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## The Teaching of the Law of Thailand

Ted L. McDorman  
*University of Victoria*

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### I. *Introduction*

Within the last few years Canada has begun to realize that it is a Pacific Rim country with substantial connections and interests in Asia. As part of this awakening Canadian interest in Asian affairs the Faculty of Law at the University of Victoria decided to develop and offer a course entitled "Legal Issues in Southeast Asia", with the hope that such a course would provide a forum for a systematic, informed comparison of the legal systems of Asia.

The Southeast Asian region was chosen as the geographic focus of the course, primarily because it was an area largely ignored by North American law schools. The legal system of Thailand was selected as the principal legal system of interest within this region. Thailand, a complex society and an enormous challenge to attempt to understand, presents a unique social and political history and a fascinating blend of legal traditions of interest to anyone involved in comparative law and, therefore, was a logical legal system upon which to focus.

The greatest difficulty in attempting to understand the legal system of Thailand is linguistic. Although the legal codes and much of the legislation of Thailand are available in English, the decisions of the courts are rendered only in Thai. Moreover, the academic and professional law journals are almost exclusively in Thai. While language is a serious handicap in developing an understanding of the Thai legal system, it was hoped that non-Thai speakers could still study Thai law and gain an appreciation of the essential components of the legal system.

Twelve students took the course when it was offered for the first time in the Spring Term of 1987 and a further 12 students enrolled in the course for the Spring Term of 1988.

For the Legal Issues in Southeast Asia class a coursebook of approximately 500 pages was prepared. Neither copies of the Thai legal codes nor specific pieces of legislation were included in the course materials. Instead, the coursebook consisted primarily of commentaries

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\*Visiting Assistant Professor, Faculty of Law, University of Victoria

\*\*Some of this note will appear in a book review of Apirat Petchsiri's *Eastern Importation of Western Criminal Law: Thailand As a Case Study* and other parts are based upon lectures given while the author was a Visiting Fellow at the Faculty of Law, Thammasat University, Bangkok in May, 1987.

about the law of Thailand. This reflected the basic premise of the course that it was considered important for the students to gain an understanding of Thai approaches to law, how the law works in Thailand, and how the legal system differs from the Canadian system, rather than the students learning detailed aspects of Thai law.

Five broad headings were used for purposes of course organization: the historical development of Thai law; the social, economic, and political *milieu* in Thailand; the occasional dichotomy between formal law and practice; perceptions of individual rights and constitutional law in Thailand; and Thai business law. Using these five broad headings it was possible to effectively explore the legal system of Thailand and identify the major issues of comparative jurisprudence. This note will employ these five headings to outline the fundamental aspects of the Thai legal system and by doing this raise many of the same comparative issues that arose during the course.

## II. *The Evolution of the Thai Legal System*

Of major importance in understanding the legal system of Thailand is the unique evolution of Thai law. Hence, an historical approach to the current Thai legal system was a critical part of the course.

Thailand's legal tradition goes back many centuries, although the detail of this history is very sketchy.<sup>1</sup> Little of the written history survived the complete destruction of the ancient capital of Thailand in 1767. In 1805 a compilation of the previous laws was completed and is referred to as the Code of Three Seals. The Code is effectively divided into two categories, the *Thammasat*, which is the Thai version of the Hindu *dharmasatra* and is based on the Hindu Code of Manu, and the *Rajasatham*. The *Thammasat* contains a very broad definition of law that has been described as a set of ethical propositions which constituted the Thai's fundamental view of law.<sup>2</sup> Although the *Thammasat* could not be altered by the sovereign, it has been viewed as positive law as it was to apply to both subjects and the sovereign.<sup>3</sup> The *Rajasatham* was a collection of decisions and orders issued by the sovereign to uphold the moral precepts found in the *Thammasat*. Only those decisions or orders that "were illustrations of the eternal Law" were elevated to the *Rajasatham*. The *Rajasatham* came to have the same authority as the *Thammasat*. This process of incorporating man-made law into part of the

1. See generally R. Lingat, "Evolution of the Conception of Law in Burma and Siam" (1950), 38 *Journal of the Siam Society* 9-31.

2. Apirat Petchsiri, *Eastern Importation of Western Criminal Law: Thailand As a Case Study* (Littleton, Colorado: F.B. Rothman, 1987), at 153-154.

3. *Id.*, at 154-155.

“sacred” text is “said to be the most ingenious device invented by Thai traditional law.”<sup>4</sup>

The positive law as found in the Code of Three Seals was not, however, for the regular use of individuals. The Code of Three Seals, for example, was only made public in 1883 and previous to that was only consulted when serious difficulties arose. The Code of Three Seals was for the use of the state in the regulation of state officials and for relations between the state and individuals.

