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Thai Legal Studies (TLS) is an open access online journal published in English by the Thammasat University Faculty of Law, Bangkok, Thailand. It seeks to publish original articles reflecting high quality research and analysis about the legal system in Thailand, including its laws, institutions, and jurisprudence, as well about legal issues more generally affecting Thailand. For scholarly articles, TLS uses the double-blind method of peer review whereby neither the author nor the reviewers know the identity of the others involved in the process.

In addition, *Thai Legal Studies* publishes shorter works, such as Opinions or Comments about specific legislation, court decisions, or previously published TLS articles, Current Developments, Book Reviews, and Summaries of articles previously published in Thai. TLS also welcomes the submission of fully translated articles previously published in Thai, the aim being to provide greater worldwide accessibility to Thai scholarship and thought.

While *Thai Legal Studies* is an academic rather than a "professional" journal, it nonetheless should be of interest to judges, officials, legislators, and law reformers, as well as scholars and students from a variety of disciplines. It will also inform the international community of legal thought and legal development in Thailand.

Thammasat University (TU), as one of Thailand's leading universities, aspires to internationalize its programs and activities and become a leading university in Asia. Publishing work of an international standard is a major aspect of this policy, and *Thai Legal Studies* is fully supported by TU Law. As a consequence, TLS is an open-access journal. It does not charge any fees or other payment from authors wishing to submit manuscripts and have their work published in TLS, nor is there any charge to view published articles or content.

Thai Legal Studies publishes two issues per calendar year, in July and December, but articles and other materials deemed ready for publication will be put online immediately for viewing before later being included in a forthcoming issue. TLS maintains its own website as an entry portal to the journal <http://tls.law.tu.ac.th>, with direct links to the substantive content hosted and archived by Thai Journals Online (ThaiJO). The editorial staff uses Open Journal Systems (OJS) as its workflow management platform.

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Editorial

Welcome to the inaugural issue of *Thai Legal Studies*, a new open-access academic journal, published by the Faculty of Law at Thammasat University, Bangkok, Thailand.

Thai legal studies present a growing field of study in English-language academic literature. Academic work by Thai scholars and international scholars who work on Thailand is now appearing in many places, and several books have appeared in recent times.[1] This field has now reached a level of activity and maturity that merits an academic journal in English. The so-called "pivot to Asia" has embraced work on China and India. Both of these countries have specialised academic journals in English devoted to their law and legal development, and we believe Southeast Asia is the next focus for comparative work. It is also significant that Thai law contains both civil law and common law components, and is increasingly eclectic in its models for law reform. We believe the pages of this journal will bear out this assertion.

Moreover, as a middle-income developing country, Thailand provides a model for law and development and for regional integration. Thailand is also a major Southeast Asian economy and a centre of gravity of ASEAN, possessing a legal system growing rapidly in scope and sophistication. For example, legislation recently has been passed to rationalise and improve the law-making process,[2] and Thailand is also experimenting with the trust, a common law device.[3] Thailand's growing connections and relations with the international community ensure a wide audience for our new journal, as the development of law in Thailand is open to international and regional influences. This is being reflected in academic research as well as other areas, such as judicial and legal professional training programmes.

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[1] See, e.g., Duncan McCargo, *Fighting for Virtue: Justice and Politics in Thailand* (Cornell University Press 2020); Andrew Harding and Munin Pongsapan (eds), *Thai Legal History: From Traditional to Modern Law* (Cambridge University Press 2021); Tyrell Haberkorn, *In Plain Sight: Impunity and Human Rights in Thailand* (University of Wisconsin Press 2018); Chris Baker and Pasuk Phongpaichit, *The Palace Law of Ayutthaya and the Thammasat: Law and Kingship in Siam* (Cornell University Press 2016); James Wise, *Thailand: History, Politics and the Rule of Law* (Marshall Cavendish 2019); David M. Engel and Jaruwan Engel, *Tort, Custom and Karma: Globalization and Legal Consciousness in Thailand* (Stanford University Press 2010); Alessandro Stasi, *Elements of Thai Civil Law* (Brill 2016); Andrew Harding and Peter Leyland, *The Constitutional System of Thailand: A Contextual Analysis* (Hart Publishing 2011).

[2] Act on Legislative Drafting and Evaluation of Law B.E. 2562 (2019).

[3] Surutchada Reekie and Narun Popattanachai, "Thai Trust Law: A Legal Import Rooted in Pragmatism" in Harding and Munin, *Thai Legal History* (n 1).

In addition, large numbers of Thai legal scholars are returning from doctoral studies in English-medium systems, such as the UK and the USA, and are keen to publish in English-language outlets. Their universities are asking them to publish in international-standard journals, and in our view the emergence of this group of highly talented young scholars represents a game-changing development in Thai legal studies. The reader will find many of them already associated with this journal as editors or contributors to the first issue.

We can also observe that many non-legal scholars, international scholars who work on Thailand, and young social science researchers from Thailand, are giving increasing attention to law for interdisciplinary study (history, political science, economics, sociology, and anthropology). Legal scholars themselves are developing doctrinal, comparative, historical, and socio-legal research. Moreover, law programmes in Thailand, both at the masters and undergraduate level, are increasingly being taught in English to Thai as well as international students. In our view, Thai legal studies in all aspects will grow very rapidly in importance, both in the numbers of researchers and the quality of scholars working in the field. Such ground-breaking work requires outlets, and it is highly appropriate that Thailand's leading law school pushes forward this initiative.

The scope of the field covered by the journal *Thai Legal Studies* encompasses any of three kinds of scholarship:

(1) Scholarly work by Thai, Thailand-based, and Thailand-focused legal scholars and scholars from other disciplines, related to Thai law.
(2) Scholarly work by such scholars that has bearing on Thailand, even if not directly on Thai law or which compares Thai law with that of other relevant countries.
(3) Scholarly work corresponding to general jurisprudence or legal theory, having some clear relevance to Thailand.

Our rationale for adding to the existing corpus of specialist academic law journals is clear. Currently, no other journal in English focuses on this area of study, while even general comparative law journals have not published a great deal on Thai law. Our purpose, therefore, is to publish in English Thai legal studies of excellent quality, providing an outlet for work of this type by Thai scholars and others working in the field, as outlined above. The existence of a journal of this kind will encourage such scholars to produce excellent work, thereby adding to the development of Thai law schools, the teaching of law in Thailand, and to the development of the legal complex in general. This work will also provide a resource for the increasing international interest in Thai law.

While *Thai Legal Studies* will be an academic rather than professional journal, we nonetheless believe it will be of interest to judges, officials, legislators, and law reformers, as well as scholars and students from a variety of disciplines. It will also inform the international community concerning legal thought and legal development in Thailand. Our intention is to publish relevant academic work of the highest international calibre. The inaugural issue itself is evidence of the salience and quality

of work that is being done in the field, and what is possible.

How sustainable is such an enterprise? This is a question we have considered very carefully before embarking on the project. We intend to adopt a proactive rather than passive approach. We plan to organise an annual conference on Thai law, which should encourage a substantial amount of excellent local scholarship. Initiatives such as ours will also encourage Thai scholars to participate in international events and produce relevant work that has already been exposed to scrutiny. We hope to attract the work of good, and especially young, scholars from *all* of Thailand's law schools, which, as with Thammasat University, are hiring excellent researchers who are anxious to publish their work.

Thai Legal Studies will be published online in two issues annually, normally in July and December. All work is usually published as soon as it has passed peer-review, editing, and production, thus before being assigned to an issue, so as to ensure speedy publication. We intend, where possible, to host one special-focus issue every year, and will invite scholars from other schools, both within and beyond Thailand, to act as guest editors. We are therefore open to proposals for special issues for 2022 and beyond.

We have been fortunate to enlist editorial support not just from Thammasat University, but also from other Thai law schools and institutions. Moreover, we have recruited eminent scholars internationally for our International Advisory Board.

Thai Legal Studies publishes articles of ordinarily 6,000–12,000 words in length. These will be double-blind peer-reviewed to ensure the highest quality of assessment and feedback. Pursuing the objective of publishing the best work on Thai law in English, we also welcome the submission of articles previously published in the Thai language for translation into English, the aim being to provide greater worldwide accessibility to Thai scholarship and thought. Also published will be shorter essays, notes on current legal developments, and book reviews.

The inaugural issue of *Thai Legal Studies* is, we believe, an event of great significance. We have put a great deal of thought and work into providing the best possible service to scholarship. We need, and seek, the support of the scholarly community in this enterprise, and thus encourage not only the submission of articles for peer-review and publication, but also help in spreading the news of this journal to the scholarly community in Asia and further afield.

We hope that you will enjoy reading this inaugural issue. The journal's website is at <http://tls.law.tu.ac.th/>.

Andrew Harding and Munin Pongsapan
Chief Editors
Bangkok, November 2021

[Ed. Note: Along with its online version, *Thai Legal Studies* will also have a special printed edition of the first issue to commemorate the launch of the journal.]

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The Child is the Betel Tray: Making Law and Love in Ayutthaya Siam

Chris Baker[*] *and Pasuk Phongpaichit*[†]

Abstract

This article investigates the process of making and applying law in Ayutthaya Siam through a close reading of one text from the Three Seals Code—the Law on Husband and Wife. Rather than a piece of legislation from a certain date, this law is an archive of judgements and decrees accumulated over a long period. The constituent clauses do not lay down rules, but give examples of disputes and advice on solving them. The courts' main role was to foster conciliation. The law seems to have been applied mainly to commoners. Many clauses have unusual features—editorial, graphic portrayal, poetic phrasing, word-play, homily—which suggest they had public use beyond a courtroom. The conclusion offers a speculative history of this law in the Ayutthaya era.

Keywords: Ayutthaya — Three Seals Code — Marriage — Archive — Conciliation

In the Ayutthaya era, how was law made and applied? That is a simple question, but difficult to answer. The Three Seals Code provides us with an exceptionally large and wide-ranging corpus of laws from the pre-modern era, but there is very little external evidence on legal practice. What then can we learn from a close reading of the

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law texts themselves? This article is an experiment using one law, พระไอยการลักษณผัวเมีย *phra aiyakan laksana phua mia*—the Law on Husband and Wife, often called the marriage law.[1] We will touch only lightly on the gender aspects of this law, which have been brilliantly analysed by Tamara Loos and others.[2] Our focus is on the process of making and applying law.

The argument proceeds as follows: The Three Seals laws are often interpreted as legislation—collections of rules enacted on a certain date—but this is an illusion. The social laws (meaning laws other than those on judicial procedure) are a cumulative archive of court judgements and decrees. The contents are not rules, but rather examples of disputes and advice on how to solve them. The clauses come in different formats, which may show a progression over time. Several clauses have unusual features—editorial commentary, graphic portrayal, poetic phrasing, word-play, homily—which suggest they had public use beyond a courtroom. On most issues, the courts advised conciliation. The exception was adultery, treated initially as a crime of violence, and later as damage to property. Any exercise of violence in a dispute was treated as an offence against the realm's duty to uphold the peace. The law seems to have been applied mainly to commoners. Although the law lays down no rules about marital relations, the courts appear to be following a consistent set of principles, perhaps based on custom or public acceptance.

In the conclusion, we offer a speculative history of the Law on Husband and Wife in the Ayutthaya era.

I. THE ILLUSION OF LEGISLATION

The laws in the Three Seals Code are often treated as similar to modern legislation—meaning sets of rules brought into force at a certain time in an act or code. This impression arises because of the form of these laws, because they have been adopted into legal history as the precursors to a civil law system, and because scholars have attempted to make them easier to understand today. Below, we will examine the very different character of the Three Seals laws from the above impression, but first, let us look at the illusion of legislation.

The Three Seals Code is a collection of legal texts, mostly surviving from the Ayutthaya era, which were assembled in 1805 to serve as the legal code of the Bangkok kingdom. The constituent laws seem like legislation because most begin with a preface or preamble, followed by a series of clauses. Moreover, these prefaces, and sometimes supplementary prefaces midway through the law, have a date and the title of a king

[1] กฎหมายตราสามดวง เล่ม 2 (องค์การค้าของคุรุสภา 2537) [*Three Seals Law* vol 2 (Khurusapha 1994)] (Thai) 205–84; กฎหมายตราสามดวง ฉบับราชบัณฑิตยสถาน เล่ม 1 (ราชบัณฑิตยสถาน 2550) [Three Seals Law Royal Society Edition vol 1 (Royal Society 2007)] (Thai) 497–589. All translations by the authors unless otherwise indicated. The numbering of clauses refers to the arabic numerals.

[2] Tamara Loos, "Gender Adjudicated: Translating Modern Legal Subjects in Siam" (PhD diss, Cornell University 1999); Tamara Loos, *Subject Siam: Family Law and Colonial Modernity in Thailand* (Silkworm Books 2006).

proclaiming the law.

As Michael Vickery has shown, the dates in these prefaces have become hopelessly corrupted, and the royal titles are also imprecise—so the prefaces offer no easy guide to when the law appeared.[3] The Law on Husband and Wife has three prefaces, marked with the dates 1904, 1906, and 1166 respectively. If interpreted as the Buddhist Era, the first two would fall in the founding years of the Ayutthaya kingdom in the mid-14th century. The third date, if interpreted in the Lesser Era (*chula sakkarat*, CS), would correspond to 1804 CE—the year before the compilation of the Three Seals Code. This third date is also given in the 60-year animal cycle as "year of the rat, sixth of the decade," which matches to 1804 CE. However, the royal title bears no resemblance to those used by King Rama I, and the titles of the city are in the form used in Ayutthaya, not Bangkok.[4] Besides, the second and third prefaces, which appear to be dated around 450 years apart, both refer to problems arising from one specific court case. Clearly, these dates are problematic.

In addition, as we discuss below, the individual clauses in the law may have appeared before or after the date in the preface. Each law is more like a historical archive than a dated act of legislation.

The Three Seals laws have often been treated as akin to modern laws, namely as a "system of rules," because of their recent history. In 1805, the Three Seals Code became the law of the land, superseded gradually by royal decrees through the 19th century and then comprehensively by law codes drafted between the 1890s and 1933. Early studies of the Code, including those on the Law on Husband and Wife, were attempts to interpret and adapt the old texts for use in the courts of the day. The authors thus tended to rephrase or paraphrase the text to approximate the form of a modern law.[5]

King Chulalongkorn decided that Siam would adopt a civil law system, meaning that law is made in the form of legislation and law codes through a process of drafting, approval by some form of authority, and proclamation. The Three Seals laws thus became viewed as the historical precursors of a civil law system. In his 1957 lecture on the Three Seals Code, MR Seni Pramoj said, "On the Ayutthaya Law on Husband and Wife, allow me to deal with it briefly, because it's not really an old law, since we were using it until the Civil and Commercial Code Volume 4 Part 6 replaced it in 1935." Seni claimed that much of the old law had been carried over into the new one, and limited

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[3] Michael Vickery, "Prolegomena to Methods for Using the Ayutthayan Laws as Historical Source Material" (1984) 72 Journal of the Siam Society 37; Michael Vickery, "The Constitution of Ayutthaya: An Investigation into the Three Seals Code" in A. Huxley (ed) *Thai Law: Buddhist Law. Essays on the Legal History of Thailand, Laos and Burma* (White Orchid 1996) 133.

[4] The name of the city as it appears in clause 75 (กรุงเทพทวาวาวะดีศรีอยุธยามหาดิหลกภพนพรัตนราชธานีบูรีรม *Krungthep thawarawadi si ayutthaya mahadilokphop ratanarat-thani burirom*) is approximately the same as the name of Ayutthaya in the royal chronicles in the Prasat Thong reign, see พระราชพงศาวดารกรุงศรีอยุธยา ฉบับพันจันทนุมาศ (สำนักพิมพ์สรีปัญญา 2553) [*Royal Chronicles of Ayutthaya, Phan Chanthanumat Edition* (Sipanya 2010)] (Thai) 271.

[5] Since the Fourth Reign, certain topics had been supplanted by royal decrees, but many cases were still decided with reference to the old law, resulting in several legal manuals appearing to assist in the interpretation; Loos, "Gender Adjudicated" (n 2) 250–51; Loos, *Subject Siam* (n 2) 140.

his account to a handful of topics—the classification of three types of wife, the basic forms of adultery and divorce, and the division of property at divorce. He argued that the equivalent clauses in the new civil code were only slightly changed. He did not broach those parts of the law which are very different.[6]

Academic studies have also tended to adjust the original to make it easier for a modern reader to understand. In his classic review of the Three Seals Code,[7] Yoneo Ishii presented the contents of the Law on Husband and Wife in a logical sequence: the conditions surrounding marriage; the status of husband and wife in marriage; adultery; divorce; matrimonial property; and inheritance. Under each topic, he presented the contents as rules—for example, that a woman could not marry without parental permission. Robert Lingat's work on this law is similar, proceeding from the conditions surrounding marriage to the conditions and procedures for divorce.[8] As we show below, these rules do not appear in the original text, and the sequence is very different (see Table 1), reflecting different underlying principles.

Scholars have also translated the original into modern English legalese, giving it the precise, formal, and impersonal feel of a modern law, and obscuring some unusual features of the original. Compare Ishii's translation of clause 62 with our more literal rendering:

> [Ishii:] Should a husband be gone for business to a province or a vassal state and not return home after one year, conjugal relations shall be deemed as terminated. Should he fail to send any gift or to give any news about his health to her for three years, then she shall no more be deemed as his wife and her co-habitation with another man shall be deemed flawless.[9]
>
> [Our more literal translation:] A husband goes to trade in a district, provincial town, royal border territory, or dependent state of the king, and does not return beyond the designated time of one year; He orders: the woman and man are separated as husband and wife; if the man does not come, or send gifts to his wife, or send a letter informing her of his ups and downs, trials and tribulations beyond the designated time of three years, the royal decree states that the woman is no longer the man's wife; if she has a lover or husband, there is no fault, nor is there fault on the part of the lover or husband.

Again, Lingat had a similar approach. He did not translate excerpts from the law, but presented summaries in legalistic French, importing modern legal concepts into his analysis. For example, in discussing the different types of property involved in

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[6] ม.ร.ว. เสนีย์ ปราโมช, ปาฐกถาเรื่องกฎหมายสมัยกรุงศรีอยุธยา แสดง ณ หอสมุดแห่งชาติ ท่าวาสุกรี พระนคร วันเสาร์ที่ 8 เมษายน พ.ศ. 2510 (คณะกรรมการจัดงานอนุสรณ์อยุธยา, 2510) [MR Seni Pramoj, *A Lecture on Law in the Ayutthaya Era Delivered at the National Library, Tha Wasukri, Bangkok, Saturday April 8, 1957* (Committee for the Ayutthaya Memorial, 1957)] (Thai) 35–38.

[7] Yoneo Ishii, "The Thai Thammasat (with a Note on the Lao Thammasat)" in M. B. Hooker (ed), *The Laws of South-East Asia,* vol 1 (Butterworths 1986) 43, 175–82.

[8] Robert Lingat, "Le Régime des Biens entre Époux en Thaïlande" (1942) 3 La Revue Indochinoise Juridique et Économique, reprinted (Imprimerie d'Extrême-Orient 1943) (French) 6–11.

[9] ibid 178.

a marriage, he wrote:

> Il conviendrait alors de faire, entre les biens prenuptiaux, une distinction voisine de celle que nous faisons, dans notre regime de communaute, entre les propres parfaits et les propres imparfaits. [It will be convenient, among the prenuptial properties, to make a distinction similar to that which we make, in our marriage regime, between perfect ownership and imperfect ownership.][10]

Lingat, Ishii, Seni, and others begin their review of this law by highlighting the classification of three types of wives—major, minor, and slave—in the preface. Lingat also points to a classification of seven types of women and a list of five types of adultery which appear later in the law. Such lists are prominent in ancient Indian legal texts. Highlighting these lists supports the argument, introduced by Lingat, that the Three Seals law are descended from the Indian legal tradition conveyed via the Mon country into Siam.[11] But the threefold classification plays almost no role in the law, appearing in only one other clause (cl. 32), while a minor wife appears only twice more (in adjacent clauses), once using a different term (cls. 32, 33),[12] and only a handful of clauses apply specifically to a slave wife.[13] In short, this threefold classification is not integral to the law. The list of seven types of women is found in the Vinaya and elsewhere, and has no application in this law. These lists stand out as being atypical, rather than typical of the law. We suspect they were incorporated into the law late in its history.[14]

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[10] Lingat, "Le Régime des Biens" (n 8) 24. Lingat's study has another, unwitting effect. Because it focuses specifically on the division of property, and because it is by far the longest, most erudite, and most famous study of this law, it gives the impression that the division of property is a major part of the law, though it occupies only four of the 134 clauses. These clauses became the focus of debate in the late 19th and early 20th century because of the accumulation of wealth by noble families in this period. See Junko Koizumi, "Legal Reforms and Inheritance Disputes in Siam in the Late Nineteenth and Early Twentieth Centuries" in Yoko Hayami, Junko Koizumi, Chalidaporn Songsamphan, and Ratana Tosakul (eds), *The Family in Flux in Southeast Asia: Institution, Ideology, Practice* (Kyoto University Press 2012) 37.

[11] Robert Lingat, *L'Influence Indoue dans l'Ancien Droit Siamois* (1937) 25 Etudes de Sociologie et d'Ethnologie Juridiques (Paris: Ed. Domat-Montchrestien). Boondarika Boonyo shows there is no similarity between the inheritance laws in Indian texts and the version in the Three Seals Law; บุณฑริกา บุญโญ "กฎหมายมรดกในคัมภีร์ธรรมศาสตร์กับกฎหมายตราสามดวง" [Boondarika Boonyo "Inheritance Law in Dharmaśāstra and Three Seals Law"] (MA diss, Chulalongkorn University 2015) (Thai). Similarly, there is no similarity between this law and sections on women and marriage in the *Laws of Manu*; see Wendy Doniger, *The Laws of Manu* (Penguin 1991) 43–50, 197–218.

[12] Clause 74 reads: "some people who have two or three wives and [have property] . . . should give two parts to the old wife, one part to the central wife, and half a part to the last wife." This clause became important in the debate on framing the modern law of inheritance in cases of polygamy. But in the original text, this is a homily (see below).

[13] In the law on slavery (พระไอยการทาษ (*phra aiyakan that*)), only two clauses (31 and 99) mention a slave wife, and do not use the term for a slave wife found in this law.

[14] On the thinking behind this suspicion, see Chris Baker and Pasuk Phongpaichit, *The Palace Law of Ayutthaya and the Thammasat: Law and Kingship in Siam* (Cornell University SEAP 2016) 30–31.

In sum, studies on the Three Seals Code and on the Law on Husband and Wife in particular have tended to make these laws seem similar to modern legislation—namely an act of law-making at a specific time—and similar to the modern definition of law as a "system of rules." We suggest that both these similarities are illusory.

II. ARCHIVE, NOT LEGISLATION

The clauses were not legislated at one particular point, but accumulated over time from rulings in court cases and decrees issued by the king.[15] The clauses come in several different formats, which may reflect evolution over time.

A. Simple Format

The simplest format, which may also be the earliest, seems to derive directly from a single court judgement. In a handful of clauses, the case giving rise to the decision appears in some detail within the clause. For example:

> Amdaeng Uu, wife of Phra Julaphai, who separated, took Luang Ratcharin as husband, then cheated on Luang Ratcharin, separated, and took Jao Chat as husband, then Phra Julaphai the old husband made a case to the king against Luang Ratcharin and Jao Chat. . . . (cl. 6, see also cl. 71)

More usually, the situation is summarised and anonymous, but the case behind the ruling is easy to imagine, for example:

> A woman who already has a husband goes to the house of a man who makes love to her; the husband knows this man has been lovers with his wife, and the matter is proven; He orders: fine the lover and give it to the wife's master; and have the woman shamed by royal command. (cl. 17)

On grounds of their language and style, most of the clauses of this first type seem relatively old. The language is strikingly simple. Most words are monosyllables. Most sentences are subject-verb-object with few dependent clauses or other complex constructions. There is little or no legal jargon, and few words that derive from Pali–Sanskrit. Indeed, the lack of a precise vocabulary, particularly for technical terms, often makes the meaning unusually unclear or ambiguous for a law code. For example, there is no standard term for intercourse; several terms are used, of varying clarity.[16]

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[15] Older law codes from the Tai world were similar; see Aroonrut Wichienkeeo, "Lanna Customary Law" in Andrew Huxley (ed), *Thai Law: Buddhist Law. Essays on the Legal History of Thailand, Laos and Burma* (White Orchid 1996) 31.

[16] These include: ทำชู้, *tham chu,* be lovers; สู่, *su*, visit; มัก, *mak,* like; สมจร, *somjon*, join-go; สมรัก,

In these simple-format clauses, there are certain words and phrases that appear nowhere else in the Three Seals Code, and today can rarely be found in any dictionary. For example, the phrase ยุมแปลง *yum plaeng* appears seven times in this law, and only once elsewhere in the Three Seals Code. It clearly means a formal apology, but does not appear in any dictionary. A child born out of wedlock is described as พรมนาจารย, *phrommanajan*, probably derived from anācāra, Pali for misconduct, but this is not found elsewhere in the Code, nor in dictionaries. Four clauses refer to a fine paid to the royal treasury as "cost of grass for royal elephants,"[17] clearly alluding to the punishment of being sentenced to cut grass for feeding royal elephants, but in a form of words not found elsewhere in the Code. Clauses on public shaming refer to ฉะมอง *chamong*, a gong used to publicize the shaming, and กะตร้อตากลวย *katro takluai*, a cone-shaped headpiece—both not found elsewhere in the Code. Some of these rare words have disappeared from mainstream Thai, but survive in local dialects.[18] Some come from everyday Khmer, which was probably spoken alongside Thai in early Ayutthaya.[19]

B. The Law-Giver

In clauses of this style, the law-giver is usually present. A typical clause begins by summarizing a situation of wrongdoing, then delivers judgement and punishment beginning with the formula ท่านว่า or ท่านให้ *than wa* or *than hai*—"He orders." For example (cl. 16): "A woman is unfaithful with a lover, and this male lover slashes and stabs the husband to death; He orders: execute the male lover and the woman. . . . "[20]

Than (ท่าน) is a third (or second) person pronoun which conveys a high level of respect, and which can be used for a king. Since the authority behind the law ultimately stemmed from the king, here the pronoun may imply the king without being explicit. In older law texts from the Tai world, a similarly ambiguous lawgiver is present in the text.[21] Many clauses also specify that the punishment is mandated โดยพระราชกฤษฎีกา

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somrak, join-love; สมรศด้วยกัน, *somrot duai kan*, join taste together; สมัก, *samak*, join; สมักสังวาด, *samak sangwat*, join in love; หลับนอนด้วย, *lap non duai*, sleep with; เอาชายมานอน, *ao chai ma non*, take a man to bed; เสียประเวณี, ร่วมประเวณี, ลักล่วงประเวณี, *sia/ruam/lakluang praweni*.

[17] In the preamble and clauses 34, 114, 126. Possibly this was an early term for a fine paid to the treasury, later replaced by *phinai*. Both terms appear in cl. 126.

[18] สยาม ภัทรานุประวัติ, "คำและสำนวนในกฎหมายตราสามดวง" ใน วินัย พงศ์ศรีเพียร, บรรณาธิการ, ภาษาไทยในกฎหมายตราสามดวง (สำนักงานกองทุนสนับสนุนการวิจัย, 2550) [Sayam Phatranuprawat, "Words and Expressions in the Three Seals Code" in Winai Pongsripian (ed) *Language in the Three Seals Code* (Thailand Research Fund 2007)] (Thai).

[19] Wilaiwan Khanittanan, "Khmero-Thai: The Great Change in the History of the Thai Language of the Chao Phraya Basin" (2001) 19(2) ภาษาและภาษาศาสตร์ [Journal of Language and Linguistics] 35; reprinted in S. Burusphat (ed), *Papers from the Eleventh Annual Meeting of the Southeast Asian Linguistics Society* (Arizona State University 2004).

[20] This form appears 98 times in the 134 clauses of the law.

[21] Mayoury Ngaosyvathn, "An Introduction to the Laws of Khun Borom" in Andrew Huxley (ed), *Thai Law: Buddhist Law. Essays on the Legal History of Thailand, Laos and Burma* (White Orchid 1996) 73, 74–75.

doi phraratchakruesadika—"by royal command."[22]

In many, but not all clauses of this type, the sentences and punishments are vague and imprecise. For example, a clause on adultery with a runaway wife merely states "fine that man . . . and punish the woman, either severely or not severely" with no calibration of the fine, and no specification of the nature of the woman's punishment (cl. 29). A clause on a miscreant lover rules "do not slash him to death, but tie his hands and bring charges according to the practice of the realm" (cl. 82). Many clauses hand down sentences of fines, compensation payments, or beatings, without indicating the amounts.

In a few cases, the rulings in two clauses conflict, perhaps because they were made at different times or by different judges.[23] On some subjects, there is a short and simple law and then longer and more complex versions which may have come later. For example, on divorce Clause 67 states simply: "A wife and husband do not like each other and wish to divorce because they have both run out of merit together; they cannot be forced to stay together." A dozen much longer clauses prescribe procedures and conditions for separating under different circumstances. Similarly, Clause 120 rules that a runaway wife should be caned and sent back to her parents, but several other clauses discuss variant cases.

C. More Complex Formats

There are clauses in three other formats that may reflect a progression over time. In the second format, the clause still appears to originate from a single specific case, but also has a sub-clause relating a variant on the original case. For example, clause 26 imposes a fine on a man who beats his wife, and has a sub-clause specifying "if the man and woman separate, give the compensation to her parents, grandparents, uncles and aunts because they have the difficulty of keeping her." Some clauses have two or three of these appended clauses, perhaps because they were updated after new rulings.

In the third format, the clause begins with a specific case, but adds sub-clauses covering all potential variations. In clause 46, a female slave sues for her freedom on grounds that her master raped her. If the rape is proved, she gets a 50 percent discount on her redemption price; if he molested her without penetration, the discount is only 25 percent; and if her charge of rape is disproved, she will have to pay the full amount.

Finally, there are a handful of clauses that begin to resemble modern legislation. These do not begin with a specific case, but by hypothesizing a situation and then mandating solutions. For example, clauses 49–51 address the situation where a man

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[22] On this term see วินัย พงศ์ศรีเพียร, "ภาษาไทยในกฎหมายตราสามดวง" ใน วินัย พงศ์ศรีเพียรม, อาจารยบูชา สรรพสาระ ประวัติศาสตร์ ภาษาและวรรณกรรมไทย (สำนักงานกองทุนสนับสนุนการวิจัย 2552) [Winai Pongsripian, "Thai Language in the Three Seals Law" in Winai, *Homage to a Teacher: Thai Etymology, History, Language, and Literature* (Thailand Research Fund 2009)] (Thai) 169–70.

[23] Junko Koizumi, "From a Water Buffalo to a Human Being: Women and the Family in Siamese History" in Barbara Watson Andaya (ed), *Other Pasts: Women, Gender and History in Early Modem Southeast Asia* (Center for Southeast Asian Studies, University of Hawai'i 2000) 254, 256–62. Compare, for example, clauses 88 and 126.

has abandoned his wife, and prescribe the conditions and procedures for separating their property and confirming their divorce, depending on various circumstances. Similarly, clauses 72–73 lay down conditions for separating different kinds of property in cases of divorce. These clauses probably date from the 17th or early 18th century, when Ayutthaya society had become significantly richer and when issues over property had increased, as indicated by extensions to the law on inheritance in this period. There is a hint that clauses 72–73 originate from the Narai reign (1656–1688).[24]

In these more complex clauses, the language is marginally more complex too. There are more multi-syllable words, and a small number of technical terms derived from Pali–Sanskrit. For example, the clauses on the division of property at divorce refer to the *borikhon*—a document recording property, derived from the Pali word *pariggaha* meaning possessions—as well as Pali-derived terms for organic and inorganic property. These clauses use fewer lost words, make less use of the "He orders" phrasing, and tend to be more precise on punishments. However, they remain very different in style from the sections of the Three Seals Code which are clearly dated from the late 17th century onwards—these have more precise legal terminology, elaborate details on graded punishments, and almost no words that are rare or unknown today.[25]

These archives had to be regularly recopied because the media for writing deteriorated over time, but there is no information on this procedure. Probably, on these occasions, the individual laws were sifted, edited, and sorted into categories. The prefaces record ceremonial events affirming or reaffirming the law, but not the creation of the laws themselves, which may have happened over a long span of years, both before and after the dates in the prefaces.

III. MATTERS OF DISPUTE, NOT RULES

As noted above, modern summaries and studies create an illusion that this law resembles the "system of rules" of modern law. But there are no rules in the Law on Husband and Wife, no clause of the form "A woman may not marry without the permission of her parents." This law, and other social laws in the Three Seals Code, are descriptions of disputes and advice on how to solve them. This is explained in the *Thammasat*, the text which serves as an introduction and index to the entire Three

[24] These clauses are preceded by an intermediate preface which states that the king proclaimed these clauses in "the throne-[hall] in the great pond to the west." This might mean the Banyong Rattanat throne-hall, situated in a pond on the western side of the Ayutthaya Grand Palace, built early in the reign of King Narai. See Chris Baker, "The Grand Palace in the *Description of Ayutthaya*: Translation and Commentary" (2013) 101 Journal of the Siam Society 69, 74–76, 98–99.

[25] See for example the laws in พระราชบัญญัติ, *phraratchabanyat*, and พระราชกำหนดเก่า, *phraratchakamnot kao*, which date from the late 17th century onwards; *Three Seals Law* vols iv and v. See also จรินทร์ สุวรรณโชติ, "การศึกษาเปรียบเทียบภาษากฎหมายในกฎหมายตราสามดวงกับกฎหมายปัจจุบัน" [Jarin Suwannachot, "Comparative Study of Legal Language in the Three Seals Law and Current Law"] (MA diss, Srinakharinwirot University 1994) (Thai).

Seals Code. This index uses a framework of "root matters" and "branch matters" inherited from Indian jurisprudence. Some of the "root matters" are about procedure—accepting cases, evaluating witnesses, and so on. Apart from that, the *Thammasat* lists 29 "root matters of dispute," each with a title in Pali and short description in Thai. Each of these root matters is the subject of a law in the Code.[26] The purpose of the Code is to manage disputes.

According to this introduction and the law's preface, the Law on Husband and Wife is *jāyampatīkassa vipattibhedā*, which translates as "about the various root causes of dispute which arise between husband and wife." Rather than just being lists of rules, the Three Seals laws somewhat resemble the law reports used today in common-law legal regimes—a record of case law used by both lawyers and judges.

In the case of the Law on Husband and Wife (but not of most others in the Code), the types of disputes have been further classified into thirteen sections. This classification is made according to the cause of dispute, as well as the persons involved in or affected by the dispute (see Table 1).[27]

Table 1. Subdivisions in the Law on Husband and Wife

	Title of subdivision in the law	Content (our definitions)	Clauses	Words
1	On the three types of wife and punishment for adultery	adultery	1–4	667
2	On not fining in cases of women who are prostitutes	prostitution	5–7	355
3	On disputes between husband and wife for various reasons	adultery, abandonment	8–41	2,909
4	On disputes over slave wives	slave wives	42–48	604
5	On men and women quarrelling and separating	abandonment, divorce, property	49–56	1,357
6	On husband and wife quarrelling, affecting the parents-in-law	quarrelling	57–61	609
7	On having a wife wait when the husband goes to trade or on royal business	abandonment	62–3	355
8	On disputes of husbands and wives over divorce	divorce, property	64–75	1,884

[26] Baker and Pasuk, *Palace Law* (n 14) 46–47. The contents of the Code do not quite match this index. There are 24 laws or part-laws.

[27] In the original, the sections are not numbered, and the titles appear at the end of the section rather than the beginning. The word-counts here, from our draft English translation, indicate the relative length of the sections.

	Title of subdivision in the law	Content (our definitions)	Clauses	Words
9	On seven types of women, and punishment for rape	rape	76–80	378
10	On men and women becoming lovers in secret without asking for hand and men tricking women	eloping	81–94	1,310
11	On a man asking for the hand of someone's daughter or granddaughter	asking hand, adultery, property	95–115	2,283
12	On a man and woman running away as lovers	eloping	116–28	1,430
13	On disputes between a woman's parents and a man	eloping, divorce	129–34	784

There are almost no sources that explain how these law texts were used. Simon de La Loubère, a French diplomat and lawyer by training who visited Siam in 1687–1688, left the most detailed account of court procedure from the era. After the case is heard and witnesses examined, perhaps through many sessions, the parties are called before the presiding judge—in this case a provincial governor. La Loubère describes the procedure twice:

> Oc-Louang Peng keeps the Book of the Law and the Custom, according to which they judge; and when Judgment is passed, he reads the Article thereof, which serves for the Judgment of the Process; and in a word it is he that pronounces the sentence.
>
> Then it belongs to Oc-Louang Peng to read with a loud voice the Article of the Law, which respects to the suit; but in that country, as in this, they dispute the sense of the Laws. They do there seek out some accommodation under the title of Equity; and under pretence that all the circumstances of the fact are not in the Law, they never follow the Law. The Governour alone decides these disputes. . . .[28]

These two accounts are somewhat contradictory; the overall sense is that the written law was used to guide judgement, but that the judge retained discretion.

IV. OTHER DISTINCTIVE CHARACTERISTICS

The clauses in this law have features which are rare in a modern law, including editorial commentary, graphic detail, poetic phrasing, word-play, and homily. These

[28] Simon de La Loubère, *A New Historical Relation of the Kingdom of Siam* (A. P. Gen tr, London 1793) 84, 86.

features suggest that the laws had uses other than in a court.

A. Editorial

In several clauses, the judge's decision is followed by a comment or editorial on the case. In cases where a dispute has resulted in murder, the judgement runs "execute the culprits, let them go the same way"[29]—a proverbial expression of eye-for-eye reciprocal justice (cl. 14, see also cl. 16). A man disrobing from the monkhood is allowed to reclaim his wife, children and property "because this is the house where he once lived, the room where he once slept on the pillow, the food that he once ate" (cl. 37). A clause on divorce advises those concerned to divide the property fairly "because possessions are something that people care about and are attached to" (cl. 61). A man is told he cannot claim any compensation from a slave wife who deserts him "because he has used her already" (cl. 33). Parents are advised to drive away an unpleasant suitor and not let him live with their daughter "as it will be disastrous" (cl. 57, see also 58).

B. Graphic Portrayal

Some clauses describe offences with a distinctive visual flourish. A husband who comes upon his wife *in flagrante delicto* is said to "catch the woman lying face-up and the lover face-down" (cl. 8). A clause specifying that a marriage is not dissolved by death until the body has been cremated begins "A man has died and been placed face-up in a coffin, and the body is still in the house; the wife, tearful and downhearted, takes a man to her bed while the corpse is still there face-up. . . . " (cl. 30). The law allowing a man to abandon an adulterous wife states "let her go with only one lowercloth and one uppercloth" (cl. 10). A husband and wife who quarrel violently are described as "grasping pike, sword, spear, bow, crossbow, or machete" (cl. 5 and others). In clauses on marital discord, the man does not simply leave the wife but "goes down from the house to leave the woman, and uses a machete or axe to slash the post of the house or her bridal chamber" (cl. 51). This image of slashing the post comes from storytelling and is probably a conventional metaphor for an irreconcilable quarrel.

C. Poetry and Word-Play

Several clauses have poetic wording and amusing word-play. A man who walks out on his wife in a fit of drunken anger then returns to apologize is described as สามาทโทโสมาแขก *samat thoso ma khaek*, burying the word for "apologize" in words meaning "drunk-angry-come-stranger" (cl. 50). A man who abandons a woman and sullies her reputation has นมบกอกพร่อง *nom bok ok phrong*, a play on words that might be translated as "he has deflated the breasts on her chest" (cl. 84). The act of seizing and manhandling a woman is described with the phrase กุมเกาะเบาะฉะแลง *kum ko bo*

[29] ให้ตกไปตามกัน, *hai tok pai tam kan*, "let them fall following," also cls 12, 14, 16, 92, 94.

chalaeng, "catch-hold-drag-with-strength," a rhythmic chain of syllables which captures the sound of the scuffle (cl. 90). A man and woman who play around are said to สะมะเลกัน *samale kan*—a languorous phrase, still used today to mean a drunken get-together, where you can almost hear them slurring the words of their pillow-talk (cl. 108).[30]

Some of the editorial commentary also has poetic flourish. When parents who changed their mind about marrying their daughter are ordered to return the bridewealth, the clause comments that "a slip of the mouth can cause loss like feet that fall out of a tree," riffing on a proverbial phrase with a triple alliteration that is hilarious in sound and meaning.[31]

D. Homily

Some clauses consist wholly or partially of homilies on good behavior. One suggests a man should "be respectful towards his wife's parents, elders, and kin on par with his own parents, elders, and kin, and must do nothing uncouth and improper" (cl. 57). A couple who have somehow lost all their property are advised "they must not argue with one another" (cls. 71, 72). A man who is separated from his family in wartime is advised to reward another man who looked after them (cl. 31). Men are advised to look after their dependents fairly and generously:

> People in the districts and territories should look after their children, wives, and siblings fairly and properly; some people who have two or three wives and by luck get paddyfield, upland, gardens, or other property, should give two parts to the old wife, one part to the central wife, and half a part to the last wife. (cl. 74)

The graphic detail, poetic phrasing, word-play, editorial and homily in these laws suggest that they were composed with some attention to their impact. As described by La Loubère, they were read "with a loud voice" in court. Perhaps the judgments were also proclaimed outside the courts as a form of public instruction.

V. THE ROLE OF THE COURTS AND THE LAW

The main role of the courts, particularly in the earlier years, seems to have been to urge conciliation in matters of dispute—with the striking exception of cases involving adultery. Here, the courts seem at first to have treated adultery as a crime of violence deserving a reciprocal, eye-for-eye punishment, but later to have treated it as a form of property damage resolved by fines and compensation. Any use of violence was treated as an offence against the duty of the realm to maintain peace and order, and was punished accordingly.

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[30] Winai, "Thai Language" (n 22) 191, 201; Sayam, "Words and Expressions" (n 18).

[31] เหตุพลั้งปากเสียสีนพลาดตีนตกต้นไม้, *het phlang pak sia sin phlat tin tok ton mai*.

A. Conciliation

Although the law classifies the disputes under thirteen headings, all but a handful concern disputes that arise in the formation or dissolution of marital partnerships.[32] The courts' primary role is to advise those involved to attempt conciliation and to sort the matter out themselves.

Couples marry either by seeking parental consent, or by eloping and then returning to beg forgiveness. If, during the negotiation for parental consent to a marriage, the prospective husband is violent with the wife or disrespectful towards the parents, the court rules "that man is very rash; give him back his property and possessions, drive him away, and do not let him injure others likewise." If the wife decides to go with him, "that's up to her." Should he return and formally beg forgiveness "then have him live together with the daughter from then on" (cl. 57). If a man runs away with a woman then returns to apologize to the parents, but they have doubts about him, the law advises the parents to "call on the man to swear an oath, then have them live together as man and wife, because the man and woman have been willing lovers already, to stop their relationship is improper" (cl. 122). If a woman runs off with a man and abandons her parents, the law recognizes that "the parents are hurt and shamed, thinking of the costs of milk, rice, bringing her up, and taking care of her," but advises: "if the parents come and lay charges in the court, have it over quickly; do not fine her, because they are mother and child, father and child; if they have grandchildren in the future, they will make up" (cl. 132).

If a husband acts badly, the court urges the wife's "parents and elders" to have the husband swear an oath or write "a letter promising to desist," and then force him to keep his word; if he continues to misbehave, the court advises him to comply with his oath, but "if later he acts badly, drive him out . . . because he does wrong against the written oath he made himself" (cls. 69, 100, 111). In a case where a couple have eloped, and her parents are seeking to punish the man, the court rules: "there is no robbery; they ran away because they are in love together; they did not sully the parents' house and domicile; they went away themselves; He orders: have them apologize to her parents and grandparents" (cl. 127).

When a partnership breaks down, before or after the marriage, the court tries to unwind the property in a fair fashion by prescribing that all parties take back what they had earlier given.[33] This probably became more difficult over time, as Ayutthaya society became more prosperous. At some point, a system was introduced for documenting property at the time of marriage, but this did not work because the

[32] The exceptions to this classification are the five clauses on rape in section 9, and a handful of clauses on miscellaneous subjects in the final "leftovers" section. The short section on prostitution is about adultery, defining when a woman seems to be acting as a prostitute and thus her lover is not guilty of adultery. It does not deal with any other aspect of prostitution.

[33] Inheritance is covered by a separate law (พระไอยการลักษณมรดก (*phra aiyakanlaksanamoradok*)), which probably appeared in the seventeenth century as the preface mentions Wat Chai Watthanaram, built early in the reign of King Prasat Thong (r. 1629–1656).

documents were lost or falsified. The law reverted to advising judges to unwind the property "with truth and justice" (cls. 72, 73, 75).

B. Adultery

The main cause of dispute which is not susceptible to conciliation is adultery, largely because disputes over adultery tend to become violent. Some clauses, which on linguistic grounds appear to be old, hand down a rough form of justice seemingly based on principles of reciprocity. Perhaps the most extraordinary clause is one that licenses murder—under special conditions:

> A woman is unfaithful to her husband; the husband catches the woman lying face-up and the lover face-down; if he wishes to kill the man, he must kill the woman as well, not kill the man alone; if he kills the woman alone, fine the husband according to rank as royal dues. (cl. 8; see also cl. 95)

Similar laws, licensing the husband's act of murder, but not requiring him to kill both the wife and the lover, are found in old law codes from Lanna and Lanxang.[34] The next clause confirms that the husband may kill the adulterer with impunity, and adds "if the husband was not able to kill [the wife] in time" she is taken away as a palace servant (cl. 9). A wife who discovers that another woman is flirting or dallying with her husband is allowed to have the woman roughed up, as long as it does not cause serious injury (cl. 34). If a woman's parents murder a man who has been making love to their daughter, the parents are punished with nothing more than a fine, while the daughter is sold into slavery to pay for the murdered lover's cremation (cl. 93).

These clauses may stem from an early phase of the law. In other, possibly later clauses, adultery is treated as damage to the wife as a form of property.[35] The male adulterer is then required to pay compensation to the husband for the damage caused, based on her value as set out in the *Phrommasak*.[36] The woman is subject to public shaming, perhaps as a way of publicizing her damaged state. She is decorated with stigma and paraded for public view. In an extreme case, the wife and lover are shamed together in a richly metaphorical tableau:

> have the man and woman shamed with the plow; place a stigma on the forehead of the woman at fault, a red hibiscus behind both her ears, a garland of red hibiscus round

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[34] A. B. Griswold and Prasert na Nagara, "Epigraphic and Historical Studies, no. 17: The 'Judgments of King Măṅ Rāy'" (1977) 65(1) Journal of the Siam Society 137, 155; Mayoury, "Laws of Khun Borom" (n 21) 75.

[35] ร. แลงกาต์, ประวัติศาสตร์กฎหมายไทม เล่ม 1 (ไทยวัฒนาพานิช 2526) [Robert Lingat, *History of Thai Law* vol 1 (Thai Watthanaphanit 1983)] (Thai) 137–42.

[36] The Phrommasak is a code that sets out the "body price" of people according to gender, age, and social rank (*sakdina*) for use in calculating fines and compensation. See ศิริพร ดาบเพชร, "'ค่าของคน' และ 'บทปรับ' ในกฎหมายตราสามดวง" (2547) วารสารประวัติศาสตร์ [Siriporn Dapphet, "Body Price and Fines in the Three Seals Law" 2003 *Warasan prawatisat*] *(SWU)* <http://ejournals.swu.ac.th/index.php/JOH/article/view/1281> (Thai).

> her head or neck, put her in one side of a yoke, the male lover in the other side of the yoke, and shame them with the plow for three days. (cl. 6)

A woman who becomes lovers with a married man, insults his wife, and then argues with the husband, is subject to a demeaning variant: "rip her lowercloth to four fingers length worn tucked up, place a stigma on her forehead, place her in a tripod-frame, and have her beaten once with a triple cane" (cl. 27). If a man commits adultery with the wife of one of his own elder relatives, both are subjected to elaborate shaming:

> have the villains placed in chains and cangue, tattoo both the man and the woman on the face with ink, tie them with leather straps, and parade them around the market beating a gong, then place them in tripod-frames, pelt them with pellets, and give 25 or 50 strokes with the leather lash; then make a raft and float them out of the city, as a warning to others. (cl. 35)

The raft is another poetic allusion. In practice, a raft floated from Ayutthaya would soon ground on a bank of the modestly broad and sinuous river. The image is taken from *jataka* tales where wronged princesses and unwanted sons are often condemned to this form of exile. The clause outlawing incest has a similar but more extreme punishment:

> make a raft and float those people on the sea; have the parents and siblings make offerings of eight chickens at the four gates of their city; have monks and brahman teachers make prayers and ceremonies to ward off evil and bring thunder and rain which will be of benefit to all. (cl. 36)

The ceremonies prescribed are similar to those required to atone for bloodletting in the palace.[37] The use of chickens, and the added touch of rain-making, hint that these rites hark back to pre-Buddhist practices among Tai groups.

C. Fines as Punishment and Fee

Fines are levied both as a punishment and as recompense for the court's involvement in the dispute. The disputes over contracting and dissolving a marriage may become complex as they involve emotions and property, the heart and the purse, and because other people become involved—rivals, parents, go-betweens. The court hands down rulings to resolve the dispute, and levies fines which serve the dual purpose of punishing the wrong-doers and compensating the court's involvement in the dispute.

[37] Baker and Pasuk, *Palace Law* (n 14) 60, 108.

D. Violence Against the Realm

If a dispute has involved violence and disorder, then an offence has been committed "against the realm," since the authorities have the duty to maintain peace and order. In such cases, the fines may be multiplied, and the guilty parties may also be subject to flogging or other physical punishment on the principle of reciprocity. A group of men who commit a gang-rape are punished severely "because they acted boldly and insolently towards the king's realm" (cl. 90).

Cases where the parties have been excessively cunning or brazen are also considered offences against the realm, because they have unduly taxed the judicial process; they are punished accordingly. For example, a man who rejects the court's attempt at conciliation, abducts a woman, and then sells her into slavery is punished with fines and flogging "because the bad woman and evil man create difficulty for the king's realm" (cl. 122, see also 22, 49, 134).

VI. THE PRINCIPLES OF MARRIAGE

The law does not lay down the rules concerning marriage, or prescribe procedures for contracting or dissolving a marital partnership. However, the courts follow certain principles with fair consistency, perhaps aiming to make rulings in accordance with custom or the social will. The major principles surrounding marriage seem to be just three in number.

First, a woman is an item of property. She belongs initially to her parents, hence their assent is required for her marriage. The marriage is a transfer of ownership to the husband, who then has exclusive sexual rights. The vocabulary for this ownership is เปนอิศรแก่ *pen itsara kae,* "is big towards [the dependent]," meaning "has authority over." The key word *itsara* derives from Pali–Sanskrit *īśvara* issara, meaning "holding power"—often used for the supreme power of gods and kings.[38] Alternative phrasing uses the term สิทธิ *sitthi*, from Pali–Sanskrit *siddhi*, which today would mean a "right," but here means being under the authority of someone—the flip side of *itsara*. A woman is described as being *mia sitthi kae chai*, wife under-authority to the man. In cases of dispute, the court allocates her under-authority-ness to either a husband or the parents (e.g. cl. 26). After divorce, the woman returns to the authority of the parents.

As Tamara Loos has described in detail, this "under-authority" status meant a woman was not an independent legal subject and hence was vulnerable in many ways.[39] Although polygamy is not directly addressed in the law—besides two references to a minor wife—it is implicit in the fact that no clause faults a husband for adultery against his wife.

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[38] See Loos, *Subject Siam* (n 2) 68 and Tamara Loos, "ISSARAPHAP: Limits of Individual Liberty in Thai Jurisprudence" (1998) 12(1) Crossroads: An Interdisciplinary Journal of Southeast Asian Studies 35–75.

[39] Loos, "Gender Adjudicated" (n 2) chs 4 and 5.

Second, a marriage results in the pooling of property, which has to be unwound before the partnership is conclusively dissolved.

Third, a marriage is based on love:[40]

> A couple . . . are in love and go to live together; her parents find out and do not complain or lay charges; the couple builds a house . . . and they live together as husband and wife; even if she has no child, the status of the woman is as wife of the man (cl. 87).[41]

When parents find out their daughter had a lover only when they are marrying her to someone else and she runs away at the last moment, the court fines the parents heavily and confirms the marriage to the old lover "because that man and woman were already in love before" (cl. 123).

Just as the law sees love as the basis of marriage, it recognizes that couples can fall out of love, that a man or woman can "withdraw their heart." If the desire for divorce is mutual, the law provides a simple and clean procedure: "the husband gives a letter to the wife, and the wife gives a letter to the husband, in the presence of elders. . . . [T]he husband and wife are divorced" (cl. 65).

A subsidiary principle that appears sporadically through the law is that marriage is the means to generate the future population, which is of political concern in a population-scarce society. Hence, child-bearing is the only waiver on the requirement for the approval from the wife's parents. If a couple elope, and

> are living together as husband and wife, and a child, male or female is born, to continue the line; He orders: the birth of a child is the betel-tray, the woman is the wife in the authority of the man (cl. 88, see also 86).[42]

In witty language, this clause equates the arrival of a child with a marriage ceremony. Seemingly by the same logic, prolific child-bearing may override the rules on adultery. If a woman runs away from a husband with whom she had no children, marries again, and has one or two children, she and the new husband are deemed guilty of adultery; but "If the woman has three or more children with the new husband, do not punish or fine the man and woman. . . . [G]ive the authority over the woman to the new husband" (cl. 20). Perhaps, by the same logic, if a man buys a slave wife and she turns out to be infertile, he can hand her back and reclaim the price he paid (cls. 18 and 46). And perhaps the law requiring a cuckold to kill his wife as well as the adulterer (cls. 8, 95) is a device to deter such murder for the sake of manpower.

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[40] The law uses two phrases for "being in love:" รักใคร่กัน, *rak khrai kan*, love-desire-together, and สมัก (สมัคร) รักกัน, *samak rak kan*, join/unite-love-together.

[41] See also cls. 108, 119, 122, 123, 127.

[42] However, cl. 126 specifically contradicts this principle, describing a similar situation and ending, "He orders: the woman is not in the status of the man's wife, only lovers."

VII. THE AMBIT OF THE LAW

Were these laws applied only in the capital and only among the *khun nang* elite, or was their ambit wider?

We have argued elsewhere, based largely on a reading of the social panorama in *Khun Chang Khun Phaen*, that there were two models of gender relations and sexuality in Ayutthaya society.[43] The model within the *khun nang* elite was based on patriarchy, licensing male polygamy and severely constricting the sexuality of women. Among commoners, by contrast, women had a prominent role as providers of the family income and curators of the family wealth, while men were often loosely attached to the family because of military service, corvée, the monkhood, and long-distance trade.

Unsurprisingly, the laws handed down by the king and his official deputies were based on the patriarchal model, exemplified by the conception of the wife as property. However, the subjects to which this law was applied mostly seem to have been commoners. Many of the disputes covered by the law are created by the loose male of commoner society—through elopement, adultery with other men's wives, absence for war, royal service, or trade, or summary abandonment. There are only seven references to using noble rank to calibrate punishments (cls. 8, 89, 90, 92, 108, 122, 126). The law does not restrict polygamy, but the practice is curiously absent. There are only two references to a minor wife, and no treatment of disputes between multiple wives, which are usually prominent in a polygamous society. Perhaps this segment of the law has been lost.[44]

Despite the patriarchal conception of the family, the law has to make space for the dominant role of females in practice. Authority within the family is always assigned to *bida-manda*—father-mother, the parents, sometimes joined by the grandparents, making room for both genders. The clause on the division of common property at divorce favours the man in a 2:1 split—a ratio that Lingat argued was prevalent in Southeast Asia,[45] assuming that the husband would be largely responsible for accumulating this property—but immediately adds a proviso which probably reflected reality at Ayutthaya: "if the woman has old capital used for trading for profit, and the husband has no old capital, He orders: divide the marriage-property into three parts, give two to the woman and one to the man, because he had no capital and had to find it himself" (cl. 68).

The Three Seals laws seem to have been distributed beyond the capital in some form. La Loubère described the laws being read aloud in a provincial court, where the presiding judge was the governor or *chao mueang*. In 1847, James Low published a study of Thai law based on manuscripts collected in the provinces, including one sent

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[43] Chris Baker and Pasuk Phongpaichit, "Gender, Sexuality and Family in Old Siam: Women and Men in *Khun Chang Khun Phaen*" in Rachel V. Harrison (ed), *Disturbing Conventions: Decentering Thai Literary Cultures* (Rowman and Littlefield 2014) 193.

[44] In the numbering of clauses in the manuscript version, clauses 91–99 are missing.

[45] Lingat, "Le régime des biens" (n 8) 11.

to Tenasserim in 1596 and another to Ligore in 1740, both with historical details that make these dates credible. The contents of the manuscripts are clearly digests of laws from the Three Seals collection.[46] La Loubère's account and Low's manuscripts suggest law texts were sent from Ayutthaya to serve as aids for local judges.

VIII. CONCLUSION: A SPECULATIVE HISTORY

To sum up the above arguments, we here propose a speculative history of the Ayutthaya Law on Husband and Wife. We stress that this exercise is an experiment based on a single law, and is designed to provoke debate.

This law originated in early Ayutthaya, possibly in the 15th century,[47] as an archive of court judgements on individual cases handed down by the king or his representative. The purpose of these judgements was to resolve disputes between people that arose in the course of contracting or dissolving partnerships. For the most part, the courts advised conciliation. Cases of adultery, which often entailed violence and defied conciliation, were settled using rough justice based on reciprocity and shaming. Perhaps the court judgments were published as proclamations, as they were written using imagery and poetic devices for impact, and often included editorial and homilies directed at a wider audience than the parties to the case. The practice of law in early Ayutthaya seems to have been intimate, personal and practical, with little or none of the formality designed to make law seem impersonal and abstract.

The settlement of disputes arising from marriages seems to have been based on a handful of principles: women were property, and marriage was transfer of this property from parent to husband, who thus had exclusive sexual rights; marriage entailed a pooling of property that had to be unwound on death or separation; and love was an emotion that demanded respect. A supplementary principle recognized the important role of the woman as begetter in a population-scarce society. The law seems to have been applied mostly to commoners.

Over time, there were changes. Adultery was treated as damage to the wife as a form of property, and thus managed through compensation rather than rough justice. Fines were more widely used, both as punishment and as a way to remunerate the court. Any use of violence in a dispute, or any cunning that increased the burden on the court, was conceived as an offence against the realm and was subject to heavier punishment. As the society prospered, probably from the early 17th century onwards, property became more important, and new laws and procedures were introduced to

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[46] James Low, "On the Law of Mu'ung Thai or Siam" (1847) 1 Journal of the Indian Archipelago and Eastern Asia 327; facsimile in วินัย พงศ์ศรีเพียร, นิติปรัญญาไทย: ประกาศพระราชปรารภ หลักอินทภาษ พระธรรมสาตร และ On the Laws of Mu'ung Thai or Siam (สำนักงานกองทุนสนับสนุนการวิจัย, 2549) [Winai Pongsripian, Thai Legal Philosophy: Preface, Tenets of Indra, Thammasat and *On the Laws of Mu'ung Thai or Siam* (Thailand Research Fund, 2006)] (Thai); Baker and Pasuk, *Palace Law* (n 14) 11–12.

[47] See Chris Baker and Pasuk Phongpaichit, *A History of Ayutthaya: Siam in the Early Modern World* (Cambridge University Press 2017) 72.

handle the division of marital property.

The form of individual clauses became gradually more complex—first with the addition of sub-clauses representing slight variants on the case, possibly incorporated at the time of copying and editing the text, and later with more comprehensive versions, possibly handed down by decree, which hypothesised a situation of conflict and provided rulings on various outcomes. Legal process became more complex and more professionalised, visible in the many laws on procedure in the Three Seals Code. The role of law and of the court may have shifted its focus somewhat from conciliation to punishment.

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Towards Deeper Judicialisation: Explaining Thailand's Increasing Engagement with International Adjudication

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Abstract

This paper calls attention to a little-noticed phenomenon: the Thai government's increasing involvement in international adjudication over the last two decades. For the first time, it has participated in the advisory proceedings before the ITLOS and made oral statements in the advisory proceedings before the ICJ. It has faced the first treaty-based arbitration by a German investor. There has also been an attempt to initiate proceedings at the International Criminal Court against Thai officials. All of these events parallel the government's extensive participation in the dispute settlement mechanism of the WTO. What accounts for such developments? The paper argues that Thailand's constantly increasing engagement with international adjudication should be understood as part of the judicialisation of international relations. Specifically, it is shaped by four main conditions. First, the Thai government has cautiously yet constantly expanded its acceptance of the jurisdiction of courts and tribunals. Second, the number of potential claimants has exponentially increased. Third, the composition of the international litigator communities has changed, resulting in a significant increase in the number of lawyers willing to

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pursue new cases. Fourth, Thai government officials are learning to strategically make themselves more visible in the litigator communities.

