulation. The courts, under law, give voice to claims for rights that have been ignored by the political branches of government and the bureaucracy.

It is natural of course, that the bureaucrats responsible for regulatory policies will resist intrusion by the courts and disparage cause lawyering. They will rely on the arguments I have outlined, namely that Thai culture is different, Thailand has a centralized bureaucratic state, and the judiciary should maintain their traditionally conservative role. They will be reinforced in this view by experts from Europe and America, especially experts sent by the World Bank, the United Nations, or even the American Bar Association, who arrive on a mission to argue for the virtues of “state of the art” practices adapted to narrow regulatory purposes and who propose market solutions rather than citizen-suit litigation in answer to problems of enforcement. In their view, legal empowerment may be reserved for lesser matters – daily dealings with lower level bureaucrats or individual rights, but should not concern policy making and economic development. These expert advisors may not understand either the Thai constitution or the needs of Thai civil society.

Global experts tend to forget the history of struggles over environmental policies in their home countries where continuing political pressure from civil society groups was often necessary to initiate and to maintain the development of sophisticated regulation and necessarily
redistributed power between civil society and business. Indeed, as I explained, U.S.
environmental policy would not have been as responsive to popular concerns, and especially to
local concerns, without the help of courts. Similarly, the constitution of Thailand makes all
policy making the people’s business, and it is the function of the courts to enforce the
constitutional order.

VI. The benefits of cause lawyering in Thailand: Case study revisited

Surachai Trong-ngam believes in involving the courts in people’s movements for
recognition and expansion of their rights. Surachai maintains that his practice gives voice to
important civil society concerns. My observation of lawyers like Surachai suggested that there
are still further benefits that flow from his public interest law practice, including the following:

First, Surachai’s litigation encourages civil society groups to form and to take action.
Much of his time is spent on public education, speaking at public meetings to teach citizens
about their rights, but also counseling them on possible courses of action to solve problems
raised by the community. 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.

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. 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 others, the scope of enforcement powers is in doubt. Court
rulings clarify these questions simplifying the role of bureaucrats. Further, 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. Litigation may empower public servants to enforce the law as written.

Third, “playing for rules,” which involves pressuring courts to make principled
interpretations of policies, has yet another benefit. 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, litigation, independently of strengthening the capacity of civil society groups, may have the effect of putting important social issues on the public political agenda for further consideration by politicians and policy makers.

VII. Encouraging cause lawyering – a role for scholars and academics

If cause lawyering is such good thing, why is it so difficult to practice, so slow to grow?

There are some answers which have less to do with political resistance or cultural inappropriateness than with the lack of institutional support. Such support can be constructed, as it has been elsewhere. As it grows, the viability of a public interest law career will grow. One key observation is that Surachai’s growing skill in litigation was developed primarily through collaboration with Thai scholars and lawyers, and not through affiliation with an international network or by imitating American style litigation.

I mentioned the growth of “epistemic communities” – communities of expertise which grow in legitimacy and power as their shared knowledge grows. University based scholars have established such projects, and some are linked to practicing lawyers. To my knowledge, Thailand does not have a University based center for environmental rights to support and amplify the work of litigators like Surachai. One easily accomplished goal might be to develop a data base of cases, briefs, and other useful documents. Making certain that policy makers as well as other litigators know about such developments, together with scholarly commentary on its significance for policy and law enforcement is a classic task for university based scholars.

A community of experts led by scholars and cause lawyers might encourage the development of skills beyond technical knowledge needed for successful environmental rights litigation. Social justice lawyers, unlike lawyers in conventional private law practice, or lawyers who work for government, require skill as an organizer, as an educator, and as a team builder. These skills are needed to help communities and civil society groups organize, learn about law and other strategies for developing and presenting social issues to those in power, and they enable a lawyer to assist such groups in making independent decisions. These are skills required
by social cause lawyers everywhere, but especially where civil society is still in its early stages of development and grassroots activism is viewed with suspicion by a significant part of the elite.

Leadership by university based scholars might also bring the currently divided legal profession together to share ideas and attempt to create a more unified and powerful voice for policy development and enforcement in the environmental arena. It is my impression that there is little communication and support by the lawyers with the most resources for lawyers who work for social justice, who have the fewest resources. The collaboration would benefit both by contributing to the professionalism as well as the expertise of both groups of lawyers, creating a united front for issues where the lawyers perceive a common interest and greater legitimacy for the profession.

Financial viability is probably the most important factor, and here there will have to be significant law reform supported by scholars. United States environmental law mandates a one-way fee shift for lawyers who win environmental law suits. Other models may be available internationally, but the scholars have to make a case that citizen initiated litigation is important for full realization of Thailand’s environmental policy as well as its constitutional order.

Judges as well as scholars should support this professionalization of cause lawyering. Concerns about the intrusion of international influence in Thai civil society building would be greatly reduced by funding public interest litigation through fee shifting. Fee shifting is one of the most effective ways of grounding the rule of law in popular will and at the same time empowering the courts to hold other branches of government accountable to statutory law and the constitution.

**Epilogue**

Yet another group of contemporary skeptics about the value of rights now claims that that the global discourse about rights has turned activists in societies like Thailand away from concerns about equality and access to power. The so-called “judicialization of politics” follows, deemphasizing the struggle for equitable redistribution of power and resources in economic development. Instead of social equity, say the critics, human rights advocacy, and especially

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6 A different, much broader federal statute, the Equal Access to Justice Act, follows a somewhat different fee shifting pattern, but it authorizes awarding fees to plaintiff’s lawyers in citizen litigation brought to enforce any civil rights law.
litigation, emphasizes minimum entitlements while delegitimizing broader social movement goals.

The fight for a better environment by communities the world over is certainly part of the struggle for equity in development. But in contrast to these skeptics, I have argued that enforcement of rights can lead to more effective struggle for political and economic equity. I have argued that social cause lawyers promote a stronger civil society as well as compliance with rules. I have also argued that in Thailand, cause lawyers and the courts can place the aspirations of people inspired by constitutionalism on the political agenda. Rather than judicializing political movements, cause lawyers and judges committed to constitutionalism have the capacity to do the opposite by bringing new issues into the public discourse where questions of equity can be recognized and discussed more widely.

Speaking as a law teacher, I do not expect every student to take up such a cause. My hope is that some will, and that they will challenge courts to do likewise. I believe that law schools have a responsibility to encourage some students to take up this responsibility by practicing law for social justice and to prepare them for this task. In Thailand, the burden on law professors may be even greater because cause lawyers will struggle to become self-sustaining until their work is respected by the profession and adequately compensated through statutory reforms which support civil society litigants and their lawyers, goals which law professors can help them achieve.