Political and economic factors, the most important of which were external political factors, resulted in a substantial shift in the positive law of Thailand in the 1800s. Westerners found the Thai legal system of the 1800s confusing and at times harsh. During the mid-1800s they forced upon Siam a series of treaties which exempted foreigners from Thai law and provided that they be bound only by their own national law and that they be tried not in Thai courts but in special Consular or international Courts which would have non-Thais as judges. Moreover, Siam in the late 1800s found itself in a precarious position between the British and French colonial interests. During the reign of King Chulalongkorn (1868-1910), massive law reform motivated by these political factors took place with the result that the current Thai court structure and framework of legal codes, based largely on European and Japanese precedents, were put in place. By emulating Western laws, it was hoped Siam could avoid providing a pretext for becoming colonized, and further that the special, extraterritorial legal privileges Westerners enjoyed could be removed. In fact, the removal of the treaty-created restrictions on Thai sovereignty was a motivating factor in much of Thai foreign policy in the late 19th and early 20th centuries, including Thailand’s decision to enter the First World War.<sup>5</sup> It was not until the late 1930s that full sovereignty was again acquired over all foreigners in Thailand. Thailand, however, was the only country in the region not to come under colonial rule.

King Chulalongkorn’s goal of establishing a legal system that looked familiar to Westerners was accomplished largely by using advisers from various countries to assist in the drafting of codes and legislation. It is interesting to note, for example, that the 1908 Penal Code was originally drafted in English and then translated into Thai. The Civil and Criminal Procedure Codes were based upon the English model and the court

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4. Preedee Kasemsup, “Reception of Law in Thailand — A Buddhist Society” in Masaji Chiba, ed. *Asian Indigenous Law in Interaction with Received Law* (New York: KPI Books, 1986), at 283 and 276-289.

5. Likhit Dhiravegin, *Siam and Colonialism (1855-1909): An Analysis of Diplomatic Relations* (Bangkok: Thai Watana Panich Co., 1975), at 59-60.

structure based upon that found in France. The Civil and Commercial Code, completed in 1935, and based on Continental and Japanese precedents, was the last of the major codes to be adopted and contains 1,755 sections governing such matters as persons, capacity, domicile, obligations, torts, sales, mortgages, agency, cheques, partnerships, companies, property, marriage and divorce, wills and intestacy.

The adoption of the Western-based legal codes ended the reliance of the Thai legal system on the 1805 Code of Three Seals. The conventional viewpoint is that the adoption of these Western codes amounted to a law reform and a modernization of the Thai legal system. One leading Thai legal scholar takes the view that the European legal system, supported by mature jurisprudence, was rational and systematic and, therefore, "it was quite reasonable that non-Western countries received it as a whole"<sup>6</sup> and that the "superior qualities of the Western legal system made the Eastern mind feel the necessity of reception".<sup>7</sup> However, another author argues that the Western powers desired to impose a legal system they could comprehend since the "more stable and Western the legal systems . . . , the easier it would be . . . to expand their industrialized markets"<sup>8</sup>, and what took place was not a law reform but an abrogation of the existing indigenous Thai law. This commentator takes the view that there was no real domestic reform since the local people were neither consulted about the changes, nor did the changes have any relevance to the majority of local people.

It does appear that prior to the adoption of the legal codes a true law reform was taking place in response to local needs and ideologies. The common law of England was the basis of some of the reform. "The reformed system seemed to run smoothly because common law principles were flexible enough for the local judges to administer indigenous law side by side with English legal principles."<sup>9</sup> However, it was the continental system that ended up forming the basis of the new legal system because it was the French that were the most agitated about the perceived "uncivilized" nature of Siamese law.<sup>10</sup> It has been suggested elsewhere that the reason for the adoption of the Continental system was its comprehensiveness and the difficulty of transplanting the Common Law into Thailand.<sup>11</sup> Certainly, for the political reason of quickly

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6. Kasemsup, *supra*, note 4, at 290.

7. *Id.*, at 289.

8. Petchsiri, *supra*, note 2, at 32.

9. *Id.*, at 41.

10. David K. Wyatt, *Thailand: A Short History* (New Haven, Conn.: Yale University Press, 1984), at 210.

11. Thailand, *Thailand Official Yearbook, 1968*, Chapter VII, "Administration of Justice", (Bangkok, 1968), at 254-255.

instituting a legal system familiar to Westerners, the Civil Law was easier to adopt.