Keywords: International adjudication — Proliferation of international courts and tribunals — Judicialisation — Institutional conditions — Socio-professional conditions

I. INTRODUCTION

The Thai government has been increasingly involved in international adjudication in many fora in the course of the last two decades. For the first time, it has fully participated in the advisory proceedings before the International Tribunal for the Law of the Sea (ITLOS) in 2015[1] and appeared in the oral phase in the advisory proceedings before the International Court of Justice (ICJ) in 2018.[2] Also for the first time, it was brought to arbitration under an investment treaty by a German company in 2006,[3] which was followed by other similar claims.[4] Additionally, there was an attempt to initiate proceedings at the International Criminal Court (ICC) as a result of the massacre in downtown Bangkok in 2010.[5] All of these events parallel the widely-discussed case concerning the interpretation of the judgment in the *Preah Vihear* case before the ICJ,[6] and the government's extensive engagement with the dispute settlement mechanism of the World Trade Organization (WTO) as a claimant, respondent, and third party, which now exceeds 100 cases.[7] What explains such developments?

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[1] *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion, 2 April 2015) ITLOS Reports 2015, 4.

[2] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* (Advisory Opinion) [2019] ICJ Reports 95. On the basis of the record of the ICJ, the first time the Thai (then Siamese) government participated in the advisory proceedings before the Court is the *Conditions of Admission of a State to Membership in the United Nations* case in 1948. In that case, it only submitted a written statement (which was received after the expiration of time-limit) without presenting the oral statements.

[3] This refers to the *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau AG (In Liquidation) v Thailand* case. All of the relevant documents are usefully collected in the ITALAW website, <https://www.italaw.com/cases/123>.

[4] At the time of writing this paper, the *Kingsgate Consolidated v Thailand* case where an Australian company filed a claim against the government is still pending. See the developments in UNCTAD website, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/825/kingsgate-v-thailand>. There is also a report on an arbitration brought by Chevron, the details of which have not been made public.

[5] Hired by former Prime Minister Thaksin Shinawatra, an American lawyer Robert Amsterdam prepared the application to the International Criminal Court. See the white paper "The Bangkok Massacres: A Call for Accountability" *Amsterdam & Peroff LLP* (2010) <https://amsterdamandpartners.com/wp-content/uploads/2010/07/Thailand-White-Paper-Final.pdf>.

[6] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Judgment) [2013] ICJ Reports 281.

[7] For the full list, see the database of the WTO, <https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm#tha>.

While there has been episodic attention to some of the cases mentioned above, an overview of the pattern that seemingly emerges remains little noticed by academics and practitioners. In each case, a good analysis of the litigation strategy, the outcome, and the broader implications of each decision requires a highly contextualised, case-specific focus. Yet, it is also illuminating to zoom out and direct attention to the panoramic view of the contemporary landscape of international courts and tribunals to grasp the practice and pattern of the behaviour of the government and other actors. To pave the way for future investigation, this paper seeks to explain the increasing engagement with international adjudication by the Thai government against the backdrop of the contemporary state of international adjudication.

By bringing into conversation two strands of literature, namely "judicialisation of international relations" and sociological approaches to international courts and tribunals, I argue that the Thai government's increasing engagement with international adjudication over the last two decades has been shaped by four main conditions. First, the Thai government has cautiously but constantly expanded its acceptance of the jurisdiction of international courts and tribunals in recent decades. Second, the jurisdiction *ratione personae* of the courts and tribunals to which the government has given its consent covers non-state actors, which has resulted in an exponential increase in potential claimants bringing cases against the state in international adjudication. Third, over the last three decades, new litigators, including lawyers in international law firms, have become particularly active in the landscape and have sought new cases, new clients, and innovative procedures. Fourth, Thai government officials, for their part, are learning to strategically make themselves more visible in the international litigator communities. With all of these four conditions present, the further involvement of the Thai government in international adjudication can be expected. The first two conditions will be discussed together in Section 2 as "institutional conditions." The other two conditions will be treated as "socio-professional conditions" and will be discussed in Section 3.

A few words about the terminology and scope of the present work are in order. Following Cesare Romano, Karen Alter, and Yuval Shany, a group of international legal scholars and political scientists, "international adjudication" in this paper is understood to be concerned with the proceedings before bodies that are:

> 1. international governmental organizations, or bodies and procedures of international governmental organization, that . . .
> 2. hear cases when one of the parties is, or could be, a state or an international organization, and that . . .
> 3. are composed of independent adjudicators, who . . .
> 4. decide the question(s) brought before them on the basis of international law . . .
> 5. following pre-determined rules of procedure.[8]

[8] Cesare P. R. Romano, Karen J. Alter, and Yuval Shany, "Mapping International Adjudicative Bodies, the Issue, and Players" in Cesare P. R. Romano, Karen J. Alter, and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014) 3, 4–9. I have excluded

As such, I exclude proceedings before *domestic courts* in foreign states which involve the Thai government, even though these have increasingly gained practical significance and scholarly interest in many types of cases, such as state immunity, universal criminal jurisdiction, and enforcement of arbitral awards.[9] Similarly excluded is the arbitration against the government based on contractual claims governed by *domestic law*. With the terms "engagement" and "involvement," which will be used interchangeably, I limit the scope of analysis to the government's participation as an applicant/claimant, as a respondent, as a third-party/non-disputing party/intervener in contentious cases, and to its participation in advisory proceedings. I therefore leave out other forms of engagement, such as the nomination of adjudicators, reform projects, etc., even though they are worthy of further exploration in their own right.[10]

II. INSTITUTIONAL CONDITIONS

The causes of the expansion of international adjudication, as well as governments' involvement in it, are undoubtedly multiple. Legal academics and political scientists tend to focus on what is called the "proliferation of international courts and tribunals." The term refers to the phenomenon of a sudden increase in the number of new international courts and tribunals after the end of the Cold War in different fields of international law, which has completely altered the landscape of international adjudication.[11] Among the well-known ones are the ITLOS under the United Nations Convention on the Law of the Sea (Law of the Sea Convention), two ad hoc criminal

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the last element of their definition, which is "issuing binding decisions," because I wish to include advisory proceedings in the analysis. By doing so, the analysis will be more illuminating and better captures the practice in the field from the standpoint of both governments and litigators.

[9] For a good contemporary overview, see Andre Nollkaemper and August Reinisch (eds), *International Law in Domestic Courts: A Casebook* (Oxford University Press 2018).

[10] My scope of the concept is thus narrower than the on-going research led by Hilary Charlesworth and Margaret Young. See, Margaret A. Young, Emma Nyhan, and Hilary Charlesworth, "Studying Country-Specific Engagements with the International Court of Justice" (2019) 10 Journal of International Dispute Settlement 582.

[11] For literature providing a good overview of the phenomenon, see Cesare P. R. Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle" (1999) 31 New York University Journal of International Law and Politics 709 (discussing the creation of new courts and tribunals, its causes, and the increasing roles of non-state actors); Benedict Kingsbury, "International Courts" in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion of International Law* (Cambridge University Press 2012) 203 (discussing the typology and the unevenness in the issues and the range of actors that are under the jurisdiction of international courts and tribunals); Gary Born, "A New Generation of International Adjudication" (2012) 61 Duke Law Journal 775 (emphasising the significance of the new style of adjudication such as investor-state arbitration, which is structurally different from traditional inter-state proceedings before a court); Romano, Alter, and Shany, *International Adjudication* (n 8) 3–26 (discussing definitional issues, taxonomy, common criticisms, and a wide variety of actors involved).

tribunals for former Yugoslavia and Rwanda created by the Security Council of the United Nations, the ICC, the dispute settlement mechanisms of the WTO, and hundreds of ad hoc tribunals established in the explosion of cases before investor-state arbitration being brought under investment treaties. In the same period, older institutions such as the ICJ and the Permanent Court of Arbitration, which administer international arbitration, have seen a remarkable rise in their caseload. In the case of the ICJ, for example, while there were 13 contentious cases brought before the Court in the 1980s, the number leaped to 36 cases in the 1990s (including 10 cases initiated simultaneously by Yugoslavia against separate NATO members). This was followed by 24 cases in the 2000s, and 30 cases in the 2010s, which has made the World Court busier than ever. Third-party dispute settlement in international relations has traditionally been an exception to the rule, but today, in some issue-areas, it has morphed into a default option.

How then should one account for the increase in a government's involvement in international adjudication? Intrigued by the proliferation of international courts and tribunals, political scientists have pursued an effort in theorising under the rubric "the judicialisation of international relations."[12] This strand of works has focused on the questions as to why, and under which circumstances, states delegate their authority to adjudicatory bodies, and the questions about the many roles of international courts and tribunals.[13] To my mind, the most illuminating theoretical framework is that which has recently been developed jointly by Karen Alter, Emilie Hafner-Burton, and Laurence Helfer in a multidisciplinary project by international legal academic and International Relations scholars.[14]

The theory developed by Alter, Hafner-Burton, and Helfer is concerned with the extent to which international adjudication has shaped politics and policy-making processes at the domestic and international levels. It first clarifies that an adjudicatory body that can contribute to the judicialisation of international relations must possess certain qualifications. There are four: first, it must have the formal authority to decide

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[12] The seminal work and the research programme are initially conducted under the label "legalization of world politics." Judith Goldstein et al., "Introduction: Legalization and World Politics" (2000) 54 International Organization 385. See also, Robert O. Keohane, Andrew Moravcsik, and Anne Marie Slaughter, "Legalized Dispute Resolution: Interstate and Transnational" (2000) 54 International Organization 457.

[13] For the overview largely from a rational-choice perspective, see Karen J. Alter, "The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review" in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2013) 345, Barbara Koremenos and Timme Betz, "The Design of Dispute Settlement Procedures in International Agreements" in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2013) 371. For the more theoretically broader coverage, see Mark A. Pollack, "Political Science and International Adjudication" in Romano, Alter, and Shany, *International Adjudication* (n 8) 357.

[14] Karen J. Alter, Emilie M. Hafner-Burton, and Laurence R. Helfer, "Theorizing the Judicialization of International Relations" (2019) 63 International Studies Quarterly 449.

concrete legal disputes between contesting parties; second, it must be an independent decision-maker that applies pre-existing rules and procedures to review facts, evidence, and legal claims; third, it must provide authoritative determinations of violations of law, which are either binding or non-binding; and fourth, it must provide an order or recommendation of actions to remedy legal violations and prevent their repetition. The theory then discusses two cumulative preconditions for the process of judicialisation to occur: first, delegation of power to an adjudicatory body charged with applying legal rules, and second, legal rights-claiming by actors who bring or threaten to bring a complaint to an adjudicatory body. In this theoretical framework, the process involves multiple groups of actors including non-state actors, and therefore, governments or state officials do not, or indeed cannot, have full control over the time, nature, or extent to which political and policy decisions are adjudicated. The main component of the theory provides the model and the steps in which the process of judicialisation occurs, but, for the purpose of this paper, only the two preconditions for judicialsation, delegation of power and rights-claiming actors, will be of relevance for the discussion. Their insight will be brought to bear upon the analysis of Thailand's increasing engagement with international adjudication as part of the broader phenomenon on a global scale.

A. Increasing Acceptance of Jurisdiction

The first condition about the acceptance of the power of courts is an obvious point of departure from the perspective of the international legal system. As a matter of international law, contentious jurisdiction of courts or arbitral tribunals is consensual; that is, the existence and the extent of the jurisdiction of international courts and tribunals depend upon the consent of the relevant states, international organisations, or other actors.[15] In a contentious case, the consent of the parties to that case confers upon the court the jurisdiction to hear and decide the case. In advisory proceedings, the jurisdiction is derived from the statute and other relevant treaties. There thus exists no compulsory jurisdiction as generally understood in domestic legal systems. The proliferation of international courts and tribunals in the 1990s has not changed this foundational principle. Therefore, for international adjudicatory bodies to have and exercise jurisdiction, states must, in the terms familiar to IR scholars, delegate the power to them by virtue of consent.

Yet, experience has shown that courts and tribunals have at times expanded the scope of their jurisdiction with the opposition of some states. The legal argument that courts and tribunals have employed to support such a move is the *kompetenz-kompetenz* principle, according to which it is the court itself that has the competence

[15] For doctrinal discussion of the principle of consent, see e.g., Elihu Lauterpacht, "Principles of Procedure in International Litigation" (2011) 345 Collected Courses of The Hague Academy of International Law 387, 437–84.

to definitively determine the existence and scope of its jurisdiction.[16] In other words, the final say lies with the court, and not with the states or any other actors. A recent example of a court's tendency to expand its jurisdiction is the ongoing debate about the relationship between the International Criminal Court and the non-state parties to the Rome Statute.[17] For instance, in the Bangladesh/Myanmar situation, the Pre-Trial Chamber has laid down a relatively low threshold for the existence of the ICC's jurisdiction *ratione loci,* as follows: "provided that part of the *actus reus* takes place within the territory of a State Party, the Court may thus exercise territorial jurisdiction within the limits prescribed by customary international law."[18] This pronouncement has been invoked as a ground to request the Prosecutor to investigate the alleged crimes of deportation committed by Chinese officials against the Uighur people in the territories of the parties to the Rome Statute such as Tajikistan and Cambodia, notwithstanding the fact that China has not even signed the Statute.[19]

The Thai government, on the whole, has been cautiously yet constantly expanding its consent to the jurisdiction of international courts and tribunals in different fields. There has been a noticeable trend towards more acceptance over the last three decades, albeit with some unevenness, before one witnesses the increasing involvement in adjudication. This cautious attitude can be clearly observed in relation to the ICJ and ICC. In the case of the International Court of Justice, the Thai government has not declared its unilateral acceptance of compulsory jurisdiction in accordance with Article 36(2) of the Statute. There is also a common practice, which has arisen in recent decades, that, when it becomes a party, Thailand will invariably make a reservation to any compromissory clause in a treaty which provides a ground for recourse to compulsory dispute settlement. [20] In multilateral environmental agreements which allow the parties to opt in to compulsory adjudication, the government has not made such a declaration thus far.[21] One of the main causes for the

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[16] On this principle, see e.g., Christian Tomuschat, "Article 36" in Andreas Zimmermann et al. (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) 712, at para 111–43.

[17] For a recent treatment of this issue, see Monique Cormier, *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties* (Cambridge University Press 2020).

[18] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (ICC-01/19), Pre-Trial Chamber III, 14 November 2019, para 61.

[19] Tia Sewell, "Unpacking the Recent Uighur ICC Complaint against Chinese Leader" (*Lawfare*, 21 July 2020) <https://www.lawfareblog.com/unpacking-recent-uighur-icc-complaint-against-chinese-leaders>.

[20] Examples of the treaties where Thailand opted out from the ICJ's jurisdiction include: International Convention for the Suppression of the Financing of Terrorism 1999 (Thailand's ratification in 2004); United Nations Convention against Corruption 2006 (Thailand's ratification in 2011); United Nations Convention against Transnational Organized Crime 2000 (Thailand's ratification in 2013); International Convention for the Suppression of Acts of Nuclear Terrorism 2005 (Thailand's ratification in 2019).

[21] See e.g., Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 1998 (Thailand's accession in 2002); Convention on

cautious attitude originates from the ICJ's judgment in the *Preah Vihear* case in 1962, which re-opened the dark episodes of colonialism in the region at the height of the Cold War. In that case, the Court held, *inter alia*, that "the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia," primarily on the basis that Thailand had long accepted the map produced by the French-Siamese Mixed Delimitation Commission.[22] As rightly observed by the prominent international lawyer Vitit Muntarbhorn, this experience "has been more dramatic and traumatic for the country than any other international legal issue, affecting national pride and sentiments."[23] Because of that trauma, the judgment "also explains the country's hesitation towards the ICJ and may have resulted in several reservations entered by Thailand to international treaties, whereby the country does not consent to dispute settlement by the ICJ."[24] The basis of the ICJ's jurisdiction in this case was Thailand's acceptance of the predecessor of the ICJ, the Permanent Court of International Justice, which was renewed under the Statute of the ICJ for a period of ten years from 3 May 1950.[25] As a result of Cambodia's initiation of proceedings, the Thai government did not renew its acceptance of the ICJ's jurisdiction.[26] It should be added that such a

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Biological Diversity 1992 (Thailand's ratification in 2003); Stockholm Convention on Persistent Organic Pollutants 2001 (Thailand's ratification in 2005).

[22] *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Reports 6, 36. For an excellent historical study on the case in the broader context of Cambodia–Thai relations, see Shane Strate, "A Pile of Stones? Preah Vihear as a Thai Symbol of National Humiliation" (2013) 21 South East Asia Research 41.

[23] Vitit Muntarbhorn, "Thailand" in Simon Chesterman, Hisashi Owada, and Ben Saul (eds), *The Oxford Handbook of International Law in Asia and the Pacific* (Oxford University Press 2019) 363, 369. A noted political scientist Thitinan Pongsudhirak recounts the vehement reactions from the Thai side as follows:

> Then-Foreign Minister Thanat Khoman called it a "miscarriage of justice," insinuated that the Polish president of the ICJ was a communist, labelled some of the judges as nationals of colonial powers and criticised and questioned the US' objectives in South East Asia for allowing Dean Acheson to plead the Cambodian case. As a sign of protest, Thailand withdrew its delegation from SEATO Council and the Geneva Conference on Laos, recalled its ambassador to France and turned back a Polish trade delegation. Echoing scenes to come years later, thousands of university students protested in the streets of Bangkok to "protect Phra Viharn."

Thitinan Pongsudhirak, "All Quiet on the Thai–Cambodian Front: Drivers, Dynamics, Directions" (2018) 26 South East Asia Research 330, 336.

[24] Vitit, *Thailand* (n 23) 369.

[25] Declaration of Thailand Recognizing as Compulsory the Jurisdiction of the Court, in Conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, Bangkok, 20 May 1950 (registered 13 June 1950) 65 UNTS 157.

[26] Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice under Article 36, Paragraph 2, of the Statute of the Court (*United Nations Treaty Collections*) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-4&chapter=1&clang=_en#8>.

passive approach to the ICJ's contentious jurisdiction is not unique to Thailand: it seems common among many Asian countries.[27]

If the Thai government is cautious in accepting the ICJ's jurisdiction, it has been even more so in the case of the ICC. While the government participated in the Rome Conference to negotiate the ICC Statute, it has neither ratified the Statute nor accepted the ICC's jurisdiction. After the adoption of the Rome Statute, there have been discussions and deliberations as to whether Thailand should ratify the Statute in numerous fora, including the ad hoc committee in the Parliament.[28] Various concerns have been repeatedly voiced, which include the possible abuse of the proceedings for political purposes, and the immunity of the King as the Commander-in-Chief of the Royal Thai Army.[29] As a result, even though Thailand has signed the Rome Statute, it has not ratified it yet. The debates have recurred from time to time, particularly in relation to the tenacious culture of impunity in the country.[30] And yet there are no noticeable changes in the official position and policy.

The non-acceptance of the jurisdiction of the ICC, nevertheless, may not always exclude the involvement of the states and governments. The ongoing investigation in Afghanistan, for instance, may implicate Thailand. In 2017, the Prosecutor at the ICC requested authorisation from the Pre-Trial Chamber to initiate an investigation into alleged war crimes and crimes against humanity in relation to the armed conflict in Afghanistan, and similar crimes related to that conflict committed in the territory of other parties to the Rome Statute, including acts allegedly committed by US armed forces and members of the Central Intelligence Agency (CIA) such as torture and cruel treatment. The alleged torture and cruel treatment, according to the Prosecutor, were committed in the so-called "CIA black sites" located in various countries which, according to some media reports, include Thailand. In the list of the sites submitted to the ICC, however, the Prosecutor did not include the "Detention Site Green," reportedly located in Thailand and in operation until the end of 2002, even though it

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[27] For a thorough survey up until 2018, see Hisashi Owada and Samuel Chang, "International Dispute Settlement" in Chesterman, Owada, and Saul, *International Law in Asia and the Pacific* (n 23) 267, 270–74.

[28] For a summary of the concerns raised in the Committee, see ศูนย์ข่าว TCIJ, "สว. ชี้หากไทยให้สัตยาบันศาลระหว่างปท. เท่ากับลดความคุ้มกัน 'พระมหากษัตริย์'" [Thai Civil Rights and Investigative Journalism, "The Senate Said Ratification of the ICC Would Undermine the Immunity of the King"] (Thai) *TCIJ* (11 October 2013) <https://www.tcijthai.com/news/2013/11/scoop/3207>.

[29] For a concise summary of legal issues concerning constitutional law, as well as public opinions, see Jaturon Thirawat, "To Join or Not to Join the International Criminal Court: The Thai Dilemma" (2005) 1 Asia Pacific Yearbook of International Humanitarian Law 168; ปกป้อง ศรีสนิท, กฎหมายอาญาระหว่างประเทศ (วิญญูชน 2556) [Pokpong Srisanit, *International Criminal Law* (Winyuchon 2013)] (Thai) 256–58.

[30] For an excellent historical study of the issue of impunity in Thailand, see Tyrell Haberkorn, *In Plain Sight: Impunity and Human Rights in Thailand* (The University of Wisconsin Press 2019).

was mentioned in the declassified summary report of the Intelligence Committee of the US Senate in 2014.[31] How the Prosecutor will proceed remains to be seen.

Apart from the ICJ and the ICC, the government has been more willingly accepting of the jurisdiction of international tribunals. In 2011, Thailand finally ratified the Law of the Sea Convention which it signed three decades ago. The Convention provides for the compulsory dispute settlement mechanisms and the advisory jurisdiction of the ITLOS. However, the Thai government retained a measure of caution once again. The government has indicated that, in accordance with Article 298 of UNCLOS, it exempts certain categories of disputes from the dispute settlement mechanism, including disputes relating to sea boundary delimitations or involving historic bays or titles.[32] It has also chosen an arbitral tribunal, not the ITLOS or the ICJ, as the default method of dispute settlement, which will allow it to maintain some control over the selection of arbitrators who will decide cases.[33]

The acceptance of the investor-state arbitration under treaties shows an even more open attitude. Thailand has been concluding investment treaties for several decades, with the understanding that the protection under those treaties, as well as the accompanying investor-state arbitration, would attract more inward foreign direct investment to the country.[34] Nevertheless, according to interviews given by a few officials, the decisions to conclude these treaties in the early decades were not based on any thorough cost-benefit analysis or robust empirical study.[35] After the first

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[31] See e.g., "คุกลับ จับทรมาน: มรดกและหมุดหมายของมิตรภาพไทย-สหรัฐฯ (ซีไอเอ)" ประชาไท (1 เมษายน 2561) ["Black Site and Torture: Heritage and Milestone of Thai–US (CIA Relations)" *Prachatai* (1 April 2018)] (Thai) <https://prachatai.com/journal/2018/04/76177>; "New CIA Chief Ran Thailand's Secret Waterboarding Site" *Bangkok Post* (14 March 2018) <https://www.bangkokpost.com/world/1427606/new-cia-chief-ran-thailands-secret-waterboarding-site>; "What Happened at the Thailand 'Black Site' Run by Trump's CIA Pick" *The Atlantic* (14 March 2018) <https://www.theatlantic.com/international/archive/2018/03/gina-haspel-black-site-torture-cia/555539/>; "CIA Director Gina Haspel's Thailand Torture Ties" *BBC* (3 May 2018) <https://www.bbc.com/news/world-asia-43496212>. However, the Thai government has initially denied the allegation. See, "Thailand Denies Existence of CIA Black Site" *Bangkok Post* (12 December 2014) <https://www.bangkokpost.com/world/449082/thailand-denies-existence-of-cia-black-site>.

[32] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

[33] For concise explanation and discussion on the various fora for dispute settlement under the Law of the Sea Convention, see Robin R. Churchill and A. Vaughan Lowe, *The Law of the Sea* (3rd edn, Manchester University Press 1999) 453–59; Yoshifumi Tanaka, *The International Law of the Sea* (3rd edn, Cambridge University Press 2019) 493–509.

[34] For a very good overview of the Thai government's changing attitude towards investment arbitration (including both contract-based and treaty-based claims), see Luke Nottage and Sakda Thanitcul, "International Investment Arbitration in Thailand: Limiting Contract-Based Claims While Maintaining Treaty-Based ISDS" (2017) 18 Journal of World Investment and Trade 793.

[35] Lauge N. S. Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Oxford University Press 2015) 126–27 (recording the following statements from the interview with the author: "the idea in the 1990s was that we would have more investment if we negotiated those bilateral instruments"; and "the perception . . . was simply that this was a precondition for foreign investors making the decision to invest, so we thought there is nothing wrong with that.").

arbitral claim brought by a German company under the German-Thai bilateral investment treaty in 2005, which resulted in the victory of the investor, the Thai government has continued to conclude new investment treaties, including free trade agreements. But the policy justification has been modified: now that Thai investors increasingly make investments abroad, the treaties as well as the accompanying arbitration are intended to protect them. "Like many countries," noted Vilawan Mangklatanakul, the then Director of International Law Development Division of the Department of Treaties and Legal Affairs in 2010, "Thailand has signed a number of [international investment agreements] designed to protect its investors abroad *and simultaneously* attract investment from abroad into the country by offering an additional layer of protection for foreign investors."[36] There have been improvements in the drafting of the treaties, too. The 2002 Model BIT was revised in 2013 to give more precision to the wording in the provisions, including those concerning the jurisdiction of the arbitral tribunal. At present, Thailand has concluded 42 bilateral investment treaties and 26 treaties with investment protection provisions, a large number of which are now in force.[37] The so-called "second generation" of investment treaties are more precise and elaborate in their provisions, which demonstrates greater caution and care on the part of the government.

A largely similar attitude can be found in the context of the dispute settlement mechanism in the framework of the WTO. The Thai government joined in the early stages and has participated actively in the proceedings as a claimant, a respondent, and a third party.[38] However, with the currently defunct Appellate Body, the European Union and other members have proposed the multi-party interim appeal arrangement, according to which the members of the WTO may choose to resort to arbitration instead of the Appellate Body.[39] The Thai government has not joined the arrangement yet. The Director-General of the Trade Negotiations Department, Ministry of

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[36] Vilawan Mangklatanakul, "Thailand's First Treaty Arbitration: Gain from Pain" in Susan D. Franck and Anna Joubin-Bret (eds) *Investor-State Disputes: Prevention and Alternatives to Arbitration II. Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution* (UNCTAD 2011) 81, 81 (emphasis added). Similar statements have been repeated by the government officials on numerous occasions. See e.g., the similar statement by Vilawan Mangklatanakul at the Academic Seminar on Investor-State Arbitration: Past, Present, and Future, held on 20 February 2020, at Faculty of Law, Thammasat University, "สรุปสาระสำคัญจากสัมมนาวิชาการเรื่อง 'อนุญาโตตุลาการระหว่างรัฐและนักลงทุนตามสนธิสัญญา: อดีต ปัจจุบัน และอนาคต'" ["Summary of the Academic Seminar on Investor-State Arbitration: Past, Present, and Future"] (Thai) <https://www.law.tu.ac.th/summary-seminar-arbitration-state-investor/>.

[37] "International Investment Agreements Navigator" *UNCTAD* <https://investmentpolicy.unctad.org/international-investment-greements/countries/207/thailand>.

[38] ประสิทธิ์ เอกบุตร, กลไกการระงับข้อพิพาท WTO: วิธีพิจารณาคดีใน WTO และข้อสังเกตเกี่ยวกับการต่อสู้คดีของไทย (พิมพ์ลักษณ์ 2550) [Prasit Aekaputra, *Dispute Settlement Mechanisms of the WTO: Procedure and Observations About Thailand's Litigation Strategy* (Pimluk 2007)] (Thai); Pornchai Danvivathana, "Thailand's Experience in the WTO Dispute Settlement System: Challenging the EC Sugar Regime" in Gregory C. Shaffer and Ricardo Meléndez-Ortiz (eds), *Dispute Settlement at the WTO: The Developing Country Experience* (Cambridge University Press 2010) 210.

[39] "Interim Appeal Arrangement for WTO Disputes Becomes Effective" *European Commission* (30 April 2020) <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143>.

Commerce, has only expressed support for the reform of the WTO dispute settlement mechanism.[40]

A brief survey of Thailand's position with regard to the jurisdiction of the ICJ, the ICC, the ITLOS, investor-state arbitration, and the dispute settlement mechanisms in the WTO, as presented above, paints a nuanced picture. The government has been cautious in accepting or expanding the jurisdiction of courts and tribunals, yet on the whole, it is clear that over the last 30 years the move has been to accept more, and not less, jurisdiction. In this period, Thailand has not withdrawn its consent to the jurisdiction of these courts and tribunals.

B. Proliferation of Potential Claimants

As Alter, Hafner-Burton, and Helfer rightly emphasise, the broader consent to jurisdiction alone is not sufficient for judicialisation; there must be right-holders bringing a claim before courts and tribunals. One of the revolutionary aspects in the landscape of international adjudication over the last 30 years has been the exponential proliferation of potential claimants, including non-state actors. While inter-state proceedings are the paradigmatic form of international adjudication in traditional international law textbooks, this has changed significantly in the second half of the twentieth century. Benedict Kingsbury usefully summarises ten types of international adjudicatory bodies as follows:[41]

- Inter-government claims commission (covering certain claims between states, but also allowing claims against the other state from a pre-defined list of grounds);
- Ad hoc inter-state arbitration (providing a traditional method of inter-state dispute settlement by the third party which precedes the establishment of a permanent international court);
- Inter-state arbitration embedded in pre-existing legal institutional structures (typically established under the administration of the Permanent Court of Arbitration);
- Standing international courts (providing the twentieth-century, quintessential example of an international adjudicatory body);
- International criminal courts (trying individuals for commission of international crimes);
- International administrative tribunals (deciding claims brought by officials of international organisations against the organisations);
- Regional human rights courts (allowing an individual whose rights under human rights treaties have allegedly been violated to bring a claim against governments);
- Regional economic integration courts (establishing under the treaty concerning

[40] "Bangkok Pushes WTO Multilateral System" *Bangkok Post* (19 March 2019) <https://www.bangkokpost.com/business/1646996/bangkok-pushes-wto-multilateral-system>.

[41] Kingsbury, *International Courts* (n 11) 205–10.

integration of a specific region such as the European Union);
- The WTO dispute settlement system (comprising three-member ad hoc panels and the permanent Appellate Body with the competence to decide the appeal);
- Investment arbitration tribunals (deciding claims brought by foreign investors against the host state in whose territory the investment is made).

To this list, one may add "quasi-judicial bodies" established under human rights treaties, such as the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. Such bodies comprise experts and may, depending upon the state party's acceptance, receive complaints made by individuals against governments, alleging violations of their protected rights. "All of this," Kingsbury aptly notes, "has led to a new paradigm of routinised litigation and judicial governance being layered alongside the traditional paradigm of episodic international (inter-state) dispute settlement by tribunals."[42]

The increasing engagement in international adjudication of governments around the world in different fields can thus be simply explained by the fact that they are brought to the cases to defend their positions by this massive group of new claimants. In other words, states are forced to defend their position; otherwise they will run the risk of losing the case. Compared with the old world of approximately 200 states bringing a case against each other, the new world of international adjudication appears as a dramatic one where a government faces potential claims for monetary damages by thousands of foreign investors, and potential allegations of human rights violations by millions of individuals in their territory or subject to their jurisdiction.

Many of the regimes in which the Thai government has accepted compulsory jurisdiction involve non-state actors. This is crystal clear in investor-state arbitration. Faced with the claims brought by a German investor and an Australian investor, the government did not have many options other than to defend its position in full in the proceedings. As with many countries, the risk of arbitration seems high, simply due to the fact that government officials are not fully aware of investment treaties, their meanings, and their implications for dispute settlement. Vilawan, again, provides a perceptive reflection upon the learning experience after the first investment arbitration:

> There are two key possible "pre-dispute pitfalls." First, government agencies can often lack experience with investment treaty arbitration. Thailand signed the first BIT with Germany in 1961 and many other countries thereafter; yet its first treaty arbitration only arose in 2005. The government officials were not fully well versed with the legal implications of the treaty, let alone the early dispute settlement or litigation under the arbitral rules of procedure. The realisation that an investor could invoke ISDS in a treaty was perhaps not fully appreciated. . . .
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> Secondly, there might be a lack of an institutionalised dispute-filtering mechanism or liaison unit that could prevent a "problem" related to investment from

[42] ibid 210.

> escalating into a formal investment "dispute."[43]

This statement was made in 2010, and it is unclear if these issues have since been alleviated to a satisfactory extent. Foreign investors continue to threaten lawsuits, which may arguably include investment-treaty arbitration. Facebook Inc, for instance, has very recently protested against the Thai government's attempt to prosecute its employees, raising concerns in alarming terms about its ability to "reliably invest in Thailand, including maintaining our office, safeguarding our employees and directly supporting businesses that rely on Facebook."[44]

The emergence of new potential claimants has also changed the traditional picture of the proceedings between states and the roles of governments. As it stands, many of the inter-state proceedings have been conducted by private persons with the help of the government, pursuing some kind of public-private partnership in adjudication. This is particularly true for the dispute settlement mechanism in the WTO. According to a path-breaking study by Gregory Shaffer in 2003, American and European companies have tried to use the WTO system to enhance their corporate interests. He concludes that the "growing interaction between private enterprises, their lawyers, and U.S. and European public officials in the bringing of most trade claims reflects a trend from predominantly intergovernmental decision-making toward multilevel private litigation strategies involving direct public-private exchange at the national and international levels."[45] A similar phenomenon can be observed in the Thai government's participation in the WTO dispute settlement mechanism. Pornchai Danvivathana, a Thai diplomat, insightfully summarises the practice of Thailand as follows:

> It should be noted that for Thailand, involvement of the private sector in any dispute is a good indicator of serious damage in real terms. However, it is the government that assesses whether the country and the industries concerned are being deprived respectively of rights and/or benefits accruing under the WTO Agreements. In making an assessment, the government considers whether there is a breach of another Member's commitments and, based on statistical data, examines whether its exports are impaired as a result of the other Member's measures. However, if the industries affected by the measures at issue petition the government to initiate a WTO dispute, the filing of a claim before the WTO is more easily justified.[46]

He also reports that in the *EC-Sugar* case, the Thai Sugar Association has closely cooperated with the Thai government. It sent its representatives to Geneva to discuss the legal, political, and public relations issues with the Thai Permanent Mission both

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[43] Vilawan, *First Treaty Arbitration* (n 36) 82.

[44] "PM in War of Words as Facebook Threatens Lawsuit" *Bangkok Post* (26 August 2020) <https://www.bangkokpost.com/thailand/politics/1974467/pm-in-war-of-words-as-fb-threatens-lawsuit>.

[45] Gregory C. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (The Brookings Institution 2003) 4.

[46] Pornchai, *Thailand's Experience* (n 38) 216.

before and after the complaint was formally filed.[47] The eagerness of the Thai private sector to collaborate with the government is also evident in the consultation between Thailand, the Philippines, and the European Community regarding the tariffs on tuna imports. Challenging the EC's tariffs, the Thai government involved a representative of the Thai Food Processors' Association, which provided some significant financial support. In the words of the representative of the Association, "[w]hen we saw that there was not enough legal expertise in the ministry, we, the private sector, gathered the funding needed to hire a law firm in Brussels."[48] As such, even though private persons do not enjoy a formal legal standing in the mechanisms, they can engage with governments, which will bring them into the proceedings before adjudicatory bodies. Some have indeed argued for more engagement of Thai private actors, particularly in sharing the fees for external counsels and experts with the government[49]—the aspect of the phenomenon to which this paper will now turn.

III. SOCIO-PROFESSIONAL CONDITIONS

Institutional conditions alone do not sufficiently explain the rise of judicialisation and the increased involvement of governments in international adjudication. Since an institution tends to entail unintended consequences, for instance, creating a new audience that is not expected at the time of the creation, an analytical net should be cast widely so as to cover such consequences. This insight, inspired by the criticism of the institutional design literature, [50] is particularly illuminating for studying international courts and tribunals. To supplement an analysis of the expansion of consent to jurisdiction and the expansion of potential claimants, attention should be turned towards the communities of litigators who are not only involved in the proceedings before international courts and tribunals, but who also serve to sustain adjudicatory activities. The litigator communities also form part of the larger constituency of courts and tribunals which provides the springboard for the legitimacy and authority of those courts and tribunals. [51] In this sense, the analysis of the

[47] ibid 217.

[48] See the interview in, Nilaratna Xuto, "Thailand: Conciliating a Dispute on Tuna Exports to the EC" (2005) <https://www.wto.org/english/res_e/booksp_e/casestudies_e/case40_e.htm>.

[49] See e.g., บัณฑิต หลิมสกุล, "ความร่วมมือระหว่างภาครัฐและเอกชนของไทย (Public-Private Partnerships: PPP) ในการใช้กลไกยุติข้อพิพาทภายใต้กรอบ WTO เพื่อแก้ปัญหาการกีดกันทางการค้า" (2554) 29 วารสารเศรษฐศาสตร์ธรรมศาสตร์ [Bundit Limsakul, "The Proposed Model for Thai Public-Private Partnerships for Resolving Multilateral Trade Dispute under the World Trade Organization (WTO)" (2011) 29 Thammasat Economic Journal] (Thai) 1, 33–36.

[50] On the seminal critique of institutional design literature, see Paul Pierson, "The Limits of Design: Explaining Institutional Origins and Change" (2000) 13 Governance: An International Journal of Policy and Administration 475–99. For the more extensive discussion, see Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton University Press 2004).

[51] Mikael Rask Madsen, "Sociological Approaches to International Courts and Tribunal" in Romano, Alter, and Shany, *International Adjudication* (n 8) 388, 408–11 (providing an overview of the issue of

judicialisation process should include the community of actors involved in the entire process of adjudication. The sociologist Antoine Vauchez aptly speaks of the "symbiotic relationship" between communities and courts, and rightly observes as follows:

> Any analysis of the symbiotic relationship between "international courts" and their "legal communities" should start from the simple yet instrumental fact that international courts are particularly precarious institutions, especially when compared to their national counterparts. Not only do they lack the backing of the state, but they cannot count on the existence of a supranational judicial profession because there is no such thing as a supranational body competent for setting common educational requirements. . . . In other words, newly-built international courts do not mechanically succeed in claiming a "natural" domain of jurisdiction of their own by the mere force of the black letter of the treaties. More often than not, their existence as an "authentic" jurisdiction capable of producing an authoritative body of case law is initially questioned by a variety of groups and professions (such as national scholarships, national supreme courts, and diplomats).[52]

Communities of international litigators comprise diverse roles and multiple actors from different backgrounds. Much will therefore depend upon the specific setting in the court and tribunal in question, even if two courts may share some overlapping litigator communities. Legal scholars have increasingly adopted this insight and have fruitfully studied a wide variety of international courts and tribunals.[53] In what follows, I shall focus on the most salient features in the composition of the international litigator communities from a socio-professional

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legitimacy and legitimation of international courts from a sociological perspective); Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen, "How Context Shapes the Authority of International Courts" in Karen J. Alter, Laurenc R. Helfer, and Mikael Rask Madsen (eds), *International Court Authority* (Oxford University Press 2018) 24, 28–36 (usefully providing a typology of de facto authority on the basis of difference audiences such as litigants, business actors, civil society organisations, etc); Fuad Zarbiyev, "Saying Credibly What the Law Is: On Marks of Authority in International Law" (2018) (9) Journal of International Dispute Settlement 291, 293–97 (conceptualizing authority as "deference entitlement" supported by the belief system collectively shared within a community).

[52] Antoine Vauchez, "Communities of International Litigators" in Romano, Alter, and Shany, *International Adjudication* (n 8) 655, 658–59.

[53] See e.g., Yyves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996) (a pioneering work, analyzing how legal professions based mainly in Europe and the US have created and competed in the field of international commercial arbitration); Mikael Madsen, "France, the United Kingdom and the 'Boomerang' of the Internationalisation of Human Rights (1945–2000)" in Simon Halliday and Patrick Schmidt (eds), *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context* (Hart Publishing 2004) 57–86 (providing the history of the European Court of Human Rights in the context of the reconstruction of the British and French empires which covers the creation of the lawyers' communities and constituency of the Court); Tommaso Soave, "Who Controls WTO Dispute Settlement? Socio-Professional Practices and the Crisis of the Appellate Body" (2020) 29 Italian Yearbook of International Law 13–31 (providing an account of how the "inner circle" of the community of legal professionals have developed the practices and norms in the dispute settlement mechanism of the WTO).

perspective, namely, the multiplication and diversification of counsels and the strategic learning of government officials. These aspects are significant, for if these groups of actors seek more cases, it is likely that international adjudication will increase, which in turn means that it is likely that the government will become more involved.

A. Emergence of Law Firms

Counsels in international adjudication are motivated, to use the distinction drawn by Max Weber, by both material and ideal interests.[54] For them, more jurisdiction and more cases mean more job opportunities, and more job opportunities, in turn, result in more income, more prestige, more sense of accomplishment, and more perception of justice. There is therefore a clear incentive for litigators to seek to expand jurisdiction of courts and tribunals and bring more cases to them.

Traditionally, counsels before the International Court of Justice and inter-state arbitration were almost monopolised by a close-knit group of British barristers and professors based largely in the UK, US, Belgium, France, and Italy.[55] In cases before the ICJ and the inter-state arbitration, the team is typically composed of the government official as an agent and several counsels from both Anglophone and Francophone backgrounds.[56] In 1994, Keith Highet, an experienced counsel before the ICJ, spoke of "the international bar that continues to serve the Court," which

> consists of those international lawyers who have practiced and who continue to practice as oral advocates before the Court, who represent a variety of foreign states other than their own governments, who are well-known to the Judges and Registrar of the Court, who know how things work out in practice, and who understand by experience the difficulties, pitfalls and tricks of the trade.[57]

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[54] For a succinct summary, see Hans H. Gerth and Charles Wright Mills, "Introduction" in Hans H. Gerth and Charles Wright Mills (eds), *From Max Weber: Essays in Sociology* (Oxford University Press 1946) 1, 61–65.

[55] Alain Pellet, "The Role of the International Lawyer in International Litigation" in Chanaka Wickremasinghe (ed), *International Lawyer as Practitioner* (BIICL 2000) 147, 147–53; Shashank P. Kumar and Cecily Rose, "A Study of Lawyers Appearing Before the International Court of Justice, 1999–2012" (2014) 25 The European Journal of International Law 893; Sarah Dezalay and Yyves Dezalay, "Professionals of International Justice: From the Shadow of State Diplomacy to the Pull of the Market for Commercial Arbitration" in Jean d'Aspremont et al. (eds), *International Law as a Profession* (Cambridge University Press 2017) 311.

[56] For the discussion of the composition team, see Alain Pellet and Tessa Barsac, "Litigation Strategy" in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (2019) <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3109.013.3109/law-mpeipro-e3109>.

[57] Keith Highet, "A Personal Memoir of Eduardo Jiménez de Aréchaga: Doyen of the Invisible Bar of the International Court of Justice" (1994) 88 Proceedings of the ASIL Annual Meeting 577, 578–79. Highet himself was certainly a member of this invisible bar, having appeared in such cases as *Southwest Africa*, *Tunisia/Libya*, *ELSI*, *Qatar v Bahrain*, *Cameroon v Nigeria, Fisheries Jurisdiction (Spain v Canada)*.

What is noteworthy from Highet's statement is not only the rich and unrivalled experience and expertise of this group of international lawyers, but also their reputation in the eyes of the ICJ judges. States appearing before the ICJ therefore have a prudential reason for choosing the counsel from this group of international lawyers to secure the trust of judges. Judge Jennings, the former President, was candid about this. "The judges," he wrote, "can therefore often make a good guess at the names of leading counsel even before the list of names is provided; and the only question remaining may well be just to learn on which side they will respectively appear."[58] Such practice and preference for the *status quo* were already revealed in the *Electricité de Beyrouth* case in the early years of the ICJ. When the Agent of Lebanon asked the Registrar for a list of potential counsels for the case, part of the Registrar's reply was the recommendation that Lebanon should seek counsels whose names appear in the judgments in previous cases.[59]

The departure from the small community of international litigators seems to have been initiated with the creation of the Iran-US Claims Tribunal in the wake of the Iran-US crisis in 1980.[60] But it certainly accelerated in the succeeding decade when investor-state arbitration, the dispute settlement proceedings before the WTO, and two ad hoc international criminal tribunals gained currency in the 1990s. With the increase in the number of international courts and tribunals, the social fabric of international lawyers appearing before them has become much more diverse. The most salient aspect in these changes is the increasing role of lawyers from law firms. James Crawford, an academic (and subsequently a judge) with very extensive experience in litigation as a counsel and arbitrator over the last three decades, once pointed out that there was an ongoing "major competition on the Anglophone side between the large law firms and the international lawyers who are professors." He also admitted he was not certain "that the professors will retain the dominant status that they have enjoyed in the past."[61] Alain Pellet, another experienced counsel, goes even further in affirming the inevitable role of law firms in international adjudication:

> I have some reservation with systematically resorting to law-firms in inter-State cases: it unavoidably and considerably raises the cost of the case and, quite usually, makes the procedure more cumbersome. This said, resorting to a law-firm will be virtually indispensable in two circumstances: first, for very poor States ill-equipped to face rather complex and heavy procedures; second, when the case implies difficult factual

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[58] Robert Jennings, "The Work of the International Law Bar" in Lal C. Vohrah et al. (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003) 443, 444.

[59] James Crawford, "The International Law Bar: Essence before Existence?" in Jean d'Aspremont et al. (eds), *International Law as a Profession* (Cambridge University Press 2017) 338, 340. This episode also illustrates the role of ICJ officers in the litigator community.

[60] ibid 342.

[61] James Crawford, Alain Pellet, and Catherine Redgwell, "Anglo-American and Continental Traditions in Advocacy before International Courts and Tribunals" (2013) 2 Cambridge Journal of International and Comparative Law 715, 723.

> or archives researches for which law professors are poorly equipped.[62]

His observation was made in the context of inter-state cases, but it is equally applicable, or indeed even more applicable, to the cases involving private persons. In particular, where the governments of small, developing countries are sued, they will inevitably have to rely upon the legal service of external counsels including lawyers from law firms.

The emergence of law firms has irrevocably altered the dynamic of international adjudication. Most importantly, compared to the "international bar of the ICJ," lawyers in law firms tend to have more time and resources to seek new clients and new cases.[63] They seem to have more incentive in trying innovative procedures. Investor-state arbitration is the case in point. Major law firms have occupied a significant part of the cases in total. Indeed, it is uncommon for a company or a state to rely upon in-house lawyers alone in investor-state arbitration. In all of the investment cases that involve Thailand, the government has invariably hired external counsels, both foreign and Thai, from law firms, to work alongside government lawyers. With regard to international law firms, the government has hired White & Case in the *Walter Bau* case, and Arnold & Porter in the *Kingsgate* case. Both of them are major players in the field. According to one study which collects the number of state-related cases law firms dealt with in 2011, the long list includes Freshfields Bruckhaus Deringer (handling 71 cases), White & Case (handling 32 cases), King & Spalding (handling 27 cases), Curtis Mallet-Prevost (handling 20 cases), Colt & Mosle (handling 20 cases), Sidley Austin (handling 18 cases), Arnold & Porter (handling 17 cases), Crowell & Moring (handling 13 cases), K & L Gates (handling 13 cases), Shearman & Sterling (handling 12 cases), DLA Piper (handling 11 cases), Chadbourne & Parke (handling 11 cases), Cleary Gottlieb Steen & Hamilton (handling at least 10 cases), Appleton & Associates (handling 10 cases and probably more), Foley Hoag (handling 10 cases), Latham & Watkins (handling 10 cases), Hogan Lovells (handling 10 cases), Clyde & Co (handing 10 cases), Norton Rose (handling 10 cases), Salan (handing 9 cases), and Debevoise & Plimpton (handling 9 cases).[64] These law firms maintain the practice of keeping current clients constantly informed of the potential claims to be brought. Some of them also seek to expand their client pool by giving training on international investment law to government officials from developing countries.[65] As one political scientist

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[62] Alain Pellet, "Introduction from the Podium" in Edgardo Sobenes Obergon and Benjamin Samson (eds), *Nicaragua before the International Court of Justice: Impacts on International Law* (Springer 2017) 15, 34.

[63] That said, some law firms have developed the practice of collaborating with academics and barristers to form a large team of counsels. This tends to be the case at the ICJ and ITLOS. Moreover, some academics may seek to be involved in cases and provide counsel.

[64] Pia Eberhardt and Cecilla Olivet, "Profiting from Injustice: How Law Firms, Arbitrators, and Financiers are Fuelling an Investment Arbitration Boom" (2012) 20–21 <https://corporateeurope.org/en/international-trade/2012/11/profiting-injustice>.

[65] See the variety of practices that different law firms have employed to seek more cases and more clients, ibid 22–30.

observes, while law firms were largely absent in the treaty conclusions in the early phase of the field, such as the conclusion of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in the 1960s, they are now playing an outsize role and occupy a prominent place in the constituency of investor-state arbitration. As such, law firms have brought about the new politics of this type of arbitration, stabilised the institution, and rendered it more difficult for governments to reform or exit.[66]

The attempt of counsels to bring more cases or expand the jurisdiction of courts and tribunals may, on some occasions, go hand in hand with the strategy of the judges or arbitrators. Judges and arbitrators, like counsels, may be motivated by both material and ideal stakes. As such, they may be motivated to enjoy expansive jurisdiction and hear more cases. The *Achmea* saga is a good illustration of an instance where the counsels' attempt to bring a case coincides with the arbitrators' preference in extending jurisdiction. In the *Slovak Republic v Achmea BV* case in 2018, the Grand Chamber of the Court of Justice of the European Union held that the arbitration clause in the investment treaties between members of the European Union, *in casu* the Netherlands-Slovakia bilateral investment treaty, violates EU law and is therefore invalid. [67] Yet, new cases continue to be brought under the intra-EU bilateral investment treaties. Several investment tribunals, on their part, have sought to contain the effect of this judgment using a variety of legal techniques, and continue to affirm the jurisdiction to hear and decide the cases. Indeed, there seem to be no (reported) cases where the tribunals followed the *Achmea* judgment and decline the jurisdiction to hear and decide the investor's claims.[68] In a very recent decision, for instance, the tribunal held that the Treaty on the Functioning of the European Union and the Greece-Cyprus bilateral investment treaty do not deal with the "same subject-matter" within the meaning of Article 30 of the Vienna Convention on the Law of Treaties, and that therefore the issue of termination of the Greece–Cyprus treaty on the basis of *lex posterior* does not arise. As a result, the bilateral investment treaty in question is still in force, and the tribunal has jurisdiction to hear the claims. The majority's view has prompted a strongly worded, but rare, dissent by one arbitrator:

> It is not in the interest of investment arbitration to extend jurisdiction where there is none and where there is not even any political or moral reason to do so. This policy only serves to discredit the system of international investment arbitration. The current practice at different levels, including treaties, looking for alternative ISDS systems should provoke a reflection in this regard.[69]

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[66] Taylor St. John, *The Rise of Investor–State Arbitration: Politics, Law, and Unintended Consequences* (Oxford University Press 2018) 240–41.

[67] Case C-284/16 *Slowakische Republik (Slovak Republic) v Achmea BV* EU:C:2018:158.

[68] For an up-to-date (and very long) list of cases, see Guled Yusuf and Godwin Tan, "United Utilities (Tallinn) v Estonia: ICSID Arbitration after Achmea: The Beginning of the End or the End of the Beginning?" (2021) 35 ICSID Review–Foreign Investment Law Journal 183, 185.

[69] *Theodoros Adamkopoulos and others v Republic of Cyprus*, Statement of Dissent of Professor Marcelo G. Kohen, ICSID Case No ARB/15/49, para 80.

In such cases, the emergence of law firms with their aim to expand jurisdiction and client pool, coupled with the receptive responses of judges or arbitrators, will result in more cases for governments to defend. Nevertheless, as emphasised by the legal theorist Duncan Kennedy, judges are bound both by legal materials such as precedents, legal provisions, etc., and their ideology.[70] Each decision, including the decision whether a court or tribunal has jurisdiction over a certain claim, therefore requires a context-specific analysis, as well as an analysis of any potential pattern of decisions made over time.

B. Strategic Positioning of Government Officials

Some government officials, for their part, may choose to strategically join the international litigator communities. By actively participating in proceedings before international courts and tribunals, they will gain more experience and credibility.[71] This is particularly the case when the government has adopted a clear policy on international adjudication. Nicaragua, for instance, has adopted the recourse to the International Court of Justice as part of its foreign policy after its historic victory in a case against the US in the 1980s.[72] It has appeared eight times as an applicant, five times as a respondent, and one time as an intervener. In these cases, the composition of the team remains largely unchanged. The agent has almost always been Ambassador Carlos Argüello Gómez, a government official of Nicaragua. Since the early years, the list of counsels has often included Paul Reichler (now a partner at a leading international law firm), Abram Chayes (a professor at Harvard Law School who has now passed away), Ian Brownlie (a professor at Oxford University who has now passed away), and Alain Pellet (now emeritus professor at Université Paris Nantere). Over time the team has expanded to include new members. In the words of Pellet, "it is in order to speak of 'the Team' in the singular—in spite of its partly changing composition depending on the case at stake: we are used to work [*sic*] together and have to live with

[70] Duncan Kennedy, "A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation" in Duncan Kennedy, *Legal Reasoning: Collected Essays* (Davies Book Publishers 2008) 154, 168 arguing that:

> "biases" or ideology do not determine jurists' work strategies any more conclusively than the system of legal norms determines outcomes. Ideologies are indeterminate in just the way that the legal order is. There is a hermeneutic circle at work here, in which the indeterminacies of each level get resolved by appeal to a deeper level with its own indeterminacies, and so on, back to the starting point, in which legal ideas influence ideology as well as vice versa.

[71] Shirley V. Scott, "Litigation versus Dispute Resolution through Political Processes" in Natalie Klein (ed) *Litigating International Law Disputes: Weighing the Options* (Cambridge University Press 2014) 24, 30–31.

[72] Pellet, *Podium* (n 62). For a thorough study of the litigation strategy in this case, see Terry D. Gill, *Litigation Strategy at the International Court: A Case Study of the Nicaragua vs the United States Dispute* (Brill 1989).

the qualities and defects of colleagues."[73] Using the repeat player tactic, Ambassador Carlos Argüello Gómez has now become a familiar face to the ICJ judges and earned a measure of their trust.

But Nicaragua's strategy is rather the exception, not the rule. Thailand has certainly not followed Nicaragua's path at the ICJ. And yet, the participation of the Thai government in the advisory proceedings of the ITLOS in the *Sub-Regional Fisheries Commission* (*SRFC)* case provides an interesting example of the visibility and credibility of the Thai government officials in the litigator community of the ITLOS, similar to Nicaragua's experience. At first glance, the *SRFC* advisory opinion seems only remotely related to Thailand. The SRFC is a small international organisation comprising 7 African states. It requested the ITLOS to give an advisory opinion regarding the obligations of states in relation to illegal, unreported, and unregulated (IUU) fishing and the potential responsibility arising therefrom under international law. The questions put to the Tribunal were worded rather broadly.[74] Notwithstanding the abstract questions, it is clear that the Thai government actively participated in the proceedings. It submitted written statements, in both the first and second rounds, and participated in the oral hearing. The oral pleading was given by Ambassador Kriangsak Kittichaisaree, who was then the Executive Director of the Thailand Trade and Economic Office in Taiwan. From the records before the Tribunal, it seems that the government did not secure any external counsels. It is noteworthy that there are not many parties to the Law of the Sea Convention who have participated as fully as Thailand did. While in the first round of written submissions, the Tribunal received statements from 22 parties, 6 organisations, and the SRFC; only 5 parties and the SRFC submitted additional statements in the second round. In the oral proceedings, only 10 parties, the SFRC and 2 other organisations participated. Interestingly, the second written statement of Thailand had as an attachment 60 pages

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[73] Pellet, *Podium* (n 62) 35.

[74] *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion, 2 April 2015) ITLOS Reports 2015, 4, 8. The questions read as follows:

> 1. What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zone of third party States?
>
> 2. To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?
>
> 3. Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?
>
> 4. What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?

of PowerPoint slides titled "Thailand Implementation in Combating IUU Fishing."[75] Indeed, the statement began with an overview of the measures that the Thai government has adopted in the "fight against IUU fishing." [76] The selection of Ambassador Kittichaisaree, as he then was, is noteworthy. He assuredly has expertise in the law of the sea, having written a doctoral dissertation on the topic of maritime delimitation at Cambridge University. [77] He also served as a member of the International Law Commission.[78] After this case, he was elected as a judge of the ITLOS from 2017. His selection as an agent served to increase his visibility and prominence in the litigator community, and added to his earlier experience as an advisor in the *"Chaisiri Reffer 2"* case.[79]

The *Chagos* advisory proceedings before the ICJ can be analysed along the same lines. The issue in that case concerned the decolonisation of the British colonies, which does not seem to directly concern Thailand. And yet, the Thai government made oral statements in the hearing. The representative of Thailand was the late Ambassador Virachai Plasai, who secured Professor Alina Miron as a counsel. Ambassador Virachai had already served as the agent of Thailand on the request for interpretation of the *Preah Vihear* judgment a few years earlier, where he worked together with prominent practitioners. The request came up while Cambodia–Thailand relations were tensely adversarial. In 2008, anti-government protests in Thailand fiercely protested against the government's acceptance of Cambodia's listing of the Preah Vihear temple as a UNESCO World Heritage Site, framing the issue as yet another loss of Thai territory. At the same time, the Hun Sen government had to mobilise political support for the 2013 general election. Cambodia's request to the ICJ has thus been construed as an attempt of the Cambodian government to rally domestic support for the 2013 election.[80] As a response, the Thai government garnered a stellar team of legal counsels: Alain Pellet, a French academic who has appeared before the ICJ more often than any other lawyer in the world; James Crawford, an Australian academic at Cambridge who would subsequently become a judge at the Court; and Donald McRae, a professor with vast experience in the law of the sea, international trade, and investment arbitration. These towering academics are truly from the circle of the "international bar," in which Ambassador Virachai has immersed himself. They brought with them two younger lawyers: Thomas Grant, a practitioner based at

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[75] "Request for an Advisory Opinion Submitted by the Sub-regional Fisheries Commission (SFRC) to the International Tribunal for the Law of the Sea: Written Statement of Thailand" *ITLOS* (2004) <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round2/21_II-5_Thailand.pdf>.

[76] ibid.

[77] The dissertation was subsequently published by Oxford University Press. Kriangsak Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* (Oxford University Press 1987).

[78] For the full biography, see "Judge Kriangsak Kittichaisaree" (*ITLOS*) <https://www.itlos.org/the-tribunal/members/judge-kriangsak-kittichaisaree/>.

[79] "*Chaisiri Reefer 2" Case (Panama v Yemen)* (Order of 13 July 2001) ITLOS Reports 2001, 82.

[80] Thitinan, *All Quiet* (n 23); P. Michael Rattanasengchanh, "The Role of Preah Viehar in Hun Sen's Nationalism Politics, 2008–2013" (2017) 36 Journal of Current Southeast Asian Affairs 63.

University of Cambridge with extensive in international litigation, and Alina Miron, then a doctoral student under the supervision of Pellet. Through his reappearance at the ICJ, as well as securing Professor Miron, the visibility of Ambassador Virachai in the community of World Court litigators, and in the eyes of the judges, has been enhanced. It should also be added that he was already well known in the WTO litigator community, having regularly been appointed as a panelist in the WTO dispute settlement system.[81]

IV. CONCLUSION

In this paper, I have argued that the increasing engagement with international adjudication of the Thai government over the last two decades is not mere happenstance, but should be understood as part of a broader global phenomenon. Specifically, it is the outcome of four institutional and socio-professional conditions. Firstly, the Thai government has cautiously but constantly expanded its acceptance of jurisdiction of international courts and tribunals in recent decades in different fields. Secondly, there are now many more potential claimants who can bring cases against governments before international courts and tribunals, including those whose jurisdiction the Thai government has accepted; Thailand, like many other countries, is now more exposed to potential claims than before. Thirdly, over the last three decades, new litigants, including in particular international law firms, have become particularly active, seeking new cases and innovative procedures. Finally, government officials are seemingly in the process of learning to build a presence in litigator communities, in order to develop experience and gain reputation. With all of these four conditions present, further involvement of the Thai government in international adjudication can be expected. Therefore, this paper calls attention to the increasing risk of litigation that the government may face in the future.

Incidentally, by drawing upon theories and insights from the literature that has not been developed to capture Thailand's experience specifically, the paper also aims to show that the government's increasing involvement with international adjudication is not unique to Thailand. Rather, it is a common and general phenomenon across different continents. The broader aim of the paper is thus to situate the Thai government's experience in the broader phenomenon of the judicialisation of international relations. By doing so, it is hoped that the paper will prompt further investigation of both theoretical and practical significance. How much have international relations been "judicialised"? How effective are international courts and tribunals? How does international adjudication shape domestic policy-making processes, and what are the sources of its legitimacy? What are the distributive effects of increasing engagement with international adjudication? How does the experience

[81] Joost Pauwelyn, "The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus" (2015) 109 The American Journal of International Law 761, 779.

of one country compare to that of other similarly situated countries? Further research, drawing upon multidisciplinary collaboration, will enhance an understanding of this increasingly important topic.

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Law and Identity: The Case of the "Common Law" of Scotland with Comparative Insights from Thailand

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Abstract

This article will first focus on the "mechanics" of the "mixed legal system" in Scotland, the product of the nineteenth century and rooted in nineteenth-century conceptions of "legal science." On the other side of the globe, the Thai legal system arose from historical contingency by which the nation sought both international recognition and self-consolidation after the colonial era. Against this backdrop, Thai legal scaffolding has been formed and imprisoned by its legal historiography as an intellectual imagination; in particular, the grand narrative creates local adherence to great legal tradition and rationalisation of Thai traditional values. Thai and Scots law may have had a completely different path of historical contingency, but what the two systems share is an exaggeration of grand narratives that obscure the nature of each legal system. To view these systems of law from a post-positivistic approach, a different approach is needed. After an initial discussion about Scots law, the influence of the civilian tradition upon Thai law will be investigated, followed by a summary of the main conclusions.

Keywords: Scotland — Thailand — Mixed jurisdictions — Colonialism — Legal history

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> Historical consciousness . . . leaves you, as does maturity itself, with a simultaneous sense of your own significance and insignificance. Like Friedrich's wanderer, you dominate a landscape even as you're diminished by it. You're suspended between sensibilities that are at odds with one another; but it's precisely within that suspension that your own identity—whether as a person or a historian—tends to reside. [1]

I. INTRODUCTION

The concept of "identity" mentioned in the quotation above plays an essential role in many facets of life. As a means of signalling belonging, it also fulfils a necessary function concerning legal systems and their ideologies, since it enables scholars of comparative law to identify and group legal systems into families or trees based on shared commonalities. Undoubtedly one of the most significant of these groups in the history of comparative law is that of the civilian legal family, namely those legal systems influenced by Roman law and its subsequent legacies.

In this article, we will explore two different narratives of "belonging" in the context of two separate legal systems that have both been influenced by the civilian tradition, namely Scotland and Thailand. Although these systems are quite different, with Scotland being classified as a "mixed legal system," drawing its rules of law initially from the civilian and subsequently from the common law tradition, and Thailand as a codified civilian system, we aim to demonstrate that the sense of "belonging" in these two systems, which is rooted in the civilian tradition, can have negative consequences if legal scholars within these systems become fixated upon a specific historical conception of the civilian tradition.

More specifically, as we will argue, the grand narratives of the creation of German legal science in the 19th century continue to impact discussions concerning the systematisation and civilianisation of these two legal systems. As we will show, the tenor of these discussions is that Scots law is insufficiently civilian. In contrast, Thai law is stigmatised for attempting to catch up to the West while at the same time struggling to remain distinct in the context of the codified civilian tradition. Despite their different contexts and premises, Scots and Thai law have had similar experiences which have harmed the fluidity of both systems. The purpose of this article is to make a case for the fluidity of the legal normativity of both systems by looking at the mechanics of legal systems from a post-positivistic perspective.

The structure of this article is broadly symmetrical. In the next three sections, the focus is on Scots law. In the two sections following those, the focus is on Thai law. In both these parts, broadly similar questions, namely current debates concerning the nature of each system and its "mechanics" (how the system operates regarding matters such as sources of law and the use of court decisions), will be investigated. In the final part of the article, a unified conclusion will be presented.

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[1] John Lewis Gaddis, *The Landscape of History: How Historians Map the Past* (1st edn, Oxford University Press 2004) 8.

II. THE DEBATES ABOUT A "MIXED LEGAL SYSTEM"

In a series of articles published between 2004 and 2018, Rahmatian critically examined the Scottish conception of "mixed jurisdiction."[2] Although one might disagree with certain aspects of this analysis, it is beyond dispute that he has identified three fundamental elements of the "mixed jurisdiction" debate, which has been the focus of much scholarship in Scotland and elsewhere since the 1990s. In first place, despite the extensive body of scholarship accumulated on the issue, there is little scholarly agreement about the nature/essential features of a "mixed legal system."[3] This first point may be subdivided into two further issues: the nature of the mixture (whether "simple" or "complex"), and whether this nature can ever really be captured at a granular level of individual rules/areas of law. In second place, as Rahmatian has shown, the debate concerning the notion of Scotland as a "mixed legal system" has, at times, acquired a political element, primarily until the start of the 1960s when certain Scots lawyers viewed the English influence upon Scots law as an opposing force which had to be resisted through "re-civilianisation."[4] In final place, taking into account the current shape and contours of Scots private law, it is unlikely, according to Rahmatian, that a wholesale codification of Scots private law in the civilian sense will occur in the foreseeable future, given the changes in Scottish "legal culture" which would need to happen to facilitate such a development.[5]

Given the nebulous nature of the discussion concerning Scotland as a "mixed jurisdiction" and the complexities highlighted by Rahmatian, one might wonder whether there is any point in contributing yet another article to this debate. In view of that, this article will take a different approach. Rather than revisiting specific areas/rules of law and the controversies surrounding their origins, this article will focus on the "mechanics" of the "mixed legal system" in Scotland. The reason for choosing this focus is as follows: in his sustained critique of the concept of the "mixed legal system" in Scotland, Rahmatian premised many of his statements on the fact that the "mechanics" of Scots law—which may be broken down into issues such as the Scottish conception of "legal science," the role of the courts in the creation of law, and the nature and function of statute law—are quite different from the corresponding matters in a codified civilian system, specifically those forming part of the Germanic legal family. Such a comparison, while helpful, should however not be taken too far. It should not be forgotten that the current "mechanics" of codified civilian systems,

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[2] Andreas Rahmatian, "Codification of Private Law in Scotland: Observations by a Civil Lawyer" (2004) 8 The Edinburgh Law Review 31; Andreas Rahmatian, "The Political Purpose of the 'Mixed Legal System' Conception in the Law of Scotland" (2017) 24 Maastricht Journal of European and Comparative Law 843; Andreas Rahmatian, "Alchemistic Metaphors in Comparative Law: Mixed Legal Systems, Reception of Laws and Legal Transplants" (2018) 11 Journal of Civil Law Studies 231.

[3] Rahmatian, "Alchemistic Metaphors" (n 2) 239–40.

[4] Rahmatian, "Political Purpose" (n 2) 850–52.

[5] Rahmatian, "Codification of Private Law" (n 2) 50–51.

especially in the Germanic legal family, are by no means ancient. They are a product of the 19th century and rooted in 19th-century conceptions of "legal science."[6] When this comparison is pushed too far, there is a danger of returning to Enlightenment notions of "progress" and the notion, propagated by some of the more overtly legally nationalist supporters, that it is the ultimate fate of Scots law to morph into a codified civilian system, preferably one aligned with the Germanic legal family.[7] The aim of this article is, therefore, to focus not on the perceived shortcomings of Scots law *qua* codified civilian systems, but on the "mechanics" of Scots private law, and to argue that there is indeed something *sui generis* about the Scottish legal system itself which is deserving of study in its own right, without the need to be linked to larger narratives of "progress" or "convergence."

III. THE CURRENT STATE OF PLAY

Arguably, one of the best ways to obtain an overview of the nature of the Scottish legal system is to conduct a survey of introductory textbooks on the Scottish legal system published between the 1960s and 2019.[8] The reasons for choosing these works as our focus is twofold. First, these tend to be written by Scottish academics teaching in the field. This gives them an insider view not often found in "national reports" commissioned in the context of comparative law projects. Second, since they are textbooks, they are likely to substantially impact the next generation of Scots legal practitioners. Thus, while providing a current snapshot, they also inform the future debate. Three issues broadly deriving from Rahmatian's critique will be investigated using the statements in these textbooks: namely, the "scientific" nature of Scots law; the sources of Scots law and the hierarchy of those sources; and the grounds for the sources' authority.

Regarding the first issue, that of "legal science," some background information

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[6] Raymond Westbrook, "The Early History of Law: A Theoretical Essay" (2010) 127 Zeitschrift der Savigny-Stiftung fur Rechtsgeschichte 1, generally, for a survey of the origins of the debate in eighteenth-century Enlightenment thought. See also Hermann Kantorowicz, *Savigny and the Historical School of Law* (Stevens 1937), generally, as well as Frederick C. Beiser, *The German Historicist Tradition* (Oxford University Press 2015) 1–26, 214–52.

[7] Alan Watson, *The Evolution of Western Private Law* (Johns Hopkins University Press 2001) 259, on this notion. On the role of Scots law in all this, see specifically, Jan M. Smits, "The Harmonisation of Private Law in Europe: Some Insights from Evolutionary Theory" (2002) 31 The Georgia Journal of International and Comparative Law 79; Jan M. Smits, "Applied Evolutionary Theory: Explaining Legal Change in Transnational and European Private Law" (2008) 9 German Law Journal 477.

[8] David M. Walker, *The Scottish Legal System: An Introduction to the Study of Scots Law* (3rd edn, W. Green 1969); Robert S. Shiels, *Scottish Legal System* (Green/Sweet & Maxwell 1999); Christina Ashton et al., *Fundamentals of Scots Law* (Thomson/W Green 2003); Nicole Busby, *Scots Law: A Student Guide* (3rd edn, Tottel Publishing 2006); Dale McFadzean, *Scots Law for Students: An Introduction* (Dundee University Press 2007); Bryan Clark, *Scottish Legal System* (2nd edn, Dundee University Press 2009); Megan H. Dewart and others, *The Scottish Legal System* (6th edn, Bloomsbury 2019).

is required. In the civilian tradition, it is a concept closely associated with the 19th century. Because of intellectual currents in the newly united German Empire, scholars across many academic disciplines began to elevate the nature of their discourse by rendering it more "scientific."[9] In law, the discourse in Germany concerning the law as a "science" became part of a debate between eminent jurists concerning the desirability of a codification. Once codification had taken place, the elements of the new German "legal science" were canonised.[10] These include first of all a commitment to "rational reasoning," to use Winkel's phrase, based on deduction and deriving from the *regulae iuris* contained in the Civil Code.[11] The second element of this "legal science" involves viewing law as a "system" that is intellectually coherent. For this to function, a clear consensus among all members of the legal community concerning the hierarchy of legal sources and their interaction must be agreed on and maintained. It is worth noting that the conception of "legal science" created in German legal scholarship during the late 19th and early 20th centuries was overtly legally positivist.[12] The Pandectists and their intellectual successors, the Legal Positivists, did not advocate a close and necessary connection between law and morality, but focused instead on the "rationality" underlying the system and its *regulae* to ensure that justice was done.

It is against this backdrop that the Scottish conception of "legal science" should be viewed. The Scottish context is informed by two other pieces of evidence. The first is the reform of Scottish legal education which took place during the late 19th century. These reforms, by way of legislation, were the product of what Cairns and MacQueen have described as a "general dissatisfaction" with the state of Scottish legal education and a desire to raise the level of "scientific" discourse along German lines.[13] As a second piece of evidence, it must be remembered that the law degree in its current form, an undergraduate degree lasting four years, was only introduced in 1960. Before 1960, the study of law was delivered part-time as a postgraduate M.A.—the entry requirement for an honours degree in another subject.

When surveying the statements from introductory textbooks, it is evident that the concept of "legal science" is not discussed in great depth. There is only one textbook, first published in 1959 and quoted here in its third edition published in 1969, which raises the issue explicitly:

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[9] Mathias Reimann, "Historical Jurisprudence" in Markus D. Dubber and Christopher Tomlins (eds) *The Oxford Handbook of Legal History* (Oxford University Press 2018).

[10] Georg Essen and Nils Jansen, *Dogmatisierungsprozesse in Recht und Religion* (Mohr Siebeck 2011) 1–22 (by Nils Jansen), for a survey of this issue.

[11] Lourens Winkel, "The Role of General Principles in Roman Law" (1996) 2 Fundamina 103.

[12] Hans-Peter Haferkamp, Klaus Luig and Tilman Repgen, *Wie pandektistisch war die Pandektistik?: Symposium aus Anlass des 80. Geburtstags von Klaus Luig, am 11. September 2015.* (Mohr Siebeck 2017) 1–16.

[13] John W. Cairns and Hector L. MacQueen, *Learning and the Law: A Short History of the Edinburgh Law School* (School of Law, University of Edinburgh 2002) ss III and IV.

> Law is truly a science, that is, a systematic body of coherent and ordered knowledge about institutions, principles, and rules regulating human conduct in society.[14]
>
> The scientific element in law consists in that a system of law comprises a body of reasonably consistent principles and rules, susceptible of arrangement under heads and sub-heads and of systematic study . . . .[15]
>
> Law must not be thought of solely or even primarily as a body of professional knowledge, the stock in trade of the practitioners of a certain profession, or as purely a practical or applied science.[16]

Two aspects of this suite of quotations are worth noting. First, the emphasis is clearly on jurisprudence (in the sense of the academic study of law) rather than legal practice, and the author is careful to separate the two. Second, Walker is at pains to stress the place and the continued existence of both branches of legal study (jurisprudence and legal practice) and to argue that the latter should not dominate the former. This "scientific" view of Scots law is not repeated in any of the other introductory textbooks surveyed. The latest textbook, the sixth edition of White and Willock published by Dewart in 2019, approaches the nature of law from a surprisingly legally realist perspective, especially in chapter 1 (Introduction—"Laws as ways of getting things done").[17] It is important to stress, however, that these two positions are of course not universally held by everyone in the legal community. Nevertheless, since they have made it into print, one may assume that they are sufficiently reflective of reality and are supported widely enough to be accepted. Given the distance between these two positions, it is therefore not difficult to see why Rahmatian holds a negative view on "legal science" —in the codified civilian sense—in Scots law. The essence of his critique is twofold.[18] First, the concept of "legal science" in Scots law remains ill-defined. Second, Scottish legal academics tend to eschew doctrinal analyses of their legal system. When they engage with doctrine, according to Rahmatian, it tends to be limited to a specific principle.[19]

Although there are elements of truth in Rahmatian's critique, its significance should not be overstated. His template for "legal science" is the Germanic legal family where, under the influence of Pandectism, the matter unfolded in a particular manner during the 20th century. There is no reason why the conception of "legal science" in Scots law should be identical to that of the Germanic legal family. Indeed, it would be surprising if it were. Even if, as Frankenberg has argued, the civil law represents "a method" more than anything else, it should not be forgotten that this "method" antedates the 19th-century conception of "legal science" created in the civilian tradition

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[14] Walker, *Scottish Legal System* (n 8) 6.
[15] ibid 7.
[16] ibid 8.
[17] Dewart and others, *Scottish Legal System* (n 8) 68–69.
[18] Rahmatian, "Alchemistic Metaphors" (n 2) 236 and 242.
[19] ibid 239.

by a considerable period of time.[20] As the entire history of the *ius commune* has shown, it is perfectly possible to form an approach to law based on "rational reasoning" and a "systemic view" of law without adopting the dictates of 19th-century conceptions of "legal science."[21] In addition, Rahmatian's elevation of "doctrinal analyses" in the study of law as a critical element lacking in the Scottish conception of "legal science" deserves further comment. While "doctrinal analysis" is conventionally linked closely to the civilian tradition, it must not be forgotten that it is by no means the total contribution of the civilian tradition. Furthermore, "doctrine" is not a unitary concept, not even in the codified civilian tradition.[22] As recent research has shown, the civilian tradition is about so much more than merely a "doctrinal" approach to law and legal reasoning.[23] A focus purely on "doctrine" within the civilian tradition has become problematic owing to its legally positivist associations. Even in the Germanic legal family, it is by no means as central as it used to be, precisely because of the pressure on its positivist nature. In light of all this, perhaps the limited focus on "legal science" in Scots law identified by Rahmatian is a virtue rather than a shortcoming. Since Scots law is uncodified, it stands to reason that the concept of "legal science" in Scotland could be more fluid because it is not tethered to principles canonised by a civil code enacted at a certain point in history. There is good evidence of this fluidity in one of the large-scale surveys of Scots private law conducted in the early 2000s. Thus, Whitty recognised this when he wrote:

> In many of its branches, Scots private law has experienced a momentous change from rule-based judicial decision-making to a discretionary jurisprudence of justifications. As part of the most important change in the modern law, namely that from form to substance, it is likely to be, and ought to be, irreversible in many respects.[24]

This is not an unimportant observation. "Legal science" cannot and should not be a static concept. Instead, it should adapt to satisfy the needs of a particular system. In this sense, therefore, there is virtue in ambiguity since it allows for greater flexibility. The current pressures on the positivist conceptions of legal science in Germany are a warning in this regard.

The second of the three issues to be investigated relates to the sources of Scots law and their hierarchy. Across the introductory textbooks surveyed, there appears to be broad agreement in acknowledging the existence of "formal" and "informal" sources

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[20] Günter Frankenberg, "Critical Histories of Comparative Law" in Markus D. Dubber and Christopher Tomlins (eds) *The Oxford Handbook of Legal History* (Oxford University Press 2018) 47.

[21] Mark Van Hoecke, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Bloomsbury 2013) 2–5.

[22] See Horatia Muir Watt, "The Epistemological Function of La 'Doctrine'" in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Bloomsbury 2013) 123–32.

[23] Mark Van Hoecke and François Ost, "Legal Doctrine in Crisis: Towards a European Legal Science" (1998) 18 Legal Studies: the Journal of the Society of Public Teachers of Law 197.

[24] Niall R. Whitty, "From Rules to Discretion: Changes in the Fabric of Scots Private Law" (2003) 7 Edinburgh Law Review 281.

of Scots law. Within the former category, a distinction is drawn between "major" and "minor" formal sources, seemingly reflecting the extent to which the individual textbook authors regard the legal significance of each source. There appears to be no empirical evidence upon which these estimations are founded; or if there is, it has not been cited anywhere.

Since the notion of the "sources" of Scots law has a long history, a few historical comments are required. To understand the current sources of Scots law, it should be recalled that during its Institutional phase (from the 17th to the 19th century), it was settled, based on Roman legal scholarship, that Scots law consisted of written and unwritten law. The former was interpreted as statute, while the latter was interpreted as the Scottish "common law," a nebulous concept with links to the *ius commune* tradition on which Scots law is based.

In terms of the individual sources, most textbook authors agree that statute (whether U.K., E.U. or specifically Scottish) is the primary source of Scots law. We are told explicitly that: "Legislation may be considered the primary source of law . . . . The volume of legislation affecting Scotland has increased significantly over the years."[25]

It is worth remembering that legislation is, of course, not a new source. Even during the Institutional phase of Scots law, the legislation of the Scottish parliament (before the union of parliaments in 1707) and that of the Westminster parliament (post-1707) are frequently mentioned. During this period, Scottish statutes represented—according to modern scholarly opinion—specific written deviations from the pan-European *ius commune*.[26] Thus, their function as a source was somewhat different. It should also be recalled that both the extent and the volume of legislation have undoubtedly increased in the modern period; its place at the pinnacle of the sources of Scots law is a recent development.

As far as case law forming judicial precedent as a source of law is concerned, most textbook authors regard it as the second most important source of Scots law. In addition, in most textbooks, case law forming judicial precedent is grouped (along with a few other "minor sources" to which we will return presently) under the term "common law." Again, it is worth stating that case law also appears in the Institutional phase of Scots law. There is a long tradition of the recording of cases in the Scottish *Practicks*.[27] That being said, the use of case law forming judicial precedent is a recent development and, as has been pointed out, it was concretised during the 19th century.

Before moving on to the other parts of the "common law," it is worth reflecting on the relationship between statute and common law in contemporary Scots law. Since the original conception of Scots law formed during the Institutional phase was based on the notion of a European "common law" in the form of the *ius commune* together

[25] Clark, *Scottish Legal System* (n 8) 9.

[26] John W. Cairns, "The Civil Law Tradition in Scottish Legal Thought" in David L. Carey Miller and Reinhard Zimmermann (eds), *The Civilian Tradition and Scots law: Aberdeen Quincentenary Essays* (Duncker and Humblot 1997) 191 for a survey.

[27] John W. Cairns, "Institutional Writings in Scotland Reconsidered" (1984) 4 The Journal of Legal History 76 for a survey.

with statutes and custom which represented deviations from the "common law," it stands to reason that the concept continues to play a significant role in the conception of Scots law. In contemporary terms, the matter is governed by a decision of the House of Lords (as it then was) from 1972, *McKendrick v. Sinclair* (1972 SLT 110), the *ratio decidendi* of which was that the common law of Scotland does not lose its force as law merely because of non-use. The effect of this rule is that the common law is presumed to apply until it has been altered by, for example, statute.

In terms of the relationship between the common law and statute, the authors of the introductory textbooks suggest the following:

> Common law was originally the body common to the whole country based on ancient customs and worked out and built up in the courts by the process of declaration of rules and their application to cases. Much of the common law has now been superseded by statute law, but it is still very important in Scotland in many areas.[28]

From such statements, it seems clear that in the opinion of the textbook writers, statute law has become dominant as a source of law and is increasingly altering the existing "common law." It should be noted that, while there is likely truth in this position, quantitative research on the matter remains a *desideratum* since none of the textbook authors cites any recent works in which empirical research has shown the extent to which the "common law" is being altered by statute. Again, this position, while seemingly treated as settled, is based on little more than a vague sense.

As to the relative "weighting" of the "common law" *qua* statute law, the matter seems less settled in the minds of the textbook authors. They write: "In the Scottish legal system . . . there is in effect a hierarchy of sources . . . . If one source is incorporated into a higher source, the original source will lose its authority."[29] Thus, in summary, according to the textbook authors, Scots law has seen a more significant influence of statute law in the recent past. This increase has harmed the existing Scottish "common law" in the sense that many areas previously regulated by the "common law" have since been placed on a statutory footing. In addition, although not as clear-cut as in codified civilian systems, there is a broad acceptance that statute has greater authority than the common law. Furthermore, once a matter has been regulated by statute, the existing "common law" no longer governs the point. In this sense, therefore, Rahmatian's criticism is a valid one. The matter of the hierarchy of sources is not canonised as in codified civilian systems. Nonetheless, the rules appear tolerably clear, and, as pointed out above, there may be a virtue in fluidity in this regard.

Having set out a broad view of the sources of Scots law and their hierarchy, it remains to speak about their "authority." Most textbook authors adopt a statist approach: "Although these historical and philosophical influences account for the origins of Scots law, they do not explain where the current binding rules of law derive

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[28] Ashton et al., *Fundamentals of Scots Law* (n 8) 35.

[29] ibid.

their authority from. Any specific binding rule of law must be derived from one or more sources of law, known as 'formal sources.'"[30] Without wishing to enter a debate about the authority of law and its connection to the state, which in the case of Scotland is rather complicated and is likely linked to the Act of Settlement by which the United Kingdom was created, it seems clear from the textbook writers that, in their view, the "authority" of legal rules in Scots law is ultimately derived from the state, whether through legislation or the operation of the courts. This is not an untenable position since, in almost all cases, the recognition of "sources of law" is a matter of court practice—the *stylus curiae* identified in the civilian tradition during the early-modern period—and in this regard, Scotland is no different.

IV. "DEBATABLE FRINGES"

Within the recognised "sources" of Scots law, specifically, the "common law" component, "minor" sources include custom, equity, and writers from the Institutional phase (the 17th to 19th centuries) of Scots law. Given that these works have a historical component, in the sense that they stretch back further into the formative period of Scots law than, say, most case law or statute, the construction of their "authority" and their use by the courts deserves closer scrutiny—especially considering views, such as the one quoted above, that the "historical and philosophical influences" have no bearing on the current "authority" of those rules of law.

However, before this can be done, a few observations are required about the status of the Institutional Writers as a "source" according to the textbook authors.[31] The matter is a common trope in textbook accounts of Scots law:

> Statements as to the law made by legal writers have varying degrees of authority, but always less than that of statute and case-law in that in case of conflict the rule laid down by statute or worked out by the courts has undoubtedly to be given effect to, notwithstanding anything in the books. The highest degree of authority attaches to the writings of a small number of writers, who all treated in their works of the whole law of Scotland, or at least of very large tracts of it.[32]

> A statement in one of them, in default of other authority, will almost certainly be taken as settling the law." [Footnote text: *Drew v Drew* 1870 9 M 163 at 167 per Lord Benholme; *Kennedy v Stewart* (1889) 16 R. 421, at 430 on Kames.].[33]

> Although the scope of [the Institutional Writers'] authority has dwindled they are still referred to on occasions where there is no statute or precedent to cover the issue of law in question . . . . A statement in an institutional writing may be given the same authority

[30] Nicole Busby, *Scots Law: A Student Guide* (3rd edn, Tottel Publishing 2006) 21.

[31] Andreas Rahmatian, "The Role of Institutional Writers in Scots Law" (2018) 1 Juridical Review 42.

[32] Walker, *Scottish Legal System* (n 8) 361.

[33] ibid.

> as one of the Inner House.[34]
>
> With the exponential rise in legislation seen over recent years coupled with the adoption of a strict system of judicial precedent and comprehensive case reporting systems, the importance of Institutional Writers as a formal source of law has diminished greatly. However, if the law is otherwise found wanting, then a principle expounded by an institutional writer may be considered as a valid source of law and may be cited in court as such. Institutional works are primarily of historical interest, especially in establishing the origins of many areas of Scots law and in determining how the Scottish legal system has been influenced by other schools of legal thinking.[35]
>
> In any case, although the Institutional Writers were of enormous importance in the past, it would be very unusual for any court today to justify its decision solely by reference to one . . . . It is rare for the Institutional Writers even to be cited in court, in part because the tide of precedent and statute has washed over so much law in the last 100 years . . . . Their primary role today is thus, perhaps, to supply a moral and intellectual sheet anchor for the law, providing stability while not excluding change.[36]

These quotations reveal an important perception about the value of the historical component of the Scottish "common law" reflected in the works of the Institutional Writers. Although there does not appear to be any recent comprehensive empirical study of case law or academic works on which this perception is based, the textbook authors all seem to broadly agree that the "authority" of the Institutional Writers has declined in the last few decades. This sense of decline is founded on two premises, the first being the increase in statute law and the second, the volume of case law forming judicial precedent. A further notable point visible across these quotations is that the notion of their function as laying down the law, while strongly advocated as late as 2003, has since been replaced by statements to the effect that their role is mainly "historical," "intellectual," and "moral."

To the historian of law, this perceived shift in the function of Institutional Writers as a source of law is a curious one and worthy of closer scrutiny. Three aspects of this shift will be discussed in greater detail—namely perception, authority, and history.

Under the first heading, "perception," it should be noted that none of the textbook authors surveyed has done any empirical research as to the perceived decline of the use and citation of Institutional Writers across various levels of Scottish courts. Since Institutional Authority is a "source" of law acknowledged as such by the courts through their *stylus curiae* during the 19th century, it stands to reason that the practices of the same courts (as the engine of the "common law") should be investigated. In 2008, Cairns and Du Plessis made an essential contribution to the research of this kind by demonstrating that Roman law, the bedrock of much of the works of the Institutional Writers, was rather more frequently used in Scottish courts

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[34] Ashton et al, *Fundamentals of Scots Law* (n 8) 59.

[35] Clark, *Scottish Legal System* (n 8) 41–42.

[36] Dewart and others, *Scottish Legal System* (n 8) 269 and 270.

than contemporary writers would have one believe in the period 1998–2008.[37] Building upon this work, an investigation was undertaken into a larger period, namely 1985–2019, to assess whether the findings of Cairns and Du Plessis could be given more significant context. More specifically, the introduction of greater devolved powers under the Scotland Act of 1998 was investigated to establish whether any trends could be ascertained.

In choosing cases for inclusion in this research, two benchmarks were set. First, only cases with sustained engagement (rather than merely intellectual "cladding") were chosen. In the second place, only cases where a point of view/position espoused by Institutional Writers had a demonstrable impact on the court's reasoning and the eventual outcome of the case were included. The results of this investigation have been surprising. In the years 1985–2019, there were 119 cases across all levels of Scottish courts in which Institutional Authority (specifically of Roman-law origin) formed a core part of the court's reasoning and eventual decision. This may not sound like a great deal but given the small amount of case law produced in Scotland, the number is not insignificant. In addition, this number merely represents the cases where Institutional Authority formed a core part of the courts' reasoning. When lesser citations are added, the number rises exponentially. In addition, it is worth noting that in the period under discussion, there seems to be a significant increase (twofold) in the number of references to the Institutional Writers after the promulgation of the Scotland Act in 1998. Although more research over a broader period is needed, this increase suggests some aspect of "legal culture," to borrow a term of socio-legal studies.[38]

If there is a dissonance between the perception of the textbook writers and the reality of legal practice in the courts, the reasons for this must be explored further. One factor which cannot be discounted is a change in the "legal culture" of Scotland. As Whitty pointed out already in the early 2000s, a shift could be detected from a more legally positivist conception of law ("rule-based") to one which was less so ("discretionary jurisprudence"). As Du Plessis recently demonstrated, aspects of the legal culture of Scots law in the period 1900–1960 were no doubt legally positivist.[39] Similarly, as Reid and Zimmermann showed in their works on the history of the law of property and obligations in Scotland, there has been a shift towards a "post-positivist" conception of Scots law during the 20th century.[40] The impact of this change in "legal

[37] John W. Cairns and Paul Du Plessis, "Ten Years of Roman Law in Scottish Courts" (2008) 29 The Scots Law Times 191.

[38] See Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Routledge 2017); David Nelken, "Using the Concept of Legal Culture" (2004) 29 Australian Journal of Legal Philosophy 1; Lawrence M. Friedman, "Legal Culture and Social Development" (1969) 4 Law & Society Review 29; Lawrence M. Friedman, "Is There a Modern Legal Culture?" (1994) 7 Ratio Juris 117, generally.

[39] Paul du Plessis "Conceptions of Roman law in Scots law: 1900–1960" in Kaius Tuori and Heta Björklund (eds), *Roman Law and the Idea of Europe* (Bloomsbury 2019) 221–38.

[40] Kenneth G. C. Reid and Reinhard Zimmermann, *A History of Private Law in Scotland. Vol. 1,* (Oxford University Press 2000) 2.

culture" is most clearly visible in the issue of the "authority" of sources of law. Whereas, according to a legally positivist view, the relationship between the authority of sources of law and other external factors is irrelevant, a post-positivist view sees authority as contingent. Thus, according to recent work by scholars such as Del Mar, the notion of the "normativity" (or authority) of legal sources cannot be separated from their contexts and must be constructed historically.[41]

But what would this mean, in practical terms? This will speak to the final matter under discussion, namely "history." It is perhaps best to start with what it does not mean. It does not mean that the history of Scots law, whether "external" or "doctrinal," should be consigned to the dustbin. All law is, in a sense, historical, since a legal system looks both forward and backward at the same time. A legal system would cease to function without its history. A post-positivist approach does not subscribe to the notion that "doctrinal history" is the sum total of legal history, however. It does not support the idea of "law office histories"—in other words, poorly researched and overtly determinist "histories" created for teleological purposes.[42] With the decline in legal doctrine across many legal systems, an even greater awareness of "external legal history" is required. This does not imply a diminution of the "authority" of existing "historical sources" of Scots law—quite the opposite. Instead, as Del Mar has argued, a post-positive approach to "normativity" demands a greater awareness of the historical contingency of "authority" and the reasons for its emergence. As Festa has recently suggested, the past must be "usable" by the courts.[43] There is no reason why, when confronted with historical sources presented as "authority," courts cannot take a broader and indeed more critical approach to these sources. This will necessarily involve a broadening of the intellectual scope and function of the historical origins of Scots law and a greater awareness of their contexts.[44]

V. A SMALL CIVILIAN COUNTRY IN THE EAST: THE "CIVILISATION" OF THE THAI LEGAL SYSTEM

The contemporary legal system of the Kingdom of Thailand emerged due to colonial influences. While it has been claimed that Thailand was never colonised, the country was in fact subjected to political and economic subjugation by colonial powers and thus exposed to the discourse of Western modernity, including the notion of a "modern

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[41] Maksymilian Del Mar, "Legal Norms and Normativity" (2007) 27 Oxford Journal of Legal Studies 355. For an opposing view, see Nils Jansen, *The Making of Legal Authority: Non-Legislative Codifications in Historical and Comparative Perspective* (Oxford University Press 2010) 95–137, and generally.

[42] David T. Hardy, "Lawyers, Historians, and 'Law-Office History'" (2015) 46 Cumberland Law Review 1.

[43] Matthew J. Festa, "Applying a Usable Past: The Use of History in Law" (2008) 38 Seton Hall Law Review 479.

[44] Richard A. Posner, "Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship" (2000) 67 The University of Chicago Law Review 573.

legal system" during the 19th century. This situation can be termed "semi-coloniality."[45] From the mid-19th century onwards, the modern Thai state attempted to systematise its legal system and institutions along European lines.[46] This led to the displacement of the pre-existing legal system which was based on a localised Hindu–Buddhist legal tradition. To achieve this modernising aim, the absolutist Siamese government decided to follow the continental civilian tradition of codification, even though some elements of English precedent had already been adopted where no Siamese law existed or where the pre-existing law could not deal with the problem adequately.[47] Modern Thai law, thus, is not a mirror of Thai society at all but emerged as a matter of administrative convenience.[48] The result of these 19th-century reforms was a contingent influx of Western frameworks of law such as allocation of rights, the division between civil and criminal law, European-inspired law, and latterly such problems as the American socio-economic development constitution, globalisation and law, legislation dictated by international legal standards, etc., all of which were unfamiliar to the Thai people.[49]

The law reform process begun in the 19th century also resulted in the reorganisation of the judiciary and the adaptation of the curricula of law schools to be compatible with its new legal system. From the 20th century onwards, Thai legal studies has in general focused on foreign legal doctrines and judicial precedents.[50] One of the most influential textbooks on the Thai legal system, written by an authority in the Thai academic world, Yut Saenguthai, notes that:

> In modern times, the Codes of Thailand were copied and analogised from continental countries' codes with a few from the Indian Code. Since we did not adopt the Anglo-Saxon legal system, apart from some aspects of procedural law or the law of evidence, we should only study the evolution of continental laws. The study of the continental

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[45] See Peter A. Jackson, "The Performative State: Semi-Coloniality and the Tyranny of Images in Modern Thailand" (2004) 19 Sojourn: Journal of Social Issues in Southeast Asia 219; Thongchai Winichakul, "Siam's Colonial Conditions and the Birth of Thai History" in Volker Grabowsky (ed), *Southeast Asian Historiography: Unravelling the Myths: Essays in Honour of Barend Jan Terwiel* (River Books 2011) 21–43.

[46] Ted L. McDorman, "The Teaching of the Law of Thailand" (1988) 11 Dalhousie Law Journal 915, 919; มุนินทร์ พงศาปาน, ระบบกฎหมายซีวิลลอว์: จากระบบกฎหมายสิบสองโต๊ะสู่ประมวลกฎหมายแพ่งและพาณิชย์ (วิญญูชน 2562) [Munin Pongsapan, *The Civil Law Systems: From the Twelve Tables to the Thai Civil and Commercial Code* (Winyuchon 2019)] (Thai) 289–91.

[47] Andrew J. Harding, "The Eclipse of the Astrologers: King Mongkut, His Successors, and the Reformation of Law in Thailand" in Penelope Nicholson and Sarah Biddulph (eds), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Brill 2008) 318.

[48] ibid 322–23.

[49] ibid 311, 322; Andrew J. Harding, "Comparative Law and Legal Transplantation in South East Asia: Making Sense of the 'Nomic Din'" in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2001) 208.

[50] Munin Pongsapan, "Legal Studies at Thammasat University: A Microcosm of the Development of Thai Legal Education" in Andrew J. Harding, Jiaxiang Hu, and Maartje de Visser (eds), *Legal Education in Asia: From Imitation to Innovation* (Brill 2017) 309.

> evolution of continental laws will help us to understand our law better.[51]

From a theoretical point of view, this quotation shows that Thailand seemingly became part of the European legal family, almost as if it had joined the European legal tradition of the *ius commune* itself at the start of the 20th century.

After the Siamese revolution in 1932, state institutions such as the monarchy, military, and legislature were substantially reformed. Still, the judiciary remained unaltered since it hardly mattered in the minds of revolutionary leaders.[52] Siam/Thailand was faced with political turbulence because of the clash between the royalist and democratic factions. The judiciary at times acted politically and legitimated the constitutionality of military coups.[53] Nevertheless, the institution continues to enjoy a respected status in Thai society and retains a close connection to the monarchy.[54] Such impunity, therefore, has provided almost no room for direct criticism of the judiciary or the broader legal system. Although the judiciary has remained largely unaffected by the changes introduced since 1932, it is broadly agreed that the newly received legal system has become chaotic it its operation. One possible cause for this has been offered: "Lawyers are likely to be narrow-minded and too legalistic, regardless of reality and societal changes. Furthermore, there appears to be a problem with the morality and ideology of lawyers."[55]

Preedee Kasemsup, a German-educated law professor from Thammasat University, asserted that the leading cause of the problem was the unreflective adoption of Western positivistic jurisprudence. The newly created legal profession could not fruitfully appropriate the received Western law into indigenous society, and legislative power was seen as an omnipotent means of social control, regardless of traditional values (Buddhism) and the "jurisprudential spirit" operative within in legal development.[56] The reception of Western law in Thailand during modernisation in the 19th century was problematic because Western conceptions of legislative power and sovereignty were exaggerated.[57]

To promote the reintroduction of such values and spirit, Kasemsup proposed a

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[51] Yut Saenguthai, *Lecture on Introduction to Law* (4th edn, Faculty of Law, Thammasat University 1971) 80–81.

[52] James Wise, *Thailand: History, Politics, and the Rule of Law* (Marshal Cavendish Editions 2019) 30–31.

[53] ibid 32–34; David Streckfuss, *Truth on Trial: Defamation, Treason, and Lèse-Majesté* (Routledge 2011) 118–21.

[54] Ted L. McDorman, "The Teaching of the Law of Thailand" (1988) 11 Dalhousie Law Journal 915, 920; Nidhi Eoseewong, "The Thai Cultural Constitution" (*Kyoto Review of Southeast Asia*, 15 March 2003) <https://kyotoreview.org/issue-3-nations-and-stories/the-thai-cultural-constitution/>; Kasian Tejapira, "The Irony of Democratization and the Decline of Royal Hegemony in Thailand" (2016) 5 Southeast Asian Studies 219, 229.

[55] Somyot Chuethai, "Introduction" in Somyot Chuethai (ed), *Essays in Honour of Preedee Kasemsup* (Faculty of Law, Thammasat University 1988) 3.

[56] Preedee Kasemsup, "Reception of Law in Thailand, A Buddhist Society" in Masaji Chiba (ed), *Asian Indigenous Law: In Interaction with Received Law* (3rd edn, Routledge 2013) 294–95.

[57] ibid 294.

three-layer theory of law that, in his view, best suited Thai society. The theory proposes three categories of law according to the evolution of society. The general idea is that law is, by nature, not manufactured but comes into existence "without any human purposive" effort from simple people's law (*Volksrecht*). During the second stage, this peoples' law is then converted into systematised jurisprudential law created by jurists (*Juristenrecht*). The third layer is state-legislated law (*Satzungsrecht*) which emerges through conceptions of sovereignty and human will.[58] Within this theory, he acknowledges the prestige of Western legal traditions by praising their rational, systematic, modern, efficient, humane, and progressive characteristics.[59] Interestingly, Kasemsup especially expressed admiration for the spirit of the *ius aequum* of German legal science rather than that of the *ius strictum* of the French code. In his view, it would be fair to consider various systems of law and cultural backgrounds when employing the jurisprudential spirit of this theory.[60]

Despite the call for the recognition of traditional values instead of Euro-centric values, the former have paradoxically been asserted to be compatible with European jurisprudence. For instance, Kasemsup has contended that the reception of the law of Thammasat, influenced by Indian legal culture, should be regarded as *Juristenrecht* and that it is as sophisticated as Roman law.[61] Prokati, one of Kasemsup's notable successors, even claimed that article 4 of the Civil and Commercial Code of Thailand (CCC), which lists the sources of law, is a skilful product of the appropriation of foreign law into the ideology of the Thammasat.[62] The Thammasat has been claimed to be equivalent to "the constitution" of the pre-modern Siamese/Thai state, morally constraining the ruler's exercise of power.[63]

Concerning the sources of law, Thai legal scholarship has nevertheless adopted a doctrinal and positivistic approach. The sources may be divided—according to modern scholarly opinion—into two categories, namely written and unwritten law. The former is systematised through a Kelsenian hierarchical structure of the legal order—namely the constitution, organic acts, acts, emergency decrees, administrative and subsidiary legislation, local legislation, and the announcements and edicts of military coups.[64] The latter comprises customary law and general principles of law which operate where no written rules are applicable.[65] Although judicial decisions are mentioned, textbooks tend to reject judicial decisions as a source of law owing to the

[58] ibid 269–71.

[59] ibid 290–91.

[60] ibid 294–95.

[61] ibid 288.

[62] กิตติศักดิ์ ปรกติ, การปฏิรูประบบกฎหมายไทยภายใต้อิทธิพลยุโรป (พิมพ์ครั้งที่ 4, วิญญูชน 2556) [Kittisak Prokati, *The Reformation of Thai Legal System under European Influences* (4th edn, Winyuchon 2013)] (Thai) 231.

[63] See Dhani Nivat, "The Old Siamese Conception of the Monarchy" (1947) 36 Journal of The Siam Society 98.

[64] รวินท์ ลีละพัฒนะ, ความรู้ทั่วไปเกี่ยวกับกฎหมาย (พิมพ์ครั้งที่ 4, วิญญูชน 2561) [Rawin Leelapatana, *General Introduction to Law* (4th edn, Winyuchon 2018)] (Thai) 24–30.

[65] ibid 30–31.

juristic method of civilian legal tradition. One textbook claims that: "In the civil law tradition, judicial decisions are not a source of law, except precedents which have been followed. In other words, such decisions become precedents when it is without any reversion or rebuttal . . . . Although, in a civil law country, the case is an exception."[66]

The theory of law introduced by Kasemsup can be seen as an attempt of Thai scholarship to solve the dilemma of its modernity—"how to be like the West yet to remain different."[67] On the one hand, the newly formed legal system seeks legitimacy by being rational, scientific, and systematic—in other words, "authentically civilian." This traps the Thai legal system within the dichotomy of civil-common law of the Thai jurisdiction to which the liberal law discourse strictly adheres. On the other hand, the system is also seeking to sustain its indigenous values, which have been claimed to be systematic and rational. This leads to a dichotomy of "Western" and "Thai" values, which give rise to intellectual myths that conceal the dynamic nature of the Thai legal system.

VI. THE NATURE OF THE THAI LEGAL SYSTEM

The notion of Thai law as a civilian legal system obscures the reality of the nature of Thai law as part of Southeast Asian legal culture. More importantly, the over-exaggeration of the "civilian" element has left Thai scholarship perpetually under the shadow of the civil-common law dichotomy. As will be shown in the remainder of this article, it is possible to challenge this grand narrative of the adoption of civil law by observing three main aspects of the Thai legal system.

A. The Stigma of Self-Civilisation

The claim that Thai law is based on the systematic civilian tradition is rooted in the stigma of its colonial encounter during the 19th century. The main narrative of Thai historiography depicts the success of the transplanting of the European legal tradition into the soil of Siam as a positive development designed to avert threats of colonisation, and to end the practice of extraterritoriality prevalent during this time.

This article will not delve into the debate as to whether the legal transplant in modern Siam/Thailand was successful. This would require a much larger project. Instead, it will be argued that the narrative conceals various dynamic interactions between discourses of the global and the local. In adopting Western civil law, Siam/Thailand became linked to the discourse of modernity and the judgement of European laws as the standard of "civilisation." "Uncivilised" laws, in the eyes of

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[66] สมยศ เชื้อไทย, คำอธิบายวิชากฎหมายแพ่ง: หลักทั่วไป (พิมพ์ครั้งที่ 10, วิญญูชน 2547) [Somyot Chuethai, Explanation of the Study of Civil Law: General Principles (10th edn, Winyuchon 2004)] (Thai) 92

[67] Tamara Loos, "Competitive Colonialisms: Siam and the Malay Muslim South" in Rachel V. Harrison and Michael Herzfeld (eds), *Ambiguous Allure of the West: Traces of the Colonial in Thailand* (Hongkong University Press 2010) 135.

colonisers, could not function as the premise for individual rights and responsibilities in a "civilised" country.[68] The adoption of Western law, which is one of many indicators of being "civilised," became a precondition for Siam to enter the European–American global stage. In this respect, non-Western countries such as Siam/Thailand had to "self-civilise" to conform to this global system.[69] Phrased differently: adopting a European model of legal codes acted as the basis for gaining recognition from Western powers. Asserting that the adoption of civilian tradition had occurred would demonstrate a successful transition, or at least the development of the Thai legal system on the same track of modern European law.

Another half-truth hidden by the grand narrative of an exceptional non-colonised country is the local authority's attempt to appropriate the Western legal system to fit local needs. The exaggeration of the adoption of European codes was marked as a heroic act of modernisation, making Siam/Thailand competitively equivalent to civilian countries (*tud tiam nana araya prathet*); but at the same time, this narrative marginalises the appropriation of modern law as an instrument to consolidate local authority over indigenous peoples. One of the aims of law reform was to restore the judicial power of the sovereign, since the establishment of extraterritorial rights, which was a legal invention to facilitate international trade between the native government and foreigners in the 19th century, had come to deprive the Siamese kings of their authority over local subjects.[70] These law reforms were not seen as a priority until the Siamese government lost its control over its indigenous subjects. Apart from that, the modern unitary law would facilitate local attempts to imperialise their pre-existing tributary states, since the contemporary administrative and legal models would strengthen the centralised power of the Bangkok absolutist state compared to the pre-colonial situation.[71] Therefore, the project of law reform paints Siam not only as a victim of imperial power, but also as a coloniser of other regions.[72]

Despite the issues mentioned above, the narrative based on the Europeanisation of law is vital in affirming the image of Thailand as being a civilian

[68] David P. Fidler, "A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalised Civilisation" (2000) 35 Texas International Law Journal 387, 392.

[69] Jackson, "Performative State" (n 45) 234.

[70] In particular, the local government began to see extraterritoriality as problematic when local natives submitted to become western subjects. See Francis Bowes Sayre, "The Passing of Extraterritoriality in Siam" (1928) 22 The American Journal of International Law 70. Nevertheless, one should not exaggerate the extraterritoriality as the humiliation of judicial independence. Wasana argues that legal immunity granted to Chinese merchants facilitated commercial activities between Siam and western foreigners. See Wasana Wongsurawat, *The Crown & The Capitalists: The Ethnic Chinese and the Founding of the Thai Nation* (Silkworms Books 2020).

[71] Jackson, "Performative State" (n 45) 234; Tamara Loos, *Subject Siam: Family, Law and Colonial Modernity in Thailand* (Cornell University Press 2006) 2–3.

[72] Loos, *Subject Siam* (n 71) 2–3.

country and part of a group of civilised (*Siwilai* in Thai) communities.[73] The main reason seems to be rooted in the colonial encounter, which left Thailand under the shadow of the self-conscious claim of a civilising mission.[74] Jackson terms this cultural mode of power a "regime of image"; by portraying the image of Siamese law as a "civilised" country developing a European legal system, it would conceal the true nature of rule-by-law tyranny.[75] Additionally, since the nation entered into a global market under the *Pax Britannica*, conforming to Anglo-European legal standards would provide an element of trust to foreign traders. This is akin to the legitimacy-generating typology of transplant suggested by Miller. Developing countries, desperate for a prestigious foreign model as a source of legitimacy to fix the limits of other types of legitimacy, adopt foreign law.[76] It stands to reason that the rational and unified efficacy of the Western legal tradition would have fulfilled the ambitions of local leaders. Moreover, Thai legal historiography tends to depict law reform—the so-called Chakri Reforms—as if the nation followed in the footsteps of European modernity. While non-legal Thai historiography has reconstructed their understanding of alternative modernity,[77] Thai legal history by Thai scholars is still under the shadow of the Chakri Reform narrative and royal nationalist

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[73] Regarding the quest for the civilisation of Siamese elites, see ธงชัย วินิจจะกูล, คนไทย/คนอื่น: ว่าด้วยคนอื่นของคนไทย (ฟ้าเดียวกัน 2560) [Thongchai Winichakul, *Thai/Other: Essays on Otherness of Thainess* (Samesky Books 2017)] (Thai) ch 2.

[74] Werner Menski, *Comparative Law in a Global Context* (2nd edn, Cambridge University Press 2006) 37.

[75] Jackson, "Performative State" (n 45) 234.

[76] Jonathan M. Miller, "A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process" (2003) 51 The American Journal of Comparative Law 839, 856–57.

[77] Regarding alternative Thai modernity, for example, see ธเนศ อาภรณ์สุวรรณ, "จากความเป็นสมัยใหม่มาสู่ความ(ไม่)เป็นสมัยใหม่" ใน ธเนศ อาภรณ์สุวรรณ (บรรณาธิการ), ความ(ไม่เป็น)สมัยใหม่ (ศยาม 2560) [Thanet Aphornsuvan, "Introduction: From Being Modern to Being (Not) Modern" in Thanet Aphornsuvan (ed), *Being (Not) Modern* (Siam Publishing House 2017)] (Thai); Loos, *Subject Siam* (n 71); Rachel V. Harrison, "Introduction" in Harrison and Herzfeld (eds), *Ambiguous Allure of the West: Traces of the Colonial in Thailand* (Hongkong University Press 2010); ธงชัย วินิจจะกูล, เมื่อสยามพลิกผัน: ว่าด้วยกรอบมโนทัศน์พื้นฐานของสยามยุคสมัยใหม่ (ฟ้าเดียวกัน 2562) [Thongchai Winichakul, *Siam at a Turning Point on the Foundational Mentality of Modern Siam* (Samesky books 2019)] (Thai) ch 1; ธงชัย วินิจจะกูล, รัฐราชาชาติ (ฟ้าเดียวกัน 2563) [Thongchai Winichakul, *Royal Nationalist State* (Samesky books 2020)] (Thai) ch 5; กุลลดา เกษบุญชู มี้ด, ระบอบสมบูรณาญาสิทธิราชย์: วิวัฒนาการรัฐไทย (ฟ้าเดียวกัน 2562) [Kullada Kesboonchoo Mead, *The Rise and Decline of Thai Absolutism* (Samesky books 2019)] (Thai); Chaiyan Rajchagool, *The Rise and Fall of the Thai Absolute Monarchy* (White Lotus 1994); Michael Herzfeld, "The Conceptual Allure of the West: Dilemmas and Ambiguities of Crypto-Colonialism in Thailand" in Harrison and Herzfeld (eds), *Ambiguous Allure of the West: Traces of the Colonial in Thailand* (Hongkong University Press 2010); Trais Pearson, *Sovereign Necropolis: The Politics of Death in Semi-Colonial Siam* (Cornell University Press 2020); Kongsatja Suwanapech, "The History of the Initial Royal Command: A Reflection on the Legal and Political Contexts of Kingship and the Modern State in Siam" in Andrew J. Harding and Munin Pongsapan (eds), *Thai Legal History: From Traditional to Modern Law* (Cambridge University Press 2021); Tamara Loos, "ISSARAPHAP: Limits of Individual Liberty in Thai Jurisprudence" (1998) 12 Crossroads: An Interdisciplinary Journal of Southeast Asian Studies 35.

historiography.[78] As a result, the conventional narrative, which may be termed the self-civilised narrative, disguises the chaos within the Thai legal system behind the image of a smooth transition to modernity. The existing studies on Thai legal history on this "critical juncture,"[79] which founded alternative modern law outside the West, have not been sufficiently acknowledged in the Thai legal world.

B. The Dichotomy of Western vs. Thai Legal Values

Even though the civilian nature of Thai law remains a hyperactive narrative in Thai legal studies, there have been calls for the recognition of traditional Thai law. In the eyes of certain Thai legal scholars, legal positivism has come to be seen as an evil contaminant of the modern Thai legal system.[80] Nevertheless, the binary opposition of the Thai and Western legal traditions is problematic and rather too simplistic. This bifurcation results from an intellectual strategy of picking and choosing in response to the colonial encounter. According to Thongchai Winichakul, this strategy separates the spiritual and material world in order to negotiate between the power of Western modernity on the one hand, and local culture and identity on the other. The West represents material supremacy in contrast to the spiritual truth of Thai Buddhism. That being said, "the West," according to Thai understanding, is not necessarily the actual West but rather a localised understanding of the West based on the bifurcated strategy.[81] In particular, in some respects, Western legal theory is portrayed as being deficient in asserting the superiority of so-called Thai traditional values premised in state-centric Thai Buddhism.

The above bifurcation has impacted the understanding of modern law and traditional Thai law itself. On the one hand, legal positivism was indeed influential during the foundation of current Thai law; the imposition of European law by a modern sovereign came with formalities of state law that overlooked customary practices.[82] On the other hand, the strong allegation against "Western" strict and positivistic law seems to be grounded in a reductionist understanding of the Western conception of law, appropriated by the local discourse, to contrast it with an Eastern legal identity. Ironically, this local understanding originated with Robert Lingat, a

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[78] Thongchai, *Royal Nationalist State* (n 77) 184; Thongchai, a prominent Southeast Asian historian, proposes alternative legal historiography about the foundation of modern Thai law under the absolute Buddhist monarchy. This results in a legally privileged state and the royalist rule of law.

[79] See Jaakko Husa, "Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law" (2018) 6 The Chinese Journal of Comparative Law 129.

[80] See Preedee, "Reception" (n 56); ปรีดี เกษมทรัพย์, นิติปรัชญา (คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2557) [Preedee Kasemsup, *Legal Philosophy* (Faculty of Law, Thammasat University 2014)] (Thai); กิตติ ศักดิ์ ปรกติ, การปฏิรูประบบกฎหมายไทยภายใต้อิทธิพลยุโรป (พิมพ์ครั้งที่ 4, วิญญูชน 2556) [Kittisak Prokati, *The Reformation of Thai Legal System under European Influences* (4th edn, Winyuchon 2013)] (Thai); แสวง บุญเฉลิมวิภาส และ อติรุจ ตันบุญเจริญ, ประวัติศาสตร์กฎหมายไทย (พิมพ์ครั้งที่ 18, วิญญูชน 2562) [Sawang Boonchalermviphas and Atiruj Tanbooncharoen, *The Thai Legal History* (18th edn, Winyuchon 2019)] (Thai).

[81] Loos, "Competitive Colonialisms" (n 67) 137–39.

[82] Harding, "Eclipse" (n 47) 323–24.

French professor later regarded as the main authority in the field of Thai legal history, who proposed a binary opposition between Western and Eastern legal traditions. In this regard, according to Lingat, while Western law is derived from legislature and authority on the consent of those to whom it is applied, the conception of law in the Far East was based on custom, which may be altered in a gradual process following social conditions.[83] This argument recurs in traditional Thai legal historiography, particularly the comparison of the Thammasat to a modern constitution and *ius naturale* whereby the *Dhamma* constrains the rulers' will.[84]

To re-examine the Western versus Thai dichotomy, it should be born in mind that Thai traditional law, as understood by Thai legal scholarship, has already been westernised, just as modern Western law has been localised.[85] Regarding Lingat's argument, for instance, Chris Baker and Pasuk Phongpaichit point out that his bifurcation of Western and Eastern legal traditions is misleading because the tradition of the West has long debated issues such as whether the law was based on custom, on morality from religion or philosophy, or on the will of the ruler. They further observe that Lingat's explanation of Eastern custom-based legal tradition tends to be like Fitz Kern's narrative of old Germanic customary law.[86] To add fuel to the fire, Lingat's Thai successors' comparison of the Thammasat to a constitution and *ius naturale* instead of human will, is anachronistic. Despite them being blamed for Western-infected modern Thai law, the local explanation has paradoxically rationalised and romanticised pre-modern Thai law by appropriating Western legal theory; in this respect, the three-layer approach of law is very similar to the ideas of the pre-war German Historical School, which consolidates national identity and prominent roles of jurists against arbitrary legislation.[87] Furthermore, viewing the Thammasat and the Three Seals Code as a single customary law appears to be Bangkok-centric, retroactive, and anachronistic. Evidence suggests that under extraterritoriality, "customary law" was appropriated and reinvented by foreign consular courts, resulting in a hybrid legal practise. As a result of this legal colonial frontier, the ethnography of law became a

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[83] Robert Lingat, "Evolution of the Concept of Law in Burma and Thailand" (1950) 38(1) Journal of Siam Society 9, 9 (see translation into Thai); Robert Lingat and Thapanan Nipithakul, "Evolution of the Conception of Law in Burma and Siam" (2020) 13 Naresuan University Law Journal 1.

[84] For instance, see Preedee, "Reception" (n 56); Kittisak, "Reformation" (n 80); Chachapon Jayaphorn, *Thai Legal History: Pre-Reformation* (Winyuchon 2018); Kanaphon Chanhom, "Codification in Thailand during the 19th and 20th Centuries: A Study of the Causes, Process and Consequences of Drafting the Penal Code of 1908" (PhD Dissertation, University of Washington 2010).

[85] This process is not unique to Thailand. In colonies like the African region, the reformulation "customary law" is found. See Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 1996) 109–137; Chris Baker and Pasuk Phongpaichit, "The Child is the Betel Tray: Making Law and Love in Ayutthaya Siam" (2021) 1 Thai Legal Studies 1, 2–6

[86] Chris Baker and Pasuk Phongpaichit, "Introduction to the Thammasat" in Chris Baker and Pasuk Phongpaichit (eds), *The Palace Law of Ayutthaya and the Thammasat: Law and Kingship in Siam* (Cornell Southeast Asia Program Publications 2016) 27–28.

[87] Gerhard Dilcher, "The Germanists and the Historical School of Law: German Legal Science between Romanticism, Realism, and Rationalization" [2016] Rechtsgeschichte-Legal History 20, 26–30.

primary source of ethography of law.[88] This supports the claim that "authentic" Thai law arose as a result of colonial encounters rather than pre-modern times, and that it does not fully reflect the spirits of multiethnic Siamese peoples as claimed.

On the other hand, while Western legal positivism is chastised for emphasising the importance of human will, evidence suggests that the kings' edicts played a significant role in developing the pre-modern legal system. In this regard, the Ayutthaya legal system developed from cases, decreed into general laws by the king and syncretised into the Thammasat; which, particularly in Siamese legal culture, was a method to sacralise the ruler's edicts as part of the cosmic code of law.[89] Laws legislated by royal will were concealed, rather than constrained, under the cloak of the Thammasat cosmic order. Therefore, at the time of modernisation, the rule-by-law concept of the pre-modern Siamese legal system had already been rendered compatible with a positivistic view of sovereign law under the Siamese absolute monarchy. Still, the local discourse has consistently cast blame on Western legal positivism.[90] In this regard, local legal imagination regarding Western law appears to be haunted by legal positivism, as if the bifurcation of Western versus Thai law represents an eternal struggle between good and evil.

Kasemsup's admiration of German legal science over that of the French has been mentioned; he also advocates the appropriation of Western law to suit Thai society. According to him,

> when the great system of natural law was fully developed and embodied in the Napoleonic Code, Law became an articulated, fixed system, emphasising the certainty of the law, that is, the spirit of the *ius strictum* . . . . Law became a machine of logic, ready to be employed by lawyers indiscriminately. Their only role was to press the deductive logic button and let the machine automatically work out the prearranged conclusion and was in this way divorced from morality.[91]

By contrast, in his view, German law includes the spirit of the *ius aequum*, containing provisions on good faith, public order, good morals, and prohibition of the abuse of rights.[92] Kasemsup's narrative over-simplifies the historical contexts of Franco-German codifications and creates a binary opposition between moral and fixed laws of the two traditions. The ideology of French codification, in the beginning, was to exclude uncertainty and arbitrariness in the application of the law; distilled from a long history of Natural Law, the code was to be the sole guide of the judge and was

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[88] Pearson, *Sovereign Necropolis* (n 77) 47–49.

[89] Therefore, Lingat's narrative obscures the localisation of the Hindu-Indian Dharmasastra into local Deravada–Buddhist Thammasat and deprives the legal culture of a central role in the law-making of Siamese kings in reality. See Chris Baker and Pasuk Phongpaichit, "Thammasat, Custom, and Royal Authority in Siam's Legal History" in Harding and Munin (eds), *Thai Legal History: From Traditional to Modern Law* (Cambridge University Press 2021); Michael Barry Hooker, *A Concise Legal History of South-East Asia* (Clarendon Press 1978) 101–3.

[90] Thongchai, *Royal Nationalist State* (n 77) 185.

[91] Preedee "Reception" (n 56) 294.

[92] ibid.

believed to sufficiently comprise values which neither judge nor citizens had to look beyond.[93] On the one hand, it is true that, by this logic, the judge mechanically applied the rules, thus becoming positivistic, as Kasemsup claimed, because the result of codification in France was that the fixation on written code triumphed over the higher values which had been the original ideology.[94] On the other hand, it is still misleading to portray the French code as being opposed to morality because it marginalises the initial attempt of Naturalist lawyers to solve the arbitrariness of human will by way of the code. As for the development of the German code, the result, despite the initial attempt of the Historical School to connect law and social conditions, was also an exaggerated rationalisation by Pandectist jurists in the form of positivist, abstract, and systematic conceptions of law—far from the romantic ideology.[95] This later led to a reactionary school of sociology, that of Jhering and Kantorowicz, to reduce the power of jurists.[96]

The point here is that Kasemsup's assumption regarding European legal history creates a binary opposition between the French and German codes to portray an opposition between legalism and moralism, embodied by the two codes respectively. French and German law have both experienced the same tensions between human will, strictness, and justice, but have solved the issues differently. Kasemsup's conclusion is of course over-simplified, but it seems to imply that the Western legal model is compatible with the Thai legal system, which had been governed by the Hindu–Buddhist law of Thammasat, in theory. By contrast, the legal certainty premised in legal positivism has had little voice in Thai society. In contrast, the arbitrariness hidden behind the cloak of the ambiguous Dhamma or morality has mainly gone unmentioned.[97] Kasemsup might have been aware of the problems arising from the reception of codified law, despite his acceptance of its rational and systematic nature, and tried to propose the ideal civil law model for the local situation. Yet, his Western demon is not evil, as both he and local discourse claimed it to be—and monsters, if they exist, are not limited to the West, as the local imagination suggested.