The adoption of the Western law systems by Thailand introduced the positivistic legal tradition of law being legitimated by its source (from the sovereign) rather than its consistency with the *Thammasat* or *Rajasat*. Commentators have taken the view that by the late 1800s the sovereign was already effectively legislating without regard to the *Thammasat* or *Rajasat*<sup>12</sup>, so that no real change took place with the adoption of Western-based law. Whichever view is accepted, the government of Thailand has been very busy in this century issuing laws to govern almost all aspects of Thai society and Thailand has a highly structured, formal legal system.

According to the 1978 Constitution, legislation is to pass through the popularly elected National Assembly and then receive the approval of the King. There exist other instruments besides parliamentary-approved legislation that compose the regulatory law of Thailand and these are variously called royal decrees, executive orders, and ministerial regulations. Usually these are instruments of the executive branch of the government and have received the direct or indirect approval of the monarch. It is important to note that Thailand has experienced a significant number of abrupt governmental changes since the end of the absolute monarchy in 1932 and that recently the Supreme Court of Thailand held that "all legislation enacted by means of revolutionary decree are considered valid law".<sup>13</sup> This confirms the accepted practice and is evidence of the varied nature of the sources of Thai legislation and regulation.

It is also important to note that local custom and general principles of law may also be regarded as a source of law where no statutory provisions exist. This is set out in section 4 of the Civil and Commercial Code.

The law (Code) must be applied in all cases which come within the letter and the spirit of any of its provisions. Where no provision is applicable, the case shall be decided according to local custom. If there is no such custom, the case shall be decided by analogy to the provision most nearly applicable, and, in default of such provision, by the general principles of law.

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12. See generally David M. Engel, *Law and Kingship in Thailand During the Reign of King Chulalongkorn* (Ann Arbor, Mich.: University of Michigan, 1975) at 33-58.

13. Viboon Engkagul, "Recognition of Human Rights under Thai Laws" in H.M. Scoble and L.S. Wiseberg, *Access to Justice: The Struggle For Human Rights in South East Asia* (London: Zed Books, 1985) at 99.

A formal court system existed in Thailand prior to the law reforms of King Chulalongkorn. However, the structure was chaotic as courts were attached to different government departments and were perceived as having few of the characteristics that Westerners ascribe to impartial courts. The Westernization of Siamese law included the establishment of a court structure based on the French model including the professional training of judges. This structure remains much the same today.

The Thai judiciary is an independent branch of the government with the Judicial Services Committee handling all appointments, promotions and transfers of judges and the responsibility for the integrity of the judiciary. It is interesting to note that, consistent with the tradition of the Thai monarch being the ultimate dispenser of justice, when the modern court structure was first established the Supreme Court of Thailand was directly responsible to the King and the King could participate in the Court's decision-making. This was changed following the end of the absolute monarchy in 1932. The monarch has retained only the Royal Prerogative of Mercy which is to be exercised on the advice of the Minister of the Interior. However, because of this close connection between the monarchy and judges the judiciary has always been very highly respected in Thailand.

Although considered to be a Civil Law country, some Thais describe their system as falling somewhere between the English and Continental systems since the decisions of the Supreme Court are highly persuasive upon lower courts and infrequently departed from, and the decisions play an important role in developing the law.<sup>14</sup>

The first thing to note about the legal profession in Thailand is that, like Canada, there is no distinction between a barrister and a solicitor, although to appear in court in Thailand a licence must be obtained from the Law Society of Thailand. This licence will usually be granted to individuals after the completion of a one-year training program. The practice of law in Thailand is restricted to Thai nationals with degrees from Thai law schools.

It is interesting to speculate how lawyers are regarded in Thai society. In North America, despite a general distrust of lawyers, they are held in high regard. This is not so in Thailand, with the exception of Royally-appointed judges and government lawyers, such as those in the Department of Public Prosecution, for the following possible reasons. Social status in Thailand is most frequently based upon position in the bureaucracy and practising lawyers are outside of this. Lawyers are usually associated with disputes and confrontation, which are not

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14. "Administration of Justice", *supra*, note 11, at 261.

considered a societal value. Traditional Thai society did not provide a high status for business people and lawyers are often associated with business. Finally, lawyers did not exist prior to this century, so society is still uncertain of how to regard them. The position of lawyers, however, is changing as societal values change, in particular, as status derived from wealth becomes more accepted.

Despite an extensive legal tradition of its own, in the late 1800s Siam borrowed from the West much of the structure and substance that one currently finds when examining the Thai legal system. To some extent this is reassuring for Westerners dealing with Thailand and in particular for law students grappling with an Asian legal system for the first time, but as will be noted shortly appearances and reality are not necessarily the same.