In sum: the Thai conception of law has been localised to assert Buddhist morality in the name of the Thammasat as a "unitary" Thai legal identity. At the same time, the understandings of Buddhism and pre-modern Thai law have been rationalised to negotiate modern legal discourse, while Western legal developments have been localised to seek a suitable Western legal model. Legal scholarship, like

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[93] John Maurice Kelly, *A Short History of Western Legal Theory* (Clarendon Press 1992) 312.

[94] ibid 313.

[95] Dilcher, "Germanists" (n 87) 53; Kelly, W*estern Legal Theory* (n 93) 324.

[96] Dilcher, "Germanists" (n 87) 24.

[97] Worachet Pakeerut, a prominent Thai legal scholar of Thammasat law school, is one of the scholars who challenge Preedee's over-generalised narrative on legal positivism. He attempts to challenge the one-sided grand narrative of legal positivism by promoting the positivist characteristic of legal certainty and the dynamic development of legal positivist movements. See วรเจตน์ ภาคีรัตน์, "กฎหมายคืออะไร #4 วรเจตน์ ภาคีรัตน์: คำสั่งรัฐอันธพาลเป็นกฎหมายหรือไม่" (ประชาไท, 26 พฤจิกายน 2554) [Worachet Pakeerut, "What Is Law? #4 Worachet Pakeerut: Is a Gangster State's Order Law?" (*Prachatai*, 26 November 2011)] (Thai) <https://prachatai.com/journal/2015/11/62643>.

other contemporary discourses, has been bifurcated into an intellectual strategy of Thai modernity. This is reminiscent of the concept of "the third space of hybridity" provided by Bhabha, whereby:

> The theoretical recognition of the split-space of enunciation may open the way to conceptualising an international culture, based not on the exoticism of multiculturalism of the diversity of cultures, but the inscription and articulation of cultural hybridity. To that end, we should remember that it is the "inter"—the cutting edge of translation and negotiation, the in-between space—that carries the burden of the meaning of culture . . . and by exploring this Third Space, we may elude the politics of polarity and emerge as the others of ourselves.[98]

C. Myths of Modern Thai Law

The co-existing narratives of civil law and Thai law permeate the collective intellectual imagination of the Thai legal system. This, in turn, obscures the understanding of the nature of the Thai legal system in various respects. Like Scots law, the over-exaggeration of the systematic legal landscape results in overlooking the nature of the sources of law. In other words, the Thai legal system becomes even more problematic when the formal sources of law obscure the legal epistemology of lawyers trying to understand the characteristics of the local system. Indeed, Thai legal scholarship should be aware of the issues that arise from these dichotomies in order to understand the complex features of the Thai legal system.

Firstly, the self-civilised narrative misleads Thai legal scholarship into overlooking a systematic problem regarding the interrelation between sources of law. While Thai academics still affirm that judicial precedent, as opposed to common law tradition, is not regarded as a source of law, the explanation for this phenomenon in Thai legal scholarship can do no more than indirectly legalistically criticise the application of legal rules in the decisions and the use of precedent. In reality, precedents have had a significant influence on the Thai legal system as a semi-formal source of law—as the Thai Bar and the Judicial Committee, which govern the recruitment of judiciary officers, tend to emphasise in the Supreme Court judges' application of rules.[99] Nevertheless, with very few exceptions, a full version of judicial decisions is not accessible to all. However, human rights, privacy and information legal activists have called for greater access to these to promote the transparency and accountability of the judiciary.[100] Given the adherence to civil law by academics, universities and courts seem to live in different legal worlds within the same

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[98] Homi K. Bhabha, *The Location of Culture* (2nd edn, Routledge 2004) 56, cited in Rachel V. Harrison, "Introduction" in Harrison and Herzfeld (eds), *Ambiguous Allure of the West* (n 67) 22.

[99] Munin, "Legal Studies" (n 50) 308–9.

[100] ทีมข่าวกระบวนการยุติธรรม, "รายงาน: ความโปร่งใสในยุคออนไลน์ เมื่อศาลอังกฤษนำคำพิพากษาขึ้นยูทูบ" (ประชาไท, 2556) [Justice System Reporters, "Report: Transparency in Digital Age When the English Court Publicise Decisions on Youtube" (*Prachatai*, 2013)] (Thai) <https://prachatai.com/journal/2013/02/45495>.

jurisdiction. Legal reasoning developed by universities, therefore, is mainly conducted through selections of shortened decisions. This leaves the question to what extent legal reasoning provided by judicial precedent, for the sake of the integrity of the legal system, should be confluent by both the academic and the judicial world.

This issue is compatible with Bedner's observation on jurists' *habitus*: Indonesian academics affirm that precedent is not binding because of the characteristics of civil law tradition and tend to focus on terminology and legal sources within legal circles.[101] The independence of the judiciary, mostly in an authoritarian regime, has gone too far. This has led to a lack of consistency of interpretation within the legal system. In particular, it causes a lack of coherent interactions between academic and judicial institutions in digesting law into the system; the civilian narrative promoted by the academic world obscures the digestion of legal sources into the system in a practical world.[102]

Secondly, the civil law versus common law dichotomy becomes a simplistic assumption for appropriating foreign law into Thai society, regardless of the contextual variations within these legal families influenced by the two great legal traditions.[103] This leads to lawyers' normative assumption based on the archetype of a "mature" legal system. Asanasak observes that one of the causes of this is "historical interpretation" only by tracing back the foreign origins of the codes.[104] The donor systems may have already evolved beyond or abandoned the characteristics usually assumed by Thai legal scholarship.[105] Therefore, the claim to be civil law fosters a regional understanding of Western legal systems, while at the same time obscuring the dynamic nature of legal developments. Kasemsup's observation on the French versus German systems and legal positivism is one notable example of this.

Our argument here is not to abandon the difference between the two great legal traditions. Instead it should not be understood in a strict and over-generalised sense as a self-civilised narrative that stereotypes the perception of Euro-American legal

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[101] Adriaan Bedner, "Indonesian Legal Scholarship and Jurisprudence as an Obstacle for Transplanting Legal Institutions" (2013) 5 Hague Journal on the Rule of Law 253, 263–64.

[102] ibid 260.

[103] Jean-François Gaudreault-DesBiens, "On the Relative Pertinence of the Civil Law/Common Law Dichotomy When Reflecting on the Relationship between Comparative Law, Development Law and Living Law. Some Observations in the African Context." (Social Science Research Network 2017) SSRN Scholarly Paper ID 2948564 12–14 <https://papers.ssrn.com/abstract=2948564>; Tom Ginsburg, "Authoritarian International Law?" (2020) 114 American Journal of International Law 221, 221–22.

[104] Suprawee Asanasak, "Transplanting Regular Impact Assessment in Thailand: A Curious Case of Perfunctory Effect and The Legal Culture of Method" (Asian Law Junior Faculty Workshop, Singapore, January 2021) 21; Korrasut points out that the Thai legal system is a mixed legal system based on the mixed nature of English, civilian, and local customary law. Despite that, his argument is still in line with historical interpretation. There is much room for studies on transplanted law in a recipient legal culture, interactions of legal institutions with sources of law that need to be filled in. See กรศุทธิ์ ขอฟ่วงกลาง, "ระบบกฎหมายผสม" (2550) 36 วารสารนิติศาสตร์ 568 [Korrasut Khopuangklang, "Mixed Legal System" (2007) 36 Thammasat Law Journal 568] (Thai) 568.

[105] Suprawee, "Regular Impact Assessment" (n 104) 22; See also Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences" (1998) 61 Modern Law Review 11.

traditions and simplifies the variations of world legal families. For instance, civil law countries no longer strictly adhere to the principal codes. In contrast, common law countries have increasingly come to rely on general statutes or restatements of areas of law.[106] Law can be migrated vertically from supranational to national level or horizontally from the situated legal system, with no relation to classic classification.[107] The U.S. jurisdiction, furthermore, also shows how misleading it is to divide civil and common law strictly; German legal science has co-evolved beyond nationalistic purpose and has seeded schools of legal realism, law and society and law and economics, particularly in the American legal world.[108] The self-civilised narrative reinforces the notion of transplant bias by which legal borrowing is based on general prestige, rather than an adequate scrutiny of the legal rules themselves.[109] In this respect, the Thai legal system remains obsessed with the prestige of civil law rather than the actual variations of both donor and local systems and becomes an "over-fitting" civil law country.[110] Notably, one must not forget that both the civil and common law traditions share Western liberal discourse, which societies outside (and a few inside) the West distance themselves from and ingest more or less with obsession and reluctance.

This brings us to the third point, namely how the Thai legal system could be perceived in the future. To begin to understand the complexity of the Thai legal system, it should be contextualised within the Southeast Asian colonial framework and legal culture. The nature of cross-fertilisation in the region is characterised by the fact that "local societies were willing to absorb foreign ideas but were absent where genuine ideas were stronger."[111] Concerning the legal aspect, Andrew Harding proposes that the Southeast Asian legal systems could be characterised as "syncretic" whereby layers of received law exist within a local legal culture under a Western framework.[112] Perhaps this legal culture is reflected by the localisation of the Thammasat as a framework with local customary law during the waves of Indianisation. In Westernisation, the grand narratives of civil law and unitary Thainess have concealed these layers of the legal landscape.

The constellation of laws can become tangible when law clashes with culture to gain legitimacy within the system. When a civilised model of the law came with the

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[106] Mathias Siems, *Comparative Law* (2nd edn, Cambridge University Press 2018) 79.

[107] Vlad Perju, "Constitutional Transplants, Borrowing, and Migrations" in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) 1319–20.

[108] Mathias Reimann, "Nineteenth-Century German Legal Science" (1990) 31 Boston College Law Review 837, 894–97; Siems, *Comparative Law* (n 106) 77–78.

[109] Alan Watson, "Comparative Law and Legal Change" (1978) 37 The Cambridge Law Journal 313, 327.

[110] See Mathias Siems, "The Curious Case of Overfitting Legal Transplants" in Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Hart Publishing 2014).

[111] Janos Jany, "Societies of Buddhist Law" in Janos Jany (ed), *Legal Traditions in Asia: History, Concepts and Laws* (Springer International Publishing 2020) 272 <https://doi.org/10.1007/978-3-030-43728-2_9>.

[112] Harding, "Comparative Law" (n 49) 208–9.

wholesale-package transplantation, there seemed to be a lack of grammar to digest the new and unfamiliar sources of law in the pre-existing Hindu-Buddhist legal tradition. For instance, a conception of civil rights based on individuality, despite the affirmation after the democratic revolution, is likely to be a mantra in legal texts but seems to lack the power of enforcement in reality; in particular, there are laws providing privileges and immunities to exceptional classes.[113] Apart from that, the Buddhist *Dhamma* and the conception of Buddhist kingship have contested and superseded the rule of law and constitutionalism.[114] So far, the misuse of *lèse majesté* laws as blasphemy in a Buddhist state exempts legality and due process in Thai criminal justice,[115] and the impenetrable impunity of the modern judiciary due to its interconnection to the Buddhist kingship, which is regarded as the fountain of justice, law, and the government, has been mostly untouched by the Thai legal academic world.[116]

Apart from that, rights-based justice provided by official sources of law is not compatible with the non-state consciousness of justice rooted in pre-existing pluralistic tradition. According to Engel, regional non-state customary law and the Buddhist law of karma have deterred citizens from asserting the rights entitled to them by positivistic law; legal modernity imposed in the reign of King Chulalongkorn did not seem to replace the consciousness of justice based on pre-modern beliefs.[117] Therefore, the adherence to Bangkok-centric modern codes of law disguised the nation under the cloak of modernity. At the same time, invisible harmony-based traditions have often been marginalised by the formal legal discourse in certain spheres. The legal missions to avoid colonial threat conceal the very nature of the colonial mentality of modern Thai law.[118]

These examples of contestation and interaction between legal culture and modern law discourse cannot be easily observed while Thai legal studies are still based on a positivistic approach. Merely tracing back to positive foreign laws would be little different from donating foreign books to a local library where even a librarian could not digest them. On the other hand, asserting Thai unitary values, given how hybrid and pluralistic they are, would create a binary opposition which obscures the understanding of legal developments and of existing pre-modern Thai law. Thailand could neither return to its traditional system nor be a small European legal system outside the West. More engagement is needed to understand the socio-historical

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[113] Thongchai, *Royal Nationalist State* (n 77) 177.

[114] See Eugénie Mérieau, "Buddhist Constitutionalism in Thailand: When Rājadhammā Supersedes the Constitution" (2018) 13 Asian Journal of Comparative Law 283; Kongsatja, "Initial Royal Command" (n 77); Thongchai, *Royal Nationalist State* (n 77) 184.

[115] See Streckfuss, *Truth on Trial* (n 53).

[116] See Thongchai, *Royal Nationalist State* (n 77) ch 4; Björn Dressel, "Thailand: Judicialization of Politics or Politicization of the Judiciary?" in Björn Dressel (ed), *The Judicialization of Politics in Asia* (Routledge 2012) 79–97.

[117] David M. Engel, "Rights as Wrongs: Legality and Sacrality in Thailand" (2015) 39 Asian Studies Review 38.

[118] อานันท์ กาญจนพันธุ์, "พรมแดนความรู้เรื่อง Legal Pluralism" (2548) 3 วารสารนิติสังคมศาสตร์ มหาวิทยาลัยเชียงใหม่ 3 [Anan Ganjanapan, "Knowledge Boundary of Legal Pluralism" (2005) 3 CMU Journal of Law and Social Sciences 3] (Thai) 9.

conditions of the contextualisation of the Thai modern legal system into Thai soil. That is why history matters to the law.

VII. CONCLUSION

The central theme uniting the Thai and Scots legal systems is their sense of "belonging" to the group of legal systems which classify themselves as "civilian." As we have shown in this article, however, this association can also be problematic, especially when what counts as "civilian" has become ossified within the respective national discourses occurring within these two systems. This is best explained by summarising the main conclusions arising from a survey of the two systems.

On balance, there is much to commend in Rahmatian's critique of the current debates surrounding Scots law as a mixed legal system. Although one might not agree with all elements of his critique, he has undoubtedly exposed some of the more vexing questions surrounding the concept. Perhaps the single most outstanding contribution of his analysis is to demonstrate that the current paradigm of the mixed legal system has run its course. There is little more that can be added to this debate if the focus is to remain solely or even predominantly on grand narratives about the nature of the mixture and individual rules or doctrines. Instead, as has been advocated in this piece, the "mechanics" of the mixture—in other words, how the concept of Scots law functions as a legal order—should be the focus of any further investigation. And when the focus is shifted to the "mechanics" of a legal order—in other words to the notions of "legal science," "legal sources," and "authority/normativity"—it becomes clear, as this article has shown, that the Scottish legal order is indeed quite different from the codified civilian tradition. In addition, once this difference is acknowledged, further questions must be asked concerning the interaction of its primary sources of law, namely statute and "common law." And it is in this latter concept, as has been argued here, that the role of history should be amplified. Current conceptions of legal history in Scots law, as "sources" for current law, approach the past in a positivist and determinist way. Since most legal scholars acknowledge that a legal order is "socially nested" in its current circumstances, this narrow conception of the relevance of these historical sources requires a revision.[119] By acknowledging the past, beyond the narrow conceptions of "authority" found in the Institutional Writers, there is an opportunity for Scots law to grow and to mature further.

The Thai legal system arose from historical contingency, by which the nation sought both international recognition and self-consolidation since the colonial era. Against this backdrop as an intellectual legacy, Thai legal scaffolding has been shaped and imprisoned by its legal historiography; in particular, the grand narrative has forced local adherence to the Western legal tradition and the rationalisation of Thai traditional values. Although history has little power of enforcement in a legal system,

[119] Kitty Calavita, *Invitation to Law et Society: An Introduction to the Study of Real Law* (University of Chicago Press 2010), 189.

the conventional narrative either mirrors or reproduces the bifurcate intellectual strategy of West versus Thai legal identity. While some lawyers have highlighted the struggles between modern and traditional legal traditions, the calls for a suitable Western legal model and Thai unitary legal identity continue to be state-centric and misleading. As has been argued in this piece, in order to understand the nature of the Thai legal system, the adherence to a classic category of legal tradition is no longer adequate to understand the variations of the world legal system and pluralistic nature of the Thai legal system. It would not be possible to return either to an authentically traditional law or a fully Westernised system. Thai legal scholarship should be aware of the underlying civil versus common law dichotomy and the authenticity of Thai tradition since both have been hybridised into a local legal culture. The main thrust is not a call to abandon all categorisation; but rather, not to exaggerate it. One should always be aware that the most fundamental rationale behind the classifications of legal traditions is to describe and understand foreign laws;[120] not to misunderstand them. The future may include drawing lessons from legal mechanisms in mixed pluralistic systems, to rethink and move beyond the myths of "legal science."[121] Thai and Scots law may have had a completely different path of historical contingency, but what the two systems share is an exaggeration of grand narratives that obscure each legal system's nature. To view these systems of law from a post-positivistic perspective, a different approach is needed.

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[120] Siems, *Comparative Law* (n 106) 85.

[121] Mérieau, for example, conducts critical legal studies using area studies and constitutional law as an alternative to Euro-American liberal legal narratives. She looked into Southeast Asian constitutional law's marginalisation, the concealment of religious and ethnic diversity, conflict, and lessons learned from the covid epidemic environment. See Eugénie Mérieau, "Area Studies and the Decolonisation of Comparative Law: Insights from Alternative Southeast Asian Constitutional Modernities" (2020) 51 International Quarterly for Asian Studies 153.

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Possibilities for Decentralisation in Thailand: A View from Chiang Mai

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Abstract

In this article we examine radical proposals for political, administrative, and fiscal decentralisation in Thailand which were developed for Chiang Mai, as a potential model for Thailand as a whole. These proposals lay emphasis on local self-government and citizen participation. We argue that they offer a way forward for a Thai decentralisation process that has yet to proceed to the extent envisaged when it was commenced, as part of democratisation, in the 1990s—embraced most notably in the 1997 Constitution. Moreover, this process, we argue, offers a way out of the extreme confrontation between the yellow (royalist-conservative) and red (pro-democracy) factions that has troubled Thailand since 2005. As Thailand is now under a civilian rule after five years of military government, local and provincial government came once more to the fore, and we argue that the Chiang Mai Metropolitan Administration Bill of 2013, still before Parliament, offers more local democracy, as well as imaginative ways of recruiting the enthusiasm of local stakeholders, via a system designed to link provincial and local authorities and the citizenry in a virtuous circle of democracy and development.

Keywords: Decentralisation — Provincial autonomy — Local democracy

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I. INTRODUCTION

In the early months of 2019, 2020, and 2021, Chiang Mai, the Northern second city of Thailand, was shrouded in haze as airborne fine particulate matter had soared to a level marked "hazardous to human health."[1] Naturally occurring forest fires and agricultural burning were blamed as its main cause. By March 2019, the city's air quality came out first in the list of the world's most polluted cities.[2] However, evidence indicates that Chiang Mai's haze crisis during the arid season (between February and April) is not novel, but has been a regular occurrence for more than a decade. It only received attention nationwide in 2019 as the Bangkok Metropolitan Region simultaneously experienced a similar problem.[3] The absence of effective long-term and sustainable solutions to the haze problem has generally prompted heated criticism against the Chiang Mai Governor. Yet, it is not correct to blame a mere individual for such failure, which seems to be systemic rather than resulting from some incidental mismanagement: the powers of the Governor are in fact inadequate to deal with such a serious problem. The allegation is that the centre was unwilling, and the local authorities not empowered, to act decisively. Under the current administrative system of Thailand, provincial authority is delegated from the central government. This means that cardinal policies with regard to the haze crisis require initiative from Bangkok, rather than Chiang Mai. Chiang Mai's haze problem has therefore in effect reinvigorated debate among local scholars and activists on the larger issue of decentralisation, thus raising the general question—why should resolutions to local problems be determined by the central administration?[4] The failure of the Chiang Mai Provincial Government to tackle the haze crisis therefore exemplifies defects pertaining to the present design of central-local relations—or more precisely, in our view, to Thailand's excessive centralisation that still exists in spite of more than 20 years of purported decentralisation.[5]

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[1] "Chiang Mai Shrouded in Haze" *Thailand News* (23 January 2019) <https://www.thailandnews.co/2019/01/chiang-mai-shrouded-in-haze/>; Chularat Saengpassa, "Urgent: Chiang Mai Needs Bangkok's Spare Air Purifiers" *Nation Thailand* (5 April 2019) <https://www.nationthailand.com/in-focus/30367199>.

[2] Apinya Wipatayotin, "Chiang Mai Air Pollution Worst in the World" *Bangkok Post* (13 March 2019) <https://www.bangkokpost.com/thailand/general/1643388/chiang-mai-air-pollution-worst-in-the-world>.

[3] Online Reporters, "Smog Worse in Greater Bangkok" *Bangkok Post* (22 January 2019) <https://www.bangkokpost.com/thailand/general/1615618/smog-worse-in-greater-bangkok>.

[4] ประชาไทย, "นักศึกษา ม.เชียงใหม่ เรียกร้องผู้บริหารรับมือฝุ่น PM 2.5- COVID-19" ประชาไทย (16 มีนาคม 2563) [Prachatai, "Students of Chiang Mai University Vividly Asking University Executive Team to deal with PM 2.5 and Covid-19" *Prachatai* (16 March 2020)] (Thai) <https://prachatai.com/journal/2020/03/86800>; and see CM Publica, "เครือข่ายแก้ไขปัญหาหมอกควันเชียงใหม่ บุกยื่นหนังสือผู้ว่าฯ เร่งแก้ปัญหาหมอกควัน" *CM Publica* (19 มีนาคม 2562) [CM Publica, "Networks Against the Haze Stormed to Lodge a Petition Before the Chiang Mai Governor to Resolve the Haze Crisis" *CM Publica* (19 March 2019)] (Thai) <http://www.cmpublica.com/?p=2719>.

[5] Daniel Unger and Chandra Mahakanjana, "Decentralisation in Thailand" (2016) 33 Journal of Southeast Asian Economies 172.

It is not only the haze problem that highlights the lack of control over their situation that Chiang Mai residents perceive. On a range of issues, there is an articulated need for greater local autonomy. These include flooding, corruption, over-development, and traffic congestion. On all of these issues the provincial Governor is seen as simply a "postbox," acting as a conduit between the province and the central government for the relaying of grievances. Over many years, Chiang Mai has had too many Governors, all appointed centrally, few able to stay long enough to make a real policy difference.[6]

Our main focus in this paper is therefore not so much the haze crisis *per se*, but, taking a broader view, central-local relations in Thailand, in particular relations between Chiang Mai and the central government in Bangkok. It is therefore important to examine related background history, as well as political ideologies and policies on decentralisation at the national level. It should be emphasized that central-local relations do not merely present options for dealing with the specific problem of territorial governance: they define the nature of the state itself.

In terms of general theory of the state, Thailand has long been described as a "bureaucratic polity"—a highly centralised state with Bangkok as the metropolitan centre.[7] This tradition has been critically challenged in recent years by the anti-junta, youth-supported Future Forward Party (FFP), campaigning for greater decentralisation, and its successor movement and political party (following FFP's dissolution), the Progressive Movement (PGM) and the Move Forward Party. More importantly, the PGM pledges to push forward the currently frozen, but enthusiastically supported, Chiang Mai Metropolitan Administration Bill (CMMA Bill), which is aimed at implementing in that province a new model of provincial and local government. The model outlined in this Bill has been taken up in other provinces, resulting in a more generalised Provincial Self-Government Bill (PSG), which is currently under consideration in Parliament.[8] We therefore ask: how, why, and to what extent does the effort by Chiang Mai citizens to seek more autonomy and authority for local governments, through proposing the CMMA Bill, challenge the constitutional contours of central-local relations in Thailand? Would a reinvigoration of local self-government, via the passing of the CMMA Bill and its potential ripple effect across Thailand, facilitate more stable democracy and constitutionalism—by way of more local autonomy and power-sharing—in Thailand's polarised political system? We argue that it would.

We proceed by outlining in section two some theories concerning decentralisation, before in section three looking at the history of Chiang Mai, and then in section four the more recent history of decentralisation in Thailand. In the fifth

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[6] See, e.g., James Austin Farrell, "A New Chiang Mai – Self-management of the Northern Rose" *Chiang Mai City News* (13 September 2012) <http://www.chiangmaicitynews.com/news.php?id=814>.

[7] Fred W. Riggs, *Thailand: The Modernization of a Bureaucratic Polity* (East-West Center Press 1966).

[8] For the PSG Bill, see <https://journal.oas.psu.ac.th/index.php/asj/article/downloadSuppFile/1101/153> (Thai).

section we set out and analyse the origins and provisions of the CMMA Bill itself, and in the concluding part we comment on these provisions more generally in the context of decentralisation. The choice of Chiang Mai to examine central-local relations is in our view highly appropriate. First, Chiang Mai is Thailand's second city, and second cities are often a gathering-place for resentment against the domination of the capital city / metropolitan centre of government, thereby representing, so to speak, the principle of local autonomy.[9] Secondly, Chiang Mai has a distinct local Lanna culture that differs quite markedly from that of Bangkok and other parts of Thailand;[10] we explain this difference in the next section. Thirdly, Chiang Mai represents the high-water mark of demand for achieving true local autonomy in Thailand, which has led to a more general move in that direction. This is evidenced by the fact that in 2011 the CMMA Bill was drafted and introduced as a result of a popular initiative that involved citizens of different political persuasions, in particular those of both the red and yellow factions that have emerged and contested for power at both national and local levels since 2005. The Bill was then debated amongst citizen groups and, by virtue of section 142(4) of the then 2007 Constitution, presented to Parliament in 2013, supported by 12,000 signatures.[11] As is well known, the red faction's support relies heavily on, and can be said to originate from, Chiang Mai—the city of its iconic leader, Thaksin Shinawatra. The polarisation between these two factions—deeply rooted throughout Thailand and also in Chiang Mai itself since Thaksin's premiership (2001–6)—is an ongoing problem that has sparked two coups d'état (in 2006 and 2014); of which the latter ensured that the CMMA Bill rested in limbo from 2013 until the present, in spite of already having been presented to Parliament. With the return of civilian, constitutional government in 2019 under a new constitution (that of 2017), which makes provision for decentralisation,[12] the issue of decentralisation came once again to the fore, and the CMMA Bill becomes highly salient, raising the issue of decentralisation across Thailand as a whole. In December 2020 local elections were held for the first time in six years; these failed to signal widespread popular support for democratisation of Thailand's provincial administration system, except in Chiang Mai province, but increased representation of the PGM and discussion of policy issues regarding provincial and local government.[13]

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[9] Jerome I. Hodos, "Identity and Governance in the Second City" in Jerome I. Hodos (ed) *Second Cities: Globalisation and Local Politics in Manchester and Philadelphia* (Temple University Press 2011).

[10] David M. Engel, "Blood Curse and Belonging in Thailand: Law, Buddhism, and Legal Consciousness" in Andrew Harding and Munin Pongsapan (eds), *Thai Legal History: From Traditional to Modern Law* (Cambridge University Press 2021) 89–99.

[11] ไทยพีบีเอส, "เสนอ พ.ร.บ. เชียงใหม่มหานคร" *Thai PBS* (26 ตุลาคม 2556) [Thai PBS, "The Chiang Mai Bill Proposed" *Thai PBS* (26 October 2013)] (Thai) <https://news.thaipbs.or.th/content/203740>.

[12] See below IV.

[13] Sebastian Strangio, "In Thailand, Local Elections See Stagnating Progressive Vote" *The Diplomat* (Southeast Asia, 22 December 2020) <https://thediplomat.com/2020/12/in-thailand-local-elections-see-stagnating-progressive-vote/>.

II. THEORIES OF DECENTRALISATION

Decentralisation of powers to provincial and local governments has been an almost ubiquitous phenomenon across the world since the early 1990s, and has been strongly espoused by international agencies such as the World Bank and the UN Development Programme.[14] As we will see in the ensuing section, Thailand has been no exception to this trend. Decentralisation is, however, highly contested in terms of its perceived advantages and disadvantages, and the rationale for pursuing it as well as its actual design may differ somewhat from country to country and over time. Southeast Asian states have nearly all decentralised powers to some extent, in ways that seem quite surprising in view of the region's reputation for authoritarian and excessively centralised government.[15]

The alleged benefits of decentralisation are geared to the ideas of democratisation and development. Often, as in Indonesia from 1999, Myanmar since 2008, and Thailand since 1997, decentralisation is seen to be important as offering a counterweight to excessively authoritarian central government, entrenching democracy and popular control over decision-making, and bringing government closer to the people. Decentralisation is also alleged to enhance balancing in political competition as well as regional development.[16] The two are connected in that enhancing political participation at the grass-roots level produces effectiveness in the promotion and policy relevance of local self-government, where local decision-makers have more local knowledge and respond better to local priorities, compared to central bureaucracies. Local autonomy also helps to de-escalate national political confrontation by getting opposed factions or parties to work together on matters of obvious local benefit—nobody is likely to be opposed to more or better housing, for example, or the mending of roads, or more effective garbage collection, whatever ideological issues divide them. The dangers of decentralisation, on the other hand, may include elements of uncertainty, especially in transition periods, over powers and fiscal arrangements; inconsistencies in policy and implementation across the nation; and the enabling of corruption at the local level, in effect, capture of local power by local

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[14] See, e.g., "World Development Report 1997: The State in a Changing World (English)" *World Bank Group* <http://documents.worldbank.org/curated/en/518341468315316376/World-development-report-1997-the-state-in-a-changing-world>; "World Development Report 2000/2001: Attacking Poverty (English)" *World Bank Group* <http://documents.worldbank.org/curated/en/230351468332946759/World-development-report-2000-2001-attacking-poverty>; "The Future is Decentralised" *United Nations Development Programme* (2 March 2018) <https://www.undp.org/content/undp/en/home/librarypage/corporate/the-future-is-decentralised.html>; "Decentralised Governance for Development: A Combined Practice Note" *United Nations Development Programme* (2015) <https://www.undp.org/publications/decentralised-governance-development-combined-practice-note>.

[15] Andrew Harding, "The Constitutional Dimensions of Decentralization and Local Government in Asia" in Adriaan W. Bedner and Barbara M. Oomen (eds), *Real Legal Certainty and its Relevance: Essays in Honour of Jan-Michiel Otto* (Leiden University 2018).

[16] UNDP, "Decentralised Governance" (n 14).

elites.[17] Some even see decentralisation as injurious to national security, and as encouraging fragmentation of the nation-state.[18]

Behind such desire for democratic and developmental enhancement lie pressing conditions that support decentralisation, such as local belief systems and demands for recognition of local identity. As Engel and Chua have argued in their survey of law and society research in Southeast Asia, locality is closely related to identity in this region, and this is probably nowhere truer than in Thailand, especially Northern Thailand.[19] It might indeed be argued that social diversity, and the conflicts to which it can lead, are ameliorated in a system where local people have some control over decisions that closely affect them. Northern Thailand is a particularly diverse part of the region, as we explain in the following section. In the case of Chiang Mai, a history of intense red-yellow conflict, especially during the visit of Prime Minister Abhisit Vejjajiva in 2009, led to the idea that resolving issues locally under decentralised governance offered a way forward that would empower the province and lead to an element of power-sharing.[20]

Naturally, these considerations lead to questions of design, of which the most acute are the allocation of local powers and central-local relations, or the nature and effect of mechanisms for central control over decentralised entities. These determine the true extent of local autonomy in terms of policy areas over which local authorities have control, and the degree of scrutiny, interference, or recall that can be exercised by central government. Across Southeast Asia as well as in Thailand, there has in recent years been a trend towards recentralisation, as governments through experience gained perspective on the realities of local autonomy and found themselves dissatisfied with its performance or the extent of power seeping away from the centre. Thus, even if the principle of decentralisation is accepted, the actuality may not in the event deliver what theory expects. Nonetheless the demand for local autonomy remains strong, and in no case has recentralisation involved anything resembling a reversal to the status quo ante.[21] The demand for decentralisation is far from moribund in Thailand and may lead to extensive reforms within the next few years, as we discuss below.

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[17] See, e.g., this critique of decentralisation in the Philippines: Sarah Shair-Rosenfield, "The Causes and Effects of the Local Government Code in the Philippines: Locked in a Status-quo of Weakly Decentralised Authority?" (2016) 33 Journal of Southeast Asian Economies 157.

[18] Andrew Harding and Rawin Leelapatana, "Towards Recentralisation?: Thailand's 2014 Coup, Tutelage Democracy and their Effects on Local Government" *50 Shades of Federalism* <http://50shadesoffederalism.com/case-studies/towards-recentralisation-thailands-2014-coup-tutelage-democracy-and-their-effects-on-local-government/>.

[19] David M. Engel and Lynette Chua, "State and Personhood in Southeast Asia: The Promise and Potential for Law and Society Research" (2015) 2 Asian Journal of Law and Society 211.

[20] Interview with Chamnan Chanruang, independent scholar and former deputy leader of the Future Forward Party, via Zoom (29 January 2021).

[21] Edmund J. Malesky and Francis E Hutchinson, "Varieties of Disappointment: Why Has Decentralisation not Delivered on its Promises in Southeast Asia?" (2016) 33 Journal of Southeast Asian Economies 125.

III. HISTORY OF CHIANG MAI

In the case of Chiang Mai, the demand for local autonomy rests in the main on issues of cultural identity, and so the history of the region now forming the nation-state of Thailand needs to be understood.

In medieval times, the territory that forms the Thailand we know today was settled by various ethnic groups, in particular Khmer (Cambodians), Mon, and Tai. By the thirteenth century CE, the Tai had become a dominant clan within that territory.[22] Mainstream historians normally regard Sukhothai, Ayutthaya, Thonburi, and Bangkok as Siam's four kingdoms. However, the reality should not be forgotten that Thailand *qua* nation-state in its modern form had never existed before the reign of King Chulalongkorn (r. 1868–1910). Before the mid-nineteenth century, the aforesaid four kingdoms were in fact dominant cities that ruled directly or indirectly over other semi-autonomous city-states. To the north, another Tai group had already settled since the ninth century in the areas now known as Nan, Phrae, Phayao, Lampang, Lampoon, Chiang Rai, and, more importantly for our purposes, Chiang Mai. Before the reign of King Chulalongkorn, these cities comprised a kingdom that was once dominant in the north but later subjugated to Siam in the Bangkok period—the Kingdom of Lanna.[23]

The Northern Tai kingdom of Lanna was founded by the great King Mangrai (r. 1292–1311). Mangrai was a Tai nobleman who previously ruled a city-state called Ngoen Yang Chiang Saen (now a part of Chiang Rai). In an aim to unify scattered city-states on the banks of the Fang, Kok, Ping, Yom, and Nan rivers, he successfully annexed the then-dominant Hariphunchai kingdom as a part of Lanna in 1292. In 1296, Mangrai founded the city of Chiang Mai as the capital of this new Kingdom. Lanna expanded furthest under Mangrai's descendant, King Tilokkarat (r. 1441–87), annexing parts of Sibsongpanna (now Xishuangbanna in Yunnan, China), Phrae, Nan, Lan Chang (Laos), and Shan (now in Myanmar).[24] However, an oppressive and unpopular rule under the reign of the later king, Mekuti (r. 1551–64), led to its decline and eventual conquest by Toungoo (Myanmar) in 1558. Burmese rule lasted until 1775.

In the mid-eighteenth century, an extremely unpopular period of rule by the Burmese instigated local resistance and a series of revolts. With Bangkok's assistance, Lanna chiefs led by Kawila successfully regained their control over Chiang Mai in 1775. Yet, such assistance also turned Lanna and its successor—the Kingdom of Chiang Mai (1802–99)—into a tributary state of Bangkok. Until 1939, Chiang Mai was ruled by tributary kings and princes; rulers who held a degree of autonomy from Bangkok. [25]

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[22] George Coedès, *The Indianized States of South-East Asia* (Walter F. Vella ed, Susan Brown Cowing tr, University of Hawaii Press 1968) 190–91, 195–96.

[23] ณัฐพล อยู่รุ่งเรืองศักดิ์, ประวัติศาสตร์ล้านนาฉบับสังเขป (โรงพิมพ์มหาวิทยาลัยศิลปากร 2558) [Natthabala Yurungruangsakdi, *Short History of Lanna* (Silapakorn University Press 2015)] (Thai) 1.

[24] ibid 30–31.

[25] For a detailed history of Chiang Mai, see Sarasawadee Ongsakul, *History of Lanna* (Chitraporn Tanratanakul tr, Silkworm Press 2005) 155.

In the late nineteenth century, the ancient system of central-local relations, that of the "tributary state," was significantly challenged by the advent of Western imperialism.[26] During the reign of King Chulalongkorn, Bangkok faced a grave imperial threat posed by the Western colonial powers, notably the British and the French. This intimidating menace forced the king to initiate rapidly fundamental bureaucratic reforms, beginning in the 1870s, by espousing the Western model of a "nation-state." This reform, widely known among scholars as *the Chakri Reformation*, significantly also transformed Bangkok-Chiang Mai relations.[27]

To realise his Siamese nation-state policy, King Chulalongkorn established in 1892 the sinew of a unified pyramidic bureaucracy extending from the Ministry of Interior (MoI) down to local provinces. Under the new system of central-local relations, the ancient tributary state was abolished and replaced by a new system called *Tesaphiban* (local-government administration). Chiang Mai and other Lanna provinces were subsumed under the Northwestern *Tesaphiban*.[28] Bangkok officials were appointed to Chiang Mai province by the MoI, leaving Lanna nobles as mere figureheads. No doubt, the reformation was met with discontent which eventually led to the Shan uprising in 1902, secretly supported by some Phrae nobles.[29] Nevertheless, having adopted the Western system of a standing army, Bangkok successfully suppressed the Shan. The Bangkok government's show of force demonstrated to other Lanna princes, including those in Chiang Mai, "the futility of revolt."[30] Apart from these administrative and military policies, in 1886 as a political gesture King Chulalongkorn married Dararatsamee, the daughter of Inthavichayanon, the last king of Chiang Mai, thus fostering a solid bond between the two kingdoms and succeeding in the process of "internal colonisation".[31]

The nation-state policy together with "the political marriage" led to the full merger of Lanna with Siam in 1899. Led by Bangkok, the sons of Inthavichayanon—Intawaroros Suriyawong (r. 1901–10) and Kaew Nawarat (r. 1910–39)—ruled Chiang Mai as Prince Rulers under Siamese tutelage. The death of Kaew Nawarat in 1939 confirmed the eventual abolition of the nobility in Chiang Mai, which is today is administered as one of Thailand's 76 provinces.

Thus, despite Chiang Mai's gradual absorption into Siam/Thailand, this absorption will be noticed to have reached full completion only around 80 years ago, and for reasons of culture and identity has been in any case quite shallow. Legacies

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[26] Thongchai Winichakul, *Siam Mapped: A History of the Geo-Body of a Nation* (University of Hawaii Press 1994) 81–84, 93, 103.

[27] Chris Baker and Pasuk Phongpaichit, *A History of Thailand* (3rd edn, Cambridge University Press 2014) 54–56.

[28] Sarasawadee, *History of Lanna* (n 25) 195–213.

[29] Katherine A. Bowie, *Of Beggars and Buddhas: The Politics of Humor in the Vessantara Jataka in Thailand* (The University of Wisconsin Press 2017) 235.

[30] Sarasawadee, *History of Lanna* (n 25) 206.

[31] Peter A. Jackson, "The Ambiguities of Semicolonial Power in Thailand" in Rachel V. Harrison and Peter A. Jackson (eds), *The Ambiguous Allure of the West: Traces of the Colonial in Thailand* (Hong Kong University Press 2010) 45.

from the past "internal colonisation" still remain, namely the Bangkok-appointed Chiang Mai governorship, together with the system of central-local relations under decentralisation, which emphasises the privileging of the centre, as discussed in the next section.

This cultural difference can be seen clearly, for example, in local conceptions of justice, as discussed by David Engel in his study of the Lanna "blood curse" ritual:

> In the place of traditional Lanna justice, interviewees said that the people of the North generally responded to injuries with generosity and forgiveness. Justice is attained by reconciling the disputants, not by winner-take-all adjudication. Justice, in other words, is inter-subjective. Bancha, a Chiangmai resident, characterised Lanna legal culture this way: "You must give each other justice," not receive it from a judge. It does not matter so much who is right and who is wrong—justice in Lanna is not about right and wrong. As he put it, "Both sides should be able to understand each other. Justice should give equally to both of them." Therefore, Lanna residents do not expect the courts or the legal system to provide justice. As Phakdi, another Lanna resident, stated, "Justice can't be the result of a legal decision. Rights are fixed and defined by the law, but justice isn't based on a verdict. We can't tell what justice will be. It depends on the feelings of satisfaction of the two parties.[32]

We examine next related legislation on decentralisation in Thailand, and Bangkok-Chiang Mai relations in the context of the governance system as a whole.

IV. MODERN THAILAND'S SYSTEM OF DECENTRALISATION AND ITS PRESENT TRAJECTORY

In this section, we explain the development of the current system of local government, including related legislation, and its trajectory in modern Thailand.[33] Again, we approach this issue by examining relevant history. At the outset, the history of Chiang Mai narrated above indicates that before the late nineteenth century, Siam was a highly decentralised kingdom, in which subaltern tributary city-states were almost independent from royal supervision.[34] The Chakri Reformation replaced local dignitaries with Bangkok-appointed officials, in effect dissipating the ideas of local self-determination and local public participation, which have in present times been foci of social movements demanding decentralised powers.[35]

Importantly, as a result of the adoption of the nation-state model by King Chulalongkorn, as from 1893, MoI-appointed officials were posted in outer provinces to run local administration.[36] Although this might well have changed after the end of

[32] Engel, "Blood Curse" (n 10).

[33] Andrew Harding and Peter Leyland, *The Constitutional System of Thailand: A Contextual Analysis* (Hart Publishing 2012) ch 7.

[34] Baker and Pasuk, *A History of Thailand* (n 27) 41–42.

[35] ibid 53.

[36] ibid 55–56.

the absolute monarchy in 1932, royalist and military factions have since then continually espoused a Bangkok-centric form of tutelage democracy denoted in the slogan of the Democratic Regime with the King as the Head of the State (DRKH), in particular from the late 1940s onwards. The notion of democracy entailed by this indicates that the people's interest is protected, in the name of the King, by a military dictatorship. With such definition of democracy, these elites have laid claim to a legitimacy based on Thai traditions. Since the late 1950s the DRKH's hegemony has therefore limited, rather than extended, decentralisation. When local political actors started "to exert local influence over matters such as policy-making and appointments, traditionally reserved for officials in the military and centralised bureaucracy," they were accused of undermining the DRKH, and this contributed to the occurrence of royalist coups on several occasions, most recently in 2006 and 2014.[37] These coups not only placed in mothballs parliamentary democracy, but also the process of decentralisation. For example, the local elections held in December 2020 were the first for six years.

Despite the implementation of a highly centralised model of statehood, some foundations for the present-day system of decentralisation were nevertheless laid during the period of absolute monarchy pre-1932. Having heard claims by foreigners regarding Bangkok's sanitation, King Chulalongkorn, given his promise and effort to "civilise" the new nation-state, passed the Royal Decree establishing Bangkok *Sukhaphiban* (sanitary district) in 1898.[38] Its implementation was later expanded to local areas by virtue of the Management of Provincial Sukhapiban Act 1909. Chiang Mai *Sukhaphiban* was established in 1912 during the reign of King Vajiravudh. In general, the *Sukhaphiban* had typical local government responsibilities for waste management, provision of healthcare facilities, and prevention of diseases.[39] This system, although in no way designed to create political participation among local residents, at least provided a nascent idea of local public service, and was in existence until 1999, when local-government reforms began pursuant to the 1997 Constitution.

The liberal idea of local government autonomy was introduced to Thailand by Pridi Banomyong, the civilian leader of *Khana Ratsadorn* (the People's Party)—the group of bureaucrats and military officials that staged the 1932 Revolution, formally abolishing royal absolutism on 24 June, and opening up the possibility of decentralisation. Regarding local elections and local citizen participation in policy decision-making essential for cultivating a liberal democratic culture, Pridi succeeded in persuading the then legislature to pass the Municipality Act in 1933. This led to the creation of local municipalities (*Thetsaban*) qua decentralised local government units

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[37] Federico Ferrara, *The Political Development of Modern Thailand* (Cambridge University Press 2015) 271.

[38] It may be noticed that public health issues have often been drivers for development of local government, as with the case of haze in Chiang Mai. For example, local government in Bombay (Mumbai) can be traced to efforts to deal with an outbreak of plague: Prashant Kidambi, *The Making of an Indian Metropolis: Colonial Governance and Public Culture in Bombay, 1890–1920* (Ashgate 2007) 68.

[39] พระราชบัญญัติจัดการสุขาภิบาลตามหัวเมือง ร.ศ. 127 (พ.ศ. 2451) [Sukhaphiban Management Act RS 127 (1908)] (Thai) s 13.

as distinct from the MoI-established organs; namely, local provinces (*Changwat*) and provincial districts (*Amphoe*) headed by appointed officials, at the levels of cities, towns, and villages across the nation.[40] Thailand's first city municipality was founded in Chiang Mai in 1935. Later, in 1936, the first Local Assembly Election Act came into force, thus bestowing upon local citizens the right to elect members of the municipal assembly (19 members in Chiang Mai). Notwithstanding the recurrence of military coups precipitating the suspension of both electoral politics and decentralisation, other forms of decentralised agencies were gradually introduced across the Kingdom to facilitate local development through local citizen participation and the carrying out of public service, namely the Provincial Administration Organisation (PAO) in 1955 and the Tambon Administration Organisation (TAO) in 1994. With their own legislative assembly and executive council directly elected by local citizens, *Thetsaban*, PAO, and TAO make up and provide a backbone for Thailand's general system of local government. Importantly, the endorsement of the right to local self-government as a constitutional right by the 1997 Constitution further increased their significance in the democratic process.[41]

The "Black May" incident of 1991, in which the military government killed many protesters demanding for a fuller democracy on the streets of Bangkok, created a political push for thorough reform, which was given expression in the 1997 Constitution, embracing thorough decentralisation and necessitating the passing of the seminal Decentralisation Plan and Process Act 1999. The 1999 Act specifies various functions and powers that were to be transferred to the decentralised authorities; these included waste management, city and investment planning, sport and recreation, and education.[42] Section 30(4) also provides for the central government to transfer to the local authorities at least 35% of its annual budget. The proposed reforms would in effect turn these provisions on their head, reversing the balance of fiscal transfers as well as local versus central powers.

While the 1999 reforms reflected a growing demand for local democracy and decentralisation, the premiership of Thaksin Shinawatra between 2001 and 2006 led to increasing polarisation between the red and yellow factions that rendered decentralisation a point of difference between them, blighting the reforms of 1997 and resulting in the coups of 2006 and 2014. These periods of military rule have halted the reforms, and in several respects reversed them, in a process of recentralisation.[43] Indeed, since 2014, decentralisation, facilitating local influence of the red faction, has been regarded by conservative factions as a threat to the DRKH itself. It was only with

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[40] มรุต วันทนากร และ ดรุณี หมั่นสมัคร, "ประวัติและความเป็นมาของเทศบาล" (สถาบันพระปกเกล้า) [Marut Wanthanākōṇ and Darunee Mansamak, "The History of Thailand's Municipalities" (King Prajadhipok's Institute)] (Thai).

[41] ss 78, 284.

[42] พระราชบัญญัติกำหนดแผนและขั้นตอนการกระจายอำนาจให้แก่องค์กรปกครองส่วนท้องถิ่น พ.ศ. 2542 [Decentralisation Plan and Process Act 1999] (Thai) ss 16–18.

[43] Grichawat Lowatcharin, "Along Came the Junta: The Evolution and Stagnation of Thailand's Local Governance" *Kyoto Review of Southeast Asia* (October 2014) <https://kyotoreview.org/yav/along-came-the-junta-the-evolution-and-stagnation-of-thailands-local-governance/>.

reluctance that the post-military government of 2019 finally agreed to local elections in December 2020. This return to local self-government can be attributed to the fact that the 1997 Constitution, although abrogated in 2006, had galvanised demands for local self-governance as a permanent feature of Thai governance, including under the 2017 Constitution, whose drafting was heavily influenced by the military.

The CMMA Bill is one cogent piece of evidence for the existence of such demand. Interestingly enough, during 2020, even as the return of local elections became unavoidable, there was also disagreement between the Interior Minister and the Election Commission over the question whether the Commission was in a position to hold local elections. The Commission insisted that it was.[44]

During the period of military rule 2014–19, General Prayuth implemented a number of draconian measures, notably coup announcements, directives, and section 44 (M-44) of the 2014 Interim Constitution, which gave him power as Head of the National Council for Peace and Order (NCPO) to promulgate executive orders. These were used to reverse Thailand's decentralisation process. In 2014, two NCPO Announcements suspended all local elections.[45] A problem then arose in that the terms of office of some local legislature members and executive heads, including in Chiang Mai, expired and no replacements could be elected. The solution provided by the two Announcements was to establish appointments committees at provincial level to fill the vacancies.

The composition of these appointments committees leaves much to be desired from the aspect of local self-government. The deputy director of the provincial Internal Security Operations Command sits on the committee, which is chaired by the provincial governor, who is appointed by the MoI. The Announcements also provide that as many as two-thirds of the newly appointed members of the local legislatures must be former senior civil servants. By the issuing of two further NCPO Announcements in 2014,[46] military officials and deconcentrated agencies, that is, provincial governors and district heads, were given substantial authority to review and veto local budgetary allocations. These attempts at recentralisation have, we would argue, severely undermined fragile democracy in Thailand and, more specifically, decentralisation in Chiang Mai—already set back by five years of military rule.[47]

The situation of decentralisation is now dealt with by the 2017 Constitution, which does not seem to offer significant improvement, but at least recognises important basic principles. Whereas the Constitutions of 1997 and 2007 provided that members of the local legislative assemblies and executive councils be elected directly by local citizens, the 2017 Constitution at section 252 allows instead the installation of administrators of specially-autonomous local authorities (currently, that is, Bangkok Metropolitan Administration and the City of Pattaya) by what it calls "means other

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[44] Post Reporters, "EC 'Ready' for Local Elections" *Bangkok Post* (12 August 2020) <https://www.bangkokpost.com/thailand/politics/1966795/ec-ready-for-local-elections>.

[45] Nos 85/2557, 86/2557.

[46] Nos 88/2557, 104/2557.

[47] Unger and Chandra, "Decentralisation in Thailand" (n 5).

than direct popular election." This leaves room for the current or any future government to appoint its favourites to such positions. Unlike—again—its predecessors, the 2017 Constitution allows MoI bureaucrats to run for local office. This new measure clearly strengthens the dominance of central government over local governments, thus diluting Chiang Mai citizens' inspiration for creating CMMA. We have drawn attention above to the fact that this recentralisation of powers has done nothing to assist solutions to problems such as the haze in Chiang Mai.

Recentralisation also appeared problematical in dealing with the spread of the Covid-19 virus during 2020. The central government chose to declare a state of emergency enabling the issuing of several Covid-19 Regulations, forbidding social gatherings and the dissemination of "false" and "fake" information.[48] These tended to support the Prime Minister's policy of recentralisation, and have been widely resented as being aimed at repressing the rising demand for liberal democracy.[49] In Chiang Mai, the power-concentrated approach also undermines the culture of compromise discussed above, leading to the unsympathetic application of law without regarding to local contexts. Like other parts of Thailand, Chiang Mai experienced economic breakdown caused by the pandemic, causing the loss of many jobs and liquidations. Not being able to afford the rent, some individuals had no choice but became vagrants. However, it was reported in 2020 that instead of showing leniency towards destitute local citizens, a number of vagrants were arrested by Chiang Mai police for breaching a curfew.[50] Given socio-political turbulence bred by the Bangkok-centric, one-size-fits-all solutions, the liberal notion of local governance envisaged by the defunct 1997 Constitution then appears to be demanding as Covid-19 conditions tend to require officials to have heeded specific local grievances.

Overall, we may discern two different notions of territorial governance and central-local relations in Thailand. Their relationship resembles "the binary-star scenario"—the gravitational pull between two stars that orbit around a shared centre of mass, neither of which is absolutely subjugated to the other.[51] The Bangkok elite view is that local authorities enjoy merely "deconcentrated" powers, in which they act essentially as agents of the central government. Holdover elites prefer, over

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[48] Covid-19 Regulations Nos 1, 2, and 3.

[49] International Crisis Group, "COVID-19 and a Possible Political Reckoning in Thailand" *International Crisis Group* (4 August 2020) <https://www.crisisgroup.org/asia/south-east-asia/thailand/309-covid-19-and-possible-political-reckoning-thailand>.

[50] For further details see Rawin Leelapatana and Chompunoot Tangthavorn, "Thailand: Emergency Responses or More Social Disturbance" in Victor V. Ramraj (ed), *Covid-19 in Asia: Law and Policy Contexts* (Oxford University Press 2021); ข่าวสด, "'คนไร้บ้านเชียงใหม่' ถูกจับ-ส่งฟ้องศาล ข้อหาออกจากบ้าน ฝ่าเคอร์ฟิว" ข่าวสด (22 เมษายน 2563) [Khaosod, "'Vagrant in Chiang Mai' Arrested and Prosecuted for Violating Curfew" *Khaosod* (22 April 2020)] (Thai) <https://www.khaosod.co.th/covid-19/news_3994471>.

[51] Rawin Leelapatana, "The Thai-Style Democracy in Post-1932 Thailand and its Challenges: A Quest for Nirvana of Constitutional Saṃsāra in Thai Legal History before 1997" in Harding and Munin, *Thai Legal History* (n 10) 217–32; Andrew Harding and Rawin Leelapatana, "Constitution-Making in 21st-Century Thailand: The Continuing Search for a Perfect Constitutional Fit" (2019) 7 Chinese Journal of Comparative Law 266, 270.

decentralised autonomous agencies, MoI-appointed agents—notably provincial governors and district heads, playing a leading and supervisory role with regard to local issues. Despite the elitist attempt to reinforce the DRKH, the now-defunct 1997 Constitution has nevertheless succeeded in reinvigorating the appetite for greater decentralisation and increasingly sturdy demands for local autonomy. As is evident from the restoration of local elections in December 2020, the military and the elites are forced to recognise the impossibility of absolute negation of decentralisation in a modern, industrialised Thailand. In fact, the junta-initiated Constitution of 2017, as with the 1997 and 2007 versions, reserves extensive provision for local administration. The main principles are contained in section 249, which states:

> Subject to section 1 [which provides that Thailand is an indivisible kingdom], local administration shall be organised in accordance with the principle of self-government according to the will of the people in the locality, as per the procedure and form of local administrative organisations as provided by law. In establishing a local administrative organisation in any form, due regard shall be had to the will of the people in the locality together with the capacity for self-government in respect of revenues, number and density of the population, as well as areas under its responsibility.[52]

Thus section 249 gives force to the demand from Chiang Mai for local autonomy. Section 250 also emphasises the need for decentralisation and independence, with minimal mechanisms for central control.

> The law … shall provide for independence of local administrative organisations in respect of management, provision of public services, promotion and support of education, public finance, and for the supervision and monitoring of local administrative organisations which may be done only insofar as is necessary to protect the interests of the people in the locality or the interests of the country as a whole to prevent corruption and for the efficient spending of funds, while having regard to the suitability and difference of each form of local administrative organisations. Such laws shall also contain provisions on prevention of conflict of interest and prevention of interference to the performance of duties of local officials.[53]

Sections 252–54 provide for the right to local democracy, as well as for freedom of information and public participation, extending as far as the right to petition for an ordinance and remove council members and administrators. However, given the holdover elites' scepticism towards local autonomy, the reserved authority to appoint specially-autonomous local governors maintains the Bangkok-centric tutelage rule, thus compromising the aim of the CMMA Bill. But, despite this hurdle and the still-prevailing authoritarian climate, we still contend that the initiation of the CMMA Bill challenges the constitutional contours of central-local relations in Thailand—in

[52] For the translated text of these sections, see Constitute, "Thailand 2017" *Constitute* <https://www.constituteproject.org/constitution/Thailand_?lang=en>.

[53] ibid.

particular, by inspiring a growing public appetite for local autonomy among many sections of Thai society. This is discussed in the next section.

V. THE CHIANG MAI METROPOLITAN ADMINISTRATION BILL

Despite the discouragements set out in the last section, the people of Chiang Mai have continued to struggle for local self-government for more than a decade. This, in turn, propelled the drafting of the CMMA Bill with wide public consultations and discussions in the beginning of the 2010s. The Bill having the endorsement of more than the requisite 10,000 signatures, the Speaker of the House of Representatives himself travelled to Chiang Mai in late October 2013 to pick up the draft Bill.

The CMMA Bill was an initiative of the Chiang Mai Provincial People's Network for Self-governing Administration. This civil-society network adopts the notion of a "self-governing province" which, according to Prin Nithat-ek,

> entails local people in each province participating in decision-making and determining their own developmental strategy and distribution of resources in politics, economy, society, culture, natural resource and environment, physical and mental health. The essence of self-governing province is to transfer political power that is concentrated in the central administrative system to a provincial community unit … The concept might be considered as the background notion for [a] "new social movement," leading to national restructuring which focuses on forming citizen consciousness as a form of "country ownership" under [a] democratic regime.[54]

The political crisis of 2010, which led to violent clashes between the red and yellow supporters in Chiang Mai and consequential adverse impacts on the local economy, further hastened a Chiang Mai-based attempt to find areas of compromise between the red and yellow factions.[55] Both sides located the main source of the problem in the presence of the Bangkok-centric system of bureaucratic polity, viewing greater decentralisation as its solution. Such compromise would allow a measure of power-sharing in that parties would be able to achieve power locally in some provinces even if not nationally.[56] FFP/PGM politician Chamnan Chanruang was instrumental in the drafting of the Bill and ensuring it received parliamentary scrutiny. A dissolution of parliament in 2013, followed by a military coup in 2014, prevented the Bill from becoming law.

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[54] Prin Nithat-ek, "The Rise of Antagonism: The Chiang Mai Province People's Network for Self-Governing Administration and Its Reaction Against the Hegemonic Centralising State" (2017) 13 Journal of Social Sciences, Naresuan University 187, 192–94.

[55] ชำนาญ จันทร์เรือง, "การกระจายอำนาจคืออนาคตของประเทศไทย" *ประชาไทย* (15 มีนาคม 2561) [Chamnan Chanruang, "Decentralisation is the Future of Thailand" *Prachatai* (15 March 2018)] (Thai) <https://prachatai.com/journal/2018/03/75884>.

[56] ibid.

In general, the CMMA Bill seeks to empower local autonomy by abolishing the MoI-supervised system of deconcentration, replacing Chiang Mai province with the devolved body called Chiang Mai Metropolitan Administration. The theory of local governance represented by the Bill involves a number of other elements that follow from rejection of deconcentration. First, it adopts from the example of Japan the idea of two-tiered local government, involving democratic participation by the lower level and cooperation between the two levels.[57] Secondly, it involves the notion of a citizen assembly at the provincial level, counterbalancing the granting of legislative power to the elected Council and executive power to an elected Governor.[58] And thirdly, it involves transfer of 70 percent of revenue from the central government in Bangkok to the province, as opposed to the present allocation which reverses these percentages, reflecting a dramatic shift in allocation of powers on the basis of a principle similar to subsidiarity—retaining only military, foreign relations, judiciary, and fiscal powers with the central government, with all else to be devolved to local authorities.[59] The citizen assembly is crucial to this enterprise in providing an element of direct democracy that can be compared to the creation of similar bodies in some Western states, such as those that led to abortion reform in the Republic of Ireland.[60] Similar assemblies in the United States inspired the adoption of this device in the case of the CMMA Bill. However, rather than being chosen on a random basis reflecting the composition of society, as with the Irish model, the Chiang Mai model involves a selection system that more resembles the notion of functional constituencies, if we understand these as including representation of lower-level local government bodies (in Chiang Mai there are 25 of these). A major reason for yellow interests being in support of the CMMA Bill is that they are convinced that in elections votes are simply bought; the selection system for the Citizen Assembly (the details of this system are to be decided by local regulations) tends to empower the civil society, which is largely controlled by yellow interests. More details of this are provided below.

No doubt, given that Chiang Mai is widely regarded as the heartland of Thaksin Shinawatra's supporters and the red faction, Prime Minister Prayuth has for this reason continuously placed the Bill in limbo. Nonetheless, the Bill indicates that the demand for ever greater decentralisation is by no means spent. In addition, the Bill offers, and is intended to offer, a model that might inspire reforms in the future, not just in Chiang Mai but across Thailand generally. In 50 of Thailand's 76 provinces the CMMA Bill has been studied with a view to being applicable more widely, and it has found favour there, leading to consideration of the PSG Bill in parliamentary committee. It is not possible at this stage to say whether the outcome of this process will involve extensive modification of the PSG Bill or lead to enactment of the CMMA

[57] Chiang Mai Metropolitan Administration Bill (CMMA Bill) s 7.

[58] ibid s 71.

[59] ibid ss 18(1), 118.

[60] Michela Palese, "The Irish Abortion Referendum: How a Citizens' Assembly Helped to Break Years of Political Deadlock" *Electoral Reform Society* (29 May 2018) <https://www.electoral-reform.org.uk/the-irish-abortion-referendum-how-a-citizens-assembly-helped-to-break-years-of-political-deadlock/>.

Bill, but the former undoubtedly bears more than a family resemblance to the latter. No doubt there will be demands for refinement or modification of the more radical elements of these bills.

According to the Preamble of the CMMA Bill, which sets out the Bill's rationale, the current platform of centralisation severely compromises the country's development, in particular by creating inefficiency, cumbersome administrative procedures, and unresponsiveness to local demands. As a result, restructuring the system of local government in Chiang Mai is a pressing issue. Accordingly, the Bill is directed towards replacing the prevailing model of Thai nation-state as applied in Chiang Mai—that is, the scheme of "deconcentration," by which the central government appoints the Chiang Mai provincial governor and other district chiefs—with the principles of devolution and delegation, set out in section 18. It therefore seeks to establish a two-tiered system of local government. The upper tier concerns the establishment of the Chiang Mai Metropolitan Administration ("CMMA"), while the lower tier is organised in the form of 25 Chiang Mai municipalities ("CMMs"). Indeed, section 9 of the Bill imposes several responsibilities of the CMMA towards the CMMs, designed to support collaboration and improvement at the lower level of technical expertise.

However, the Bill mainly concerns the CMMA itself. To ensure a smooth and uninterrupted transfer of authority, functions, and obligations from the central government to decentralised agencies in Chiang Mai, the Bill further sets up a Chiang Mai Metropolitan Administration Committee, with the obligation to determine criteria, procedures, and plans for giving effect to the transfer of powers within two years of the Bill coming into effect. The members of this committee include the Prime Minister or a Deputy Prime Minister assigned by the Prime Minister; five representatives of Chiang Mai local administrations; a group of three experts comprising a scholar, a representative of the NGOs, and a representative of local community organisations; and the Head of the Office of the Decentralisation to the Local Government Organisation Committee.[61] The Bill in Part IV also sets up the CMMA itself. This comprises three major elements. The CMMA Council ("the Council"); the Governor of the CMMA; and a Citizen Assembly.[62] The Council is the legislative branch of the CMMA, which consists of Councillors directly elected by Chiang Mai citizens for a term of four years, the number of Councillors depending on the population at the relevant time. The area governed by the CMMA shall be divided into constituencies with the approximate number of 100,000 Chiang Mai citizens—each shall be represented by one member of the Council.[63] Its main function is to consider and approve Chiang Mai ordinances.[64] The Governor of the CMMA is also directly elected by Chiang Mai citizens for a term of four years.[65] Not only does he /

[61] CMMA Bill (n 57) s 14.
[62] ibid s 23.
[63] ibid ss 24–25.
[64] ibid pt 8.
[65] ibid ss 56–58.

she hold authority to initiate policies and plans necessary for local administration, but also to dissolve the Council.[66] Unlike existing governors, including the Bangkok Governor, the Chiang Mai Governor may hold a referendum on significant matters affecting the CMMA.[67]

Whereas the Council and the Governor of CMMA are generally based on the Bangkok model, the Citizen's Assembly is a striking innovation proposed by the Bill. The status of the Citizen's Assembly is stated to be "equivalent to the Governor," although it is not clear what this implies in terms of the balance of power between them.[68] It has been explained in terms of the three Chiang Mai entities resembling the three apexes of a triangle, but it should be noted that according to section 71 of the Bill, the Citizen's Assembly shall be comprised of 200 members installed from a selection amongst four groups as follows, the details still to be determined:

> (i) civil society organisations having the objectives of promoting agricultural, environmental, and natural resources development and urban infrastructure development; the interests of children, youths, women, elderly people, disabled people, HIV patients, and other types of patients; individual rights and liberties, consumer rights, and labour development and democratisation; healthcare, education, or arts and culture;
> (ii) delegates of every Tambon civil organisation;
> (iii) delegates of professional groups; and
> (iv) special experts.

In order to understand the sweep of these provisions, we need to set out here the duties of the Citizen's Assembly as enshrined in section 72, which are those of:

> (i) supervising and recommending policies and direction of development;
> (ii) tracking the performance of local Members of Parliament and civil servants, including by bringing lawsuits as an injured party, and by proposing a motion for impeaching members of the Council;
> (iii) promoting and supporting members of civil-society organisations to collaborate in sustainably managing the local environment and in conserving and reviving local traditions, wisdoms, arts, and good cultures;
> (iv) organising public forums for Chiang Mai citizens and residents to exchange opinions;
> (v) reporting problems in the CMMA administration and their consequences, resulting from any operations carried out by CMMA, CMMs, or other government to these institutes.

Deliberation in the Citizen Assembly is, in line with local culture which has already embraced the idea informally, not based on voting or specific decision-making, but rather on consensus; the Assembly having no legal powers as such.

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[66] ibid s 60(7).
[67] ibid s 140.
[68] ibid s 71(1).

Within its territory, the CMMA shall, according to section 72 of the Bill, have authority in the following matters, representing a very wide range of functions, from development planning, infrastructure and environmental and cultural conservation to policing, tourism, and education.

Significantly, the Bill provides several mechanisms, in addition to the Citizen Assembly, aimed at encouraging local citizens to participate in the administration of Chiang Mai. They have the rights to obtain information related to the CMMA and participate in the legislative process;[69] express their political opinions with regard to CMA;[70] be consulted;[71] participate as members of a committee or sub-committee or a working group responsible for administering Chiang Mai;[72] request a public hearing; and vote in a referendum.[73]

Furthering the democratic orientation of the Bill, it reflects an innovation, in that 5,000 and 10,000 citizens of Chiang Mai, respectively, may lodge a petition for the impeachment of a Councillor, or the Governor.[74] But this device still requires the enactment of specific legislation.

The CMMA Bill is, as we have seen, both extensive in scope and question-begging in detail. It represents a plan that requires much further discussion. More importantly, the Bill inspires the proposal of the PSG Bill by the Law Reform Committee which proposes the implementation of two-tiered local government,[75] the abolition of the MoI-supervised system of deconcentration,[76] the adoption of the 70/30 revenue share,[77] the creation of the directly elected governor of CMA,[78] the introduction of the Citizen Assembly[79] in local provinces throughout Thailand. Calls for PSG foster the sense of local identity within many local provinces, in particular, Pattani, a Muslim-majority province currently struggling with insurgencies.[80] Despite these promising provisions, enormous challenges still remain. At present, the approximate annual amount of taxation collected in Chiang Mai is one hundred billion baht. Under the present Bangkok-centric system, however, 70 percent of its revenue must be remitted to Bangkok.[81] It is therefore highly unlikely that Bangkok and the

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[69] ibid s 134(1) and (6).

[70] ibid s 134(2).

[71] ibid s 134(3).

[72] ibid s 134(4).

[73] ibid ss 134, 137, 143.

[74] ibid s 146.

[75] Provincial Self-Government Bill (PSG Bill) s 12.

[76] ibid s 126.

[77] ibid s 96 para 2.

[78] ibid s 32.

[79] ibid s 12 para 2.

[80] สัญชัย ศรีตระกูล, "แนวคิดและข้อเสนอการเป็นจังหวัดจัดการตนเองของฝ่ายต่าง ๆ ในจังหวัดเชียงใหม่" (วิทยานิพนธ์ศิลปศาสตรมหาบัณฑิต, วิทยาลัยพัฒนศาสตร์ ป๋วย อึ๊งภากรณ์, มหาวิทยาลัยธรรมศาสตร์ 2558) [Sanchai Sritrakool, "Concepts and Proposals for the Self-governing of Chiang Mai Province, Thailand" (Master of Arts Thesis, Puey Ungphakorn School of Development Studies, Thammasat University 2015)] (Thai) 26.

[81] เชียงใหม่นิวส์, "เชียงใหม่ จังหวัดจัดการตนเอง ฝันนี้ไกลคงไปไม่ถึง!! หรือยังไง" เชียงใหม่นิวส์ (4 สิงหาคม 2561) [Chiang Mai News, "Chiang Mai as PSG an Overreaching Dream!! or What?" *Chiang Mai News* (4 August 2018)] (Thai) <https://www.chiangmainews.co.th/page/archives/770569/>.

holdover elites will easily let their ties loosen. An abrupt restructure of the revenue system appears to be radically ambitious. Besides, it should be reiterated that the CMMA Bill was propelled by a reached compromise between moderate red and yellow supporters grieved by consequential adverse impacts on the local economy resulting from the country's intractable political conflict. However, the implementation of the CMMA model as enshrined in the PSG Bill in other provinces must take into account other factors beyond an economic issue. As this model requires decentralisation at both city and district levels, the climate of reconciliation which facilitates discussions among wide-ranging interests is crucial. The presence of ultra-royalist movements against anti-establishment protesters in eastern and southern provinces, which reinvigorate a strong sense of radical nationalism and advocate the current form of establishment, ostensibly undermines this climate. In short, the CMMA Bill inspires the establishment of a radical reorientation in central-local relations that impacts not just on territorial governance but on Thai democracy itself. It conspicuously challenges the nation-state as it has been defined so far, after 90 years of constitutional government. However, while the Bill is radical in its implications, it cannot be negated that it was drafted from a non-partisan perspective in terms of the divisive colour-coded politics. It is, in those terms, an *orange* proposal, and will reward discussion and refinement in the ongoing development of Thai democracy—if given the chance to do so.

VI. CONCLUSION: ANTI-COUP MOVEMENTS AND SOME HOPES FOR DECENTRALISATION?

In his public interview on 14 June 2020, Deputy Prime Minister Wisanu Krua-ngam stated that local elections might potentially be delayed given that "the central budget for them has been diverted to contain the coronavirus outbreak."[82] Unsurprisingly, this interview enraged large segments of Thai society, already frustrated by Prayuth's attempt to prolong his tutelage regime under the cloak of the DRKH and its incompetence in alleviating adverse socio-economic impacts caused by Covid-19. This simmering discontent, in turn, galvanised nation-wide anti-junta protests led by younger generations and pro-liberal, pro-decentralisation activists between July and August 2020, continuing through November and December 2020. As a result of the immense public pressure, Prayuth allowed the local elections to be held, as discussed above. The anti-junta PMG, led by Thanathorn Juangroongruangkit, former leader of the dissolved left-wing FFP, also fielded its candidates to compete in the elections, including in Chiang Mai. The CMMA Bill remains a bill before Parliament, and the election results do not indicate a strong push for more decentralisation outside Chiang Mai itself. The main red party, Pheua Thai, won handsomely in Chiang Mai and the

[82] Post Reporters, "Coronavirus Ate Local Poll Budget, Claims Wissanu" *Bangkok Post* (15 June 2020) <https://www.bangkokpost.com/thailand/politics/1934708/coronavirus-ate-local-poll-budget-claims-wissanu>.

North and Northeast generally, but elsewhere the failure of PGM to secure a single local government headship indicates that demand for more decentralisation nationwide is weaker than it is in Chiang Mai.

Nonetheless the CMMA Bill represents what is so far the most radical attempt to decentralise powers in Thailand. It takes very seriously not just local autonomy for Chiang Mai, but local autonomy within Chiang Mai, on the basis that what is granted to Chiang Mai must also, on the same principle, be granted to the districts and municipalities of Chiang Mai. The Bill therefore represents a high-water mark for local democracy as well as for local autonomy. In this sense it has proved to be a model appropriate to be adopted in other parts of Thailand, especially where local culture differs from that of Bangkok—that is, virtually everywhere.

The CMMA Bill is also radical for another reason. It offers a way forward for power-sharing between the red and yellow factions or parties, not just at city level but at district level too. That this should be envisaged in Chiang Mai, the epicentre of the red faction, is remarkable; but if the conflict proves impossible to resolve finally at the national level—an outcome that appears quite likely in view of ongoing protests—then this type of decentralisation reform might just be attractive to all parties. If so, then we suggest that the Thai people will be the winners. In addition, reforms along the lines suggested would contribute to the experimentation that has been taking place globally in public participation in local government.

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Women Lawyers for Social Causes: Professional Careers and Legal Development in Thailand

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Abstract

Women have become increasingly visible as leading advocates for social causes in a male-dominated profession. Their advancement in a specialized and often risky law practice illustrates a general process by which lawyers establish themselves as influential interpreters of law, enabling them to broker contentious relationships between the state and those who challenge its authority. The women lawyers considered in this article have succeeded through the strategic use of resources available to them as women from families with limited financial or social capital, including the legacies of prior generations of women lawyers: networks connecting social cause lawyers with particular powerholders—especially bureaucrats and international organizations—and the rise of NGOs, social movements, and a welcoming community of social cause practitioners. In general, it may be said that lawyers succeed through the "investment" of social, cultural, and economic "capital" in law—a conceptual framework developed in Part II. Part III describes the long relationship between political authority and legal development in Thailand, which

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created opportunities for women's investments in legal activism. Part IV illustrates our general arguments by following the careers of three women lawyers whose different investments in law led to success as advocates for social causes, while having other unexpected consequences. These investments enabled them to develop distinctive law practices, creating different professional identities and relationships to the rule of law.

Keywords: Thailand women lawyers — Thailand legal profession — Thailand legal development — Rule of law

I. INTRODUCTION

Thailand's robust 21st century social movements are drawing attention to women who are leading legal defenders of human rights and social movements. The question addressed in this article is how women have succeeded as legal advocates for social causes[1] in a male-dominated profession; notwithstanding limited progress in judicial appointments, few women have risen to positions of influence within the legal profession itself. Recent studies have drawn attention to women's critical roles in grassroots protests[2] and their emergence in politics.[3] Lawyers acquire their status through the profession's special relationship to the state—as interpreters of the state's own authority, and as "double agents" who may use the law to defend or oppose actions of the state itself. The advancement of women lawyers who choose to become advocates for social causes shows a more general process by which lawyers establish themselves as influential interpreters of state authority, enabling them to broker relationships between the state and those who challenge its authority.

Part II of this article describes the conceptual framework for this study. Part III examines the long relationship between political authority and legal development in Thailand, which created opportunities for women's investments in legal activism. In Part IV, the careers of three women lawyers are described, to illustrate the relationship between each lawyer's success and the "capital" she accumulates and "invests" in a career—with special attention to differences in the use of international forms of capital. Part IV also considers why these investments in successful law practices may have unexpected consequences, creating different professional identities and relationships to the rule of law, while yielding fewer alternatives for women's

[1] For purposes of our research, we define advocacy for social causes as a private calling using a lawyer's special function in the state on behalf of social movements, the politically weak or socially marginal, requiring little in return from the beneficiaries.

[2] Adam Simpson, "Democracy and Environmental Governance in Thailand" in Sacchidananda Mukherjee and Debashis Chakroborty (eds), *Environmental Challenges and Governance: Diverse Perspectives From Asia* (Taylor and Francis 2015).

[3] Duanghatha Buranajaroroenkij, Philippe Doneys, Kyoko Kusakabe, and Donna L. Doane, "Expansion of Women's Political Participation through Social Movements: The Case of the Red and Yellow Shirts in Thailand" (2018) 53 Journal of Asian and African Studies 34.

advancement through politics or government employment than social cause advocacy might for similarly situated men.

II. A CONCEPTUAL FRAMEWORK

The essence of our argument is that lawyers gain influence by "investing" accumulated social, cultural and economic "capital" in the construction of a career.[4] This includes "family capital," by which we mean a family's experience, wealth and social position, and other forms of cultural, economic and social capital—such as a knowledge of law acquired through education and professional socialization, and the status, wealth, and relational resources accumulated within and outside a community of professionals over the length of a career. Each lawyer's aggregation of resources may be different, allowing the construction of a unique career, but the construction of a career must make sense within particular domestic social and political conditions—a necessity that yields similarities within generational cohorts, but creates differences over time.

Our focus on lawyers for social causes, who generally favor stronger protections for the rights and liberties of ordinary Thai, necessarily aligns to a degree with the international narrative of modernization advanced by scholars who have argued that stronger legal systems in developing countries will speed convergence toward democratic forms of government.[5] Yet, pro-rights activists in a developing country such as Thailand rely on a more complex narrative—the legacy of much earlier attempts to achieve protections and equity, indigenous social movements for goals that make sense locally, and indigenous ideas of justice. Activism in Thailand, and indeed anywhere else, may invoke international ideals when they make sense and have

[4] Our approach is consistent with the conceptualization of career strategies within the "field of state power" developed by French sociologist Pierre Bourdieu (see Pierre Bourdieu and Loïc J. D. Wacquant, *An Invitation to Reflexive Sociology* (Chicago University Press 1992)) and its application in the path-breaking research by Yves Dezalay and Bryant Garth (see Yves Dezalay and Bryant Garth, *Asian Legal Revivals* (Chicago University Press 2010); *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago University Press 1996) 15–17). In contrast to Dezalay and Garth's research on elite lawyers, we study lawyers with more limited access to "resources," as we use that term here, who are required to develop different, more risky strategies to manage contention in the "field of state power." See Frank W. Munger, "Globalization through the Lens of Palace Wars: What Elite Lawyers' Careers Can and Cannot Tell Us about Globalization of Law" (2012) 37 Law & Social Inquiry 476.

[5] Dezalay and Garth, *Asian Legal Revivals* (n 4); Frank Upham, "Mythmaking in the Rule-of-Law Orthodoxy," in Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment 2006).

been adapted to local conditions, but in developing countries such as Thailand, activism is rooted in indigenous concepts of justice and equity,[6] or a blend of both.[7]

Although increasingly visible in the contemporary media environment, women's legal activism has roots in the past and is intertwined with the origins of the modern state.[8] Lawyers representing social causes are found in nearly every generation, but a distinct community of practice coalesced after a 1973 student-led uprising demanded a new constitution and overthrew a military dictator. Constitutional reform in 1997 gave additional prominence to the community of lawyers for social causes, who embraced the opportunity to put constitutional rights and new courts to use. Women are not only at the forefront of this effort, but also have significant, if often underappreciated, roles in its development.[9] The careers of the women lawyers described here provide a lens through which to examine and begin to understand the reasons for the rise of women in particular sectors in modern Thailand. The careers of women lawyers who have become advocates for social causes are also a point of entry for understanding the relationship between Thailand's legal evolution and the struggles over political authority.

We assembled detailed descriptions of the lives of three successful women lawyers, in order to illustrate the process by which lawyers construct a career and simultaneously build the authority of law, enabling them, under the right conditions, to represent social causes and become agents of legal change. Each of these women founded an innovative law practice for social causes.[10] Our emphasis is on the women's accumulation of "capital," including family background, continuing relationships from

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[6] See Peter A. Jackson, "Withering Centre, Flourishing Margins: Buddhism's Changing Political Roles," in Kevin Hewison (ed), *Political Change in Thailand: Democracy and Participation* (Routledge 1997).

[7] The problem of "translating" international human rights in local "vernacular" is well-known to Thai activists working with community groups who have a strong sense of justice but little understanding of "rights" or "human rights" as a technical discourse. Community organizers, and lawyers who work effectively with them, are well aware of this gap and often use different vocabularies to "translate", which might be said to a court or bureaucrat into terms that community leaders can apply to local conditions. Conversely, these lawyers face the reciprocal problem of translating a community's expectations and sense of justice into terms for a judge or bureaucrat who has little understanding of a rural, urban slum, or ethnic group the lawyer represents.

[8] The importance of women as agents of change in Thailand is not new. Tamara Loos, *Subject Siam: Family, Law and Colonial Modernity in Thailand* (Cornell University Press 2006); Philippe Doneys, "Political Reform Through the Public Sphere: Women's Groups and the Fabric of Governance" in Duncan McCargo (ed), *Reforming Thai Politics* (Nordic Institute of Asian Studies Press 2002) 163–82, nor have women's roles in the past been limited to members of the elite and educated middle class. Juree Vichit-Vadakan, "A Glimpse of Women Leaders in Thai Local Politics," in Kazuki Iwanaga (ed), *Women and Politics in Thailand: Continuity and Change* (Nordic Institute of Asian Studies Press 2008) 125–67; James Ockey, *Making Democracy: Leadership, Class, Gender and Political Participation in Thailand* (University of Hawaii Press 2004).

[9] Doneys, "Political Reform" (n 8)".

[10] We have been interviewing lawyers for social causes in Thailand for more than 15 years, and during that time we have conducted multiple interviews with each of the three women, their colleagues and clients, government officials and members of the judiciary. Unless otherwise indicated, information about them is based on these interviews.

early life, university experiences, and other sources of support for their law work that shaped their skills and purposes as lawyers. Of the greatest importance is the embedding of each of these women in an evolving "community of practice,"[11] comprised of practitioners connected to one another through dense and long-standing relationships, which support and guide how they represent social causes.

The community of practice that welcomed the women includes at least four interrelated generations of lawyer-activists, linked through continuing relationships formed at university, collaboration in advocacy, mentoring, and shared identity. The First Generation are role models and mentors in the community, and became outspoken defenders of the rights and liberties of common people between the end of the absolute monarchy in 1932 and the student-led democracy movement of the 1970s. They are followed by the October Generation, lawyers who graduated between the late 1960s and the end of 1976—the years leading up to the momentous student-led uprising in 1973 and the crushing military response in 1976. The Amnesty Generation is comprised of lawyers who entered the profession from 1979, when amnesty was declared for those who fled the military, onwards to 1997, the year Thailand's liberal constitution was adopted. These were years that solidified the community of practice. The Constitution Generation entered practice after 1997, during a period of robust and continuing struggle for constitutionalism. Other groupings might be identified, but these correspond to important changes in the state's political structure, and are frequently mentioned by the lawyers we interviewed as periods in which the state's shifting structure required important changes in their status and legal strategies. Over the length of this timeline, we can observe not only the effects of the changes in state structure, but also the rise of new resources for lawyers, including new forms of "legal capital." Legal capital has been created by new legal institutions, rising political support for rights, and shifts in Thailand's geopolitical context.

The women lawyers whose careers are described in this article are members of Generation Three—social cause lawyers who entered the profession between the amnesty in 1979 and the adoption of the People's Constitution in 1997. Their careers bridge the shift from dominance by a military-monarchy alliance to a continuing popular struggle between new political actors arising from a changing civil society and the forces of tradition that oppose them, represented by the military. Sor.Rattanamanee Polkla is the founder of the Community Resource Centre, which specializes in litigating community environmental and land rights, two persistent sources of conflict caused by development projects. She now helps the government to draft legislation preventing environmental human rights abuses by corporations. Siriwan Vongkietpasan, founder of SR Law Firm, is a pioneer advocate for gender rights, ending human trafficking, and criminal law reform. She partners with government ministries to reform policy while retaining sufficient independence to litigate against both government and private companies to end human rights abuse. Yaowaluk Anuphan directs Thailand Lawyers for Human Rights, an NGO that

[11] See Part III.B for detailed explanation of this concept.

represents victims of human rights abuse by the military or police—an especially controversial and risky practice under Thailand's recent governments.

III. LAWYERS IN THE MODERN THAI STATE

A. Origins of the Thai Legal Profession

Sor.Rattanamanee, Siriwan and Yaowaluk's family origins bear little resemblance to the lives of the hereditary elites who were, with a few exceptions, the first Thai trained as lawyers. Siriwan and Yaowaluk grew up in poor families supported by women, while Sor's parents left a government-owned state enterprise to work on their farm. All three grew up in regions distant from Bangkok, the country's political center. For women of their generation, a university education promised upward mobility and security, and studying law was a thoroughly practical preparation for government work or business. Sor.Rattanamanee and Siriwan chose law to make a living. Yaowaluk acknowledges that from a young age she believed that by becoming a lawyer she would be able to protect her family from the injustices her mother suffered as a single parent. Social cause advocacy as a life's work was not a plan or even a concept for any of them.

Still, attending university and entering the profession of law was itself a measure of the revolutionary changes that have occurred since the founding of the modern state in the late 19th century. Thailand's enlightened monarchs, Rama IV [1851–68] and V [1868–1910], father and son, conceived of a modern state with sufficient power and legitimacy to consolidate the monarchy's authority internally and preserve its territorial integrity while under pressure from Western colonial powers. Law, courts and ministries, adapted from European models, were their chosen mechanisms of centralization. Rama V chose to create a bureaucratic judiciary and establish a new civil code because he believed that these not only gave him more control over the use of his authority, but that they would also make it easier to negotiate with Western countries with similar legal systems.[12] Loyal, law-trained professionals from among the ranks of the hereditary elite, the core of a legal profession, were necessary to negotiate Thailand's relationship to European states, and to staff new ministries and a centralized system of courts. The political and social development that followed reform and Thailand's dependence on geopolitics over the course of the 20th and 21st centuries left an additional imprint on later generations of lawyers, but the legacy of the profession's origin survives.

Our three advocates regularly encounter one of the principal legacies of the monarchy's plans for law—the conservatism of its judiciary. Although in practice a mixed legal system, the Thai judiciary emphasizes strict adherence to its

[12] Loos, *Subject Siam* (n 8); Central Intellectual Property and International Trade Court Thailand, *The Judicial System in Thailand: An Outlook for a New Century* (Institute of Developing Economies, Japan External Trade Organization 2001) 64.

understanding of statutory language, granting lawyers little license to interpret policies. Judges are highly trained career bureaucrats selected on the basis of academic merit rather than practical experience. They are widely viewed as favoring the interests of Thailand's bureaucrats and monarchy.[13]

A Ministry of Justice Law School[14] was established in 1897, later becoming part of Chulalongkorn University. Rama V sent a younger brother to England for legal training, charging him on his return with developing a curriculum for the school that trained officials entrusted with overseeing ministries and serving as justices in the Royal Courts. Only a few commoners from influential families joined members of the hereditary elite at the school. No women were admitted until the late 1920s.[15]

B. The First Legal Activists

Rama V embraced the idea that change and improvement could be brought about by human agency, a view that influenced other elites and inspired educated commoners who were increasingly frustrated by absolute rule and the disadvantages of their rank. Belief in "people making history" along with the ambitions of an upwardly mobile class became "a potent combination."[16] One such talented commoner was Pridi Banomyong, who, together with a few aspiring civilian and military members of his generation, led the revolution in 1932 that ended the absolute monarchy[17] but did not end the monarchy's influence, its continuing role in Thailand's politics, or the character of its rule of law.

Pridi's influence on the legal profession is profound and lasting. Until 1933, formal training in law excluded most commoners. In 1934, Pridi carried out the

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[13] Scholars have observed that Courts of Justice are reluctant to rule against the government (David M. Engel, *Code and Custom in a Provincial Court* (University of Arizona Press 1978)), and that in highly charged political cases, courts favor what they perceive to be the will of the monarchy (Duncan McCargo, *Fighting for Virtue; Justice and Politics in Thailand* (Cornell University Press 2019)). Lawyers we interviewed made similar observations.

[14] In 1891, Rama V created a Ministry of Justice to handle law reform and consolidation of existing court systems, and in 1897 the Ministry of Justice established its "Law School" (โรงเรียนกฎหมาย). เนติบัณฑิตยสภา, 100 ปี โรงเรียนกฎหมาย (เนติบัณฑิตยสภา 2540) [Thai Bar Association, *100th Anniversary of the Law School* (Thai Bar Association Under the Royal Patronage 2008) (Thai) and Central Intellectual Property and International Trade Court Thailand, *Judicial System in Thailand* (n 12) 63.

[15] As in many countries, the earliest form of legal education was an apprenticeship at the home or office of an experienced judge, practitioner or bureaucrat who trained his new associates or office staff himself, an unlikely path to law practice for women (Thai Bar Association, *100th Anniversary of the Law School*). Even today, law graduates are required to complete an apprenticeship before they can be licensed, and the continuing importance of a patron-client culture may benefit women if they form a lasting professional relationship with an experienced attorney but may create barriers for others in a predominantly male profession.

[16] Chris Baker and Pasuk Phongpaichit, *A History of Thailand* (2nd edn, Cambridge University Press 2005).

[17] Returning from France before the revolution, he lectured at the older Ministry of Justice school. The king considered his lectures politically dangerous and warned him to be careful. A few months later, Pridi led a coup against the King.

revolutionary party's plan to create an accessible institution of higher education by establishing the University of Moral and Political Science, now Thammasat University. The University, open to all who could qualify, offered an education where class attendance was not required and tuition was low. The curriculum was intended, in part, to prepare a new generation for government service.[18] Profoundly influenced by his training in French jurisprudence, as well as by his upbringing in Thailand, Pridi's lectures on principles of government under rule of law included not only the structure of government and interpretation of a modern legal code, but also the harmonization of European liberal ideals with familiar Thai values.[19] Several generations of students remember that Pridi introduced them to new ideas about the role that law could play in their society.[20] Only a few of Pridi's students entered private practice. Among them were a handful of social cause practitioners, whose personal experience led them to undertake the risky practice of defending politically unpopular causes.[21] The influence of these Generation One practitioners on younger social cause lawyers continues today.

C. Women in the Legal Profession

The decision to become a lawyer was not unusual for women of Sor.Rattanamanee, Siriwan, and Yaowaluk's generation. Employment opportunities for women in Thailand's developing economy make that choice attractive—opportunities gained, in part, through the efforts of earlier generations of women. Women's early failures to achieve equality under law revealed both the limitations on women imposed by family culture and the determination of Thailand's elites to preserve important characteristics of a male-dominated social hierarchy.[22] Even though Thammasat

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[18] The curriculum covered law, but also political science and the ethics of public service.

[19] Pridi Banomyong, *Pridi by Pridi: Selected Writings on Life, Politics and Economy* (Chris Baker and Pasuk Phongpaichit tr, Silkworm Press 2000). Members of Khana Ratsadorn, or the Siam Revolution Group, were deeply involved in the policy and administration of Thammasat University. While Pridi served as Rector at Thammasat University, other members of the revolution's leadership and their close relatives also held positions as Rector, Chairman of the University Council and on the faculty. See วารุณี โอสถารมย์ และคณะ, ผู้ประศาสน์การและอธิการบดีมหาวิทยาลัยธรรมศาสตร์ (พ.ศ. 2477–2556): ประวัติชีวิต ความคิด และการทำงาน (มหาวิทยาลัยธรรมศาสตร์ 2556) [Warunee Osodtarom et al. (eds), *Administrators and Rectors of Thammasat University: Life History, Ideology and Their Work* (Thammasat University 2013)] (Thai).

[20] ธเนศ อาภรณ์สุวรรณ, "ขบวนการนักศึกษาไทยในช่วงแรก", ใน วิทยากร เชียงกูล, ขบวนการนักศึกษาไทย : จาก 2475 ถึง 14 ตุลาคม 2516 (กรุงเทพฯ : สายธาร, 2546 [Thanet Arpornsuwan, "Student Movement in the First Period," in Wittaya Chiangkul (ed), *Student Movement in Thailand: From 1932 to October 14, 1973* (Bangkok-Satarn 2003) (Thai).

[21] Marut Bunnag and Thongbai Thongpao are among the best known in Thailand. See Frank W. Munger, "Thailand: The Evolution of Law, the Legal Profession and Political Authority" in Richard L. Abel, Ole Hammerslev, Hilary Sommerlad, and Ulrike Schultz (eds), *Lawyers in 21st-Century Societies, Vol. 1: National Reports* (Hart Publishing 2020).

[22] Loos, *Subject Siam* (n 8). The first notable exceptions, for example, women's right to vote and ending formal recognition of polygamous marriages, were victories of an early male advocate for women's rights, Pridi Banomyong.

University's open admissions allowed women to enter the legal profession in significant numbers for the first time, women's opportunities for advancement through government employment were limited.[23] Understandably, in comparison with men, fewer women sought a legal education. However, those women who chose to study law were undoubtedly attracted by the opportunity for safe and secure government employment; still, they were as likely as their male classmates to be influenced by Pridi's enlightenment jurisprudence.

In 1928, while Pridi was still teaching at the Ministry of Justice Law School, the first female student, Ram Promobol, was admitted. Ram hoped to become a judge, but after her graduation and admission to the Thai Bar in 1930, the law was changed to deny her that opportunity.

> In 1930 when I graduated second in my class and became the first female [member of the] Bar in Thailand, I was so excited and hoping to become a judge. But when they announced the new Judiciary Act, it wasn't possible for me to be a judge and perhaps a prosecutor too. According to this new act, a judge must be Thai male and older than 25 years old, but I am a woman and younger than 25 years old. So, I decided to become a lawyer, which was the only profession that I studied. I went to work with Tilleke & Gibbins, an English law firm, and they didn't have a Thai lawyer working at that time.[24]

After the revolution in 1932, Ram joined a group of former students to help Pridi plan Thammasat University.[25] The group's collaboration created a small but tight-knit network of lawyers who shared the goal of helping the nation develop.[26]

By the middle of the twentieth century, much had changed as a result of Asia's increasing entanglement in international politics, World War II, and America's sponsorship of Thailand's post-war development. Expansion of higher education was among the first investments by American funders and the Thai government towards meeting the demands of expanding ministries, flourishing businesses, and the demand for upward mobility among ordinary Thai. The number of lawyers increased at an almost exponential rate.[27]

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[23] These legal barriers have since been removed.

[24] คุณหญิงแร่ม พรหโมบล บุณยประสพ, "เสี้ยวหนึ่งแห่งความทรงจำ" (สถาบันปรีดี พนมยงค์ 2553) [Ram Promobol, "Part of My Memory" (Pridi Institute 2020) <https://pridi.or.th/th/content/2020/05/266>] (Thai). The article was originally published in 1984.

[25] ibid.

[26] ibid.

[27] See announcement of Lawyers Council on 19 June 2012. In addition, 29 former teachers' colleges have upgraded programs offering law degrees on the approved list (see พระราชบัญญัติมหาวิทยาลัยราชภัฏ พ.ศ. 2547, ราชกิจจานุเบกษา เล่ม 121 หน้า 1 (14 มิถุนายน 2547) [Rajabat University Act B.E. 2547, Government Gazette vol 121 p 1 (14 June 2004)] (Thai).

Table 1. University Graduates and Law Graduates by Gender 1991–2016

	University graduates		Law graduates	
Year	Total	% female	Total	% female
1991	59,654	n/a	5,239	n/a
1992	61,658	n/a	5,260	n/a
1993	63,749	n/a	4,941	n/a
1994	68,503	n/a	5,266	n/a
1995	71,048	n/a	4,997	n/a
1996	61,009	54	4,861	19
1997	65,892	54	6,214	19
1998	69,532	56	4,048	24
1999	73,647	56	4,934	24
2000	80,671	57	5,171	28
2001	93,764	58	5,849	31
2002	82,158	55	5,932	31
2003	220,142	59	6639	37
2004	257,881	n/a	n/a	–
2005	272,886	62	n/a	–
2006	259,089	62	11,059	40
2007	268,508	61	9,747	41
2008	289,413	61	7,841	43
2009	274,473	60	9,634	43
2010	231,733	61	9,833	45
2011	248,871	61	8,129	45
2012	182,216	61	7,246	43
2013	140,653	64	7,867	43
2014	245,566	62	8,311	47
2015	262,807	63	6,888	51
2016	220,768	65	4,063	52

Sources: Bureau of Policy and Planning (1998; 1997–2004); Information Center Bureau of Administration (2005–06); Office of Higher Education Commission data for 2006–16 available at http://www.info.mua.go.th/information.

Although earlier generations of women were excluded from positions of power in government and business, many occupied positions in which they could exercise

influence. In 1947, 80 female graduates created a legal aid program to help women and families. In 1955, the same group founded the Women Lawyers Association of Thailand under the Queen's patronage, and soon launched a campaign for women's equality by drafting legislation to encourage the appointment of women as civil servants and judges.[28] In 1961, the Queen provided funding for a National Women's Council.[29] Women appointed to the Council have sponsored NGOs supporting advocacy for women and children.[30]

Today, many barriers to government employment of women have been removed, and recent National Development Plans emphasize the importance of women's advancement. The enrollment of women in law schools has increased steadily from the 1970s onwards, and the number of female graduates now exceeds that of male graduates (see Table 1), although they pass bar examinations at somewhat lower rates (Table 2). Many women work for businesses, and increasing numbers of women lawyers work for global firms.[31] Women lawyers are comparatively well represented among the legal advocates for NGOs and social movements, and in government service. While a few women have risen through bureaucratic advancement to the highest levels of the judiciary,[32] they are still underrepresented in higher positions within ministries and offices with political power, including Parliament.[33]

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[28] The Women Lawyers Association, especially Khunying Nanthaka Supraphatranan, was a key sponsor of a gender equality requirement in the draft of the 1978 Constitution. ธีรนันท์ ธีระธนากร และ กนิษฐา ชิตช่าง, "บทบาทของสมาชิกสภาสตรีในการเคลื่อนไหวผลักดันสิทธิสตรีใน รัฐธรรมนูญ: ศึกษากรณีคุณหญิงนันทกา สุประภาตะนันทน์" (2558) 41(2) วารสารสังคมศาสตร์และมนุษยศาสตร์ มหาวิทยาลัยเกษตรศาสตร์ 96–97 [Theranun Therathanakorn and Kanitha Chitchang, "The Role of Female Members of Parliament to Call for Women's Rights in the Thai Constitution: Case Study of Khunying Nanthaka Supraphatanan" (2015) 41(2) Journal of Social Sciences and Humanities 96–97] (Thai).

[29] The status of both NGOs "under the Royal Patronage" provides symbolic capital for staff members' work as an implicit endorsement by the monarchy of advocacy for women and families.

[30] Interviews with Saisuree Chutikul (July 28, 2010; July 12, 2011).

[31] Bangkok's largest firms reflect the influence of global norms by offering more opportunities for women. One female Baker McKenzie partner said she had experienced no discrimination in the Bangkok office, noting that the managing partner at the time was a Thai woman. She estimated that about 30 per cent of the lawyers in the Bangkok office were female, but a smaller percentage were partners because they had begun their careers much more recently than their male partners. A prominent female lawyer and activist, who served as a commissioner of the National Human Rights Commission until 2007, confirmed that Thai women still encounter barriers to career advancement.

[32] A woman was recently appointed Chief Justice of the Supreme Court of Justice and as Chief of Justice of the Appellate Court of Justice. "Thailand Appoints First Female Supreme Court President" *Royal Thai Embassy, Washington D.C.* (2020) https://thaiembdc.org/2020/08/03/thailand-appoints-first-female-supreme-court-president/; "ไสลเกษ'พ.อาวุโสในศาลฎีกา 'เมทินี'ปธ.ศาลฎีกาหญิงคนแรก 'ปิยกุล'ขึ้นปธ.ศาลอุทธรณ์" - ข่าวสด (9 สิงหาคม 2563) <https://www.khaosod.co.th/newspaper-column/people/news_4666205> ["Slaikate – Senior Judge on the Supreme Court, Methinee – First Female Supreme Court President, Piyakul Appointed Appellate Court President" *Khaosod* (9 August 2020)] (Thai).

[33] See "Asia and the Pacific: Thailand" *UN Women* <https://asiapacific.unwomen.org/en/countries/thailand>. The recently deposed female Prime Minister, Yingluck Shinawatra, may be the exception that proves the rule, since she served as the surrogate for her brother, Thaksin Shinawatra, removed from the same office in 2006 by a military coup. Like her brother, Yingluck was accused of corruption and abuse of power.

Table 2. Bar Passage by Gender, 2011–16

	Thai Bar Pass		Attorneys Bar Pass	
Year	Total	% female	Total	% female
2011	n/a	–	1,918	46
2012	1,231	44	3,087	46
2013	1,227	46	3,182	55
2014	1,485	46	2,599	46
2015	1,302	49	2,420	45
2016	928	48	1,630	42

Source: Thai Bar data courtesy of Thai Bar Association; Attorneys Bar data from Lawyers Council (2011–15) and unpublished 2016 data courtesy of the Lawyers Council Under Royal Patronage.

D. The October Generation and Creation of a Community of Practice

By the 1960s, an expanding university system opened higher education to children of families seeking upward mobility for the next generation. Unprecedented numbers of women were among the students in the October Generation, and along with their classmates they quickly discovered that they knew little about their country's politics or people, and that they could play a role in bringing about change. New ideas about society and government flowed not only from Western-educated faculty but also from neighboring China and Vietnam, where popular revolutions and confrontations with Western powers offered alternatives. In 1973, student leaders led a movement that united social sectors with long-suppressed grievances behind the demand that the military dictator adopt a constitution. The students' demand was carefully crafted to uphold the principles of the "civic religion" promulgated by Rama VI—Nation, Religion, Monarchy, principles that had legitimated the elite-dominated governments established by earlier constitutions; but coming now from a truly popular movement, the demand for a constitution was unprecedented. A new vision of the rule of law was introduced, if not fully realized or universally appreciated, animating efforts to use law to advance social causes and effect change.[34]

The return of the military dictator in 1976 was accompanied by a brutal military and police crackdown that slaughtered students, led to arrest and trial for many, and forced thousands to flee. NGOs and other progressive organizations identified by the police as "communist" were disbanded, and their offices ransacked and destroyed. A few courageous lawyers represented defendants in the political trials that followed—

[34] Kanokrat Lertchoossakul, *The Rise of the Octobrists in Contemporary Thailand* (Yale University Southeast Asia Studies 2016).

lawyers from Generations One and Two who were politically or royally protected, or known internationally as human rights defenders.[35] As support among liberal elites and the middle class for the restored military government eroded, it was eased aside by the monarchy and more liberal generals and elites, and in 1979 amnesty was granted to those who had fled.

In the late 1970s, two projects took shape under a more tolerant semi-democratic government,[36] growing from the legacy of the October Generation to become pillars of an intergenerational network of lawyers for social causes. The Union for Civil Liberties [UCL] and Friends of Women [FOW] revived advocacy for social causes, recruiting and training new generations of lawyer-activists and opening the way for women in particular. Together they created a new culture of law-based reform, and a discourse of rights and rights-related strategies among social cause advocates. FOW advanced a progressive discourse of women's rights and became a leading center of advocacy for women—a training ground for Generation Three lawyers, especially women lawyers, and a starting point for women who founded other advocacy projects. FOW was founded through collaborative networks that extended into influential institutions of the state, and it spawned a group of NGOs for gender-related causes that accepted negotiation with bureaucrats as a principal, if not the only means, of establishing reform. UCL was revived by October Generation lawyers, training new legal advocates for social causes in both law and community organizing. UCL forged a discourse of human rights and government accountability, which was widely shared by leaders of NGOs and lawyers for social causes.[37]

The two NGOs, whose influence we discuss in detail in Part IV, contributed to the formation of a self-sustaining *community of practice* comprised of lawyers for social causes. Practitioners understand that law is a practical art, and that lawyers are guided not only by jurisprudence and technical skills, but by practical knowledge developed during representation of similar clients and causes. Lawyers doing similar work form a "community of practice" made up of "layered and overlapping sets of attorneys who interact regularly and provide reference points for one another about the nature of appropriate professional conduct"[38] who communicate knowledge of

[35] For example, Generation One lawyer Marut Bunnag came from an influential and royally connected family, and other lawyers who defended October 1976 defendants benefited from relationships with military officers or recognition of their human rights advocacy by the international community. Sulak Sivaraksa, the activist professor trained as a barrister in England, who inspired Generation One and Two advocates and organized international support for the October 1976 defendants, began his university-based activism under the protection of a member of the royal family, Prince Narathip Pongprapan, who served as Rector of Thammasat University. Osodtarom, *Administrators and Rectors* (n 19) 188–89.

[36] See Baker and Pasuk, *A History of Thailand* (n 16).

[37] Michael Kelley Connors, *Democracy and National Identity in Thailand* (Nordic Institute of Asian Studies Press 2003).

[38] Leslie C. Levin and Lynn Mather, *Lawyers in Practice: Ethical Decision Making in Context* (Chicago University Press 2012) 66.

practice by example with other lawyers whom they trust.[39] Nearly all of Thailand's lawyers for social causes have been embedded in the community of practice that was formed by returning October Generation radicals in private practice and the attorneys associated with FOW and the UCL. This community of practice became a repository of resources—knowledge, purpose, legitimation, and a gateway to external resources, including resources from foreign and international organizations. But the community of practice was much more than that. Notwithstanding differences in relationships and commitments that created variations in practice, over time the community of practice influenced each lawyer's identity—the sense of who they were and how they should practice, supported by a narrative of the community's purpose. Fundamental to the community's sense of purpose were ideals embraced by the October Generation about entitlement to rights and government responsibility—beliefs that were intrinsic to their later-acquired discourses of human rights and rule of law, and which gave these meaning.

E. The 1997 "People's Constitution"

The constitution enacted following the 1973 uprising was the first to be adopted in response to a broad popular movement, and it was pushed aside by a military coup two years later.[40] After the amnesty, activism returned, but nearly two decades of unresponsive Parliaments, rampant political corruption, and popular activism led to a broadly-based movement for a new constitution that guaranteed rights, popular participation and government accountability. With widespread support and unprecedented popular involvement, the 1997 constitution included an extensive bill of rights, a fully democratic government, independent watchdog agencies, and a National Human Commission, together with a Constitutional Court and a system of administrative courts to maintain the new political structure.[41] Thailand had never experienced life under a constitution that established effective checks and balances on politicians and bureaucrats, permitted meaningful participation, or guaranteed enforceable equal rights. The "People's Constitution" reshaped the relationship between Thai citizens and the state, but from the beginning its influence was far from certain. The constitution's revolutionary implications as guarantor of rights and as a framework for popular sovereignty required nurturing to withstand the precedent of

[39] Sor.Rattanamanee made this point by saying that trust was one prerequisite for collaboration with otherwise skilled practitioners who represent communities in environmental cases, and for this reason she has been wary of lawyers attracted to similar litigation by fees or by its potential for attracting publicity.

[40] See generally, Marc Askew, "Introduction: Contested Legitimacy in Thailand," in Marc Askew (ed), *Legitimacy Crisis in Thailand* (Silkworm Books 2010).

[41] James R. Klein, *The Constitution of the Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy* (The Asia Foundation 1998).

history and the text's ambiguous language, which permitted interpretations serving different visions of change.[42]

Differences within the coalition supporting constitutional reform meant that actual change depended on interpretation. Interpretation of reforms led to bureaucrats and politicians who put the Constitution into practice, but above all to the courts and those who use them—the lawyers and the people. Unexpectedly, lawyers invested in representing social causes were among the most likely potential beneficiaries of what was, in many ways, a lawyers' constitution. Making rights meaningful required not only new courts, but new ways of thinking about law and the judiciary's role, and new support systems for constitutional interpretation and litigation. In the view of the most liberal reformers, implicit in the concept of constitutionalism was a broad acceptance not only of democracy in form, but also a far more consequential social revolution that included a judiciary, bureaucracy and general public willing to accept a reduced role for traditional centers of power, and an expanded role not only for popular democracy, but also for the judiciary itself. Thailand hardly seemed ready for such a leap. Lawyers for social causes were limited by the absence of a support structure—developed jurisprudence, a judiciary that embraced rights, organizations that provided resources and legitimacy for defending rights, and popular trust in meaningful constitutionalism. Among other challenges, they represented individuals and groups who had limited understanding of the value of rights and feared government officers, especially the police and judges.

IV. CONSTRUCTING A CAREER

In Part IV, we illustrate our theory of career construction through detailed descriptions of women who became Generation Three lawyers (between the amnesty for guerillas and communists in 1979 and the adoption of the 1997 Constitution), maturing in the constitutional era by investing in a singular and risky[43] form of law practice.

Between 1995 and 2005, three enterprising women attorneys crossed paths while working for the Chalit Meesit Law and Accounting Firm [hereafter Meesit Law Firm], which was, arguably, Thailand's first social cause law firm that attempted to become self-supporting without depending solely on the charismatic leadership of a single, dedicated practitioner or the generosity of wealthy business partners. Yaowaluk Anuphan joined the firm in 1993 after two years as a staff attorney with the Women's Law Center of the Friends of Women Foundation. Siriwan Vongkietpaisan met Chalit

[42] James R. Klein, "The Battle for the Rule of Law in Thailand: The Constitutional Court of Thailand," in Amara Raksasataya and James R. Klein (eds), *The Constitutional Court of Thailand: The Provisions and Working of the Court* (Constitution for the People Society 2003) 35–92 (Appendices omitted).

[43] In Thailand, the risks posed to lawyers are real. Assassinations and "disappearances" of human rights defenders have occurred and lawyers have been the subject of these incidents. Lawyers for political dissenters have been arrested or harassed for activities that would be unremarkable in Europe or the United States.

Meesit in 1997 and joined his firm after working in debt collection for ten years. Sor.Rattanamanee never became a partner but moved her practice into the firm's offices in 2000 to begin a career as an environmental litigator. As partners, Siriwan and Yaowaluk were attracted in part by the promise of financial support, which gave them the freedom to practice as they chose, and the capacity to develop innovations in complex forms of advocacy for social causes of their own choosing. For Sor.Rattanamanee, the firm provided symbolic and material resources that shaped her law practice, in particular the promise of collaboration with her law school mentor, a skilled environmental litigator. How and why they, as women, sought this opportunity and what their alignment with the firm enabled them to do depended, in turn, on the investments in law and law practice for social causes made by each of the women.

In the first section, we follow the women's careers from their family background to the establishment of their signature law projects, examining the influence of "capital" acquired early in life, at university, and at their first jobs, which led each of them by a different path to the network of social cause lawyers and its community of practice. While family background determined their point of entry into the legal profession, relationships with peers and mentors at university were a more important influence on their first career steps, and were a resource that influenced their career paths at later points. The forms of capital that influenced early career steps also guided each to the activist community at a different point in her career though a different network. In addition to FOW and the UCL, which play important, if sometimes indirect, roles in creating the resources on which they drew, we also discuss the Lawyers Council of Thailand Under Royal Patronage [LCT], created by Parliament in 1985 to represent the interests of the practicing bar, which became a center of the community's collaborative law work.

In the second section of this part, we examine the influence of the internationalization of law on each career. Globalization's influence has left few areas of Thai society completely untouched, but Thailand's legal development has been a particular target of Western assistance. International resources have had important but different influences on the construction of each woman's career.

A. Entering Law Practice; Finding an Identity

Yaowaluk Anuphan[44]

> *Yaowaluk Anuphan is composing herself for a picture at her modest desk in the offices of Thailand Lawyers for Human Rights [TLHR], an NGO whose mission is "to provide legal aid and monitor human rights situations after 2014-coup in Thailand."*[45] *TLHR lawyers defend political protesters and those charged with political crimes or who are victims of police and military abuse. To her audience she appears unassuming but determined, which suits her uncommon bravery*

[44] Based on interviews conducted in 2007, 2011, 2014, and 2020.

[45] Quoted from TLHR's Facebook page, found at <https://www.facebook.com/tlhr2014/>.

> *and dedication to her vision of the rule of law. Later, in another room, the exuberance of her younger collaborators is on display. Staff attorneys are hard at work documenting cases and preparing for litigation. One has brought his children, who are keeping the staff entertained. A group outside on the patio is discussing strategies over beer. Morale is high in spite of the risk of practicing law at the outer limits of regime tolerance.*

TLHR's extraordinary legal practice is the culmination of Yaowaluk Anuphan's long journey from modest beginnings. She grew up in Narathiwat Province in the South of Thailand, a region troubled by conflict over Muslim independence since its annexation during British rule in Malaysia in the 19th century, and a virtual battle ground under the military occupation ordered by Thaksin's government in 2005.[46] Yaowaluk's memories of her childhood recall a different kind of injustice. After her father's death when she was two, hardships suffered by her mother caused by disrespectful local officials made Yaowaluk think of becoming a lawyer. There were other reasons, too. Law was a route to government jobs, which were considered a secure source of income and sought after by sons and daughters of upwardly mobile families. Yaowaluk and her three siblings all studied law.

Like many students who lacked elite credentials or needed to work while studying, she chose Ramkamhaeng University, an open admissions institution located in Bangkok. Beginning her studies in 1986, law school focused her sense of justice on social issues and opened unforeseen paths to a career. She was inspired by the ideals and aspirations of October Generation radicals who were returning to complete their university education, and by summer camps where students worked with villagers to build community facilities or tend crops. In her second year, she began skipping classes to work in a slum project, joined a student club run by labor NGOs, and began to learn about women's rights. Law school, she says, made her an activist.

Yaowaluk's early career reflects two motives in tension—concern for injustice and desire for financial independence. From childhood she had an understanding of women's victimization in Thai society, and at university her interest in women's rights grew. Choosing a job and a career was not so easy for a university graduate attracted to social causes, because Yaowaluk knew that she would earn little working as an activist lawyer. She is critical of radical classmates who compromised their ideals by working for politicians or in high paying jobs. When she graduated in 1990, she accepted an internship with the Northern Women Leaders Project, teaching women from ethnic minorities about their rights. In 1991, she applied for a position as a paralegal at the Friends of Women Foundation's Women's Rights Protection Center.

She was attracted to the Center by its work for victims of human trafficking, a global problem of great concern in Thailand,[47] and because she could work with

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[46] Duncan McCargo, "Thaksin and the Resurgence of Violence in the Thai South: The Network Monarchy Strikes Back" (2007) 38 Critical Asian Studies, 39–71; "Thai Districts Put Under Martial Law" *New York Times* (3 November 2005) <https://www.nytimes.com/2005/11/03/world/asia/thai-districts-put-under-martial-law.html>.

[47] Yaowaluk says she had observed abusive treatment of prostitutes in her hometown.

experienced Generation One and the October Generation lawyers who provided training. There, she met Surachai Trong-gnam—a 1986 Thammasat graduate, one of the Center's attorneys and a litigator for grass roots social causes, who became her role model, mentor and friend. After two years, she passed the bar and received her attorney's license. Seeking higher income[48] and the freedom to choose her own cases, Yaowaluk followed Surachai to the Meesit Law Firm, [49] where lawyers received modest living expenses and costs from a common fund. Additional income depended on the cases she handled. The lawyers were free to represent different social causes. Yaowaluk recalls her hopes for the firm:

> It was . . . like . . . we still dream about it. We wanted people who had the same way of thinking, sharing common ideal goals. The leaders were from the Oct 6th [1976] people and Pee Tom [Surachai].

After two years, Yaowaluk became one of the first to leave. She acknowledges that her litigation skills were improved by Chalit's instruction and that her commitment to social causes became deeper, but the firm failed to provide an adequate income, and Chalit's demanding labor cases limited her freedom. Continuing to maneuver her career toward greater independence, Yaowaluk accepted a well-paid[50] position in a business consulting firm. After learning everything she needed to know about business practice, she established her own practice, relying on business clients for financial support and volunteering for FOW where she became the Head of Litigation.

As Yaowaluk gained the independence to practice as she wished, her reputation as an activist lawyer grew. Encouraged by Surachai, among others, she became active in a new network forming around the Lawyers Council of Thailand [LCT].[51] She began to work closely with Somchai Homla-or—a veteran of the October 14 uprising, President of the UCL from 1995 to 1999, and a leader of the popular movement for constitutional reform.[52] Somchai used the visibility and legitimacy of the Lawyers Council to help organize collaborative projects among legal activists to put the 1997 Constitution's new courts and constitutional rights to use. Once again, Yaowaluk felt she was not fighting

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[48] At the Center, she worked as a paralegal trainer and victim counsellor for two years earning a salary of 2700 THB/mo (less than 100 USD).

[49] Entering Thammasat University in 1976, Chalit Meesit met members of the October Generation and witnessed the military crackdown. Graduating in 1979, he joined the UCL, becoming a skilled litigator and an inspiring labor organizer. In the early 1990s, Chalit and a few Generation Three friends formed the Chalit Meesit Law & Accounting Firm, Ltd., structured as a corporation with shares owned by wealthy investors.

[50] 40,000–50,000 THB/mo.

[51] Yaowaluk chaired the LCT's subcommittee on Children, the Elderly and Disabled, a group of informed advocates who made policy recommendations, joined international NGOs to comment on draft legislation, and represented the Lawyers Council in Parliament.

[52] In part through his influence, she was selected by the United Nations High Commissioner for Refugees [UNHCR] to work on cases involving the rights of refugees and other human rights issues, while continuing to work as an independent attorney and dividing time between the Women's Rights Center and UNHCR until 2007.

alone but in partnership with friends, and this time, she believed, Somchai had found a way to minimize the conflict between serving human rights and earning a living through collaboration with independent practitioners.

Sor.Rattanamanee Polkla[53]

> *In 2015, a group of villagers in the northern village of Ban Haeng is engaged in discussion with a young woman lawyer from the Community Resource Centre [CRC]. The lawyer is telling them that she is close to filing the law suit she and the villagers have been preparing to oppose nearby construction of a lignite mine, which threatens to render large tracts of village land unusable. CRC is the life's work of Sor.Rattanamanee Polkla who is well-known to NGOs, activists, and community organizers throughout the North and Northeast.*[54] *For four years Sor.Rattanamanee and her staff attorneys helped Ban Haeng's residents gather facts, construct maps and charts, prepare documents in preparation for litigation, and counselled them about strategies that included demonstrations, petitions, and election to the local Tambon Administrative Organization.*[55]

Sor.Rattanamanee Polkla is from the South and the oldest of five children, of whom she is the only lawyer. Her career bridges the period of increasing NGO strength after 1980 and the post-1997 constitutional era. Sending girls to university is now more common in Thailand, but at that time supporting a university education for a girl who was an eldest child and capable of helping out at home or going to work to help the family was more unusual, unless the family was well-off. Sor's family was indeed among the better off in her community because her parents were retired government workers who owned a farm, placing them among the middle class in their community. Unlike Yaowaluk, Siriwan, and most other Generation Three lawyers for social causes, she maintained an independent practice from the start of her career, but long before the Ban Haeng litigation, she made a decision to devote most of her practice to "social law."

In 1987, Sor.Rattanamanee entered Thammasat University Law School, the university at the center of the 1973 uprising, where students and faculty carried forward the memory of the October Generation through student clubs and social activism. Just over a decade after the uprising, students continued to visit the countryside and slums, faculty members encouraged the study of society and its problems, and a "Rule of Law" club ['*Nititham*'] formed by faculty and students from the October generation continued to attract students inclined to support social causes. The Rule of Law Club taught a new generation about the history of the preceding

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53 Based on interviews conducted in 2007, 2011, 2014, 2017, and 2020.

54 Experienced organizer and Commoner Party founder Lertsak Kamkongsak put the villagers in touch with CRC in 2011.

55 The Tambon is a subdistrict within Thailand's hierarchy of provincial government administration. The Tambon Administrative Organization [TAO] is an elected local board with financial and administrative power over villages within the district.

decade, and connected students with alumni who encouraged them to continue their activism after law school. She says that during her first year she was drawn to the group by a charismatic fifth-year student in the Club, Surachai Trong-ngam, whom Yaowaluk was to meet a few years later at FOW. When Sor.Rattanamanee graduated in 1991, the Rule of Law Club's faculty mentor guided her to his business law firm, where she learned the fundamentals of practicing law. To her surprise, she liked litigation, and a few years after receiving her attorney's license she set up her own practice.

Sor.Rattanamanee's journey from her family's farm to becoming a premier advocate for community rights is intertwined with Surachai's path to the EnLAW project under the Meesit Law Firm. Reconnecting with Surachai reminded her of the Rule of Law Club's concern for justice, and made her acutely aware of the violations of people's rights perpetrated by some of her business clients. She says that as a student, although she was a member of the Club, she did not know that lawyers could earn a living while working for social causes. Through Surachai and Somchai Homla-or, she was invited to join Lawyers Council working groups, and became increasingly committed to defending the rights of communities. When Surachai was chosen as coordinator of Thailand's first environmental litigation project, EnLAW,[56] he invited Sor.Rattanamanee to join him in litigation in the new administrative courts. Until 2009, she maintained her independent practice at EnLAW's offices, collaborating with Surachai on numerous cases.

Siriwan Vongkietpaisan[57]

> *To the young woman lawyer who is legal director of an anti-trafficking NGO in Chiang Mai, Siriwan Vongkietpaisan is a role model. In 2005, Siriwan and her husband established SR Law, a firm that has become a hub for innovative gender rights litigation, labor protection advocacy and other human rights cases. The young attorney says she is awed by Siriwan's handling of a human trafficking case in which she persuaded a judge to accept a new interpretation of Thai statutory law, providing a remedy for the grievous injustice to a young woman trafficked by her parents to Japan. Unspoken, Siriwan's rise from poverty through hard work to create her own celebrated law firm is likely to have been equally compelling for the young attorney, herself the daughter of an impoverished single parent, and for other women who face similar challenges.*

Siriwan is the youngest of six children of Chinese immigrants who settled near relatives in Buri Ram, a province in Thailand's Northeast. Her mother's small business was the family's principal source of income, and when she died, a year after Siriwan's birth, providing for the younger children was of greatest importance. Her father

[56] In 2000, the New York-based Blacksmith Institute announced its intent to fund a Thailand-based litigation project. A group of leading environmental NGO directors chose Surachai as director and served on its board, along with intellectuals, academics and senior lawyers for social causes, such as the Director General of the UCL.

[57] Based on interviews conducted in 2008, 2012, 2014, and 2020.

remarried and had six more children, but he was a poor provider. Siriwan's sister, fifteen years her elder, cared for her like her own daughter, and supported her until she completed her university degree.

Siriwan enrolled at Ramkamhaeng University in 1983, overlapping Yaowaluk's years as a student, but without meeting her. Siriwan chose Ramkamhaeng because its open admissions and relaxed attendance policies allowed her to work and earn her degree at the same time. Her memories of studying law at Ramkamhaeng and her plans after graduation are quite different from Yaowaluk's. Her sister told her that lawyers do not have a good reputation, but Sirwan was curious. During law school, Siriwan lived with her older sister and helped her sell merchandise made from forest products, sometimes working late into the night, skipping classes and limiting her participation in student activities to those which would not interfere with work. Still, her limited involvement in a student organization that raised money for orphans left a lasting impression.

> I think I was affected by student activities; especially, when I was appointed to be president of a group. I sometimes argued with the male vice-president. I thought that males and females were equal, but some members would complain that I could not make a proper decision because I am a woman. I also learned that I should not focus only on the majority, because the voice of each person is important, and I needed to listen [to everyone]. This activity showed me how to conduct a group effort, and it became a part of what inspired me to work for society.

Motivated, perhaps, by her family's struggles, Siriwan intended to earn a good living, and upon graduation in 1991 she went to work for a debt collection company. After discovering that as an unlicensed law graduate she could do little to help her family or other people in need of legal assistance, she set new goals for her career. In 1994, she obtained her practitioner's license, but knew she needed a different job in order to learn about practicing law. Through a high school friend, she learned about the Lawyers Committee's working groups and met Chalit. Although the lawyers in the Chalit Meesit Firm were earning less money, they had more freedom to develop as practitioners. In 1997, after several months of discussion with Chalit, she quit her job in debt collection to pursue her dream by becoming a partner in his firm.

Siriwan chose the Meesit Law Firm, in part because she lacked the experience to join a more established firm, but also because she admired Chalit's mission.

> In the end, I decided to work with the Meesit Law Firm because I believed that Khun Chalit is the role model for me. . . . He worked on labor cases, and he was also a counselor for many labor federations. I worked with him on many cases relating to social issues and human rights, such as women's rights, environmental issues and so on because there were not many lawyers who would work on those cases. For me, I had a chance to learn how to work on social issues, such as children, women, labor and marginalized people who lost social benefits. Mr. Chalit showed me the value of being a lawyer in the field of social assistance and service, and it became my inspiration.

Siriwan was inexperienced when she arrived, but she believes that at that time she was the only lawyer in the firm ready to pursue litigation in criminal court. At first, she assisted Chalit with his labor cases, of which there was a constant stream. Like Yaowaluk, she acknowledges that Chalit taught her how to work with clients and with judges beyond the formalities of litigation—skills she applied in other areas. She handled mainly labor cases involving women, but also criminal cases referred by NGOs, such as FOW and related NGOs, and she assisted Surachai and Sor.Rattanamanee with their environmental litigation.

B. Advancing a Career Through Internationalization

As we noted earlier, our focus on pro-rights lawyers aligns to a degree with the international narrative of modernization advanced by scholars who have argued that stronger legal systems favor liberal democratic regimes.[58] In many cases, these theories have proved to be misguided. Pro-rights activists in a country such as Thailand have benefited more from the material resources and legitimacy that international recognition brings, than from the usefulness of international prescriptions.

Yaowaluk Anuphan

In 2006, toxic Prime Minister Thaksin Shinawatra was driven from politics by a military coup—an event that stunned the international community, dividing Thailand, and, unexpectedly, its community of social cause lawyers. While the shock wave and aftermath still roiled the country, Yaowaluk was invited for advanced study and training at the Asian Human Rights Commission [AHRC] in Hong Kong, where Somchai had been a fellow 20 years before.[59] There, she worked on cases of torture and forced disappearance, but far more important than the particular legal issues, she says, is the way AHRC fundamentally changed her understanding of rule of law and the importance of international human rights.

> Yes, it was a turning point for me. At AHRC, I got to learn about the concept of rule of law and was taught to look at the structure, which was called the Structural Problem. Actually, because we live in Thailand, all we had worked on were issue-based problems, right?

After her internship, she understood the purposes of the 1997 Constitution's mandates for separation of powers and rule of law in a new way and viewed the expanding field of activism as a "ripple effect" of constitutionalism.

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[58] See note 6.

[59] She was likely to have been recommended by Somchai, who had been a fellow at the AHRC in 1986.

Yaowaluk's greater understanding of human rights at first brought her closer to Somchai, as she immersed herself in the defense of human rights and the abuses of law caused by extrajudicial executions during Thaksin's war on drugs, and the ongoing conflict between the military and Muslims in the South of Thailand. But as she became progressively more outspoken in her opposition to military intervention and her support for upholding the letter of the earlier constitution, they went their separate ways. She and a few younger lawyers (Generation Five–post-2006 coup) charged the Lawyers Council with failing to defend the rule of law by approving the coup and defending pro-government protesters (Yellow Shirt and anti-Thaksin) but not anti-government (Red Shirt) protesters. The group formed a "loose network" that defended those arrested after the 2010 violence between the military and anti-government protests, and it became a source of support for the next step in her career—defending the rights of people caught up in partisan politics.

When the military stepped in again in 2014, ending the elected government of Thaksin's sister and once again setting a democratic constitution aside, Yaowaluk became a lead organizer and Director of Thailand Lawyers for Human Rights [TLHR], with the aim to "provide legal and litigation assistance to individuals who had been summoned, arrested, and detained by the military as a result of the 2014 coup" and to "consolidate the rule of law."[60] With support coming almost exclusively from abroad, and at some risk to themselves,[61] TLHR attorneys defend targets of arrest or persecution by the military government. Yaowaluk and her colleagues are viewed as Red Shirt supporters, although she maintains that their support for the rule of law is without political bias, but the international visibility of TLHR, as well as the increasing intolerance of Thais for the use of heavy-handed military intervention to suppress dissent, has allowed the NGO space to survive.

Sor.Rattanamanee Polkla

Although Sor.Rattanamanee Polkla and Surachai Trong-gnam collaborated on many cases, Sor.Ratanamanee's story diverges from that of her mentor. Working on her own, she began to earn a reputation as a litigator for communities, and developed relationships with NGO-supported organizers in the North and Northeast. CRC's relationship with villagers in Ban Haeng, not far from Chiangmai in the North, grows from her connection to those organizers. Shortly after Yaowaluk returned from Hong Kong in 2007, Sor.Rattanamanee was urged to accept a similar internship at the Asian Human Rights Commission by the Country-Based Officer of the AHRC, an experienced female activist whose local office and personal network placed her in daily contact with the network of social cause lawyers.[62] Like Yaowaluk, Sor says her

[60] From the TLHR website <https://tlhr2014.com/en/about-us-2>.

[61] She has been threatened by the military, and her staff lawyers have been arrested while representing clients.

[62] The Country-Based Officer, Putanee Kangkan, is a Thai activist with extensive experience working on local and Southeast Asian human rights issues and close relationships with other Thai activists.

internship transformed her as a lawyer, but this transformation moved her career along a very different path from Yaowaluk's. In Hong Kong, she learned about treaties concerning environmental rights and the influence of international organizations on government decisions. Her internship taught her about international human rights law and ways to challenge police tactics frequently used in Thailand to harass protesters—knowledge she uses to make her advocacy for communities more effective. She learned strategies and skills for litigation that are not taught in Thai law schools—methods of investigation, documenting evidence, and pushing courts toward internationally recognized interpretations of environmental rights that include prohibiting government actions that contravene the letter of the law or defeat the purpose of statutory protections.

As an independent practitioner, Sor.Rattanamanee was faced with the familiar dilemma of generating enough income to handle extremely complex cases with multiple clients, and with the financial burdens of investigation, documentation, and collaboration with domestic and international NGOs. Before she returned to Thailand in 2010, AHRC's director suggested setting up an NGO to seek international funding to sustain her practice. The international environmental movement and interest in Thailand's popular democracy created an opportunity, and her reputation as a community advocate, not to mention her growing competence in English, made her an inviting prospect for funding. In 2009, she received an initial grant from the Open Society Institute to establish the Community Resource Center. On her return to Thailand, Sor.Rattanamanee and her staff of young lawyers began to apply what she learned at AHRC to their work on land issues with communities in the South of Thailand and for groups resisting development projects in the North and Northeast. She began to push judges to use their authority expansively to fulfill the purposes of the environmental protection laws in situations like the conflict in Ban Haeng. She is proudest of a signature victory in a suit brought on behalf of villagers in Songkla Provincial Court for damages due to vibrations from blasting by the Khu-Ha Mining Company—a path-breaking judicial recognition of a new kind of injury. Unlike EnLAW, which Sor.Rattanamanee says has become too busy to work directly with community leaders, she and her staff spend years, if necessary, preparing her clients in rural communities for the long process of litigation by teaching them about law, conducting mock hearings to overcome their fear of courts, and securing court compensation for the cost of accommodation for large numbers of petitioners far from their homes.

Siriwan Vongkietpaisan

Innovative litigation on behalf of victims of illegal labor practices made Siriwan famous. In 1999, FOW referred a case to her involving thirty Burmese laborers imprisoned by their employer. She was told by government officials not to bother bringing the case to court because illegal workers were not protected by Thai law. She sued the employer anyway and persuaded a Labor Court judge that the workers, even

though undocumented, were protected under Thai labor law. Her success opened the floodgates to litigation by other lawyers on behalf of undocumented migrant workers, and the Foundation for Women began a campaign to inform migrant workers of their rights. In Siriwan's view, her litigation was helping Thailand to "become a developed country with respect to justice and law enforcement." Dissatisfied with the lack of opportunity to expand her practice, Siriwan and her husband left the Meesit Law firm in 2005 to pursue legal work that would be more effective in accomplishing this goal. They established their own firm, which they named SR Law, and sought funding support for their legal work toward, among other things, modernizing Thailand's labor standards.

A year after forming SR Law, Siriwan accepted her first human trafficking case, winning a second widely recognized victory by persuading a conservative judge to use his power to interpret a statute of limitations with exceptional latitude to allow compensation for the suffering of a victim of human trafficking. SR Law relies on Siriwan's growing reputation as an advocate for human rights to attract cases, and on international as well as domestic support. By focusing on issues for which there is strong international support and government concern, she is able to support her practice, while collaborating with ministries to train officials as well as improve regulation, enforcement, and public knowledge of gender rights and laws prohibiting human trafficking. She benefits from the same network that supported the careers of Yaowaluk and Sor. Rattanamanee. The Meesit Law Firm, FOW, and the Lawyers Council connect her to other resources. Naiyana Supapong, one of the first female litigators for FOW, a founder of new NGOs for women, and one of the first commissioners [2001–9] of the National Human Rights Commission created by the 1997 Constitution, recommended Siriwan to the U.S. based Ashoka Foundation, which awarded SR Law a three-year sustaining grant for human rights litigation.[63] Additional funding from American foundations supports Siriwan's litigation, and also her non-litigation projects for broad-based legal change: writing manuals and conducting workshops for the public, and working with government ministries to draft regulations that comply with international standards while training the officials to enforce them.

V. FROM DEMOCRACY MOVEMENTS TO LITIGATING FOR RIGHTS

The 1997 Constitution provided lawyers for social causes with an arsenal of rights and the means to enforce them. The women lawyers' effective use of this arsenal is bound up with their paths to practice, the influence of commitments they have made along the way to particular causes, and the resources that enabled each of them to construct a career. Their narratives show that each of them became inclined to make certain

[63] EnLAW also received an Ashoka grant at about the same time. The two law projects have similar goals and approaches, Siriwan says.

choices through responsibilities felt at an early age as a woman within the family. Later interest in law practice was shaped by relationships, mentors, and colleagues at university. Two of the women (Yaowaluk and Siriwan) have a continuing commitment to issues of gender—a cause that has become increasingly important in Thailand. Sor.Rattanamanee found she liked litigation and turned this interest into an advantage for the cause of community environmental rights, for which there was strong international support, and where domestic law had recently established new government responsibilities. Further, her law school mentor offered to collaborate with her in environmental litigation, a cause in which she was already becoming interested. All three were embraced by the social cause lawyers' community of practice, opening the way to additional "capital," both symbolic (including knowledge of law practice and legitimacy) and material. The acceptance they receive as women within this community contrasts with the lack of opportunity they experienced in male-dominated private practices.

A. October Generation Legacy—Lawyers as Movement Organizers

In the years before and during their association with the Meesit Law Firm, Yaowaluk, Sor.Rattanamanee and Siriwan became embedded in the community of practice where they learned distinctive methods of law work, and much more. The community was a repository of resources, including applied knowledge of legal practice, purpose, and legitimation, and was a gateway to external resources, especially from international sources–all of which lawyers converted into successful law work. Over time, the community of practice shaped each lawyer's identity—the sense of who they were and how they should practice. Fundamental to this sense of purpose were ideals embraced by the October Generation about the importance of the people's voice and government accountability–beliefs that were intrinsic to later-acquired discourses of human rights and rule of law, and lent these meaning. Their goals were tied to a strong commitment to working with social movements as teachers and resource providers, and as organizers with legal skills.

The organizations that provided each of the lawyers with a point of entry to practice for social causes were sources of the goals and strategies of the community of practice. The women who founded FOW remained movement organizers, playing leading roles in the popular movement for constitutional reform. The UCL, where Chalit became a practitioner, had been founded by October Generation idealists who believed that a social revolution was possible through a broader recognition of human rights. They had learned the hard lesson that lasting political change would also require support from new sources of political power, which they found in popular movements. When UCL was revived in the late 1970s, its leaders continued to preach that to bring about change, law should be combined with movement organizing, and spread a discourse of rights among social movement and NGO activists. Chalit has vivid memories of the intense debates about UCL's mission:

> We fought, we argued . . . in the end, it was concluded that . . . we might have to define "legal aid" with a broader meaning. . . . UCL must work on each case [by] providing legal aid to people, [by] training workshops and so forth, necessarily leading to a movement that would improve the law so that it will be fair, amending the law in order to allow public participation. . . . The people must be able to identify their needs, able to understand the structure of the law, able to distinguish bad versus good law or just and unjust law, the makeup of a good law. . . . And this condition encompasses the legal aid service of UCL that would cover these three criteria.

Yaowaluk and Siriwan acknowledge Chalit's influence on their development as lawyers, and Sor.Rattanamanee adopted a similar style while working alongside these lawyers and others at the firm, or with lawyers who joined working groups organized by Somchai Homla-or, another UCL veteran. Teaching and organizing are as important to the success of their law work as the technical skills they have developed as litigators.

B. Litigation Strategies

Liberal intellectuals and leaders of the popular movement for constitutional reform pushed for the inclusion of rights that protected the means of popular dissent and participation, and for independent agencies to oversee the enforcement of these rights—most importantly, a Constitutional Court and a system of administrative courts. Resistance by conservatives limited the jurisdiction and powers of the Constitutional Court, and guaranteed the appointment of a majority of justices expected to share their views about preserving the traditional hierarchy of authority between monarchy, bureaucrats and the people. A National Human Rights Commission established by the Constitution, despite the resistance of conservatives, expressly recognized the importance of human rights, but was stripped of enforcement powers. Nevertheless, for the first time, lawyers had an arsenal of express rights and the means to enforce them. In many ways, the 1997 Constitution and its successors are lawyers' constitutions, intended by liberals to enforce rights and hold bureaucrats accountable, and by conservatives to shift political conflict to the courts and oversight by elite judges. In many ways, it will not be the courts alone, but also the lawyers who determine the impact of the new courts.

The three women lawyers are among the most successful litigators for social causes because of the resources they have been able to accumulate over the course of their careers—the benefits of mentoring by experienced activists; opportunities to practice for social causes within the network of colleagues and organizers that took shape during the 1980s; financial support, also made available through a network of contacts that extended to international foundations and NGOs; and their growing ability to adapt their organizing and litigation skills to particular causes. Yaowaluk and Sor.Rattanamanee had the benefit of internships at the Asian Center for Human Rights, which transformed their understanding of the function of law and methods of

practice. Siriwan, with the benefit of an internship abroad, learned about the power of rights and creative advocacy in other ways—through perception of the subordinate status of women, collaboration with working groups and FOW, and the application of Chalit's perspective as a labor organizer for justice beyond the law to her litigation involving victims of labor exploitation.

Each of the women is pushing for changes in law not only by winning in the courts, but by mobilizing other functions of the courts.[64] The courts, by providing the women's clients with greater visibility, create opportunities for social change in a variety of ways, even when a judge is unreceptive to the lawyer's arguments. Litigators like these women are using the courts to bring insular and unresponsive ministries and powerful officials into a public forum, with the power to compel them to answer to law—a spectacle carrying lessons of its own. The courts have the power to make officials and politicians give an account of their conduct and, if the litigation is managed effectively, to allow litigants to present evidence that would not otherwise be revealed to the public. Finally, litigation is a means to organize through motivating group solidarity, creating legitimacy for a cause and becoming a focus of collective action that molds both a group's capacity and purpose. All of these functions are utilized regularly by social cause lawyers in countries where public interest lawyers are well-established.[65] Although examples of litigating for rights in other countries were not unknown among Thai lawyers before 1997, the practice flourished in the social, political and legal context of the 1997 Constitution.

By employing the multi-functionality of courts, the three lawyers are among the most successful social cause litigators who use the courts to achieve broader change in law—aided, at times, by reform-oriented government officials who welcome change, and by practitioners waiting in the wings to follow their example.[66] Their efforts may harmonize with the advancement of a social movement, but their strategy is litigation to create new rules.

As we saw, Sor.Rattanamanee expanded the reach of Thailand's environmental protection laws and regulations, which have often been ignored by government ministries that have the responsibility for approving and overseeing development projects.[67] Many of her cases are carefully constructed to pressure judges to shift their

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[64] Somchai Homla-or encouraged each of the Lawyers Council's working groups to develop "precedent" cases to serve as examples for judges and other attorneys contemplating litigation.

[65] Michael McCann, "Law and Social Movements," in Austin Sarat (ed), *The Blackwell Companion to Law and Society* (Blackwell Publishing 2004) 506–22.

[66] Environmental litigation is the focus of at least three other NGOs modeled on EnLAW and CRC, the first organized by a former Meesit Law Firm attorney, the second by a protégé of Surachai Trong-ngam, and the third a former business practitioner who competes with EnLAW by bringing head-line seeking law suits. Members of the business-oriented bar employ litigation strategies pioneered by NGOs when they seem useful, such as litigation under a new statute permitting class action litigation. See <https://www.tilleke.com/resources/thailand-certifies-first-class-action>.

[67] Under pressure from an international consensus minimum standard for environmental protection, Thailand adopted the National Environmental Quality Act in 1992, which included a requirement for a public hearing and an impact assessment prior to approval of projects with potential environment impact.

perspective on strict statutory interpretation—from literal readings that minimize burdens on the government, to interpretations that serve the purpose of protecting the public and provide remedies for litigants with few means of support.[68]

Siriwan is especially proud of her signature litigation for victims of human trafficking, which persuaded a judge to expand protection for illegal immigrant workers by ordering compensation for unlawful dismissal by an employer—setting an example soon followed by other attorneys. Her law firm, SR Law, litigates when necessary to protect the rights of trafficking victims, but she and her staff of lawyers use the knowledge gained through litigation to effect broad-reaching change through public education, and by collaborating with government ministries to improvement regulations and harmonize them with international best practices.

Yaowaluk and TLHR are viewed as opponents of the government rather than allies, but they are also engaged in a law reform project. By defending clients who are unpopular with the government, they are attempting to establish rules limiting suppression of dissent that are often deemed by the international community to be within the civil and political rights of Thai citizens. Their cases rarely have support from the Lawyers Council, and they do not motivate other lawyers to do similar work because of its risks and the unpopularity of their mission. They receive international attention and funding. Working together with iLaw, a documentation project created by the NGO community, TLHR created a repository of information and analysis of prosecutions under Thailand's lèse-majesté and computer crimes laws, which are often used to suppress criticism of the government deemed insulting to the monarchy. Yaowaluk, from her perspective, might conclude that even when courts fail to protect rights, lawyers may succeed in laying a foundation for stronger protections for political expression.

C. Diminishing Professional Hierarchy

Siriwan's success as a law reformer has had another quite unexpected effect on who speaks "with the force of law."[69] In Thailand, judges of the royal courts, followed by public prosecutors as bureaucrats who serve the king, traditionally have a far higher status and greater influence on the outcome of legal proceedings than the lawyers who represent defendants or civil litigants. Judges are rarely deferential to lawyers in court. The expertise of a new generation of social cause lawyers, represented by the three women, is shifting the force of law to lawyers—a change still in its early stages. Siriwan discovered that her expertise is valued not only by bureaucrats, but also by judges, and

[68] Similarly, she has won compensation for the particular costs of litigating on behalf of villagers with limited incomes, including the costs of travel, room and board to participate in lengthy proceedings in a distant Administrative Court.

[69] Different legal systems empower different institutional role players with the control over the force of law—legal advocates in common law systems, senior judges and scholars in civil law systems. See Pierre Bourdieu, "The Force of Law: Towards a Sociology of the Juridical Field" (1987) 38 Hastings Law Journal 814.

she noted how remarkable it seems when she is the featured lecturer in a room full of judges and prosecutors:

> It has never happened that the lawyers lecture the judges or exchange idea or provide training. . . . Normally, when there is a training for judges, it will be a judge who is the lecturer. There is no way that the prosecutors would have come to join this training. . . . But, at present, I think that this has changed. When we trained prosecutors, they would say "you are lawyers, how can you train prosecutors?"
>
> . . . [O]ur method is that we present true stories from our experience and . . . combine these stories with legal matters. For the judges and prosecutors, we take for granted that many of them specialized in civil cases, criminal cases, but we specialized in labor matters and claims [by workers] for compensation. . . . So, when the judges or prosecutors have to work with these issues, they have to know about them, too. And we have a manual that we already wrote. In addition, we also have written an academic work [with legal scholars], so they can see that what we lecture them is real and it is academic work, too.

In principle, both constitutional law and international law are intended to influence the distribution of power among state institutions by defining their authority. While social cause litigators agree that the Thai judiciary has been slow to recognize the implications of such fundamental changes in the rule of law, this slow progress tracks the growing legitimacy of both sources of law under pressure from international agencies, foreign governments and Thailand's internal development. Furthermore, the judiciary's importance in resolving social conflict has placed judges increasingly in the public spotlight, subjecting them to unprecedented scrutiny and criticism. Because of their role as advocates for Thailand's popular movements, the women often speak with the force of each of these sources of authority.

Sor.Rattanamanee acknowledges her continuing battle with judges over constitutional supremacy.[70] She makes sure to put forward her views about the applicability of statutory and constitutional rights, which the judiciary might otherwise ignore in her arguments to courts. Representing a group protesting the Thai-Malaysia Pipeline in 2004, she and her litigation team convinced the Supreme Administrative Court to find that police exceeded their authority by arresting participants in a peaceful demonstration—a right particularly cherished by constitutional reformers, and protected by an express guarantee in the 1997 Constitution.[71] She often negotiates with trial court judges over the interpretation of law, emphasizing the importance of learning from international practices described in

[70] Former Asian Foundation director James Klein has made a similar observation. Klein, "The Battle" (n 42).

[71] The case was based on an administrative regulation defining police authority, but it resonates more widely within the new contested culture of constitutionalism. It should be noted that the case was filed in 2005, but it was not decided on appeal until nearly a decade later in 2013, when the women say that some of the judges were more willing to recognize such rights.

her carefully developed pleadings. Sor.Ratanamanee has developed rapport with some judges, allowing her greater latitude to make these arguments.

Yaowaluk also observed that a few judges are beginning to recognize the supremacy of the Constitution. In retrospect, Yaowaluk thinks that judges are becoming increasingly receptive to advocacy for change since the adoption of the 1997 Constitution, more noticeably since 2006 when the King intervened to remind the justices of Thailand's three major court systems of their responsibility to respond to assaults on Constitutional democracy.[72]

Although the King had delivered similar speeches for decades before the turmoil over Thaksin to remind judges and prosecutors to seek justice, the 2006 speech has been viewed by some scholars as an invitation to the judiciary to exercise greater responsibility towards serving the underlying purpose as well as the letter of the law. It is possible that the speech had a symbolic force, recognizing the power of the judiciary to resolve social conflict and opening the way for other sources of influence. Yaowaluk observes that the influence of change may be especially pronounced among younger judges, who have a more internationalized understanding of rights and rule of law:

> My work pushing alternative interpretations of the law continues. I would like officials in the legal system, such as judges, to recognize and understand human rights principles written into the Constitution and international law, such as the ICCPR [International Convention on Civil and Political Rights]. I saw a positive impact from the work done by many lawyers working in the southernmost areas. For example, my partners and I conducted a seminar for judges to train them to understand human rights principles and how to apply those principles to real cases. In the past, it would be difficult because the court tends to be more concerned with state security than human rights. . . . Actually, younger judges seem to be more opened-minded than senior judges.

Some of the women's innovations in practice have been made possible by the increasing influence of an international discourse of rights, and funders who support social causes aligned with international movements for rights. Yaowaluk's and Sor's exposure to international law during internships at the Asian Human Rights Commission added a new dimension to their repertoire of strategies, and gave them an edge as advocates. They learned about international treaty law, enforcement by treaty bodies, and international NGOs ready to intervene on behalf of their causes. The AHRC also taught about protections for rights, constitutionalism, and rule of law in legal systems considered to be more developed. After her internship, Yaowaluk's career changed course. She worked with international agencies for several years to document and remedy human rights violations committed by the Thai military police during suppression of conflict in Thailand's southern provinces, and she conducted

[72] Duncan McCargo, "Competing Notions of Judicialization in Thailand" (2014) 36 Contemporary Southeast Asia, 417–41. In context, the King's speech was a broad hint, if not an explicit directive, to the judiciary to use its power under the Constitution to deal with Thaksin's abuses of power.

internationally sponsored seminars for security forces on international human rights and rule of law principles and practices.

Sor, following her AHRC internship, became a more aggressive litigator, pressing judges to interpret Thai law to protect basic rights accepted by judiciaries in other countries, and urging them to follow international human rights standards. Perhaps because of her own lack of knowledge before her internship abroad, she believes that Thai judges know little of constitutional or human rights enforcement elsewhere, and she views her role in part as that of educator as well as advocate.[73] She not only modified her advocacy in court, but also partners with international agencies to pressure government officials when courts refuse to intervene. For example, to stop a cross-border electrical power project with Laos, she by-passed a reluctant appellate court by contacting an international agency that used the country's international treaty obligations to pressure the Thai cabinet to reverse its approval. In another a recent case, she persuaded a Thai court to recognize the liability of a Thai corporation for projects extending across borders.[74]

D. The Limits of Women's Investment Law

Although all three women characterize themselves as human rights defenders, they are positioned differently in Thailand's changing legal culture, pursuing different interpretations of the rule of law. Implicit in their advocacy are different conceptions of Thailand's political structure and the future of democratic reform. These differences arise in large part because of the specializations made possible by the unique resources each of them assembled to support her advocacy. Among the most important of these resources are the diverse social movements and causes they represent, a sign of increasing popular engagement with law. Representation of different social causes in an increasingly engaged civil society has increased the diversity among the lawyers who work with them, and has perhaps—as we might conclude from the narrative of these women – weakened their shared identity as social cause advocates.

Siriwan's human rights projects concern changes that government officials welcome, because they improve regulatory authority, and in some cases end corruption.

> I think our work is different from others because we are working on human trafficking and human rights which is in accordance with the government policies. [Further, in the South] . . . we asked a company to return the land to the government and distribute

[73] The lack of knowledge among the older judges of the Courts of Justice about international human rights law and the meaning of human rights in general is confirmed by a high-ranking judge. Interview with Justice Court of Appeals, Judge A (2009). Younger judges have received a different education and seem to know far more. Interviews with Justice Court judges B and D (2020).

[74] Indeed, Sor.Rattanamanee is one of the few attorneys to attempt cross-border litigation under principles of Thai law, which, she argues in court, must meet standards for cross-border liability recognized in other countries. She now makes regular use of decisions of courts in other countries as persuasive authority.

> it fairly to people [i.e., by reversing decisions made by corrupt officials]. So, our legal process is in line with the government policies on human rights and human trafficking. Now . . . the government allows migrant labor to register more easily and protects people from human trafficking better. Therefore, we do not face any political problems.

Her cases and projects extend across a changing social landscape, which the government itself is attempting to regulate, in the process subjecting its officers to laws that the administrative and justice courts seem ready to enforce—thus doing little to restructure the authority of government itself.

Sor.Rattanamanee's advocacy for communities threatened by development has closed down projects, forced payment of damages, and changed the way these projects operate. While her cases sometimes have political dimensions because they potentially alter the balance of power between communities, investors and government, she is careful to avoid association with factional politics or the ongoing protests against the military. Her reasons for this are partly pragmatic; environmental cases are easier to litigate than cases with overt political implications. But her decision to remain focused on environmental advocacy is also related to the growing power of the environmental movement in Thai society while government officials often favor development and profit.

> Like, the people have power . . . [for] the environment. It's very easy to makes changes to protect the people when we talk about an environmental case. It is easier to change the law to create more protection for the environment and, like, community rights.

Her reputation as an expert in environmental law and her legitimacy in court are not only derived from the environmental movement in Thailand, but are also supported by pressure from international agencies. As a result, some officials view her as an expert who can help them to draft legislation preventing human rights abuses by corporations that threaten environmental harm, and to present the new policy to the United Nations.

Sor.Rattanamanee acknowledges that the challenges that she confronts are fundamentally different from Yaowaluk's:

> [I]f you talk to me, I will say that oh now they . . . the justice courts . . . are more developed, have changed from before. But if you talk with Yaowaluk, you may see that, oh no. . . . They are very conservative – still more extreme. It's totally different because of the issue.

Yaowaluk's advocacy is politically controversial. Thailand Lawyers for Human Rights frequently accepts cases that arise from political movements deeply intertwined with struggles over the country's political future. Yaowaluk and her staff of lawyers defend the most controversial leaders of protests against Thailand's rulers—as well as defending ordinary Thai accused of political crimes under broad legislation controlling use of the internet, and under an equally broad law forbidding speech, which may be interpreted as criticism of the Monarchy.

Yaowaluk's journey to this outermost borderland of practice for social causes began with the 2006 military coup that ended Prime Minister Thaksin Shinawatra's corrupt and autocratic populist government. At the same time, the coup demonstrated the vitality of support for Thailand's ultimate authority, the monarchy and the military. The coup revealed a deep schism among NGOs, social movements, and October Generation leaders who supported the 1997 Constitution, dividing them according to unspoken political loyalties within networks of influence that gave them power, and by different conceptions of state authority.[75] The coup likewise had unexpected consequences for the women's community of practice, splitting lawyers for social causes between those who accepted, or at least did not object to, the military coup and those who, like Yaowaluk, rejected the legitimacy of the coup and the governments the military has put in place since 2006. She and a group of younger lawyers accused the Lawyers Council of ignoring the rule of law, due to its support of the coup.

Yaowaluk's constitutionalism was inspired by the liberal international ideals and practices she studied at the Asian Human Rights Commission—views at odds with the legacy of the monarchy and the October Generation's ambivalence about extreme populist democracy. On one hand, TLHR defends individuals accused of political crimes, mostly anti-coup Red Shirt sympathizers, drawing threats from the government and occasional arrests. On the other hand, as spokesperson for TLHR, Yaowaluk maintains her neutrality by emphasizing the NGO's mission to uphold the law and defend human rights. She attempts to distance TLHR from politics, even though her organization's work appears to others to have a political bias. For now, TLHR is also protected by international funding and recognition of its professionalism.

Still, the three women agree on an important core of beliefs about law and democratic change. They believe in the necessity of a stronger and more comprehensive rule of law to protect people's rights. Yaowaluk, perhaps because she embraces so completely the international discourse of constitutionalism and rule of law, is acutely aware of the dependence of legal development on changing the structure of power:

> I view this problem the same way that NGOs do. That is, we need to build strong communities. They will have to have bargaining power.

As a lawyer, she says her role is different from that of a leader of a social movement. Like Siriwan and Sor.Rattanamanee, her role is defined by her profession:

> I think toward the future, and I would like to train the next generation of law practitioners to become human rights law practitioners. No matter what they will become, lawyers, public prosecutors, or judges, as long as they understand the human rights issue.

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[75] Kengkij Kitirianglarp and Kevin Hewison, "Social Movements and Political Opposition in Contemporary Thailand" (2009) 22 The Pacific Review 451–77.

Despite the women's agreement on the importance of the profession's political autonomy, differences among their efforts to bring about change through law may mark the decline of the community of practice as a unified voice for constitutionalism and rule of law. Thailand's increasing acceptance of law as a medium of conflict and change is replicating the complexity of its politics.

VI. CONCLUSION

We have argued that understanding the remarkable rise and success of women lawyers for social causes requires recognizing the influence of the "capital" that women have been able to "invest" in using the law. Women's influence traditionally depended on networks with other women, including a few women married to elite men, which extended across formal boundaries of government and social hierarchy. Economic development has been an important driver of social and political change, and has added new forms of capital, which women were able to invest specialized careers.

Relaxation of military oversight after 1980 allowed the legacy of earlier generations of social cause lawyers to develop into a self-sustaining community of lawyers, which recruited and trained new generations of lawyers and channeled other forms of support to their network. New social movements and continuing popular involvement in the contention over Thailand's political future created pressure on policy makers and politicians, which opened space for social cause lawyers to speak with the authority of law in order to broker relationships between the new social forces and the state. Strategies for supporting social movements were developed within the community of practice and learned by its new members. After the constitutional reform in 1997, litigation became an effective and permanent addition to the strategies employed by the lawyers on behalf of particular social movements. Growing support for constitutionalism as well as symbolic and material resources from foreign governments and NGOs in the contemporary era of globalization added to the women's capital.

An increasing engagement of civil society with law and a growing acceptance of constitutionalism provided lawyers for social causes with new ways to invest in a career and the rule of law. Constructing their careers as advocates has had other consequences as well, including increasing diversity among their social causes and differences between their commitments to the rule of law.

Our final thought is that the success of each of these women lawyers as a broker of state power for a different social cause has been made possible by her specialized capital, as conceptualized in our research—including particular technical knowledge, specialized strategic skills, a supporting network, and the social cause each lawyer represents. This accumulation of resources is the foundation for each lawyer's legitimacy and influence. Further, we suspect that the capital each of them has used to construct her career will not be readily convertible to other positions of influence.

Our explanation for the women's success leads us to ask whether they would have the same mobility as their male counterparts if they chose to reinvest the capital that made them successful lawyers in other pursuits that serve the same goals in politics or government? By becoming legal advocates for particular social movements, these women have succeeded in creating niche practices—not unlike other successful lawyers. Notwithstanding their success in specialized domains, women still face gender barriers, which the resources supporting their law work would be of little use in overcoming.[76] Unlike men, women who invest in careers as lawyers for social causes are unlikely to be able to convert their success into upward mobility to other positions of greater influence.

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[76] While male human rights lawyers from the same community of practice have occasionally risen to positions of influence as government officials, few women have done so. As noted at the beginning of this article, women have risen within the judiciary, some who express commitment to social causes, but they have not been practitioners or lawyers for social causes.

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Rights to Own and Operate a Hydro-Floating Solar Project in Thailand

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Abstract

This paper finds that the current electricity regulatory regime, established by the Energy Industry Act B.E. 2550 (2007), together with the current electricity industry structure—the enhanced single buyer model—serves as a favorable legal basis for a state electricity enterprise, especially the Electricity Generating Authority of Thailand (EGAT), to own and operate a hydro-floating solar project in Thailand. However, it argues that, despite their ability to obtain the relevant licenses under the Energy Industry Act B.E. 2550 (2007) as well as enter into power purchase agreements with state electricity enterprises or private customers, the rights of private hydro-floating solar project operators to own and operate a hydro-floating solar project on the surface of public water resources are undermined by uncertainty pertaining to the possessory right over the water surface of public water resources, as well as unfair or discriminatory practices concerning electricity network access.

Keywords: Hydro-floating solar project — Public water resources — Electricity license

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I. INTRODUCTION

Uninterrupted energy supply at a reasonable and affordable price—or energy security[1]—is a crucial factor behind the growth of a country and the well-being of its people. In Thailand, traditional energy projects—for example natural gas production and a coal mine, along with its coal-fired power plant—have played a vital role in ensuring energy security. Acknowledging energy as a key factor behind greenhouse gas emissions, the Thai government has stimulated investment in renewable energy industries[2] as a means toward achieving "energy sustainability," a concept which requires the reconciliation of disparate interests—the provision of adequate, reliable, and affordable energy, and conformity to social and environmental requirements.[3] Converting sunlight, a renewable resource, into electricity using solar photovoltaic systems (PV) has been accepted as a form of sustainable development, as the operation of PV systems can contribute to the security of the electricity supply, while causing minimal pollution during their lifetime.[4]

Rather than occupying land, PV systems can be installed on the surface of water. The first commercial floating PV system, with a generation capacity of 175 kWp, was installed in California in 2008.[5] Medium-to-large floating PV systems with a generation capacity of larger than 1MWp began to emerge in 2013.[6] Under the Power Development Plan 2018, hydro-floating solar technology is expected to contribute to security of electricity supply.[7] The Thai government approved a proposal submitted by the Ministry of Energy requesting the Electricity Generating Authority of Thailand (EGAT) to implement a large-scale 45-MW hydro-floating solar project.[8] The project will be located on the water surface of Sirindhorn Dam, and will operate in conjunction with the existing 36-MW hydroelectric power plant owned by EGAT.[9]

From a technical perspective, a hydro-floating solar project involves the installation of photovoltaic solar panels above open-air waterways and water bodies—

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[1] Ang Beng Wah, Lawrence Wai-Choong Wong and Ng Tsan Sheng, "Energy Security: Definitions, Dimensions and Indexes" (2015) 42 Renewable and Sustainable Energy Reviews 1077, 1077–78.

[2] Office of Natural Resources and Environmental Policy and Planning, Thailand's Intended Nationally Determined Contribution (INDC) *UNFCCC* (October 2015) <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Thailand%20First/Thailand_INDC.pdf>.

[3] Evangelos Grigoroudis, Vassilis S. Kouikoglou, Yannis A. Phillis, and Fotis D. Kanellos, "Energy Sustainability: A Definition and Assessment Model" (2019) Operational Research 1, 2.

[4] Serafeim Michas and others, "Identifying Research Priorities for the Further Development and Deployment of Solar Photovoltaics" (2019) 38(3) International Journal of Sustainable Development 276, 276.

[5] Rocio Gonzalez Sanchez and others, "Assessment of Floating Solar Photovoltaic Potential in Existing Hydropower Reservoirs in Africa" (2021) 169 Renewable Energy 687, 688.

[6] "Where Sun Meets Water: Floating Solar Market Report" *World Bank* (2018) 2 <https://olc.worldbank.org/system/files/131291-WP-REVISED-P161277-PUBLIC.pdf>.

[7] Energy Policy and Planning Office, "Power Development Plan 2018" *Ministry of Energy* (April 2019) 14 <http://www.eppo.go.th/images/POLICY/PDF/PDP2018.pdf>.

[8] "Summary of the Cabinet Resolution on the 29th of October 2019" *Royal Thai Government* (October 2019) <https://www.thaigov.go.th/news/contents/details/24140>.

[9] ibid.

typically artificial basins, dams, or lakes.[10] Similarly to a land-based photovoltaic project, floating photovoltaic solar panels are responsible for generating direct current (DC) electricity.[11] The generated DC electricity is gathered by combiner boxes and converted to alternating current (AC) by inverters.[12] This physical characteristic of a hydro floating solar project means that an electricity operator needs to obtain the right to possess or use a water surface for installation and operation of photovoltaic solar panels. Therefore, it is necessary to address and analyze the legal questions that arise as to the existence of the right of an electricity operator, whether state-owned or privately-owned, to possess or use a water surface for the commercial operation of floating PV systems under the Thai legal system.

This paper finds that the current electricity regulatory regime established by the Energy Industry Act 2007, together with the current electricity industry structure—the enhanced single buyer model—serves as a favorable legal basis for state electricity enterprises, especially EGAT, to own and operate a hydro-floating solar project in Thailand. However, it argues that private hydro-floating solar project operators' rights to own and operate a hydro-floating solar project on the surface of public water resources are undermined by the uncertainty of their right to use public water resources under the Water Resources Act B.E. 2561 (2018). In addition, a private hydro-floating solar project operator's right of access to electricity networks, as guaranteed by the Energy Industry Act 2007, can be undermined by the fact that electricity network owners may become competitors of private hydro-floating solar project operators in the electricity generation market.

The paper begins by discussing rights of electricity operators, whether state-owned or private enterprises, to own and operate a hydro-floating solar project in Thailand. The second part analyses how the existing laws, especially the Water Resources Act B.E. 2561 (2018) and the Energy Industry Act B.E. 2550 (2007), can positively contribute to the installation and commercial use of floating PV systems in Thailand. The third part presents the practical challenges of gaining the right to use public water resources under the Water Resources Act B.E. 2561 (2018), as well as the difficulties in exercising a right of third-party access to electricity networks under the Energy Industry Act B.E. 2550 (2007).

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[10] Eden Cohen and Ryan Hogan, "Made in the Shade: Promoting Solar over Water Projects" (2018) 54(1) Idaho Law Review 101, 118; Nallapaneni Manoj Kumar, Jayanna Kanchikere, and P. Mallikarjun, "Floatovolatics: Towards Improved Energy Efficiency, Land and Water Management" (2018) 9(7) International Journal of Civil Engineering and Technology 1089, 1090.

[11] World Bank (n 6) 1.

[12] ibid.

II. RIGHTS TO OWN AND OPERATE A HYDRO-FLOATING SOLAR PROJECT

Historically speaking, it was a commonly accepted view that electricity could be supplied most efficiently by vertically integrated monopolies.[13] In this monopolistic situation, electricity operators could either be state-owned or privately-owned.[14] Reflecting the state-owned model, the Thai electricity industry has been dominated by three state-owned electricity enterprises, namely the Electricity Generating Authority of Thailand (EGAT),[15] Metropolitan Electricity Authority (MEA),[16] and Provincial Electricity Authority (PEA).[17] Prior to 2007, EGAT, without obtaining any license from a regulator, was vested with public power to generate, acquire, transmit or distribute electric energy to the MEA, the PEA or other electricity authority.[18] Under the Declaration of the Revolution Council No. 58, private operators were prohibited from carrying out electricity operational activities, unless they obtained a license from or entered into a concessionary agreement with a competent Minister.[19]

In 1992, in order to promote private participation in the electricity generation market, the cabinet approved the plan by EGAT to purchase electricity from private producers, such as small power producers (SPP)[20] and independent power producers (IPP).[21] Renewable power producers, being categorized as very small power producers (VSPP), were allowed to sell their electricity to MEA and PEA in 2006 at a subsidized price.[22] In addition to this market reform, the Energy Regulatory Commission (ERC) was established as an independent power regulator in 2007.[23] It is vested with public power to regulate electricity and natural gas operation[24] activities through a licensing

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[13] Peter Choynowski, "Restructuring and Regulatory Reform in the Power Sector: Review of Experience and Issues" *Asian Development Bank* (May 2004) 2 <https://www.adb.org/sites/default/files/publication/28187/wp052.pdf>.

[14] Paul L. Joskow, "Lessons Learned From Electricity Market Liberalization" (2008) 29 The Energy Journal, Special Issue: The Future of Electricity: Papers in Honor of David Newbery 9, 10.

[15] Electricity Generating Authority of Thailand Act B.E. 2511 (1968) s 6.

[16] Metropolitan Electricity Authority Act B.E. 2501 (1958) s 6.

[17] Provincial Electricity Authority Act B.E. 2503 (1960) s 6.

[18] Electricity Generating Authority of Thailand Act B.E. 2511 (1968) s 6(1).

[19] Declaration of the Revolution Council No. 58 B.E. 2515 (1972) cls 3 and 4.

[20] "Power Purchasing from the Private Producer" *Energy Policy and Planning Office* (2011) <http://www.eppo.go.th/images/Power/pdf/buy.pdf>.

[21] ibid.

[22] "Resolution of the Energy Policy and Planning Committee in the Meeting No.3/2006" *Energy Policy and Planning Office* (September 2006) <http://www.eppo.go.th/index.php/th/eppo-intranet/item/1741-nepc-thaksin106#s5>.

[23] Energy Industry Act B.E. 2550 (2007) s 10.

[24] The ERC only regulates the following natural gas operation: the natural gas transmission through pipelines via a natural gas transmission system, natural gas storage and transformation of natural gas from liquid to gas, natural gas procurement and wholesale, or natural gas retail via a natural gas distribution system, exclusive of the natural gas industry operation in the transportation sector. Natural gas exploration and production are activities that need legal authorization from the Minister of Energy under the Petroleum Act B.E. 2514 (1971).

system, tariff regulation, setting of safety standards, and energy network regulation under the Energy Industry Act B.E. 2550 (2007).[25] Replacing the Declaration of the Revolution Council No. 58 in the part concerning electricity operation,[26] the Energy Industry Act B.E. 2550 (2007) requires that electricity operation—namely production, procurement, transmission or distribution of electricity, or the control of a power system[27], including any of those carried out by EGAT, MEA, and PEA—are subject to supervision of the ERC.

A. Operating Rights: Licensable Activities Under the Energy Industry Act 2007

Generating and supplying electricity from floating photovoltaic solar panels are licensable activities under the Energy Industry Act B.E. 2550 (2007). A person desiring to generate electricity, whether or not for remuneration, shall obtain a power generation license from the ERC; however, if the generation capacity is lower than 1,000 Kilovolt-Amps (kVA), the power producer is exempted from obtaining the license. At the same time, a person who does not hold a power generation license, and who desires to supply electricity to the consumer, can apply for an electricity supply license from the ERC. As with the exemption from obtaining a license for generation activity, electricity supply having a supply capacity lower than 1,000 Kilovolt-Amps (kVA) is exempted from the necessity to obtain an electricity supply license.[28] In the case that an operator is exempted from obtaining the license, the operator is required to notify the ERC Office of the details of its operation.[29]

In granting an electricity license, the ERC, in addition to compliance with the Energy Industry Act 2007, is required to comply with other applicable legislations including the Enhancement and Conservation of National Environment Quality Act B.E. 2535 (1992). Under the Enhancement and Conservation of National Environment Quality Act, if the proposed electricity activity is an activity which is subject to the environment impact assessment (EIA), for example a thermal power plant with a generation capacity exceeding 10 MW,[30] the ERC shall not grant an electricity license

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[25] Energy Industry Act B.E. 2550 (2007), Division 3.

[26] Clause 6 of the Declaration of the Revolution Council No. 58 B.E. 2515 (1972) provides that where a specific law on businesses specified in order No. 3 or order No. 5 exists, that law shall apply.

[27] Energy Industry Act B.E. 2550 (2007) s 5.

[28] Energy Regulatory Commission Notification re: Types and Term of a License B.E. 2551 (2008), cl 5(1); Royal Decree re: Types, Size, and Characteristic of Energy Businesses that are Exempted from Obtaining Energy License B.E. 2552 (2009) ss 3(1) and 3(3); Energy Regulatory Commission Notification re: Types and Term of a License B.E. 2551 (2008) cl 5(4).

[29] Energy Regulatory Commission Notification re: Notification Requirement for the Exempted Activities B.E. 2552 (2009) cls 3 and 4.

[30] Notification of Ministry of Natural Resources and Environment re: Prescribing Projects, Businesses, Operations that are Required to Conduct an Environmental Impact Assessment and Criteria, Procedures, and Conditions in Conducting an Environmental Impact Assessment 2019, Annex 4 No. 18.

unless they are notified of the approval of the environmental expert committee.[31] However, a hydro-floating solar project is not deemed a project, business, or operation which is subject to EIA requirements under the Enhancement and Conservation of National Environment Quality Act B.E. 2535 (1992). In relation to environmental impact mitigation, a person desiring to obtain an electricity generation license for a hydro-floating solar system is required through the "Notification of the ERC re: Preventive Measures and Environmental Monitoring for an Electricity Generation Licensee who generates electricity from Floating Photovoltaic Solar Panels 2019" to comply with the Code of Practice (COP) attached to that Notification.[32]

In addition to licensing requirements for electricity activities per se, the ERC, acting as a one-stop-service agency, is vested with the power to grant permission for establishing a new factory under the law on factories, the law on building control, the law on town and country planning, and the law on energy development and promotion.[33] Under the amended Factory Act B.E. 2535 (1992), a "factory" is defined as:

> buildings, premises, or vehicles using machines with total power from 50 horsepower or equivalent of 50 horsepower or more or which employ 50 workers or more with or without machinery to engage in factory operation in accordance with the type or kind of factory as prescribed in the Ministerial Regulations.[34]

Additionally, a detailed description of factories under the Factory Act B.E. 2535 (1992) can be found in the Ministerial Regulations promulgated under the aforementioned Factory Act. The Ministerial Regulations prescribe that solar power generation, except for solar rooftop systems with a generation capacity not exceeding 1,000 KV, shall be deemed a factory under Category 3.[35] A person desiring to operate a Category 3 factory shall obtain a factory license from the licensor.[36] Therefore, an operator of floating PV systems is required to obtain a factory license from the ERC prior to operation.

In relation to the Building Control Act B.E. 2522 (1979), any person who wishes to construct, modify, or move a building must be licensed by a local competent official, or inform a local competent official.[37] A "building" is defined as: "a town house, house, home, hall, shop, raft, warehouse, office and other construction which people may live in or utilize . . ."[38]

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[31] Enhancement and Conservation of National Environment Quality Act 1992, s 50 para 2.

[32] Notification of the ERC re: Preventive Measures and Environmental Monitoring for an Electricity Generation Licensee Who Generates Electricity from Floating Photovoltaic Solar Panels 2019, cl 4.

[33] Energy Industry Act B.E. 2550 (2007) s 48 para 1.

[34] Factory Act (No.2) B.E. 2562 (2019) s 3 (amending Section 4 of the Factory Act B.E. 2535 (1992)).

[35] Ministerial Regulations re: Types Kinds and Size of Factories B.E. 2563 (2020) No.88 of the Annex.

[36] Factory Act B.E. 2535 (1992) s 12 para 1.

[37] Building Control Act B.E. 2522 (1979) s 21.

[38] ibid s 4.

A hydro-floating solar system is not a town house, house, home, hall, shop, raft, warehouse, office or any other construction in which people may live; however, it is a construction which can be utilized by an electricity operator to generate electricity. Hence, a person desiring to install, modify, or remove floating PV systems is required by the Building Control Act B.E. 2522 (1979) to obtain a building construction, modification, or removal license from the licensor. Therefore, an operator of floating PV systems is required to obtain the aforementioned licenses from the ERC.

Under the Energy Development and Promotion Act B.E. 2535 (1992), no one shall be allowed to produce or expand the production of controlled energy, unless a controlled energy production license is granted by the Department of Energy Development and Promotion.[39] Under the Ministerial Regulations, a regulated energy activity includes the generation of electricity exceeding 200 kVA. If it appears that a hydro-floating solar system generates electricity over 200 kVA, the generation of energy becomes a regulated activity under the Energy Development and Promotion Act B.E. 2535 (1992). In this case, a person desiring to generate electricity of over 200 kVA from floating PV systems is required to obtain a controlled energy production license from the ERC.

B. Ensuring the Financial Viability of a Power Project: A Power Purchase Agreement

To generate income and ensure financial viability—which can be referred to as a situation when a power company can earn sufficient revenue, e.g. from selling electricity, to cover the cost of service[40]of a power project—a power producer needs to sell the generated electricity to a buyer. Electricity transmission and distribution can be done through electricity networks such as the transmission system[41] or distribution system,[42] which are natural monopolies.[43]

State operators like EGAT, MEA and PEA own and operate electricity networks. Their rights to supply electricity through electricity networks are recognized by the Electricity Generating Authority of Thailand Act B.E. 2511 (1968), the Metropolitan

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[39] Energy Development and Promotion Act B.E. 2535 (1992) s 25.

[40] Joern Huenteler and others, "Cost Recovery and Financial Viability of the Power Sector in Developing Countries" *World Bank* (January 2020) 5 <http://documents1.worldbank.org/curated/en/970281580414567801/pdf/Cost-Recovery-and-Financial-Viability-of-the-Power-Sector-in-Developing-Countries-Insights-from-15-Case-Studies.pdf>.

[41] Section 5 of the Energy Industry Act B.E. 2550 (2007) provides that "electricity transmission system" means a system that transmits electricity from a power generation system to a power distribution system, and shall mean to include the power system operator controlling that given power transmission system.

[42] Section 5 of the Energy Industry Act B.E. 2550 (2007) provides that a system that transmits electricity from a power transmission system or a power generation system to power consumers who are not licensees, and shall mean to include the power system operator controlling that given power distribution system.

[43] Kim Talus, *Introduction to EU Energy Law* (Oxford University Press 2016) 24.

Electricity Authority Act B.E. 2501 (1958), and the Provincial Electricity Authority Act B.E. 2503 (1960). Under the Electricity Generating Authority of Thailand Act B.E. 2511 (1968), EGAT is vested with the "statutory authority and power" to generate and supply electricity to MEA and PEA through its electricity networks. As a result, when EGAT generates electricity from floating photovoltaic solar panels, it will be able to gain income from the supply to MEA and PEA.

However, under a single buyer model, the right of a private power producer to sell and generate income for a project depends on the decisions of state agencies. The term "single buyer" can be referred to as a situation where the government authorizes private operators to construct a power plant to generate electricity and sell it to the national power company through a long-term power purchase agreement.[44] Reflecting the essence of the single buyer model, the power to decide over the right to sell electricity generated from renewable resources in Thailand is vested in the state. From the outset of a power purchasing procedure, the ERC has the authority and the duty to prescribe the regulations and criteria for electricity procurement and the issuance of request proposals for the purchase of power, as well as monitor the selection procedures in order to ensure fairness for all stakeholders.[45]

For example, under the Notification of the ERC re: Electricity Procurement from the Land-Based Solar System for State Agencies and Agricultural Cooperatives B.E. 2560 (2017), the ERC allows state agencies and agricultural cooperatives to submit their electricity vending proposal to the ERC.[46] Once the proposal is accepted by the ERC, the project owner shall submit their intention to be party to a 5-MW power purchase agreement with the MEA or the PEA.[47] The power purchase agreement shall last for 25 years.[48] Prior to the commercial operation date (COD), the project owner shall present all required licenses to the MEA or the PEA.[49] The price of electricity shall be calculated in accordance with the subsidy rate announced by the ERC.[50] As with the land-based solar system procurement announcement, the ERC can exercise its power under the Energy Industry Act B.E. 2550 (2007) to prescribe the regulations and criteria of electricity procurement for the electricity generated by hydro-floating system operators.

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[44] Laszlo Lovei, "The Single-Buyer Model: A Dangerous Path toward Competitive Electricity Markets" *World Bank* (2000) 1 <https://openknowledge.worldbank.org/handle/10986/11409>.

[45] Energy Industry Act B.E. 2550 (2007) s 11(4).

[46] Notification of Energy Regulatory Commission re: Electricity Procurement from the Land-Based Solar System for State Agencies and Agricultural Cooperatives B.E. 2560 (2017) cl 7.

[47] ibid cls 9 and 10.

[48] ibid cl 11.

[49] ibid cl 13.

[50] ibid cl 15.

C. A Case Study: EGAT's Hydro-Floating Solar Hybrid Project

The previous sub-sections reveal the capability of the Electricity Industry Act B.E. 2550 (2007) and other relevant laws to support the implementation of a hydro-floating solar project in Thailand. In practice, this capability has been tested by the hydro-floating solar hybrid project initiated by EGAT. In January 2020, EGAT and B.Grimm, a privately-owned power company, announced that they had signed an engineering, procurement, and construction (EPC) contract with Energy China Consortium to build a hydro-floating solar hybrid project at Sirindhorn Dam.[51] The solar panels selected for this 45 MW project are crystalline double glass modules, which are suitable for installation in a high humidity environment, e.g. on water surfaces.[52] The eco-friendly high-density polyethylene (HDPE) plastic floating platform, which is not dangerous to aquatic animals, will cover a surface area of over 720,000 square meters.[53]

The implementation of the above-mentioned EGAT project partially reveals the capability of the Thai legal system to permit the future implementation of hydro-floating solar projects in Thailand. With regard to the operating rights, as discussed in section 1 of this article, EGAT can apply for a power generation license from the ERC and conduct an EIA in accordance with the announced COP. As regards the right to sell electricity, unlike a private power producer, who needs to wait for the renewable purchasing round, EGAT is vested with the statutory power to supply electricity to MEA and PEA.

However, a question arises concerning EGAT's right to use or possess the water surface for the project. It is necessary first of all to identify legal status of the right to use or possess the water surface of public water resources as well as determine the state agency that is vested with the power to manage Sirindhorn Dam. Being a multi-purpose dam, Sirindhorn Dam was jointly constructed in 1968 by the National Energy Office—which was subsequently changed to Department of Alternative Energy Development and Efficiency—and the Royal Irrigation Department. The Dam can be used e.g. for power generation, irrigation, disaster reduction, fishery, transportation, and tourism purposes.

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[51] "EGAT kicks off the World's Largest Hydro-Floating Solar Hybrid Project" *EGAT* (January 2020) <https://www.egat.co.th/en/news-announcement/news-release/egat-kicks-off-the-world-s-largest-hydro-floating solar-hybrid-project>.

[52] ibid.

[53] ibid.

III. OPPORTUNITIES FOR A PRIVATE HYDRO-FLOATING OPERATOR

Emphasized by EGAT's hydro-floating solar hybrid project, Part II of this article reveals possibility of the development of hydro-floating systems in Thailand. EGAT is able to obtain a generation license and supply the generated electricity to MEA and PEA. However, it was also argued that the current electricity regulatory framework, as established under the Energy Industry Act B.E. 2550 (2007), poses challenges to a private operator. Firstly, there is a practical difficulty for a private operator in obtaining an electricity generation license due to the inability to demonstrate the right to use or possess public water resources. Secondly, under the single buyer model, even if an electricity generation license is obtained, a private operator is still unable to sell the electricity generated from a hydro-floating system, unless the ERC announces an electricity procurement round for hydro-floating projects, and a power purchase agreement with a state electricity enterprise is entered into.

A. Rights to Use And Possess the Water Surface of Public Water Resources: The Water Resources Act B.E. 2561 (2018)

In applying for an electricity generation license, an operator of a hydro-floating solar project must have the qualifications prescribed by the ERC. Among several qualifications, a licensee, whether a natural person or a juristic person, must demonstrate that they have ownership, a possessory right, or a right to use the area that will be used for the operation.[54]

According to the Electricity Generating Authority of Thailand Act B.E. 2511 (1968), EGAT is vested with the power to construct the impounding dam, diversion dam, storage dam, reservoir or other things which are accessories of the dam or reservoir thereof for the production of electric energy.[55] Sirindhorn Dam, where the 45-MW floating PV systems are expected to be installed and used for generating electricity from sunlight, has been under the control of EGAT for electricity generation since 1972. Despite the absence of a water resources law, EGAT has the power to manage and monitor the operation of Sirindhorn Dam for electricity generation, including the installation of floating PV systems. Hence, EGAT can demonstrate its possession over the water surface of the Dam, and can obtain a generation license from the ERC. However, a private operator desiring to install floating PV systems does not have the same privileges as EGAT regarding the water surface of the Dam. Its access to and right to use public water resources depend on the applicable water resources law.

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[54] Energy Regulatory Commission Regulation re: Energy License Application and License Granting B.E. 2551 (2008) cls 4(1)(g) and 4(2)(d).

[55] Electricity Generating Authority of Thailand Act B.E. 2511 (1968) s 9(4).

The Water Resources Act B.E. 2561 (2018) is a primary legislation governing the usage or utilization of public water resources in Thailand. Limiting a person's right to water use, the law postulates that public water resources are publicly owned. A person has the right to use or keep water to the extent necessary for the benefit of his activities or his land, without causing grievance or damage to other persons who may use such water.[56] "Public Water Resources" is defined as:

> water in a water source which is publicly used or reserved for common use by the public or, by nature, capable of common use by the public and shall include rivers, canals, waterways, swamps, underground water sources, lakes, internal waters, territorial seas, wetlands, other natural water sources, water sources built or developed by the State for common use by the public, international water sources located in the territory of Thailand and capable of use by the public, irrigation waterways under the law on irrigation and groundwater under the law on groundwater.[57]

Apart from the definition of public water resources, the Water Resources Act B.E. 2561 (2018) defines "water use" as:

> a pursuit of activities in relation to public water resources for the purpose of consumption, ecosystem conservation, customs, public disaster mitigation, agriculture, industry, commerce, tourism, communication, waterworks or energy generation or for any other purpose, whether it may result in a change in the quantity of water or not.[58]

From the above definitions, if a private hydro-floating solar system operator desires to install floating photovoltaic solar panels on the water surface of a natural water source or an irrigation waterway, it shall be deemed an activity to be carried out in a public water resource. Even if such activity may not result in a change in the quantity of water, it is still deemed water use.

The Water Resources Act B.E. 2561 (2018) explicitly makes a reference to the use of public water resources to generate electricity. The use of public water resources for electricity generation falls under Type 2 water use, as stipulated in the Water Resources Act B.E. 2561 (2018).[59] A person seeking to use public water resources for electricity generation, whether a state-owned enterprise like EGAT or a private power producer, is required by the Water Resources Act B.E. 2561 (2018) to obtain a water use license from the Director General of the Irrigation Department, Director General of the Department of Water Resources or the Director General of the Department of Groundwater Resources (depending on the location of the water resources) with the approval of the drainage basin committee responsible for the area in which the water

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[56] Water Resources Act B.E. 2561 (2018) s 7.

[57] ibid s 4.

[58] ibid.

[59] ibid s 41.

resources are located.[60] In granting a license, Thai authorities must take the balance of water in public water resources into consideration.[61]

Once a private hydro-floating system operator has obtained a Type 2 water use license, it can present this license to the ERC to demonstrate its right to use or possess a water surface (of public water resources) in the process of obtaining an electricity license. From this finding, it can be said that the Water Resources Act B.E. 2561 (2018) can contribute to the development of hydro-floating solar projects, especially when it comes to a right to use the water surface of public water resources.

B. The Right to Sell Electricity: A Private Power Purchase Agreement

As discussed in sub-section II.B., the right of a private operator to commercially sell its electricity depends on the decisions of state agencies, especially an electricity procurement round of the ERC. A legal question then arises as to whether a private operator can ensure the financial viability of its hydro-floating solar project through a private power purchase agreement that is directly entered into with a customer who is not a state electricity enterprise regardless of the procurement round to be announced by the ERC.

First of all, it must be noted that a hydro-floating system operator, as discussed in sub-section II.A., can apply for a supply license from the ERC or be exempted from obtaining a supply license if the supply capacity is lower than 1,000 Kilovolt-Amps (kVA). However, due to the technical nature of the electricity industry, electricity that is generated from hydro-floating photovoltaic solar panels must be delivered through the electricity network, for example a transmission system or a distribution system. This private operator may choose to construct its own electricity distribution network and obtain an electricity distribution system license from the ERC.[62] In the case that it does not wish to invest in the grid construction and, importantly, wishes to utilize the existing electricity networks that are owned by EGAT, MEA, and PEA, the Energy Industry Act 2007 recognizes this as third-party access (TPA).[63]

Under the electricity TPA regime, EGAT, MEA, and PEA, as licensees that own and operate electricity networks, shall allow other licensees or energy business operators to use or connect to their energy network systems, in accordance with the regulations prescribed and announced by an owner of the electricity network.[64] It must be noted that EGAT, MEA, and PEA are required to operate their electricity networks in a fair manner and shall refrain from unjust discrimination.[65] Unfair or

[60] ibid s 43.

[61] ibid s 46.

[62] Energy Regulatory Commission Notification re: Types and Term of a License B.E. 2551 (2008) cl 5(3).

[63] Energy Industry Act 2007, ch 3 pt 4.

[64] ibid s 81 para 1.

[65] ibid s 80.

discriminatory electricity network operation practice by EGAT, MEA, and PEA will be dealt with and is subject to the regulatory power of the ERC.[66]

The electricity TPA regime, as established by the Energy Industry Act B.E. 2550 (2007), reveals that a private hydro-floating system operator may enter into a transmission or distribution service agreement with EGAT, MEA, or PEA to transmit or distribute its electricity to the buyer under a private power purchase agreement. This private power purchase agreement will allow the producer to directly collect electricity charges from the customer, while using the electricity network owned by EGAT, MEA, or PEA. The producer will be responsible for paying service fees related to transmission or distribution—for example, transmission or distribution charges, connection charges, imbalance charges, and ancillary charges under a transmission or distribution service agreement.[67]

IV. POTENTIAL CHALLENGES

The opportunities for a private operator to own and operate a hydro-floating solar project addressed in Part III.A. can be counter-argued on the grounds of uncertainty potentially arising from the interpretation of the Water Resources Act B.E. 2561 (2018), especially in relation to the definition of water use. On the other hand, the TPA regime can be criticized on the grounds of difficulty in the practical implementation of the regime, as well as an unlevelled playing field for private and public operators.

A. Definition of "Water Use" Under the Water Resources Act B.E. 2561 (2018) and Possessory Right

Unlike EGAT, which is vested with public power to construct and utilize dams for electricity generation including installation of hydro-floating systems over Sirindhorn, a private electricity operator needs to obtain legal authorization from the applicable water regulators, and faces difficulties potentially arising from the interpretation of the Water Resources Act B.E. 2561 (2018). When granted a Type 2 water use license, a licensee only gains the right to use water, not the right to use or possess a water surface. Under the Civil and Commercial Code of Thailand, a person acquires possessory right by holding a property with the intention of holding it for himself.[68] However, a Type-2 water use licensee may only use water resources to support

[66] ibid s 82–84.

[67] Please see for example, "Sacramento Municipal Utility District's Rate Policy and Procedures Manual re: Distribution Wheeling Service" *Sacramento Municipal Utility District* <https://www.smud.org/-/media/Documents/Going-Green/PDFs/Distribution-Wheeling-Service-Policies-and-Procedures.ashx>; "The Distribution Connection and Use of System Agreement" *Distribution Connection and Use of System Agreement* (December 2020) <https://www.dcusa.co.uk/dcusa-document/>.

[68] Civil and Commercial Code, s 1367.

electricity generation without holding the water resources or the water surface with the intention of holding it for himself.

The use of public water resources for a cooling system or a power plant is clearly different from using the water surface for a hydro-floating solar system. This is because a cooling system or a hydroelectricity project actually uses the water in the production process (which may not result in a change in the quantity of water); however, a hydro-floating solar system operator only possesses the water surface without actual usage or consumption of public water resources. Hence, despite the application of the Water Resources Act B.E. 2561 (2018) and its reference to the use of public water resources for power generation, it has remained unclear if a hydro-floating solar system operator can rely on this law to obtain a property right to occupy the water surface of public water resources.

One way forward is to provide the details of Type 2 water use in the Ministerial Regulation, as the Water Resources Act B.E. 2561 (2018) provides that "the nature and descriptions of the water use of each type under (1), (2) and (3) shall be as prescribed in the Ministerial Regulation issued by the Prime Minister with the approval of the NWRC."[69] The Prime Minister and the NWRC can use this opportunity to clarify the definition and characteristics of water use for electricity generation, by including the use of a water surface for a hydro-floating solar project in the Ministerial Regulation.

One could claim that the term "water use," as defined by Section 4 of the Water Resources Act B.E. 2561 (2018) is broad in its definition, for the reason that it begins by describing water use as "a pursuit of activities in relation to public water resources." Literally speaking, it does not only limit water use to an activity that relies upon consumption of public water resources. Installation of a hydro-floating solar system over the water surface of a public water resource should be deemed "an activity in relation to public water resources (for the purpose of electricity generation)." Hence, the Prime Minister, with the approval of the NWRC, is vested with the administrative power to postulate a detail of water use that includes a possessory right over the water surface for a hydro-floating system.

However, it can be counter-argued that it is beyond the power of the Prime Minister, in exercising his power under the Water Resources Act B.E. 2561 (2018), to promulgate a ministerial regulation that authorizes the use of a water surface. This is because the ministerial regulation can only provide details on "the use of public water resources." Since a hydro-floating project only needs a possessory right over the water surface, it is therefore not within the power of the Prime Minister to include this possessory right in the licensing regime under the Water Resources Act B.E. 2561 (2018). Promulgation of a by-law that goes beyond the scope of authority conferred on the delegate, or which is in conflict with the Water Resources Act B.E. 2561 (2018), can be deemed an unlawful administrative act and is subject to a review by the administrative court.[70] It should be noted that EGAT can avoid the aforementioned

[69] Water Resources Act B.E. 2561 (2018) s 41 para 2.

[70] Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999) s 9(1).

potential legal uncertainty by relying on its statutory power to utilize the dam under its control for electricity generation, including installation of floating PV systems, without the need to obtain a water use license under the Water Resources Act B.E. 2561.

Even if the Ministerial Regulation promulgated by the Prime Minister included a possessory right over a water surface for a hydro-floating system, a challenge could arise from a financial perspective. In the case that a hydro-floating system operator relies on a loan from a lender which is granted on a project finance basis, the lender will carefully assess repayment ability according to the revenue flow of the project.[71] This assessment can be referred to as a "bankability assessment." Among several bankability factors, including power purchasing commitment and the price of electricity, the lender will assess the property rights of the project owner.[72] For a hydro-floating project that is planned to be installed over public water resources in Thailand, uncertainty arising from the interpretation of "water use" will undermine the bankability of the project.

B. The Electricity TPA Regime Without Unbundling

In more liberalized electricity markets, electricity operators that own and operate electricity networks shall be separated from those carrying out generation and supply activities. For example, the EU Directive 2019/944 recognizes that "without the effective separation of networks from activities of generation and supply (effective unbundling), there is an inherent risk of discrimination not only in the operation of the network but also in the incentives for vertically integrated undertakings to invest adequately in their networks."[73]

It further states that where the distribution system operator is part of a vertically integrated undertaking, it shall be independent at least as regards its legal form, organization and decision-making, from other activities not relating to distribution.[74]

Unlike the legal requirement of the EU Directive 2019/944, the electricity TPA regime under the Energy Industry Act B.E. 2550 (2007) only imposes a duty upon EGAT, MEA, and PEA to refrain from acting unfairly or discriminatorily when operating their electricity networks. Under this regulatory framework, a situation could arise where a private hydro-floating electricity producer would need to compete against a state electricity enterprise that is also a hydro-floating electricity producer and, simultaneously, the owner and operator of electricity networks. Consequently,

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[71] Jeffrey Delmon, *Public-Private Partnership Projects in Infrastructure: An Essential Guide for Policy Makers* (Cambridge University Press 2011) 73.

[72] ibid 76.

[73] European Parliament and the Council 2019/944 of 5 June 2019 on Common Rules for the Internal Market for Electricity and Amending Directive 2012/27/EU [2019] OJ L158/125, Recital (67).

[74] ibid art 35 para 1.

there is a chance that a hydro-floating operator that decides to enter into a private power purchase agreement could be unfairly treated by the electricity network operator, as the latter would be its competitor in the electricity generation market.

V. CONCLUSION

Part II of the article reveals the capability of the Energy Industry Act 2007 to serve as a regulatory basis for the operation of a hydro-floating solar project in Thailand. Under the Energy Industry Act B.E. 2550 (2007), if not carrying out electricity operation activities that are exempt from licensing requirements, a hydro-floating operator, whether a state electricity enterprise or a private operator, can obtain the right to generate electricity from floating PV systems and to supply the generated electricity by obtaining the applicable licenses from the ERC. In addition, the ERC, acting as a one-stop-service agency, is vested with the administrative power to issue other relevant licenses—for example, an electricity generation license, a factory license, or a license for regulated energy activities. To ensure the income and financial viability of a hydro-floating project, a private operator can enter into a power purchase agreement with state-owned electricity enterprises in accordance with the power purchasing rules promulgated by the ERC.

EGAT's hydro-floating solar hybrid project serves as a good example that preliminarily reveals the readiness of the current electricity regulatory regime to support and regulate the implementation of a hydro-floating solar project in Thailand, especially when an operator is a state-owned enterprise like EGAT. Regardless of the interpretation of the right to use public water resources under the Water Resources Act B.E. 2561 (2018), EGAT can rely on its statutory power under the Electricity Generating Authority of Thailand Act B.E. 2511 (1968) to use the water surface of a dam under its control (such as Sirindhorn Dam) for the installation of floating PV systems. Therefore, a state-owned operator like EGAT is capable of demonstrating a right to use the area that will be used for the installation and operation of floating PV systems when applying for an electricity generation license from the ERC.

However, this article argues that, despite the ability to obtain the relevant licenses, the current regulatory regime poses challenges to a private operator desiring to install a floating PV on the water surface of a public water resource. Unlike EGAT, a private hydro-floating system operator needs legal authorization from the applicable water regulators, and inevitably faces difficulties that could potentially arise from the interpretation of the Water Resources Act B.E. 2561 (2018), especially concerning the right to use or possess the surface of public water resources. Even if a Type 2 water use license has been obtained by a private operator, it may be argued that the obtained right does not include the right to use the water surface for installation of floating PV systems. In addition, this uncertainty may undermine the bankability of a private hydro-floating project to be developed by a private operator in Thailand.

In relation to the financial viability of the project, it can be said that revenue flow for a hydro floating solar project can rely on a power purchase agreement that the operator enters into with a state electricity enterprise like EGAT, MEA, or PEA, or alternatively, a private power purchase agreement that enables the private operator to directly collect the tariff from the consumer while transmitting or distributing the electricity through electricity networks owned by EGAT, MEA, or PEA. However, this paper argues that the TPA regime, without effective separation of the generation and supply activities and network activities, may make it difficult for a private operator to escape from unfair or discriminatory practice by the network operator. This is particularly likely to be the case when the network operator is also a hydro-floating electricity producer, thus being a competitor of the network user in the electricity generation market.

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Thailand's Law on Criminal Online Falsehoods: A Critical Discussion

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Abstract

This article critically discusses the Thai criminal law applicable to online falsehoods, namely Section 14 para. 1(1) and (2) of the Act on Computer-Related Offences. Linking developments in Thailand to global and Southeast Asian fake news discourses, the article's main part sheds light on several interpretational and constitutional complexities. Conflicting concepts of falsity, structural inconsistencies and an uncertain ambit of protected interests are found to persist, despite legislative amendments. It is argued that criminal punishment should depend on proof of actual rather than likely damage. In the light of recent constitutional jurisprudence, the level of punishment is found to constitute a disproportionate restriction of the right to freedom of expression. The article provides an in-depth analysis that contributes to the evolving scholarship on the challenges of regulatory responses to fake news. It concludes that education in media literacy and critical reflection are the approaches best suited to enhance society's resilience against manipulated information.

Keywords: Fake news — Computer crimes — Free speech

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I. INTRODUCTION: CRIMINAL ONLINE FALSEHOODS AND THE FAKE NEWS PARADIGM

In 2007, the Thai National Legislative Assembly enacted the Act on Computer-Related Offences 2007.[1] It was Thailand's first law criminalising the distribution of false information through computer systems. The relevant provisions, namely Section 14 para. 1(1) and (2) constitute Thailand's anti-fake news law. This article discusses its development, enforcement, interpretation and constitutionality. Despite Thailand's ostensible frontrunner position among countries criminalising fake news, it is argued that multiple legal uncertainties have remained. Meanwhile, however, online falsehoods have become a ubiquitous phenomenon, with governments around the world vowing to eradicate them. The newly created laws focus on the protection of public interests, as opposed to reputational concerns as under traditional defamation laws.

Since the 2016 Presidential Election campaign in the United States, the discourse on the threat from fake news has been spreading globally. The former U.S. President Donald Trump, who himself allegedly benefited from false news stories on social media before the election,[2] popularised the term, frequently labelling traditional mainstream media as "fake."[3] The global public as well as governments on all continents rapidly adopted the term.[4] Google Trends shows that the interest in "fake news" has indeed risen—quite specifically since September 2016.[5]

The fake news paradigm has also attracted significant academic attention. Initial reservations against adopting the allegedly imprecise term[6] have largely given way to pragmatic acceptance.[7] While academic publications had previously referred to

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[1] พระราชบัญญัติว่าด้วยการกระทำความผิดเกี่ยวกับคอมพิวเตอร์ พ.ศ. 2550, ราชกิจจานุเบกษา เล่ม 124 ตอนที่ 27 ก หน้า 4 (18 มิถุนายน พ.ศ. 2550) [Act on Computer Related Offenses 2007, Government Gazette vol 124 pt 27 kor p 4 (18 June 2007)] (Thai).

[2] Hunt Allcott and Matthew Gentzkow, "Social Media and Fake News in the 2016 Election" (2017) 31(2) Journal of Economic Perspectives 211, 212.

[3] John Brummette, Marcia DiStaso, Michail Vafeiadis, and Marcus Messner, "Read All About It: The Politicization of 'Fake News' on Twitter" (2018) 95(2) Journalism & Mass Communication Quarterly 497.

[4] Rosa Scardigno and Giuseppe Mininni, "The Rhetoric Side of Fake News: A New Weapon for Anti-Politics?" (2020) 76(2) World Futures 81, 82.

[5] Google Trends, "fake news" (regions with low search volume not included) <https://trends.google.com/trends/explore?date=all&q=fake%20news>; the data show that Southeast Asian countries figure prominently among those where the search term has been most prevalent: Behind leading Brazil, the Philippines and Singapore follow on the second and third places while the United States is ranked fifth. Among the top 50 countries, Malaysia is placed on 15, Thailand on 44, Indonesia on 47, and Vietnam on 48.

[6] Joshua Habgood-Coote, "Sthitop Talking about Fake News!" (2019) 62(9–10) Inquiry 1033.

[7] Jessica Pepp, Eliot Michaelson, and Rachel Sterken, "Why We Should Keep Talking About Fake News" (2019) Inquiry <https://doi.org/10.1080/0020174X.2019.1685231>; Jana Laura Egelhofer, Loes Aaldering, Jakob-Moritz Eberl, Sebastian Galyga, and Sophie Lecheler, "From Novelty to Normalization? How Journalists Use the Term "Fake News" in their Reporting" (2020) Journalism Studies <https://doi.org/10.1080/1461670X.2020.1745667>.

a variety of different phenomena as "fake news"—for instance, news satire and parody, the fabrication or manipulation of reports, advertising techniques, propaganda, and the discrediting of traditional news or of dissenters[8]—the majority now appear to understand the term broadly to mean intentional misinformation, particularly perpetrated via social media. As for the effects of online falsehoods, it is frequently asserted that they may lead to a loss of trust in institutions and modes of governance, contribute to an increase in social polarisation, spread hate, or incite to violence;[9] effects that may be accelerated by selective information exposure and so-called "filter bubbles" on social media.[10] Due to the alleged agenda-setting power of deliberately false information,[11] the truth is described as being increasingly subject to contest. As a result, terms such as "alternative facts" or "post-truth" have found their way into everyday language.[12]

At the same time, research shows that the fake news label has also become a discursive tool to discredit unwanted information, media outlets and politicians.[13] It has been argued that "fake news" is a Laclaudian floating signifier "lodged in-between different hegemonic projects seeking to provide an image of how society is and ought to be structured."[14] Thus, while online falsehoods have become a legitimate concern for societies and governments around the world, the fight against them has been frequently abused in order to justify unwarranted or excessive restrictions of constitutionally protected free speech. This Janus-faced character of the fake news

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[8] Edson C. Tandoc, Zheng Wei Lim, and Richard Ling, "Defining 'Fake News': A Typology of Scholarly Definitions" (2018) 6(2) Digital Journalism 137.

[9] Paul Mozur, "A Genocide Incited on Facebook, With Posts From Myanmar's Military" *New York Times* (15 October 2018) <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html>.

[10] Edda Humprecht, "Where 'Fake News' Flourishes: A Comparison Across Four Western Democracies" (2018) 22(13) Information, Communication & Society 1973; Dominic Spohr, "Fake News and Ideological Polarization: Filter Bubbles and Selective Exposure on Social Media" (2017) 34(3) Business Information Review 150; Herman Wasserman, "Fake News from Africa: Panics, Politics and Paradigms" (2020) 21(1) Journalism 3; Homero Gil de Zúñiga, Brian Weeks, and Alberto Ardèvol-Abreu, "Effects of the News-Finds-Me Perception in Communication: Social Media Use Implications for News Seeking and Learning about Politics" (2017) 22(3) Journal of Computer-Mediated Communication 105.

[11] See Chris J. Vargo, Lei Guo, and Michelle A. Amazeen, "The Agenda-Setting Power of Fake News: A Big Data Analysis of the Online Media Landscape from 2014 to 2016" (2018) 20(5) New Media & Society 2028.

[12] Silvio Waisbord, "Truth is What Happens to News" (2018) 19(13) Journalism Studies 1866.

[13] Sander van der Linden, Costas Panagopoulos, and Jon Roozenbeek, "You Are Fake News: Political Bias in Perceptions of Fake News" (2020) 42(3) Media, Culture & Society 460; Anne Schulz, Werner Wirth, and Philipp Müller, "We Are the People and You Are Fake News: A Social Identity Approach to Populist Citizens' False Consensus and Hostile Media Perceptions" (2020) 47(2) Communication Research 201; Christopher A. Smith, "Weaponized Iconoclasm in Internet Memes Featuring the Expression 'Fake News'" (2019) 13(3) Discourse & Communication 303.

[14] Johan Farkas and Jannick Schou, "Fake News as a Floating Signifier: Hegemony, Antagonism and the Politics of Falsehood" (2018) 25(3) Javnost – The Public 298.

discourse calls to mind the "war on terror" and its two-decade-long global utilisation to extend governmental powers under the banner of national security.[15]

The growing body of literature on regulatory responses to fake news discusses the promise and the challenges of state-led approaches, self-regulation, and models where fake news is simply "swamped" by truth.[16] While some publications focus more on the question of "how" rather than "if" the phenomenon should be regulated,[17] others have called for careful consideration as to whether governments and technology corporations should become the arbiters of truth.[18] The European Commission has recommended increasing the pressure on social media companies and improving media literacy through enhanced curricula at schools and universities.[19] In Southeast Asia, ASEAN member states favour a stronger role for governments in terms of monitoring and clarification, and the creation of laws, norms and guidelines.[20]

II. SOUTHEAST ASIA'S LEGAL WAR ON FAKE NEWS

In hindsight, Thailand's criminalisation of online falsehoods foreshadowed a global legislative trend in which Southeast Asian countries quickly took a leading role, making the region the world's foremost laboratory for anti-fake news laws.[21] This part outlines the major legislative steps across the region, before addressing the Thai developments in a more detailed manner.

In Malaysia, where the former Prime Minister Najib Razak called fake news the "new plague,"[22] an Anti-Fake News Act was adopted in April 2018, just a month before

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[15] Adam Hodges, *The 'War on Terror' Narrative – Discourse and Intertextuality in the Construction and Contestation of Sociopolitical Reality* (Oxford University Press 2011).

[16] Albert Alemanno, "How to Counter Fake News? A Taxonomy of Anti-fake News Approaches" (2018) 9(1) European Journal of Risk Regulation 1; Petros Iosifidis and Nicholas Nicoli, "The Battle to End Fake News: A Qualitative Content Analysis of Facebook Announcements on How it Combats Disinformation" (2020) 82(1) International Communication Gazette 60.

[17] Rebecca K. Helm and Hitoshi Nasu, "Regulatory Responses to 'Fake News' and Freedom of Expression: Normative and Empirical Evaluation" (2021) Human Rights Law Review <https://doi.org/10.1093/hrlr/ngaa060>, arguing for criminal sanction as an effective regulatory response; Young Min Baek, Hyunhee Kang, and Sonho Kim, "Fake News Should Be Regulated Because It Influences Both 'Others' and 'Me': How and Why the Influence of Presumed Influence Model Should Be Extended" (2019) 22(3) Mass Communication and Society 301.

[18] Irini Katsirea, "'Fake News': Reconsidering the Value of Untruthful Expression in the Face of Regulatory Uncertainty" (2018) 10(2) Journal of Media Law 159; Jack Andersen and Sille Obelitz Søe, "Communicative Actions We Live By: The Problem with Fact-Checking, Tagging or Flagging Fake News – the Case of Facebook" (2020) 35(2) European Journal of Communication 126.

[19] European Commission, "Tackling Online Disinformation: A European Approach" COM (2018) 236 final, 26 April 2018.

[20] ASEAN, 14th Conference of the ASEAN Ministers Responsible for Information (AMRI), Framework and Joint Declaration to Minimise the Harmful Effects of Fake News, 10 May 2018.

[21] Lasse Schuldt, "Truth vs. Free Speech: How Southeast Asia's War on Fake News Unfolds" (*Verfassungsblog*, 7 December 2019) <https://verfassungsblog.de/truth-vs-free-speech>.

[22] Sumisha Naidu, "Free Speech Thriving in Malaysia but Fake News a Plague: PM Najib" *Channel*

UMNO's historic electoral defeat. At the time, evidence of Najib Razak's alleged involvement in the 1MDB corruption scandal was mounting and was being shared on social media, which might have been a reason for the law's quick passage. Section 4 of the Act provides that "any person who, by any means, maliciously creates, offers, publishes, prints, distributes, circulates or disseminates any fake news or publication containing fake news" commits a crime. Fake news was defined as "any news, information, data and reports, which is or are wholly or partly false" (Section 2). Thus, the law criminalised the spreading of falsehoods, regardless of any probable or actual damage. After the May 2018 election, the Mahathir Mohamad administration pursued the goal of repealing the Act—a campaign promise that was eventually delivered in December 2019. Mahathir himself, however, had previously described the law as "good."[23] His successor in the office of Prime Minister, Muhyiddin Yassin, has said that he would make use of various laws to combat misinformation on the Internet.[24]

Another prominent case is Singapore, where the Protection from Online Falsehoods and Manipulation Act 2019 (POFMA) was passed by Parliament in May 2019. It entered into force in October of the same year. POFMA's Section 7 makes it a crime for anybody to make available a false statement of fact to end-users in Singapore that is likely to have negative effects on enumerated public interests. These include national security, public health, safety, tranquillity, finances, international relations, presidential or parliamentary elections or referenda, peaceful relations between different groups, and public confidence in the performance of state authorities. The type of statements the Act considers to be false is defined in Section 2(2)(b) which stipulates that "a statement is false if it is false or misleading, whether wholly or in part, and whether on its own or in the context in which it appears." The Singaporean government has made it clear that it considers it "not conventional warfare, but a battle within all our societies" to fight against hate speech and fake news that "spread like wildfire."[25]

In the Philippines, the COVID-19 pandemic triggered the enactment of the Bayanihan to Heal As One Act (Republic Act No. 11469). The Act gave the president emergency powers and criminalised the creation, perpetration and spreading of "false information regarding the COVID-19 crisis on social media and other platforms, such

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News Asia (19 April 2017) <https://www.channelnewsasia.com/news/asia/free-speech-thriving-in-malaysia-but-fake-news-a-plague-pm-najib-8741726>.

[23] FMT News, "Tackle Fake News Without Hindering the Truth, Says Dr M" *FMT News* (4 October 2019) <https://www.freemalaysiatoday.com/category/nation/2019/10/04/tackle-fake-news-without-hindering-the-truth-says-dr-m>.

[24] Emmanual Santa Maria Chin, "Muhyiddin: Enough Laws to Curb Fake News Even Without Repealed Act" *Malay Mail* (30 January 2020) <https://www.malaymail.com/news/malaysia/2020/01/30/muhyiddin-enough-laws-to-curb-fake-news-even-without-repealed-act/1832860>.

[25] Channel News Asia, "Terrorism and 'Fake News' Key Security Threats the World Faces: Ong Ye Kung" (*Gov.sg*, 30 January 2019) <https://www.gov.sg/news/content/channel-newsasia---terrorism-and-fake-news-key-security-threats-the-world-faces>; Prime Minister's Office Singapore, "PM Lee Hsien Loong at the 29th Inter-Pacific Bar Association Annual Meeting and Conference" (*Prime Minister's Office*, 25 April 2019) <https://www.pmo.gov.sg/Newsroom/PM-Lee-Hsien-Loong-at-the-29th-Inter-Pacific-Bar-Association-Annual-Meeting-and-Conferenc>.

information having no valid or beneficial effect on the population, and . . . clearly geared to promote chaos, panic, anarchy, fear, or confusion" (Section 6(f)). While further anti-falsehood legislation was still pending in the lower house and the Senate, this provision effectively became the Philippines' first anti-fake news law. At the same time, President Rodrigo Duterte had repeatedly labelled accurate news as fake,[26] and the government itself was found spreading falsehoods.[27]

In Indonesia, the pending draft revision of the Penal Code aims to introduce an anti-falsehood provision in Article 309(1). The draft provision stipulates that "any person who broadcasts fake news or hoaxes resulting in a riot or disturbance shall be punished."[28] The Indonesian government had already launched a new cybersecurity agency in 2018, which monitors the internet for fake news and holds regular briefings.[29] Due to a perceived COVID-19-related infodemic,[30] the first weeks of the pandemic saw dozens of people arrested for spreading false information online. Similar arrests took place in Vietnam, where in early 2020 the government stipulated administrative fines for people who provide and share fake, untruthful, distorted and slanderous information on social media. COVID-19 also triggered the Cambodian government to enact the Law on National Administration in the State of Emergency. It restricts the publication of information that could cause panic or chaos.

Academic literature with a focus on free speech on the Internet in Southeast Asia has so far largely focused on the effects of improved internet access on political participation,[31] and issues of cyber-repression and defamation.[32] Publications on the

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[26] Editorial Board, "A Philippine News Outlet is Exposing Duterte's Abuses. He Calls it Fake News" *Washington Post* (13 December 2018) <https://www.washingtonpost.com/opinions/a-philippine-news-outlet-is-exposing-dutertes-abuses-he-calls-it-fake-news/2018/12/12/c97a0d5a-f722-11e8-8d64-4e79db33382f_story.html>.

[27] Maria A. Ressa, "Propaganda War: Weaponizing the Internet" *Rappler* (3 October 2016) <https://www.rappler.com/nation/148007-propaganda-war-weaponizing-internet>.

[28] Alliance of Independent Journalists, "2018 Year-End Note" *Asian Forum for Human Rights and Development (Forum-Asia)* (8 January 2019) <https://www.forum-asia.org/?p=27974>.

[29] Kate Lamb, "Indonesian Government to Hold Weekly 'Fake News' Briefings" *The Guardian* (27 September 2018) <https://www.theguardian.com/world/2018/sep/27/indonesian-government-to-hold-weekly-fake-news-briefings>.

[30] Crispin Maslog, "Scientists Call for Media Sobriety Amid COVID-19 Fake News 'Infodemic'" *Asia Pacific Report* (11 March 2020) <https://asiapacificreport.nz/2020/03/11/scientists-call-for-media-sobriety-amid-covid-19-fake-news-infodemic/>.

[31] Debbie Goh, "Narrowing the Knowledge Gap: The Role of Alternative Online Media in an Authoritarian Press System" (2015) 92(4) Journalism & Mass Communication Quarterly 877; Mai Duong, "Blogging Three Ways in Vietnam's Political Blogosphere" (2017) 39(2) Contemporary Southeast Asia 373; Aim Sinpeng, "Participatory Inequality in Online and Offline Political Engagement in Thailand" (2017) 90(2) Pacific Affairs 253; Ross Tapsell, "The Smartphone as the 'Weapon of the Weak': Assessing the Role of Communication Technologies in Malaysia's Regime Change" (2018) 37(3) Journal of Current Southeast Asian Affairs 9.

[32] Ronald Deibert, John Palfrey, Rafal Rohozinski, and Jonathan Zittrain (eds), *Access Contested. Security, Identity, and Resistance in Asian Cyberspace* (MIT Press 2012); Liu Yangyue, "Controlling Cyberspace in Malaysia. Motivations and Constraints" (2014) 54(4) Asian Survey 801; Elvin Ong, "Online Repression and Self-Censorship: Evidence from Southeast Asia" (2019) 56(1) Government and

Southeast Asian fight against fake news and the corresponding legislation, however, are still scarce. Nonetheless, the techniques Singaporeans use to authenticate information they encounter on social media have been analysed.[33] An edited volume on fake news and elections in Southeast Asia is currently forthcoming.[34] And in Thailand, to which we will now return, a study has investigated social media literacy and the impact of fake news on public opinion in Bangkok.[35]

III. DEVELOPMENT AND ENFORCEMENT OF THAILAND'S CRIMINAL LAW ON ONLINE FALSEHOODS

In comparison to neighbouring Malaysia and Singapore, the enactment of Thailand's Act on Computer-Related Offences 2007 was an early legislative response to what would later become the fake news threat. It was part of a broader legislative project going back to 1998, aimed at developing Thai law with a view to keeping pace with advancements in information technology.[36] In 2017, the Act was changed and amended in various respects.[37] This part outlines the development and enforcement of the Thai criminal law on online falsehoods, and the accompanying government discourse.

The Thai Criminal Code has long criminalised false statements of fact that amount to defamation due to their negative effect on the reputation of another person (Sections 326 to 333). The criminal provisions are accompanied in private law by a specific defamation tort that provides a claim for damages (Section 423 of the Civil and Commercial Code). Thai mass media laws do not explicitly address the

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Opposition 141; Garry Rodan, "The Internet and Political Control in Singapore" (1998) 113(1) Political Science Quarterly 63; Aim Sinpeng, "State Repression in Cyberspace: The Case of Thailand" (2013) 5(3) Asian Politics & Policy 421.

[33] Edson C. Tandoc, Richard Ling, Oscar Westlund et al., "Audiences' Acts of Authentication in the Age of Fake News: A Conceptual Framework" (2017) 20(8) New Media and Society 2673.

[34] James Gomez and Robin Ramcharan (eds), *Fake News and Elections in Southeast Asia* (Palgrave Macmillan 2021, forthcoming).

[35] นันทิกา หนูส และวิโรจน์ สุทธิสีมา, "ลักษณะของข่าวปลอมในประเทศไทยและระดับความรู้เท่าทันข่าวปลอมบนเฟซบุ๊กของผู้รับสารในเขตกรุงเทพมหานคร" (2562) 37(1) วารสารนิเทศศาสตร์ 37 [Nuntika Noosom and Viroj Suttisima, "The Analysis of Fake News and The Level of Media Literacy of Users in Bangkok" (2019) 37(1) Journal of Communication Arts] 37 (Thai).

[36] Besides the Computer Crime Act, the project aimed to develop an Electronic Transactions Act, an Electronic Signature Act, an Act on the Development of Inclusive and Equal Information Infrastructures, a Personal Data Protection Act, and an Act on Electronic Money Transfer; see สาวตรี สุขศรี และคณะ, อาชญากรรมคอมพิวเตอร์?: งานวิจัยหัวข้อ "ผลกระทบจากพระราชบัญญัติว่าด้วยการกระทำความผิดเกี่ยวกับคอมพิวเตอร์ พ.ศ. 2550 และนโยบายของรัฐกับสิทธิเสรีภาพในการแสดงความคิดเห็น" (โครงการอินเทอร์เน็ตเพื่อกฎหมายประชาชน (ไอลอว์) 2555) [Sawatree Suksri, *Computer Crime? Research Title: Impact of the Computer-related Crime Act 2007 and State Policies on the Right to Freedom of Expression* (iLaw) 2012] (Thai) 168, with footnote 6.

[37] พระราชบัญญัติว่าด้วยการกระทำความผิดเกี่ยวกับคอมพิวเตอร์ (ฉบับที่ ๒) พ.ศ. 2560, ราชกิจจานุเบกษา เล่ม 134 ตอนที่ 10 ก หน้า 24 (24 มกราคม พ.ศ. 2560) [Act on Computer Related Offenses (No 2) 2017, Government Gazette vol 134 pt 10 kor p 24 (24 January 2017)] (Thai).

distribution of false information. They do, however, prohibit the broadcasting of information or the import of printed material which induces to overthrow the administration under the democratic form of government with the King as Head of State; or which is likely to negatively affect national security, public order or good morals; or which is obscene, or may cause a serious deterioration of the mind or health of the people.[38] Thai consumer protection law prohibits false or exaggerated advertisements.[39] In addition, the Criminal Code prescribes punishment for the malicious dissemination of false information that causes people to panic (Section 384). The latter provision's goal to protect public order conforms with some of the aims pursued by the relevant provisions of the Act on Computer-Related Offences.

Interestingly, initial drafts of the Act which were drawn up between 2002 and 2006 and which used the title "Computer Crime Act"[40] did not contain any content-related provisions. These were added in later versions which were approved by the Legislative Assembly further down in the legislative process, after the military coup of September 2006.[41] The vast majority of the Act's substantive criminal provisions are genuine computer-related crimes such as unauthorised access to computer systems, deletion of data, and similar acts (Sections 5 to 13). The scope of these sections is largely comparable to the requirements to signatories made by the "Budapest Convention"—the Council of Europe's Convention on Cybercrime of 2001.[42]

As for the content-related provisions, Section 14 para. 1(1) and (2), which deal with the dissemination of false information through computer systems, form part of a Section that also criminalises the entry into a computer system of computer data which constitutes an offence against the security of the Kingdom, or which constitutes terrorism, or which is obscene (Section 14 paras. 1(3), (4)). Another content-related Section deals with the dissemination of images that affect another person's reputation (Section 16). The latter part of the Act (Chapter 2, or Sections 18 to 31) stipulates the powers of executive officials and courts in relation to investigations and other interventions. The power to suppress or remove information from computer systems (Section 20) is particularly noteworthy.

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[38] พระราชบัญญัติการประกอบกิจการกระจายเสียงและกิจการโทรทัศน์ พ.ศ. 2551, ราชกิจจานุเบกษา เล่ม 125 ตอนที่ 42 ก หน้า 14 (4 มีนาคม พ.ศ. 2551) [Broadcasting and Television Businesses Act 2008, Government Gazette vol 125 pt 42 ก p 14 (4 March 2008)] (Thai) s 37; พระราชบัญญัติจดแจ้งการพิมพ์ พ.ศ. 2550, ราชกิจจานุเบกษา เล่ม 124 ตอนที่ 93 ก หน้า 1 (4 มีนาคม พ.ศ. 2551) [Printing Recording Act 2007, Government Gazette vol 124 pt 93 kor p 14 (4 March 2008)] (Thai) s 10; see also วนิดา แสงสารพันธ์, หลักกฎหมาย: สื่อสารมวลชน (พิมพ์ครั้งที่ 6, วิญญูชน 2557) [Wanida Saengsaraphan, *Principles of Law: Mass Media Laws* (Winyuchon, 6th edn 2014] (Thai) 108, 125.

[39] พระราชบัญญัติคุ้มครองผู้บริโภค พ.ศ. 2522, ราชกิจจานุเบกษา เล่ม 96 ตอนที่ 72/ฉบับพิเศษ หน้า 20 4 พฤษภาคม 2522 [Consumer Protection Act 1979, Government Gazette vol 96 pt 72 (special part) p 20 (4 May 1979)] (Thai) s 22 para 2(1).

[40] "พระราชบัญญัติอาชญากรรมคอมพิวเตอร์."

[41] Sawatree, *Computer Crime* (n 36) 169.

[42] Thailand is not a signatory.

The initial wording[43] of Section 14 was as follows:

> Section 14. Any person who perpetrates the following offenses shall be subject to imprisonment not exceeding five years or a fine not exceeding one hundred thousand baht, or both:
> (1) put into a computer system forged computer data, partially or entirely, or false computer data, in a manner that is likely to cause damage to another person or the public;
> (2) put into a computer system false computer data in a manner that is likely to damage national security, or cause panic in the public;
> (3) put into a computer system any computer data which is an offense about the security of the Kingdom or is an offense about terrorism, according to the Criminal Code;
> (4) put into a computer system any computer data which is obscene, and that computer data is accessible by the public;
> (5) disseminate or forward any computer data when being aware that it is computer data as described in (1), (2), (3) or (4).

During the first years of its existence, the Act was enforced with varying intensity. While the restriction of website access figured most prominently,[44] criminal investigations and prosecutions for the distribution of illicit content also formed part of the enforcement by police and judicial authorities. Between July 2007 and December 2011, at least 215 criminal proceedings were launched that focused on content-related crimes under the Act (Sections 14 to 16). About half of these cases dealt with defamation, others with royal defamation, fraud and obscenity, and six of them with national security.[45]

In the following years until the Act's amendment, charges under Section 14(1) mostly focused on defamation.[46] Among the allegedly defamed persons were private individuals, juristic persons, politicians, state officials and institutions of the state. During this period, defamation charges were frequently based on the Act on Computer-Related Offences—rather than on Sections 326 to 333 of the Criminal Code—if the relevant acts were committed online. In a notable Supreme Court decision, Matichon Public Company Limited was found criminally liable under Sections 15 and 14(1) for publishing false information on its news website "Matichon Online." The Court decided in the final instance that the story falsely named the plaintiff as the core leader of a rubber farmers' protest in Nakhon Sri Thammarat.[47]

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[43] English translation (slightly corrected by the authors) taken from Thai Netizen Network, "พ.ร.บ. คอมพิวเตอร์ 2560 ไทย-อังกฤษ Thailand's Computer-related Crime Act 2017 bilingual" *Thai Netizen Network* (25 January 2017) <https://thainetizen.org/docs/cybercrime-act-2017/>.

[44] Between July 2007 and December 2011, access to 81,213 internet addresses (URLs) was blocked under Section 20 of the Act, see Sawatree, *Computer Crime* (n 36) 71.

[45] Sawatree, *Computer Crime* (n 36) 75; 175, with footnote 14.

[46] Fifty-nine of 100 cases documented for this period by ศูนย์ข้อมูลกฎหมายและคดีเสรีภาพโดย ไอลอว์ [iLaw Freedom of Expression Documentation Center] (Thai) <https://freedom.ilaw.or.th/case?k=&p=&d_from=&d_to=&Offense=1%2B2> Section 14(1) and 14(2) preselected.

[47] Thai Supreme Court Decision 319/2560.

In several cases, charges under Section 14(1) were brought in combination with charges under Section 112 (royal defamation) or 116 (sedition) of the Criminal Code.[48] At the same time, the less frequent cases under Section 14(2) dealt with the online distribution of false information likely to impact public interests—namely having a negative effect on national security or causing panic to the public.[49]

In 2017, after ten years of enforcement, the Act on Computer-Related Offences was changed by the National Legislative Assembly, which had been in charge of legislation since the military coup of May 2014. Additional criminal provisions were inserted among the computer-related crimes (Sections 5 to 13) as well as the content-related crimes (Sections 14 to 16/2). The competences of officials (Sections 18 to 31) were expanded, in particular regarding powers to block access or remove information from computer systems (Section 20). Section 14 received a second paragraph, while numbers 1 and 2 of the first paragraph were also subject to important modifications:[50]

> Section 14. [Changes marked]
> Any person who perpetrates the following offenses shall be subject to imprisonment not exceeding five years or a fine not exceeding one hundred thousand baht, or both:
> (1) with ill or fraudulent intent, put into a computer system distorted or forged computer data, partially or entirely, or false computer data, in a manner that is likely to cause damage to ~~another person or~~ the public, in which the perpetration is not a defamation offense under the Criminal Code;
> (2) put into a computer system false computer data in a manner that is likely to damage the maintenance of national security, public safety, national economic security or public infrastructure serving national public interest, or cause panic in the public;
> (3) – (5) . . . [unchanged]
> If the offense under Paragraph One (1) has not been perpetrated against the public but against a particular individual, the perpetrator or a person who distributes or transfers the computer data shall be subject to imprisonment not exceeding three years and a fine not exceeding sixty thousand baht, or both, and it is a compoundable offense.

The National Legislative Assembly considered the changes in Section 14 necessary in order to render the provision better suited to respond to current threats of advanced technologies, and to enhance its clarity. As regards Section 14 para. 1(1), only actions committed with ill or fraudulent intent should be criminalised. In addition, the drafters explicitly excluded defamation from the Section's scope, as they considered that the Act's purpose was to protect public interests rather than personal reputation. Accordingly, Section 14 para. 2 was added to render Section 14 para. 1(1) a

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[48] iLaw, Documentation (n 46).

[49] Nine of 100 cases documented for this period by iLaw, Documentation (n 46); for instance "K Thong Bomb Bangkok" <https://freedom.ilaw.or.th/case/84>; "ปอท.VS เสริมสุข กษิติประดิษฐ์" ["TCSD VS Sermsuk Kasitipradit"] <https://freedom.ilaw.or.th/case/483>; "รินดา: โพสต์ข่าวลือประยุทธ์โอนเงินหมื่นล้าน" ["Rinda: Posted Rumor that Prayuth Transferred 10 Billion"] <https://freedom.ilaw.or.th/case/682>; "สมลักษณ์ คดีที่สาม: โพสต์วิจารณ์เหมืองทองคำ จ.พิจิตร" ["Somlak 3rd case: Posted Comment on a Gold Mine in Phichit Province"] <https://freedom.ilaw.or.th/case/750>.

[50] For all changes, see Thai Netizen Network, "Computer-related Crime Act" (n 43).

compoundable offence for cases where public interests would not be infringed.[51]

The amendment stopped defamation charges from being brought or pursued under the Act. The Supreme Court, for instance, dismissed charges brought by King Power Suvarnabhumi Company Limited against administrators of the website Manager Online, based on Section 14 para. 1(1) of the Act on Computer-Related Offences, while confirming a concurrent conviction based on Section 328 of the Criminal Code. The case dealt with defamatory statements made at a rally of the People's Alliance for Democracy that were reproduced on the website.[52] Another Supreme Court decision equally rejected defamation charges due to the subsequent change of Section 14 para. 1(1).[53] A further case against Manager Online website administrators ended with an acquittal by the Supreme Court, as the special intent required by the new Section 14 para. 1(1) could not be proven.[54] In yet another case, however, the Supreme Court dismissed charges based only on concurrences, though the facts of the case would also have allowed a rejection with reference to the change in law.[55]

Overall, the number of cases based on Section 14 para. 1(1) apparently dropped, rendering Section 14 para. 1(2) the more frequently used provision. False information that would likely affect national security or cause public panic were the most important legal grounds in a practical sense, despite the introduction of additional protected interests.[56]

At the same time, the global fake news discourse was reaching Thailand. Government and military officials began to frequently refer to the threat from online falsehoods, speaking of "cyber and hybrid warfare," hidden enemies, and political parties trying to educate young people with falsities.[57] Fake news was described as

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[51] สำนักกฎหมาย สำนักงานเลขาธิการวุฒิสภา ปฏิบัติหน้าที่สำนักงานเลขาธิการสภานิติบัญญัติแห่งชาติ, เอกสารประกอบการพิจารณาร่างพระราชบัญญัติว่าด้วยการกระทำความผิดเกี่ยวกับคอมพิวเตอร์ (ฉบับที่ . . .) พ.ศ. . . . (2559) [Office of Legal Affairs, Secretariat of the Senate, acting as the Secretariat of the National Legislative Assembly, Supplementary Documents for the Consideration of the Draft Act on Computer-Related Offenses (No ...) Year ... (2016)], as cited in สราวุธ ปิติยาศักดิ์, คำอธิบายพระราชบัญญัติว่าด้วยการกระทำความผิดเกี่ยวกับคอมพิวเตอร์ พ.ศ. ๒๕๕๐ และ (ฉบับที่ ๒) พ.ศ. ๒๕๖๐ พร้อมด้วยประกาศกระทรวงที่เกี่ยวข้อง (นิติธรรม 2561) [Sorawuth Pitiyasak, *Explanation of the Act on Computer-Related Offenses B.E. 2550 and (No 2) B.E. 2560 With Relevant Ministerial Announcements* (Nititham 2018)] (Thai) 166.

[52] Thai Supreme Court Decision 2778/2561.

[53] Thai Supreme Court Decision 6794/2561.

[54] MGR Online, "ศาลฎีกาพิพากษากลับ ยกฟ้อง 'MGR Online' เสนอข่าว 'ส่วยป้ายแอลอีดี'" ["Supreme Court Dismisses Case Alleging 'MGR Online' Published News on 'LED Sign Graft'"] (Thai) *MGR Online* (20 August 2020) <https://mgronline.com/crime/detail/9630000085486>.

[55] Thai Supreme Court Decision 2148/2562.

[56] iLaw, Documentation (n 46), for instance "พล.ท.พงศกร: แชร์ข่าวปลอมเรื่องกาแฟบิ๊กป้อม" ["Gen. Pongsakorn: Shared False News about Big Pom's Coffee"] <https://freedom.ilaw.or.th/case/861>; "ปิยบุตร: วิจารณ์คดียุบพรรคทษช" ["Piyabutr: Commented on TSN Party Dissolution"] <https://freedom.ilaw.or.th/case/864>; "กฤษกร: ทำกิจกรรมลอยอังคารผู้ว่าอุบลฯ" ["Kritkorn: Organized Floating of Ashes of Ubon Ratchathani Mayor"] <https://freedom.ilaw.or.th/case/884>; "'สายน้ำ': แชร์โพสต์พล.อ.ประยุทธ์หนีคดีกบฏจากเพจ KonthaiUK" ["Sainam': Sharing a Post From KonthaiUK Facebook Alleging That Prayuth Flees Coup Case"] <https://freedom.ilaw.or.th/case/894>.

[57] Bangkok Post, "Apirat: Fake News Feeds 'Hybrid War'" *Bangkok Post* (9 August 2019) <https://www.bangkokpost.com/thailand/general/1727615/apirat-fake-news-feeds-hybrid-war>.

being "embedded within every aspect of our society."[58] Ministerial spokespersons announced legal action against fake news spreaders.[59] Besides the Act on Computer-Related Offences, charges could also be brought based on two post-coup announcements (ประกาศ; *prakat*) from the National Council for Peace and Order (NCPO), which prohibited the publication of false information by the media and any unreasonable criticism of the NCPO based on false information.[60] The orders were revoked shortly before the elected government assumed office in July 2019.

In November 2019, the government introduced a new mechanism in the fight against fake news when it inaugurated its "Anti-Fake News Center."[61] The Center operates a website as well as Facebook and Line accounts where allegedly false news is corrected, and allegedly true news is confirmed. In addition, it has the power to refer cases to the police for further investigation. At the launch of the Center, the responsible Minister referred to fake news as "one of the critical threats that could harmfully affect people's lives and the economy."[62]

Another temporary anti-falsehood law was enacted in late March 2020, two months into the global COVID-19 pandemic. After the Thai government had declared an emergency, a related stipulation (ข้อกำหนด; *khokamnot*) prohibited anyone, under threat of criminal punishment, from spreading false information about the COVID-19 situation in Thailand in a manner creating public fear, and from distorting information so that it could create misunderstanding leading to disturbances in public order or good morals.[63] Due to the merely temporary character of this stipulation, however, we maintain our focus on the permanent anti-falsehood provisions of the Act on Computer-Related Offences, and proceed to their critical evaluation.

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[58] Khaosod English, "Thailand to Set Up Center to Combat 'Fake News'" *Khaosod English* (22 August 2019) <http://www.khaosodenglish.com/news/crimecourtscalamity/2019/08/22/thailand-to-set-up-center-to-combat-fake-news>.

[59] Wassana Nanuam, "Prawit Wants 'Fake News' Crackdown" *Bangkok Post* (27 June 2019) <https://www.bangkokpost.com/thailand/politics/1702408/prawit-wants-fake-news-crackdown>.

[60] ประกาศคณะรักษาความสงบแห่งชาติ ฉบับที่ 97/2557, ราชกิจจานุเบกษา เล่ม 131 ตอนพิเศษ 138 ง หน้า 10 (23 กรกฎาคม 2557) [Announcement of the National Council for Peace and Order No 97/2557, Government Gazette vol 131 special pt 138 ngor p 10 (23 July 2014)] Item 3(1); ประกาศคณะรักษาความสงบแห่งชาติ ฉบับที่ 103/2557, ราชกิจจานุเบกษา เล่ม 131 ตอนพิเศษ 143 ง หน้า 10 (30 กรกฎาคม 2557) [Announcement of the National Council for Peace and Order No 103/2557, Government Gazette vol 131 special pt 143 ngor p 10 (30 July 2014)] (Thai) Item 1.

[61] ศูนย์ต่อต้านข่าวปลอม ประเทศไทย [Anti-Fake News Center Thailand] (Thai) <https://www.antifakenewscenter.com>; see Lasse Schuldt, "Official Truths in a War on Fake News: Governmental Fact-Checking in Malaysia, Singapore, and Thailand" (2021) 40(2) Journal of Current Southeast Asian Affairs 340.

[62] Suchit Leesa-Nguansuk, "Centre Goes Live to Fight Fake News" *Bangkok Post* (2 November 2019) <https://www.bangkokpost.com/business/1785199/centre-goes-live-to-fight-fake-news>.

[63] ข้อกำหนด ออกตามความในมาตรา ๙ แห่งพระราชกำหนดการบริหารราชการในสถานการณ์ฉุกเฉิน พ.ศ. ๒๕๔๘ (ฉบับที่ ๑), ราชกิจจานุเบกษา เล่ม 137 ตอนพิเศษ 69 ง หน้า 10 (25 มีนาคม 2560) [Stipulation Enacted under Section 9 of the Emergency Decree on Public Administration in Emergency Situations 2005 (No 1), Government Gazette vol 137 special pt 69 ngor p 10 (25 March 2020)] (Thai) Item 6.

IV. INTERPRETATIONAL PITFALLS

Despite the amendments of 2017, the interpretation of Section 14 para. 1(1) and (2) has remained doubtful in several respects. The uncertainties laid out in this part raise fundamental questions about the purposes pursued by the Act. Two main contentious issues can be distinguished: The meaning of "false" (1.) and the scope of the protected interests (2.).

A. The Meaning of "False"

Up until the present, drafters, scholars and courts apparently have not agreed on the question of what is "false" in the sense of Section 14 para. 1(1). Early drafts of Section 14 covered only the act of introducing forged (ปลอม; *plom*) computer data[64] into a computer system. The provision was meant to close a gap in the law: provisions dealing with the forgery of documents (Sections 264 to 269 of the Criminal Code) were only applicable to paper documents.[65] Thus, the new law was necessary to protect the trustworthiness[66] of computer data. During the legislative process, however, the Council of State proposed the inclusion of additional paragraphs covering false computer data (ข้อมูลคอมพิวเตอร์อันเป็นเท็จ; *khomun khomphiotoe an pen thet*), computer data that constitute an offence against the security of the Kingdom, as well as obscene computer data. These proposals were later included in Section 14 as Nos. 2 to 4.[67] At that point in the drafting process, therefore, No. 1 dealt with forged computer data and No. 2 with false computer data. Had this version been enacted, the apparent difference between the two provisions would have constituted the following: Forged computer data, analogous to forged documents, would have been understood as data that has been changed by a person who pretends to be the original data creator; false computer data, by contrast, would have been untruthful data as regards content—in other words, false statements of fact.

Significant interpretational uncertainty ensued, however, when the National Legislative Assembly (NLA) decided to include false, besides forged, computer data

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[64] Computer data (ข้อมูลคอมพิวเตอร์) is defined in Section 3 of the Act as "data, statements or set of instructions contained in a computer system, the output of which may be processed by a computer system including electronic data according to the Law on Electronic Transactions"; translation taken from Thai Netizen Network, Computer-related Crime Act (n 43).

[65] Sawatree, *Computer Crime* (n 35) 175ff.; มานิตย์ จุมปา, คำอธิบายกฎหมายว่าด้วยการกระทำความผิดเกี่ยวกับคอมพิวเตอร์ (พิมพ์ครั้งที่ 2, วิญญูชน 2554) [Manit Jumpa, *Explanation of the Law on Computer-Related Offenses* (2nd edn, Winyuchon 2011)] (Thai) 93.

[66] The integrity of computer data against alteration is protected by Section 9 of the Act.

[67] See Manit, *Computer-Related Offenses* (n 65) 93; จอมพล พิทักษ์สันตโยธิน, "'ข้อมูลเท็จ' การฟ้องหมิ่นประมาท กับพ.ร.บ.คอมพิวเตอร์ 2550" *Thai Netizen Network* (18 มิถุนายน 2016) [Jompon Pitaksantayothin, "'False Information,' Defamation Charges and the Act on Computer-Related Offenses 2007" *Thai Netizen Network* (18 June 2016)] (Thai) <https://thainetizen.org/2016/06/defamation-computer-crime-act/>.

under No.1, as well as the element of likely damage to another person.[68] In addition, the NLA further decreased the provision's resemblance to Section 264 of the Criminal Code by deleting the phrase "to cause another person to believe . . . ." (เพื่อให้บุคคลอื่นเชื่อว่า; *phuea hai bukkhon uen chuea wa*).[69] No. 1 was thus not meant to be a mere gap-filler for data forgery but to serve the additional[70] purpose of protecting the truth.[71] With one pen stroke, No. 1 now also addressed false statements of fact—an area already covered by No. 2.[72]

The fact that police, prosecutors and courts mainly relied on Section 14(1) of the Act's 2007 version to bring charges of defamation[73] demonstrates that the provision was widely interpreted as protecting the truthfulness of computer data. Though defamation was subsequently explicitly excluded from the Section's scope, the NLA in 2017 confirmed its intention to protect the content-accuracy of information, not only through Section 14 para. 1(2), but also through the addition into No. 1 of another alternative: the introduction of distorted (บิดเบือน; *bitbuean*) computer data. Distortion of computer data apparently occurs where the perpetrator "does not tell 100% of the truth" or "does not tell the truth that should be told."[74] As a result, Section 14 para. 1(1) maintained its twofold character as a provision that protects both the trustworthiness and the truthfulness of computer data. Earlier scholarly interpretations that focused exclusively on trustworthiness have therefore been superseded.[75] A recent Supreme Court decision apparently also considers that the Section covers computer data that is false as regards content.[76] This overlap between No. 1 and No. 2 is not only systematically unfortunate, but raises important questions as to the protected interests of these provisions. Below, we will further discuss this issue.

As far as Section 14 para. 1(1) and (2) protect the truthfulness of computer data, the provisions address statements of fact that can be proved true or false. They are not applicable to opinions reflecting personal standpoints. This is in line with the tort of defamation (Section 423 of the Civil and Commercial Code), which also distinguishes

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[68] Jompon, "False Information" (n 67).

[69] ibid.

[70] Manit, *Computer-Related Offenses* (n 65) 95, appears to interpret the term only from the perspective of truthfulness as regards content.

[71] It needs to be noted, though, that forgery crimes may also protect the truthfulness of information under certain circumstances, see Sections 267 and 269 of the Criminal Code.

[72] That also seems to be the opinion of Sorawuth Pitiyasak, *Computer-Related Offenses* (n 51) 170.

[73] Using the provision as a legal ground for defamation charges might have ignored the drafters' intention at least in this regard, see Sorawuth Pitiyasak, *Computer-Related Offenses* (n 51) 167.

[74] Sorawuth Pitiyasak, *Computer-Related Offenses* (n 51) 169.

[75] See, on the Act's 2007 version, Sawatree, *Computer Crime* (n 36) 176; พรเพชร วิชิตชลชัย, คำอธิบายพระราชบัญญัติว่าด้วยการกระทำความผิดเกี่ยวกับคอมพิวเตอร์ พ.ศ. ๒๕๕๐ (สำนักงานศาลยุติธรรม, โรงพิมพ์ดอกเบี้ย ๒๕๕๐) [Pornpech Wichitchonchai, *Explanation of the Act on Computer-Related Offenses B.E. 2550* (Office of the Judiciary, Dokbia Printing 2007)] (Thai) 26.

[76] MGR Online, Supreme Court Dismisses Case (n 54).

between facts and opinions.[77] It differs, however, from criminal defamation, which covers both statements of fact and opinions. This can be seen most explicitly in Section 329 of the Criminal Code, which provides a justifying ground for opinions (ความคิดเห็น; *khwam khit hen*) and statements (ข้อความ; *kho khwam*) if made in good faith.[78] Another distinguishing feature is the fact that a person can be found criminally liable of defamation even if the relevant statement of fact was true,[79] which again distinguishes criminal from civil defamation.[80] It also distinguishes criminal defamation from the Act on Computer-Related Offences: Sections 14 para. 1(1) and (2) demand of the plaintiff to prove that the statements in question were false. The general rules of criminal procedure regarding the burden of proof[81] apply.

For a statement to be subjectively false, the perpetrator must have acted with intention regarding all elements of the offence (Section 59 of the Criminal Code), including the falsity of the facts in question.[82] Besides the question whether the statement was objectively and subjectively false, it also must have had the likely effect of impairing one of the protected interests. This raises further interpretational uncertainties—which we will deal with in the following part.

B. The Scope of Protected Interests

The preceding part revealed that Section 14 para. 1(1) of the Act on Computer-Related Offences protects both the trustworthiness and the truthfulness of computer data, while No. 2 focuses exclusively on truthfulness. However, the provisions do not protect trustworthiness and truthfulness for their own sake, but stipulate that the action in question must be likely to cause damage to the public (No. 1) or to damage the maintenance of national security, public safety, national economic security, or public

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[77] พจน์ ปุษปาคม, คำบรรยายประมวลกฎหมายแพ่งและพาณิชย์ ว่าด้วยละเมิด (สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา 2520) [Phoj Pusapakom, *Explanation of the Thai Civil and Commercial Code Regarding Torts* (Legal Education Institute of the Thai Bar Association 1977)] (Thai) 474.

[78] ฅนไท ก้วนหิ้น, ปัญหาทางกฎหมายเกี่ยวกับเสรีภาพในการแสดงความคิดเห็นของบุคคลในระบบกฎหมายไทย (วิทยานิพนธ์ นิติศาสตรมหาบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2554) [Khonthai Kuanhin, *Legal Problems Related to Freedom of Expression of Persons in the Thai Legal System* (Master Thesis, Thammasat University 2011)] (Thai) 141.

[79] See also David Streckfuss, *Truth on Trial in Thailand* (Routledge 2011) 10: "defamation is not designed to produce the truth."

[80] This has been explained with the character of criminal law that also protects public order, see อนันต์ วิมลจิตต์, ความผิดฐานหมิ่นประมาทในทางอาญา (วิทยานิพนธ์ คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2495) [Anan Wimonjit, *The Offense of Criminal Defamation* (Master Thesis, Thammasat University 1952)] (Thai) 94ff. Note that this publication based its analysis on the Criminal Code of 1908. The (current) Criminal Code of 1956 contains the, albeit limited, possibility in Section 330 to prove that an allegation was true. In addition, criminal defamation is a compoundable offense (Section 333).

[81] See อุดม รัฐอมฤต, คำอธิบายกฎหมายลักษณะพยานหลักฐาน (พิมพ์ครั้งที่ 7 โครงการตำราและเอกสารประกอบคำรสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2562 [Udom Rathamarit, *Explanation of the Law of Evidence* (7th edn, Project for Promotion of Textbooks and Teaching Materials, Faculty of Law, Thammasat University 2019)] 71; จรัญ ภักดีธนากุล, กฎหมายลักษณะพยานหลักฐาน (พิมพ์ครั้งที่ 14 สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา 2561) [Jaran Phakdeethanakool, *Explanation of the Law of Evidence* (14th edn, Legal Education Institute of the Thai Bar Association 2019)] 286.

[82] In addition, Section 14 para 1(1) requires the special intent of "ill or fraudulent intent."

infrastructure serving national public interest, or to cause panic to the public (No. 2).[83] Thus, both provisions aim to protect public interests. Indeed, the Act's 2017 amendment effectively removed individual interests from No. 1 with the deletion of "likely damage to another person," and the clarification that the offence must not be defamation. No. 2 had from the outset protected only public interests. However, Section 14 para. 2, also introduced in 2017, at least partly conserves the protection of individual interests by extending the scope of Paragraph 1(1) to cases where the offence "has not been perpetrated against the public but against a particular individual." Such offences are compoundable, and the punishment must be reduced.[84]

A problematic issue already alluded to concerns the relationship between the interests protected in No. 1 and No. 2. Damage to "the public" (ประชาชน; *prachachon*) in No. 1 and damage to the more specific public interests in No. 2 resemble the relationship between a *lex generalis* and a *lex specialis*. In other words, if national security, public safety, national economic security or public infrastructure serving national public interest are likely to be affected, or if public panic is likely to be caused, one would assume that this amounts to a likely damage to the public. The objective elements of No. 1 would be fulfilled as well. Since 2017, however, No. 1 requires a specific (ill or fraudulent) intent which is not required by No. 2. These systematics seem to indicate that the likely damage to the interests protected by No. 2 was considered particularly severe by the drafters. As far as false computer data is concerned, No. 1 could therefore be classified as a "fall-back" provision for less severe cases which, in compensation, requires an elevated subjective threshold. With regard to "misleading" computer data, however, No. 1 is the only applicable provision as No. 2 only covers false computer data. Thus, again, the systematics of the provision seem not entirely consistent.

Finally, significant practical problems are caused by the statutory requirement to prove that damage or panic was "likely" (โดยประการที่น่าจะเกิด . . . .; *doi prakan thi na cha koet* . . . .). Judges need to determine in hindsight whether and how third persons were to react to the news. The anticipated reaction of the audience becomes, retrospectively, the threshold for criminal liability. This reflects the character of Section 14 para. 1(1) and (2) as a discursive crime that needs an audience, just like defamation.[85] Although, would a judge need to have *ex-post facto* "prophetic powers" to decide the case?[86]

Some examples may help to illustrate this issue. In one instance, the police and the prosecution considered that the message of a social media user, according to which the Prime Minister and his wife had transferred a substantial amount of money to

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[83] With regard to the Act's 2007 version, the Constitutional Court found that the elements of Section 14(2) were sufficiently certain, Thai Constitutional Court Order 46/2555; Sawatree, *Computer Crime* (n 36) 179, however, argued that it was one of the most problematic provisions.

[84] Welcoming the amendment, ไอลอว์, "#พรบคอม แก้ไขใหม่แล้ว คดี "ปิดปาก" มีแต่แนวโน้มจะเพิ่มขึ้น" [iLaw, "#ComAct Newly Amended: 'Gag' Cases Will Follow Rising Trend"] (Thai) (20 March 2017) <https://ilaw.or.th/node/4399>.

[85] Streckfuss, *Truth on Trial* (n 79) 21ff.

[86] ibid 53.

Singapore, was likely to damage national security. Both the first instance and the appeals court dismissed the case, however.[87] In another case, the authors of a news article that referred to a *Reuters* report claiming that Thai naval forces earned money from omitting to perform their duties regarding the trafficking of Rohingya people were brought to criminal trial. The court, however, considered that damage to national security was not likely. It also rejected the likelihood of a public panic.[88] A further example could be the case of a person who falsely claimed on social media that a provincial authority was to close a dam, risking floods. An additional message called on the public to attend a mock cremation ceremony for the provincial governor. The court found that the posts were likely to cause public panic and pronounced a 4-year prison sentence, suspended for two years, and a fine of 110,000 baht.[89] Public panic-related charges were also brought in relation to claims that the Deputy Prime Minister had bought expensive coffee cups; in response to allegations that the Prime Minister fled rebellion charges; and in reaction to criticism of the Thai Raksa Chart Party dissolution.[90]

None of these cases seem to indicate a concrete threat to national security or a risk of immediate outbreak of public panic. This provokes the question of which level of probability needs to be applied. Scholarly commentary argues that the perspective of an average person (วิญญูชนคนธรรมดาทั่วไป; *winyuchon khon thammada thua pai*) should be adopted.[91] This would be in congruence with the standard applied to the tort of defamation.[92] As a consequence, proof of an "abstract panic"[93] rather than concrete evidence would be required. Section 14 para. 1(1) and (2) therefore provide significant interpretational leeway to authorities and, in the final instance, courts, which are neither able nor willing to conduct opinion polls to test the public's reaction to certain messages. At the same time, it goes without saying that individual assumptions and preferences are not suitable guidance for judicial decision-making.

An approach to limiting the interpretational uncertainty could be to require proof of an "ill or fraudulent intent" not only concerning No. 1, but also No. 2. A

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[87] iLaw, Documentation (n 46) "รินดา: โพสต์ข่าวลือประยุทธ์โอนเงินหมื่นล้าน" ["Rinda: Posted Rumor that Prayuth Transferred 10 Billion"] <https://freedom.ilaw.or.th/case/682>.

[88] ibid "กองทัพเรือ vs สำนักข่าวภูเก็ตหวาน" ["Thai Royal Navy vs Phuketwan News Agency"] <https://freedom.ilaw.or.th/case/554>.

[89] ibid "กฤษกร: ทำกิจกรรมลอยอังคารผู้ว่าอุบลฯ" ["Kritkorn: Organized Floating of Ashes of Ubon Ratchathani Mayor"] <https://freedom.ilaw.or.th/case/884>.

[90] ibid "พล.ท.พงศกร: แชร์ข่าวปลอมเรื่องกาแฟบิ๊กป้อม" ["Gen. Pongsakorn: Shared False News about Big Pom's Coffee"] <https://freedom.ilaw.or.th/case/861>; "'สายน้ำ': แชร์โพสต์พล.อ.ประยุทธ์หนีคดีกบฏจากเพจ KonthaiUK" ["'Sainam': Sharing a Post from KonthaiUK Facebook Alleging that Prayuth Flees Coup Case"] <https://freedom.ilaw.or.th/case/894>; "ปิยบุตร: วิจารณ์คดียุบพรรคทษช" ["Piyabutr: Commented on TSN Party dissolution"] <https://freedom.ilaw.or.th/case/864>.

[91] Manit, *Computer-Related Offenses* (n 65) 97.

[92] Phoj, *Torts* (n 77) 475; see also ไพจิตร ปุญญพันธุ์, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ลักษณะละเมิด (พิมพ์ครั้งที่ 11, นิติบรรณาการ 2548) [Phaijit Punyaphan, *Explanation of the Thai Civil and Commercial Code – Torts* (11th edn, Nitibannagan 2005)] (Thai) 55: "Even if no one believes it."

[93] Lasse Schuldt, "Abstract Panic: On Fake News, Fear and Freedom in Southeast Asia" *Verfassungsblog* (14 April 2020) <https://verfassungsblog.de/abstract-panic-on-fake-news-fear-and-freedom-in-southeast-asia/>.

stronger focus on the subjective elements of the crime would indeed approximate online falsehoods to defamation, where Thai scholars have considered that intention forms the core of the crime.[94] However, it also appears undesirable to render the provision a crime of conscience, where bad intentions turn the balance. A more precise objective threshold would be preferable. It appears that this could only be achieved by requiring proof of actual—rather than likely—threats to the protected interests. Such a solution might not only suffice from the perspective of penal policy, but also better safeguard the constitutional right of freedom of expression—to which we turn now.

V. CONSTITUTIONAL REQUIREMENTS

This part discusses the criminalisation of online falsehoods from the perspective of constitutional law. The contentious issues are related to the statutory restriction of free speech, and they include: The general constitutional protection of falsehoods (1.) and the proportionality of criminal punishment (2.).

A. The General Constitutional Protection of Falsehoods

Thai constitutional law has protected individual rights to differing extents over the course of the past ninety years. While the temporary Constitution Law of June 1932 did not contain any rules on rights or liberties, the permanent Constitution of December 1932 broadly stipulated in Section 14 the protection of several individual rights, including the rights to speak, write and publish.[95] Beginning with the Constitution of 1949, a pattern of constitutional provisions emerged that distinguished the scope of a right from enumerated grounds for restrictions.[96] The pattern reflects the general constitutional doctrine related to individual rights that defines a right's general scope (*Schutzbereich*) that might then, in a second step, be subject to restrictions for constitutionally defined purposes.

While Thai scholarly literature has devoted most of its attention to developing and clarifying constitutional standards for restrictions,[97] the scopes of rights have often remained undefined. Doctrinally speaking, however, this question might be

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[94] Streckfuss, *Truth on Trial* (n 79) 145 with reference to จิตติ ติงศภัทิย์ [Jitti Tingsapath].

[95] จักรกฤษณ์ กาญจนศูนย์, การจำกัดเสรีภาพในการแสดงความคิดเห็นของบุคคลโดยกฎหมาย (วิทยานิพนธ์ บัณฑิตวิทยาลัย จุฬาลงกรณ์มหาวิทยาลัย 2524) [Jakkrit Kanchanasun, *The Restriction of Freedom of Expression of Persons by law* (Master Thesis, Chulalongkorn University, 1981)] (Thai) 194-5.

[96] This pattern was adopted in the Constitutions of 1968, 1974, 1978, 1991, 1997, 2007 and 2017; see for Constitutions until 2006, Khonthai, *Legal Problems* (n 78) 82–89.

[97] วรเจตน์ ภาคีรัตน์, "เงื่อนไขการตรากฎหมายจำกัดสิทธิและเสรีภาพของประชาชน : 'มาตร' ในการควบคุมตรวจสอบความชอบด้วยรัฐธรรมนูญของกฎหมาย" (2543) 30(2) วารสารนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 184 [Worajet Pakeerut, "The Requirements for Legislation that Restrict the Rights and Liberties of the People" (2000) 30(2) Thammasat Law Journal 184] (Thai) 184–94; ธีระ สุธีวรางกูร, "การคุ้มครองสิทธิและเสรีภาพของบุคคลที่รัฐธรรมนูญรับรอง" (2542) 29(4) วารสารนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 578 [Teera Suteevarangkul, The Protection of Rights and Liberties of Persons Guaranteed by the Constitution (1999) 29(4) Thammasat Law Journal 578] (Thai) 578–92.

considered upstream to the discussion on restrictions; if a right is not applicable to a given case in the first place, the issue of restrictions becomes a moot point. Thus, the question arises as to whether freedom of expression in Thai constitutional law generally also protects falsehoods. In a word: Are false statements of fact included in its scope? If that is not the case, Section 14 para. 1(1) and (2) of the Act on Computer-Related Offences would not amount to a restriction of that right. The constitutional mechanism that requires legislators to conform restrictions to the constitutionally permitted purposes would not be triggered.[98]

The question of whether falsehoods are protected speech has been discussed in foreign legal systems, including Germany and the United States of America. Based on its wording, Article 5(1), first sentence[99] of the German Basic Law of 1949 has been interpreted by the German Constitutional Court to protect primarily the expression of opinions. Consequently, statements of fact are protected only to the extent that they are a prerequisite for the formation of opinions. Thus, the protection of freedom of expression ends where the factual assertions can contribute nothing to this constitutional prerequisite of formation of opinion. Seen from this perspective, incorrect information is not an interest that merits protection. The Federal Constitutional Court starts with the supposition that a factual assertion which the asserting party knows is untrue, or which has been proven untrue, is not encompassed by the protection afforded by Art. 5(1), first sentence. As the distinction between value judgments and factual assertions can be difficult in a given case,[100] the Court would usually extend the protection to the entire statement. However:

> the correctness of the factual portions can then play a role in the context of the balancing. If the expression of opinion contains factual assertions which the asserting party knows are untrue, or which have been proven untrue, then the basic right of freedom of opinion routinely will yield to the legal interest protected by the statute that limits the basic right.[101]

German constitutional law thus affords false statements of fact only limited constitutional protection, and may exclude them entirely from Article 5's scope if they do not at all contribute to the formation of opinions. In contrast, the First Amendment

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[98] Note, however, that the general freedom of action under Section 25 of the Constitution of the Kingdom of Thailand B.E. 2560 (2017) would still apply.

[99] "Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources."

[100] บุญศรี มีวงศ์อุโฆษ, "คำอธิบายวิชากฎหมายรัฐธรรมนูญเปรียบเทียบ: รัฐธรรมนูญเยอรมัน" (โครงการตาราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2535) [Boonsri Weewongukote, "Explanation of Comparative Constitutional Law: The German Constitution" (Books and Teaching Materials Project, Faculty of Law, Thammasat University 1992)] (Thai) 141–42.

[101] Federal Constitutional Court of Germany (*Bundesverfassungsgericht*), judgment of 9 October 1991, 1 BvR 1555/88, BVerfGE 85, 1 ("Bayer Shareholders"), B.II.3.; English translation by University of Texas at Austin School of Law <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=625>; see also judgment of 13 April 1994, 1 BvR 23/94, BVerfGE 90, 241 ("Auschwitz lie") <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=621>.

of the Constitution of the United States of America does not provide a textual basis for distinguishing between opinions and factual statements.[102] Moreover, the U.S. Supreme Court has held that the liberal conception of free speech in U.S. constitutional law also generally prohibits the government from criminalising falsehoods:

> The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth. . . . And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.[103]

The Thai Constitutional Court has so far not addressed this question. Constitutional scholarship, however, has touched upon the issue. Notably, Khonthai Kuanhin has argued for the inclusion of statements of facts (การแสดงข้อเท็จจริง; *kan sadaeng kho thet ching*) into the scope of freedom of expression. While acknowledging that the Thai term for freedom of expression (การแสดงความคิดเห็น; *kan sadaeng khwam khit hen*) literally refers to the expression of opinions, he adopts a functional approach and plausibly considers that facts contribute to the formation of public opinion in an important manner.[104] Occasionally, Thai legal scholarship has also referred to Article 19(2) of the International Covenant on Civil and Political Rights (1966)[105] which stipulates that the right to freedom of expression includes the freedom to seek, receive and impart "information and ideas of all kinds."[106]

The wording of the current Thai Constitution of 2017[107] may not directly allow a definitive conclusion. Section 34(1), first sentence, provides that "a person shall enjoy the liberty to express opinions, make speeches, write, print, publicise and express by other means."[108] Even if the provision's first element, the liberty to express opinions, does not include the right to impart factual statements, the remaining

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[102] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[103] *United States v. Alvarez* (2012) 567 U.S. 709, 727-28 [U.S. Supreme Court].

[104] Khonthai, *Legal Problems* (n 78) 142–43; see also ปริญญา เทวานฤมิตรกุล, สารานุกรมรัฐธรรมนูญแห่งราชอาณาจักรไทย (พ.ศ.2540) (องค์การค้าของคุรุสภา 2544) [Prinya Thewanaruemitkul, *Encyclopaedia of the Constitution of the Kingdom of Thailand (1997)* (Trade Organization of the Teachers' Council 2001)] (Thai) 106.

[105] Thailand is a State Party.

[106] วนิดา แสงสารพันธ์, ขอบเขตการใช้เสรีภาพในการแสดงความคิดเห็นของประชาชนตาม บทบัญญัติรัฐธรรมนูญแห่งราชอาณาจักรไทย พุทธศักราช *2550* (มหาวิทยาลัยกรุงเทพ 2555) [Wanida Saengsaraphan, *The Extent of the Application of Freedom of Expression According to the Constitution of the Kingdom of Thailand, B.E. 2550* (Bangkok University 2012)] (Thai).

[107] รัฐธรรมนูญแห่งราชอาณาจักรไทย, ราชกิจจานุเบกษา เล่ม ๑๓๔ ตอนที่ ๔๐ ก หน้า ๑ (๖ เมษายน ๒๕๖๐) [Constitution of the Kingdom of Thailand, Government Gazette vol 134 pt 40 kor p 1 (6 April 2017)] (Thai).

[108] บุคคลย่อมมีเสรีภาพในการแสดงความคิดเห็น การพูด การเขียน การพิมพ์การโฆษณา และการสื่อความหมายโดยวิธีอื่น; English translation by the Office of the Council of State.

elements all appear to be of equal rank rather than constituting sub-categories of the first. The provision thus apparently protects a more general freedom of "expression" (การสื่อความหมาย; *kan sue khwam mai*) in contrast to a narrow conception of freedom of "opinion."

This relationship between the Section's elements stands in an interesting contrast to the wording of Section 39 of the Thai Constitution of 1991 in the version of its fifth amendment of 1995, which introduced the term "liberty to express opinions" (การแสดงความคิดเห็น; *kan sadaeng khwam khit hen*) for the first time into the text of a Thai Constitution.[109] This provision differed from later wordings in the important respect that the liberty to express opinions was apparently meant to be exercised "by" (โดย; *doi*) making speeches, writing etc.,[110] thereby indeed relegating these latter elements to sub-categories of the freedom to express opinions. However, the Constitutions of 1997, 2007 and 2017 removed the "by." Thus, even considering that in these Constitutions the "liberty to express opinions" itself is confined to imparting opinions, the comparison with the text of 1995 appears to confirm that the remaining elements do not seem to be limited in that respect.

If factual statements are thus generally covered by Section 34(1) of the 2017 Constitution, this logically applies to both true and false statements, in the absence of any evidence to the contrary. Consequently, Section 14 para. 1(1) and (2) of the Act on Computer-Related Offences constitutes a restriction of freedom of expression which needs to satisfy the constitutional requirements laid down in Section 34(1) and 26 of the 2017 Constitution, including proportionality—to which we now turn.

B. The Proportionality of Criminal Punishment

Besides the requirement that restrictions of rights must pursue the constitutionally permitted purposes,[111] every limitation must also be proportionate. This is explicitly stipulated in Section 26(1) of the Thai Constitution of 2017 and is considered a fundamental principle of Thai public law.[112] As this article cannot expound the genesis and scope of the principle of proportionality in Thai scholarship and jurisprudence,[113]

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[109] See the different versions in Khonthai, *Legal Problems* (n 78) 82–89; in the decades before, it was argued by some scholars that the term was too imprecise to be used in a Constitution, see วิษณุ เครืองาม, "เสรีภาพในการแสดงความคิดเห็น" (2524) 11(4) วารสารนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 570 [Wissanu Kreangam, "Freedom of Expression" (1981) 11(4) Thammasat Law Journal 570)] (Thai) 570–76: "theoretical language rather than constitutional language" (571).

[110] บุคคลย่อมมีเสรีภาพในการแสดงความคิดเห็นโดยการพูด การเขียน การพิมพ์ การโฆษณา และการสื่อความหมายโดยวิธีอื่น.

[111] Section 34(1), second sentence, allows restrictions of freedom of expression for the purposes of "maintaining the security of the State, protecting the rights or liberties of other persons, maintaining public order or good morals, or protecting the health of the people." The security of the State as well as public order seem to be sufficient general grounds for the restrictions contained in Section 14 para. 1(1) and (2) of the Act on Computer-Related Offenses.

[112] วรเจตน์ ภาคีรัตน์, กฎหมายปกครอง ภาคทั่วไป (นิติราษฎร์ 2554) [Worajet Pakeerut, *Administrative Law. General Part* (Nitirat 2011)] (Thai) 57.

[113] See ศรีรัตน์ งามนิสัย, หลักความพอสมควรแก่เหตุ: พัฒนาการและการปรับใช้ในระบบกฎหมายไทย (วิทยานิพนธ์ คณะ

it focuses on recent jurisprudence of the Constitutional Court of Thailand with respect to the proportionality of criminal punishment.[114]

In recent years, the Court has referred to the principle of proportionality, including the three-step test of suitability, necessity, and proportionality in the narrow sense, in several of its decisions.[115] In decision 30/2563, however, the Court for the first time invalidated a criminal law provision (also) due to the disproportionality of the prescribed punishment. The case dealt with two announcements by the National Council for Peace and Order (NCPO) which were issued in 2014 after the military coup. The announcements functioned as the legal basis for ordering persons to report to the NCPO, and stipulated a criminal penalty of up to two years' imprisonment and/or a fine of up to 40,000 baht in case of non-compliance. In late 2020, the Constitutional Court declared these announcements unconstitutional. Besides finding a retroactive character, the Court judged them disproportionate based on a comparison with Section 368(1) of the Criminal Code. This Section criminalises the refusal to comply with an official order, and stipulates a penalty of up to ten days' imprisonment and/or a fine of up to 5,000 baht. This stark discrepancy regarding the prescribed punishment led the Court to find the NCPO announcements disproportionate according to Section 26 of the 2017 Constitution.[116]

The Constitutional Court's reasoning provokes the comparison of Section 14 para. 1(2) of the Act on Computer-Related Offences with Section 384 of the Criminal Code, which was mentioned earlier in this article. Section 384 criminalises the malicious dissemination of false information, thereby causing the people to panic. It stipulates a punishment of up to one month's imprisonment and/or a fine of up to 10,000 baht. Section 14 para. 1(2) of the Act on Computer-Related Offences criminalises, among the other alternatives, the—not necessarily malicious—entry of false computer data into a computer system that is likely to cause the public to panic. The stipulated punishment is imprisonment for up to five years and/or a fine of up to 100,000 baht. Thus, despite the fact that Section 384 demands a specific intent in the form of malice, and the additional fact that Section 384 demands an actual, not only likely instance of panic, Section 14 para. 1 prescribes a punishment which is more than 60 times higher regarding imprisonment and ten times higher regarding the fine. With a view to the Constitutional Court's decision 30/2563, it appears doubtful whether this discrepancy can be reconciled with the principle of proportionality as applied by the Court.

นิติศาสตร์มหาวิทยาลัยธรรมศาสตร์ 2550) [Sirat Ngamnisai, *The Principle of Proportionality: Development and Application in the Thai Legal System* (Master Thesis, Thammasat University 2007)] (Thai); Worajet, *Administrative Law* (n 112) 57–62.

[114] Khonthai Kuanhin, *Legal Problems* (n 78) 165, questions the proportionality of Section 14(1) and (2) of the Act's 2007 version on the ground that the provision criminalises falsehoods that do not address any individual person, unlike defamation. However, the Act on Computer-Related Offenses aims to protect other interests than personal reputation. These aims do not, on their own, appear disproportionate.

[115] For instance, Thai Constitutional Court Decisions 8/2561; 4–5/2562; 8/2562.

[116] Thai Constitutional Court Decision 30/2563, 8–9.

VI. CONCLUSION

Pre-empting the global trend to criminalise online falsehoods, Thailand adopted the Act on Computer-Related Offences before the dawn of the fake news era. In recent years, the political and legal awareness of the topic has sharply risen. The relevant provisions of the Act, however, reveal several interpretational and constitutional complexities that deserve critical evaluation. In particular, this article raised questions regarding the systematic structure of Section 14 para. 1(1) and (2) and the meaning of "false" computer data. More importantly, it was shown that the statutory requirement of damage or panic that is "likely" to occur may result in uneven and disparate law enforcement. Proof of actual damage was therefore suggested as an alternative that would also limit the impact on the constitutional right to freedom of expression. This right fully applies, as statements of fact are within its scope of protection. Finally, the prescribed criminal punishment seems hardly in accordance with recent jurisprudence of the Thai Constitutional Court.

The case of Thailand thus reflects the challenges in finding the right response to the apparent fake news threat. Developing a constitutionally sound balance between regulation and *laissez-faire* requires not only an understanding of social media's technological, aggregational and psychological aspects, but also a consideration of chilling effects on the formation of public opinion. Speech without any measurable adverse effects on protected interests might not deserve to be criminalised. At the same time, society's resilience against the manipulatory potential of fake news needs to be enhanced and reinforced. Education curricula will need to focus on media literacy and critical reflection skills to an even higher extent than is already the case. This continues to be the most promising approach to prevent fake news from falling on fertile ground, while limiting the collateral damage on constitutional liberties.

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Commentary

The Supreme Court Jurisprudence on Corporate Criminal Liability 2010–2020

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Despite over a century of development, the Thai law on corporate criminal liability remains doctrinally unfinished. This Commentary looks at the past decade of relevant Supreme Court jurisprudence. It traces lasting trends and highlights questions that still require resolution.

I. DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY IN THAI LAW[1]

The beginnings of corporate criminal liability in Thai law date back to the year 1911 when the Act on Partnerships and Companies[2] was enacted. Violations of its rules could result in criminal liability also of the partnerships and companies, i.e., the legal persons, themselves. Thailand's first Penal Code of 1908,[3] however, did not contain any rules on corporate crime. This changed when the aforementioned provisions from the Act on Partnerships and Companies were added to the Code (Sections 341-70) in

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[1] For a concise overview of the development both in legal scholarship and in Supreme Court jurisprudence, see ศูนย์วิจัยและให้คำปรึกษา คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, การศึกษาเปรียบเทียบความรับผิดทางอาญาของนิติบุคคลและผู้แทนนิติบุคคลของประเทศไทยกับประเทศต่างๆ ในประชาคมอาเซียน (สำนักงานอัยการพิเศษฝ่ายสถาบันกฎหมายอาญา สำนักงานวิชาการ สำนักงานอัยการสูงสุด 2558) [Centre for Research and Consultancy, Faculty of Law, Thammasat University, *Comparative Study of Corporate and Representative's Criminal Liability in Thailand and ASEAN Countries* (Office of the Special Prosecutor, Criminal Law Institute, Academic Office, Office of the Attorney General 2015)] (Thai) 139–67.

[2] พระราชบัญญัติลักษณะเข้าหุ้นส่วนและบริษัท ร.ศ. 130 (= พ.ศ. 2448).

[3] กฎหมายลักษณะอาญา ร.ศ. 127 (= พ.ศ. 2451).

1925. The current Criminal Code of 1956[4] does not explicitly include corporate criminal liability. Rather, relevant special offences are dispersed across specific Acts. In 1963, however, the Thai Supreme Court extended the applicability of intentional crimes within the Criminal Code to legal persons in its seminal and much criticised Decision No. 787–788/2506. Three decades later, the Court declared the Criminal Code applicable to legal persons also regarding negligent crimes in Decision No. 3446/2537 (1994). Ever since, the Court's jurisprudence has apparently consolidated. Scholarly discussions have continued, of course, and most recent Supreme Court cases from the years 2010 (B.E. 2553) to 2020 (B.E. 2563) reveal serious doctrinal uncertainties.

II. ATTRIBUTION OF CRIMINAL LIABILITY AND THE ROLE OF REPRESENTATIVES

As legal persons can only act through natural persons, the model of criminal attribution is of utmost legal interest: Whose action or omission triggers the legal person's liability, and whose intention or negligence is relevant? To date, it has remained unclear which criminalisation model[5] Thai criminal law pursues. With a few notable exceptions,[6] the statutory law is silent on this issue.

The landmark Supreme Court Decision No. 787–788/2506 (1963) tried to provide some clarity at least for corporate criminal liability under general "Whoever" (ผู้ใด; *phudai*) provisions criminalising intentional wrongful behaviour, such as Section 274 of the Criminal Code in the case at hand. The Supreme Court held that Section 70(2) of the Civil and Commercial Code (CCC),[7] according to which the purpose of a juristic person is expressed by its representatives (ผู้แทนนิติบุคคล; *phuthaen nitibukkhon*), was to be used to attribute the representatives' criminal intention to the legal person, a limited company in the case. Scholarly commentary suggests that the Court's approach reflects the identification or "Alter Ego" doctrine,[8]

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[4] ประมวลกฎหมายอาญา พ.ศ. 2499.

[5] See generally, Mark Pieth and Radha Ivory, "Emergence and Convergence: Corporate Criminal Liability Principles in Overview" in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability. Emergence, Convergence, and Risk* (Springer 2011) 3–60; James Gobert, "The Evolving Legal Test of Corporate Criminal Liability" in John Minkes and Leonard Minkes (eds), *Corporate and White-Collar Crime* (Sage 2008) 61–80.

[6] For instance, Section 176 of the Organic Act on the Prevention and Suppression of Corruption 2018 [พระราชบัญญัติประกอบรัฐธรรมนูญว่าด้วยการป้องกันและปราบปรามการทุจริต พ.ศ. ๒๕๖๑] stipulates legal persons' vicarious criminal liability for actions of natural persons involved with the legal person. Such involved persons include employees, representatives, affiliated companies or any other person acting for or on behalf of the legal person.

[7] Section 75 at the time of the decision.

[8] สุรศักดิ์ ลิขสิทธิ์วัฒนกุล, ความรับผิดทางอาญาของนิติบุคคล: การศึกษาทางกฎหมายเปรียบเทียบโดยเฉพาะที่เกี่ยวกับประเทศไทย (วิทยานิพนธ์ นิติศาสตร์มหาบัณฑิต คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2527) [Surasak Likasitwatanakul, *Corporate Criminal Liability: A Comparative Legal Study with Particular Focus on Thailand* (Master Thesis, Thammasat University 1984)] (Thai) 126; สุรพงศ์ อัศวราพานิช, ความรับผิดทาง

originally developed by the English courts. At the same time, the Supreme Court was viewed to have exceeded its powers by this drastic extension of the Criminal Code's applicability and the apparent mixing of civil and criminal law.[9]

The Court confirmed its extensive interpretation of "Whoever" provisions in subsequent decisions.[10] Within the last ten years, this jurisprudence was continued on the levels of First Instance Courts, Appeals Courts and by the Supreme Court, applying "Whoever" provisions of the Criminal Code[11] and specific statutory legislation[12] to legal persons such as limited partnerships or limited companies, often as joint principals together with their representatives (see below III. on this particular issue). However, only one decision (No. 10194/2555 (2012)) was found in which the Supreme Court expressly used Section 70(2) CCC as an attribution mechanism.

In addition, the provision was referred to with respect to the question when a legal person as a *victim* has received knowledge of the facts constituting the crime. Supreme Court Decisions Nos. 693/2556 (2013) and 4603/2560 (2017) cite Section 70(2) CCC and state that the representative's knowledge is decisive in this regard. This may be important for the question of when the prosecution of a compoundable offence is barred by prescription under Section 96 of the Criminal Code.

The role of representatives in criminal proceedings has also been highlighted in Decision No. 10569/2558 (2015),[13] in which the Supreme Court quashed prior convictions by the First Instance Court and the Appeals Court for the reason that the indicted limited company had not been properly represented at the preliminary hearings according to Section 165(1) of the Criminal Procedure Code (CPC). The Court held that, if a legal person was not represented by its legal representatives at this stage,

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อาญาของนิติบุคคล (วิทยานิพนธ์ นิติศาสตร์มหาบัณฑิต คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย 2526) [Suraphong Assawaraphanich, *The Criminal Liability of Juristic Persons* (Master Thesis, Chulalongkorn University 1983)] (Thai) 62; นลินอร ธิบดี, ความรับผิดทางอาญาของนิติบุคคล: ศึกษากรณีกระทำผิดโดยประมาท (วิทยานิพนธ์ นิติศาสตร์มหาบัณฑิต คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย 2551) [Nalinorn Tibodi, *Corporate Criminal Liability: Case Study of Criminal Negligence* (Master Thesis, Chulalongkorn University 2008)] (Thai) 101, 106.

[9] Surasak, *Corporate Criminal Liability* (n 8) 121ff.

[10] See, for instance, Supreme Court Decisions No. 1669/2506, 54/2507, 584/2508, 981/2508, 448/2513, 63/2517, 378-379/2517, 97/2518, 1586/2519.

[11] Sections 173, 175 (false incrimination) in Supreme Court Decisions Nos. 14508/2557, 2255/2560; Section 180 (providing false evidence) in 7250/2554, 10452/2557; Sections 264, 268 (forgery of documents) in 13740/2553, 7455/2554, 19144/2555, 833/2561; Sections 271, 272, 274 (unlawful use of names or trademarks) in 5340/2553, 8151/2553, 2451/2555, 3129/2555, 12268/2558, 13583–4/2558, 8995/2560; Sections 326, 328 (defamation) in 8511/2554, 9435/2554, 14169/2557, 3493/2562; Section 335 (theft) in 8403/2554, 12328/2558; Section 341 (fraud) in 11089/2557, 11732/2557, 7677/2561; Section 350 (defrauding creditors) in 4196/2558, 10570/2558; Section 362 (trespass) in 6006/2561.

[12] These included relevant "Whoever" provisions from the Act on Offences Related to the Issuance of Cheques in Supreme Court Decisions 4207/2554, 10194/2555, 7453/2562; the Trademark Act in 5340/2553, 8151/2553, 15705–6/2557, 5446/2558, 13583–4/2558, 8995/2560, 7007/2562; the Customs Act in 2757/2561; the Revenue Code in 1040/2559, 8967/2561; the Copyright Act in 18122/2557, 1322/2558, 9960/2559; the Computer Crime Act in 319/2560; the Bankruptcy Act in 5252/2559; the Fertilizer Act in 12268/2558, 4214/2559; the Minerals Act and the Forest Act in 8403/2554; the Immigration Act in 2823/2553.

[13] A similar constellation was found in Decision No. 7455/2554 (2011).

all subsequent steps of the proceedings were invalid. The decision is also in line with Section 7(1) CPC which demands subpoenas to be issued to managers or representatives if a legal person is the alleged or indicted offender.

Supreme Court Decision No. 12328/2558 (2015), however, raised more serious questions with regard to the attribution of criminal liability to legal persons. In this case, a limited company was defendant No. 1 while its two managing directors were defendants Nos. 2 and 3. The Appeals Court found all three defendants jointly criminally liable for theft under Section 335(1), (7) of the Criminal Code. The Supreme Court affirmed the Appeals Court's guilty verdict. According to the facts of the case, the limited company had entered into an electricity supply agreement with the Provincial Electricity Authority (PEA). A PEA official later found that an electricity meter cable had been cut. The company agreed to pay for the unrecorded electricity consumption while dismissing any criminal wrongdoing.

The Supreme Court acknowledged that it had not been proved who had cut the cable and when this had occurred. However, as the meter and the cable were located on the company's premises, the Court ruled that the company must be criminally liable. This is remarkable because the Court did not require proof that any of the legal person's representatives, i.e., the managing directors, had committed the act with the relevant intention. It could indeed have been anyone in the company. The question thus arises whether the Supreme Court silently dismissed its approach laid down decades ago. Is this a departure from the identification/Alter Ego doctrine? Can the action of any company member trigger the company's criminal liability? These questions remain unanswered.

The decision is interesting for another reason as the Supreme Court then apparently attributed the company's criminal liability to the managing directors: "as the facts indicate that defendant No. 1 [the limited company] committed the criminal act, it is considered that it is the criminal act of defendants Nos. 2 and 3, too."[14] One may ask if this amounts to a "reverse attribution," from the legal person to the registered representative;[15] but on which doctrinal basis? Are representatives such as managing directors automatically criminally liable once the legal person has been convicted? Such an approach would certainly be in tension with the existence of provisions found in dozens of statutory Acts according to which a representative's criminal liability can only be based on the proof of his or her own contribution to the crime.[16] Further clarification is therefore urgently required.

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[14] See the Thai original in Supreme Court Decision No. 12328/2558: "เมื่อข้อเท็จจริงฟังได้ว่า จำเลยที่ 1 กระทำผิด ถือว่าเป็นการกระทำของจำเลยที่ 2 และที่ 3 ด้วย."

[15] In the case, the Managing Directors had entrusted the actual company management to a third person but remained the registered representatives.

[16] Such as Section 54, Direct Sale and Direct Marketing Act B.E. 2545 (2002): "Where the offender is a juristic person, if the offence derives from an order or action of a director or the manager or any person responsible for its operations, or where such person has the duty to issue an order or to take action but failed to do so thereby causing the juristic person to have committed the offence, such person shall be liable to the punishment provided for such offence as well." This wording was introduced in 76 Acts by the Act on the Amendment of Legal Provisions Related to Criminal Liability of Representatives

All but one decision reviewed for this Commentary involved intentional criminal acts. The one exception was the Supreme Court's Decision No. 8565–8566/2558 (2015), which dealt with the criminal consequences of the deadly fire in the Santika nightclub in Bangkok on 1 January 2009 that killed 66 people and injured more than two hundred more. The First Instance and Appeals Court had held that the company that had installed stage fireworks was criminally liable for negligent causation of fire (Section 225 of the Criminal Code), negligent killing (Section 291) and negligent grievous bodily harm (Section 300). Several natural persons including representatives of legal persons were found liable, too. The Supreme Court affirmed the company's conviction. It held that the negligent acts of a director with the capacity to represent the company must be attributed to the company. Therefore, the company was criminally liable, too.

The Court's finding is similar to that in Decision No. 3446/2537 (1994) already referred to above. That case dealt with the disastrous liquid gas explosion in Bangkok on 24 September 1990 that killed 90 people and injured more than a hundred. It was the first time that the Supreme Court approved the conviction of a legal person for a negligent crime.[17] However, the Court did not pronounce which attribution model it pursued. It also refrained from applying any civil law provisions, apparently because the case did not involve intention. The managing partner's negligence in the handling of the dangerous goods was considered the legal person's negligence. The decision was subject to strong criticism, suggesting a violation of the *nullum crimen sine lege* principle.[18] Nonetheless, about two decades later, the Supreme Court reached a largely similar conclusion in the Santika case. The legal basis for the attribution of criminal liability to legal persons, however, remains opaque.

III. LEGAL PERSONS AND REPRESENTATIVES AS JOINT PRINCIPALS?

The practice of Thai criminal courts[19] to find legal persons and their representatives jointly liable has already received some scholarly attention.[20] Recent Supreme Court

B.E. 2560 (2017) [พระราชบัญญัติแก้ไขเพิ่มเติมบทบัญญัติแห่งกฎหมายที่เกี่ยวกับความรับผิดในทางอาญาของผู้แทนนิติบุคคล พ.ศ. ๒๕๖๐] after a series of Constitutional Court decisions had found the previous wording in violation of the constitutionally protected presumption of innocence. See Constitutional Court Decisions Nos. 12/2555, 5/2556, 10/2556, 11/2556, 19–20/2556.

[17] Like in the Santika case, criminal liability was based on Sections 225, 291 and 300 of the Criminal Code.

[18] สุรศักดิ์ ลิขสิทธิ์วัฒนกุล, "ข้อสังเกตบางประการเกี่ยวกับคำพิพากษา ๓๔๔๖/๒๕๓๗ เรื่องความผิดทางอาญาของนิติบุคคล" (2538) 25(2) วารสารนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 260 [Surasak Likasitwatanakul, "Some Observations on the Supreme Court Decision No. 3446/2537 Related to Corporate Criminal Liability" (1995) 25(2) Thammasat Law Journal 260] (Thai); see also Nalinorn, *Corporate Criminal Liability* (n 8) 107, who considers that the decision reflects the identification or "Alter Ego" doctrine.

[19] See, for instance, Supreme Court Decisions Nos. 1328/2503; 59/2507; 584/2508; 63/2517; 84/2539.

[20] Suraphong, *Criminal Liability of Juristic Persons* (n 8) 75–83; นรเศรษฐ์ สว่างแจ้ง, ความรับผิดทางอาญาของผู้บริหารนิติบุคคล: ศึกษาบทบัญญัติของกฎหมายไทย (วิทยานิพนธ์ นิติศาสตร์มหาบัณฑิต คณะนิติศาสตร์

decisions provide an opportunity to revisit the issue and highlight persistent doctrinal vagueness.

In Decision No. 10194/2555 (2012), a limited partnership and its managing partner with the capacity to represent the partnership were found to have issued a dishonoured cheque as part of a real estate deal. Both the limited partnership and the managing partner, as defendants, argued that the cheque was issued in the managing partner's own name so that the legal person should not be implicated. The Supreme Court rejected this due to the factual circumstances, particularly because the managing partner had stamped the company seal next to his signature. Based on these facts, the Court held that it could "clearly be seen that it was a joint perpetration of a criminal act."[21] The Supreme Court thus affirmed the finding of the Appeals Court according to which the limited partnership and the managing partner had violated Section 4 of the Act on Offences Related to the Issuance of Cheques B.E. 2534 (1991) as joint principals under Section 83 of the Criminal Code.

Joint perpetration of a legal person and its representative was also found in Decision No. 7677/2561 (2018). In this case, a travel agency (a limited company) had defrauded customers while also operating without the necessary business licence. The First Instance Court convicted the company and its director jointly of fraud under Section 341 of the Criminal Code as well as of operating a travel agency without the required licence under Sections 15(1), 80 of the Tourism Business and Guide Act B.E. 2551 (2008), in conjunction with Section 83 of the Criminal Code. While the Appeals Court rejected the conviction based on the Tourism Business and Guide Act, the Supreme Court restored the First Instance Court's findings, emphasising that the defendants "jointly sold tour programmes and arranged their service for [the victim] . . . . The actions of both defendants therefore constitute the joint offence of operating a travel business without a licence."[22]

Another example is Decision No. 8967/2561 (2018) which dealt with allegations of tax evasion under Section 37 of the Revenue Code. The First Instance Court found the defendants, a limited partnership and its managing partner, criminally liable as joint principals under Section 83 of the Criminal Code. The Appeals Court reversed the decision and acquitted the defendants, which was affirmed by the Supreme Court. While the decision was also interesting for its distinction between tax evasion and different shades of tax avoidance, it particularly emphasised what would have been necessary to convict the legal person and its representative. The defendants would have needed to act intentionally according to Section 59 of the Criminal Code so that "Defendant No. 1 and Defendant No. 2 must have joint intention to evade or to attempt to evade tax, and must commit the act jointly with false information, by fraudulent or

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มหาวิทยาลัยธรรมศาสตร์ 2556) [Noraset Sawangchaeng, *Criminal Liability of Administrators of Legal Persons: A Study of Thai Laws* (Master Thesis, Thammasat University 2013)] (Thai) 66–68, 161–63.

[21] See the Thai original in Supreme Court Decision No. 10194/2555: "จึงเห็นได้ชัดว่าเป็นการร่วมกันกระทำความผิด."

[22] See the Thai original in Supreme Court Decision No. 7677/2561: "ได้ร่วมกันขายโปรแกรมการท่องเที่ยวและจัดบริการให้แก่ [ผู้เสียหาย] . . . การกระทำของจำเลยทั้งสองจึงเป็นความผิดฐานร่วมกันประกอบธุรกิจนำเที่ยวโดยไม่ได้รับใบอนุญาต."

deceitful acts or in another manner of a similar nature."[23]

The examples illustrate how legal persons and their representatives are frequently convicted as joint principals for the same action.[24] Criminal law doctrine, however, seems to be opposed.

Joint principals (ตัวการ; *tuakan*) under Section 83 of the Criminal Code are two or more persons who commit an offence together (ร่วม; *ruam*). The relevant crime must be an intentional offence, and the perpetrators must have joint intention (เจตนาร่วม; *chettana ruam*, or การร่วมใจ; *kanruamchai*).[25] It is generally true that a legal person and a respective representative may both be criminally liable for one action, either under the same or under different provisions. But this can hardly be joint liability under Section 83 of the Criminal Code because joint intention presupposes two or more persons who are each capable individually to develop intention. Legal persons, however, cannot develop their own independent will, let alone the will to collaborate with their representatives. This is inherent in the nature of legal persons, and this is why the will of a natural person needs to be attributed to the legal person in order to establish corporate criminal liability. Representatives are also not "split personalities" who have "two wills," their own and the legal person's will.[26] Such would be a questionable fiction for which there is no discernible need as both persons can be criminally liable on separate accounts.

Joint or separate responsibility may not make a significant difference in sentencing. But the collateral damage for doctrinal clarity and the reliability of criminal law should not be underestimated if a legal fiction with limited roots in reality is continuously reaffirmed. It might therefore be preferable to reconsider the practice of finding legal persons and their representatives jointly responsible for the same action.[27]

Joint perpetration faces even higher doctrinal hurdles if different provisions

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[23] See the Thai original in Supreme Court Decision No. 8967/2561: "จำเลยที่ 1 และจำเลยที่ 2 ต้องมีเจตนาร่วมกันหลีกเลี่ยงหรือพยายามหลีกเลี่ยงการเสียภาษีอากรนั้น และต้องร่วมกันกระทำโดยความเท็จ โดยฉ้อโกงหรืออุบาย หรือโดยวิธีการอื่นทำนองเดียวกัน."

[24] Additional evidence can be found, for instance, in Supreme Court Decisions Nos. 5446/2558, 10570/2558, 12328/2558, 1040/2559 and 7007/2562.

[25] หยุด แสงอุทัย (ผู้แต่ง), ทวีเกียรติ มีนะกนิษฐ (บรรณาธิการ), กฎหมายอาญา ภาค 1 (พิมพ์ครั้งที่ 21, สำนักพิมพ์มหาวิทยาลัยธรรมศาสตร์ 2556) [Yut Saeng-uthai (Author), Twekiat Menakanist (Editor), *Criminal Law Part 1* (21st edn, Thammasat University Press 2013)] (Thai) 104ff; ทวีเกียรติ มีนะกนิษฐ และ รณกรณ์ บุญมี, กฎหมายอาญา ภาคทั่วไป (พิมพ์ครั้งที่ 23, วิญญูชน 2564) [Twekiat Menakanist and Ronnakorn Bunmee, *Criminal Law, General Part* (23rd edn, Winyuchon 2021)] (Thai) 130–31; วิวรรธน์ ดำรงค์กุลนันท์, คำอธิบายกฎหมายอาญา ภาคทั่วไป (มาตรา 1-106) (พิมพ์ครั้งที่ 2, วิญญูชน 2563) [Wiwat Damrongkulnan, *Explanation of Criminal Law. General Part (Section 1-106)* (2nd edn, Winyuchon 2020)] (Thai) 169ff.

[26] For an overview of this opinion, see Noraset, *Criminal Liability of Administrators* (n 20) 66–68.

[27] ibid 163, who also considers that the principles of criminal law do not permit joint perpetration in these cases; Suraphong, *Criminal Liability of Juristic Persons* (n 8) 89, who rejects the possibility of a common plan made by a legal person and a representative, though specifically for conspiracy; สุชาติ ธรรมาพิทักษ์กุล, ทฤษฎีสถานภาพของนิติบุคคลกับความรับผิดทางอาญา (งานวิจัย, วิทยาลัยการยุติธรรม กระทรวงยุติธรรม 2541) [Suchart Thammapitakkul, *Theory of the Status of Juristic Persons and Criminal Liability* (Research, Justice College, Ministry of Justice 1998)] (Thai) 49, especially with regard to cases involving cheques.

apply to the legal person than to the representative. Supreme Court Decision No. 3282/2558 (2015) is instructive in this regard. The case dealt with tax fraud. The First Instance Court found the limited company and its director jointly liable under Section 90/4(7) of the Revenue Code. The provision stipulates criminal punishment for "a business operator [ผู้ประกอบการ; *phu prakopkan*] who intentionally uses a false tax invoice or tax invoice which is unlawfully issued for the purpose of tax credit." Thus, the First Instance Court considered both the legal person and its representative as business operators.[28] In the next instance, the Appeals Court decided that the director was liable additionally under Section 90/5, reflecting the prosecutor's initial indictment. At that time, Section 90/5 read:

> In the case where the offender liable to any penalty under this Chapter is a juristic person, the managing director, director or representative of such juristic person shall also be liable to the penalty provided for such offence unless such person can prove that he or she did not give consent to or was not involved in the commission of the offence of such juristic person.[29]

The Supreme Court rejected the conviction under Section 90/5, arguing that the prosecutor had failed to prove the director's knowledge of the criminal act in question.[30] The conviction as joint principals under Section 90/4(7) remained. While this finding of joint liability is in itself problematic for the reasons set out above,[31] it shall be highlighted here that the Appeals Court's additional conviction based on Section 90/5, a provision that applies exclusively to managing directors, directors or representatives, does certainly not extend to the legal person. Joint perpetration under Section 83 of the Criminal Code presupposes that all principals possess all necessary characteristics to commit the offences in question.[32]

A comparable constellation existed in Supreme Court Decision No. 6176/2559 (2016) which dealt with a case of tax evasion under Section 90/4(6) of the Revenue Code. Here, the Appeals Court apparently found the managing director jointly liable under Sections 90/4(6) and 90/5 of the Revenue Code, citing also Section 83 of the Criminal Code. The Supreme Court rejected the conviction based on Section 90/5 because the provision was not part of the prosecutor's indictment. Had the Appeals

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[28] "Business operator" is defined by Section 77/1(5) of the Revenue Code as "a person who sells goods or provides service in the course of a business or profession." In this respect, it should be noted that Section 77/1(1) usefully defines for Chapter IV of the Code that "'person' means a natural person, a group of persons without juristic personality, or a juristic person." The term "juristic person" is then further defined in Section 77/1(4) in conjunction with Section 39.

[29] The wording of this provision was changed in 2017 to bring it into conformity with the constitutional guarantee of the presumption of innocence, see n 16.

[30] The Supreme Court apparently interpreted Section 90/5 of the Revenue Code in light of the Constitutional Court's decisions, see n 16.

[31] An additional problem is whether legal person and representative can indeed both be considered as "business operators" under the Revenue Code, or whether only the legal person has this capacity in this case.

[32] Yut and Twekiat, *Criminal Law* (n 25) 105; Suraphong, *Criminal Liability of Juristic Persons* (n 8) 79.

Court considered joint perpetration also under Section 90/5, the rules applying to joint principals would certainly have been another reason to dismiss the conviction.

Finally, the Supreme Court's Santika decision already mentioned above could be illustrative of another problem that is connected to the issue of joint perpetration. In this decision, the Court reversed the Appeals Court's acquittal of the club owner and found him guilty of negligent killing (Section 291 of the Criminal Code) and negligent grievous bodily harm (Section 300) mainly because the club's emergency exits were either blocked or otherwise insufficient. Despite these being negligent offences, one phrase of the judgment reads almost as if the Court considered that the owner "acted in joint negligence" besides the negligence of two other defendants.[33] Joint negligence is doctrinally impossible, of course.[34]

IV. CONCLUSION

The last ten years of Supreme Court decisions on corporate criminal liability have shed new light on persistent doctrinal uncertainties. These are mainly related to how the objective and subjective elements of a crime are attributed to a legal person but also to the question of joint principals. As criminal prosecution of legal persons occurs quite frequently in Thailand, the doctrinal questions—many of which have existed for decades—have high practical relevance and should therefore finally be resolved. To this end, the constitutional principles of legality and legal certainty (*nullum crimen sine lege*) may require legislative interventions. Section 176 of the Organic Act on the Prevention and Suppression of Corruption B.E. 2561 (2018) appears to be a possible model in this regard. In the meantime, legal scholarship should continue to critically observe related developments in judicial practice.

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[33] See the Thai original in Supreme Court Decision No. 8565–8566/2558: "จำเลยที่ 1 จึงได้ชื่อว่ากระทำโดยประมาทร่วมด้วยนอกเหนือจากการกระทำโดยประมาทของจำเลยที่ 6 และที่ 7."

[34] Twekiat and Ronnakorn, *Criminal Law* (n 25) 131–32; but see Suraphong, *Criminal Liability of Juristic Persons* (n 8) 71, who apparently affirms the possibility of negligent joint perpetration.

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Book Review

Thai Legal History: From Traditional to Modern Law

Andrew Harding and Munin Pongsapan (eds)
Cambridge University Press (2021)
350 pp., ISBN-10: 1108830870

Reviewed by *Thongchai Winichakul*[*]

Congratulations to the new publication on Thai legal history. A new monograph or an edited collection in this field is infrequent, especially the one that is not mainly about current issues. Perhaps because of this, *Thai Legal History* (TLH) does not pretend to focus on a coherent theme or concept. Instead, eighteen articles in this collection cover quite a range of subjects in this relatively small field. I think it is the right approach that serves the field at this time very well as an invitation to readers to see how exciting Thai legal studies is.

TLH covers ancient legal doctrines, Buddhist and local legal customs, both public and civil laws, constitutions and coup orders, administrative justice and gender equity, and more. Chronologically, it covers traditional law and legal culture in pre-modern Siam, to the modernizing legal reform in the late nineteenth to early twentieth century, and the constitutional and legal crises since the mid-2000s to the present day.

As an historian of Thailand with interest in its legal history, I have five observations about the "H"—history—as it pertains to the articles in TLH.

First, we can find different kinds of history integral to the narratives and often as the unspoken premise of the analyses in TLH. Some are conventional and less critical historiography, while others are very critical ones. These different histories do not necessarily contradict one another. But if one is taken instead of another as the premise of many studies, the outcomes would be quite different. (I will clarify below.)

Second, the articles on recent politico-legal crises in Thailand, mainly Part III (on the constitutions, the legal aspects of the Thai-style democracy, legal immunity of the coup regimes and so on), plus chapter 6 on the lèse-majesté law by Eugénie Mérieau, are historicized very well. They often take Buddhism and cultural matters into consideration, too. I take note of this point because the discussion on these issues

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in Thai language has often been more technical, legally, and not historicized. The different tendencies are perhaps attributed to the previous works in English, like the ones by Björn Dressel, Andrew Harding, Peter Leyland, and David Streckfuss, that set the more historical tone than the Thai ones, except those by Somchai Preechasilapakul and Piyabutr Saengkanokkul.

Chapters 15 by Rawin Leelapatana and 16 by Henning Glaser in particular engage with some history and contending ideas in Thai jurisprudence beyond the recent disputes surrounding Thai-style democracy or the royalist regime. Tyrell Haberkorn takes a step further from her recent book on impunity of the coup regimes[1] and tries to find a legal approach to end it. I wish she would have elaborated the final section much more.

The recent politico-legal crisis should have led us to examine the systemic problems and the fundamentals of the legal system and Rule of Law in Thailand. However, the constitutional struggles, the abuses of the security laws, and the unjust judiciary, are understood primarily as political issues or as the politicization of the laws and the system, not their systemic problems. Hence the limited scrutiny of the legal system and Thai jurisprudence in similar fashion as Nick Cheesman does with regard to the legal system in Burma[2] and Jothie Rajah with regard to Singapore,[3] in which they historicize the currently perplexing conditions of the Rule of Law in those countries, then identify their particular characteristics.

The third observation: The narrative about the beginning of the modern legal system in Siam is that the legal reform was due to the colonial threats and its success was a key to save Siam's independence. This narrative, which has been formed in the early twentieth century, basically follows King Chulalongkorn's views shown in many of his writings in the 1890s and 1900s. In English scholarship, the same narrative has hardly changed since David Engel's seminal work in 1975.[4] This narrative in legal history closely observes the conventional historiography of Siam during King Chulalongkorn's era that has been challenged by historians in the past few decades.

Critical historiography has suggested that Siam was in fact semi-colonial (in various connotations of the term), and the reforms were to maintain Siam's imperial power by transforming the state into a modern one under the absolute monarchy. Modern technology of the state was adopted and employed effectively, such as the creation and management of territorial sovereignty, modern functional bureaucracy, railways and telegraph, and of course, the centralized and modernized legal system, to consolidate the power of Bangkok's rulers.

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[1] Tyrell Haberkorn, *In Plain Sight: Impunity and Human Rights in Thailand* (University of Wisconsin Press 2018).

[2] Nick Cheesman, *Opposing the Rule of Law: How Myanmar's Courts Make Law and Order* (Cambridge University Press 2015).

[3] Jothie Rajah, *Authoritarian Rule of Law: Legislation, Discourse and Legitimacy in Singapore* (Cambridge University Press 2012).

[4] David M. Engel, *Law and Kingship in Thailand During the Reign of King Chulalongkorn* (University of Michigan Center for Southeast Asian Studies 1975).

We cannot say that the critical narrative is merely ideological while the conventional one is based more on facts. They are the outcomes of different points of views and questions that historians employ. In some ways, we may say that they were two sides of the same coin. Yet, each have different implications conceptually and methodologically. For example, while the reform-saved-independence is a narrative of victimhood that regards the monarch as the savior, the reform-for-absolutism is a history of the traditional imperial power that reaffirmed its domination over its former vassals and subjects.

If the alternative narrative is taken more seriously, and the views of the Bangkok elite are taken more critically instead of taken for granted, the legal reform might look quite different, such as Tamara Loos has done in her book *Subject Siam*.[5] The two historiographies may also lead to quite different legacies of the legal reform under King Chulalongkorn. One suggests the establishment of a modern legal system and the Rule of Law, while the other points to the authoritarian legal system.

The fourth observation: Underlying the conventional historiography is the modernization theory. It suggests that the legal state or the Rule of Law in Siam was established since the reform, and, like other respects of the modernizing reform in the same period, it only needs further development to achieve the "normative" Rule of Law as in a developed country. This narrative usually, though not always, raises minimal, if at all, frictions between the modern system from the West and the pre-existing legal traditions in the creation and operation of the modern one. In other words, the legal transplantation was near perfect!

Even where the transplantation took place simply by translating foreign laws without understanding the concepts or history of the original ones, as Munin Pongsapan shows in his article on contract law, the law can function on the new soil without much problem. Indeed, it has been in place for more than a hundred years. The trust law, discussed meticulously in chapter 11 by Surutchada Reekie and Narun Popattanachai, was also entirely imported since there had been no such law in Siam before. It has served well for pragmatic purposes for more than a century, even though it might not fit well with the rest of the Thai legal system. The friction-free importation is hard to believe and even if it is true, these two articles do not explain why such was the case.

Perhaps the private laws are easier to be transplanted, I guess. Then, I assume that for public laws, which reflected the relations of power between the state and people, the transplant from the post-absolutism in Europe to the rising absolutist state in Siam must show serious frictions, particularly because the feudal systems in the two worlds were quite different, too. But Kanaphon Chanhom, in chapter 10, doubles down that the traditional Thai penal laws were similar and compatible with the European ones; thereby, the reform was merely a technical upgrade to rearrange, recategorize and systematize the old aged, disorganized laws by the European ones. Differences and frictions were minimal and mostly technical and were solved easily. Siam's first

[5] Tamara Loos, *Subject Siam: Family, Law, and Colonial Modernity in Thailand* (Cornell University Press 2005).

modern penal code of 1908 has been primarily in use until today with thorough reviews and minor revisions only a few times.

Does the near-perfect transplantation reflect Siam's exceptionalism? If true, how? It needs further explanations. Otherwise, should we raise doubts to the narrative of transplantation with minimal frictions and to their historiographical premises?

The narratives in chapter 12 on gender by Apinop Atipiboonsin and chapter 13 on administrative justice by Peter Leyland do not fit the legal modernization narrative. In the former, the modern family law awkwardly embraces monogamy while inheriting many traditional elements of gender inequality. Frictions are never resolved. In the latter, the discontinuous history of administrative justice results in multilayered laws with the written laws in appearance while customs, religions, history and politics are at work underneath it. Astonishingly, this arrangement allows the possibility of legal changes from below, unlike the conventional historiography in which the reform was entirely from above.

In social science, modernization theory has fallen out of fashion in the 1970s–80s because it failed to explain or solve the economic and political underdevelopment (poverty and authoritarianism, respectively). Somehow it survives rather well in the history of legal reform in Siam. Perhaps, legal underdevelopment (failure of the Rule of Law) has not been the case in Thailand. Or it is the contrary, that is, scholars do not consider the repeated, serious problems, including crimes by the state and impunity it enjoys, as symptoms of the failure of the legal system but as aberrations due to human errors and corruptions in the fine system.

The fifth and final observation: According to the conventional narrative, the success of the legal reform was a rather clean break from the pre-modern legal traditions. Buddhism and customs do not play significant roles in the modern system. Most studies of Thai legal history, therefore, do not pay much attention to the religious and cultural factors in the transplantation process or their legacies in the modern system, with a few exceptions, such as David and Jaruwan Engel's recent book *Tort, Custom, and Karma*.[6]

Every article on Part I of this book is refreshing as they revive the excitement in the pre-modern legal traditions including the roles of Buddhism and customs. Chris Baker and Pasuk Phongpaichit argue that the Thammasat in the Thai legal tradition was not as restrictive and in fact kings enacted new and lasting laws regularly. Eugénie Mérieau argues in chapter 6 that the monarchy's authority continues even today over the court, the constitutions, and the use of the laws. The legal influence of the monarchy is implied even in the royal proclamations at the beginning of the reign, according to Kongsajja Suwanapech in chapter 4. Besides, as several articles in Part III indicate, prominent Thai legal scholars today regard the monarchy as the supreme legal sovereign in Thai jurisprudence.

Khemthong Tonsakulrungruang, in chapter 5, also argues convincingly that the idea of Dharma (ธรรม; *tham*) still pervades throughout the modern legal system—in

[6] David M. Engel and Jaruwan S. Engel, *Tort, Custom, and Karma: Globalization and Legal Consciousness in Thailand* (Stanford University Press 2010).

the laws, in the interpretation and enforcement of them, in the mentality, the principles and practices of the judiciary, and in two of the most important concepts for the entire legal culture, Yutti-tham (ยุติธรรม, "justice") and Nititham (นิติธรรม, "Rule of Law"). If words matter, perhaps the Thai jurisprudence and legal system is not as secular as we assume since the Thai ideas of "justice" or "Rule of Law" are shaped by Buddhism rather than the Roman or Western laws. David Engel also reminds us of the cultural and regional diversity in Thailand's legal traditions.

One final note—the judiciary could be the institutional nexus in which the various forces in the history of the modern Thai legal system converge, such as modernity and traditions, both sides of the legal reform, and various trajectories of subsequent development. We could probably learn a lot about legal history by focusing on it. Unfortunately, there are only two chapters in TLH in that regard (chapter 8 on British judges in the post-reform period and chapter 17 on the crisis in the judiciary in 1991–92). The implications of both articles to the broader history are not less interesting, nonetheless, especially the article by Duncan McCargo that tries to bring us to look beyond the phenomenon of personality to the matter of principles and the system.

Last observation, though not about history: The majority of authors in TLH are from the younger generations of legal scholars. Such is a bold approach to an edited volume. Kudos to the two editors of the project. Judged by the quality of their works, the field has a bright future indeed.