### III. *The Social, Economic and Political Milieu*

As well as the historical perspective on Thai law it was necessary in the course to provide the students with an understanding of the political history of Thailand, the current economic and political issues facing Thailand, Buddhism, and the social fabric of the country. Without this background, knowledge of the Thai legal system would be artificial and many interesting issues of comparative law overlooked.

The most difficult part of this section was attempting to articulate how Thais view and relate to law and the formal legal system. In North America and other Western societies, law has an exalted position in the consciousness of society. Societal reliance upon law to protect interests, individual or communal, is well-accepted. In the United States the interests protected are perceived to be individual interests, whereas in Canada, the legal culture has traditionally been oriented more towards community interests than individual interests, although this may now be changing. Acceptance of law as a means of resolving conflicting interests and promoting and ensuring desirable individual and communal action is unquestioned.

A legal resolution of disputes is not always the preferred solution in Thailand. The emphasis of Eastern jurisprudence is upon harmony of social relationships and, therefore, a rule-oriented system like that of the West, which presupposes disputes, is inconsistent with a social setting where there is a strong expectation that disputes should not arise or, if they do, are to be settled by mutual understanding. Great societal value is placed upon avoiding direct confrontation and there is a wariness of entanglement with bureaucratically-created institutions like the courts. Moreover, the "entourage model" of social organization, which is peculiar to Thai society, provides its own avenues for conflict mediation



that in many cases are perceived as being a more appropriate means to settle conflicts than recourse to the formal legal system. Some comment on this social structure is necessary.

Thai society is a "status community" where each individual has his or her social status, although it is not based on caste, community groups or kinship. The Code of Three Seals dealt specifically with ranking of societal members in three separate sections. "Such categorization is legal and moral but not a divine order as is the Hindu caste system."<sup>15</sup> The law of *Sakdina*, as the hierarchial ordering was called, was a system where the status of every man was established, and based upon this status, an individual's responsibilities to the state or sovereign were determined.<sup>16</sup> Status also determined the punishment for breach of the law or injury suffered. Lower-ranked accuseds received higher penalties where the victim was of a higher rank. Also, a higher-ranked accused received greater penalties since a higher duty was placed on him to respect the law.

One author describes Thai societal structure as centering around "reciprocal exchanges and personal preference" between individuals of differing social status.<sup>17</sup> The higher status individual, the patron, provides protection and influence to the lower status individual, the client, who in turn, when called upon, performs services for the patron. The entourage is extremely important in providing informal mechanisms for resolving disputes and for establishing moral obligations among its members. It is important to note that one of the main protections offered by the patron to the client concerns assisting the client in avoiding or dealing with the formal legal system.

It is to the courts that the formal, rule-oriented legal system directs individuals for resolution of disputes. This is well-accepted in Western societies. However, in Eastern societies like Thailand, the court structure and formal legal system is frequently avoided. Greater reliance is placed upon tolerance, community or moral pressure, and informal systems of dispute resolution (for example, through the intervention of patrons). The informal system of dispute resolution, with its reliance on negotiation and mediation, is premised on the avoidance of direct confrontation and minimization of "grievance tension, a term used by anthropologists to

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15. Petchsiri, *supra*, note 2, at 156.

16. See generally H.G.Q. Wales, *Ancient Siamese Government and Administration* (New York: Paragon Books, 1934, reprinted 1965) at 21-68.

17. Petchsiri, *supra*, note 2, at 167. See also David M. Engel, *Code and Custom in a Thai Provincial Court* (Tucson: University of Arizona Press, 1978) at 69-78. The literature regarding societal relationships in Thailand is vast. See generally G.W. Skinner and A.T. Kirsch, eds. *Change and Persistence in Thai Society* (Ithaca, N.Y.: Cornell University Press, 1975).

denote the sense of grievance harboured by the party adjudged at fault in a dispute".<sup>18</sup> Hence,

Despite the creation of a national judicial system with its adversary process and adjudicative procedures, the traditional practice of mediating private wrongs has remained strong in Thailand. There has been a continuity with the past, even within the very institution that would appear to destroy customary juridical practices. The procedural codes themselves, while creating a process by which the court can adjudicate legal matters brought before it, also provide the mechanisms by which mediation can be achieved. They permit the settlement and withdrawal of private criminal suits; they allow the judge to promote settlements in civil suits; they provide for the refunding of fees in civil suits which are settled without adjudication; they spread individual trials out into a series of monthly hearings and presentations that provide a maximum opportunity for negotiation. In short the process of mediation is supported both by tradition and by specific provisions in the procedural codes themselves.<sup>19</sup>

Without question the formal legal system for dispute settlement is not perceived by many in Thailand in the same manner as by Westerners. Moreover, law and the legal system do not necessarily play the same role in Thai society and North American society. It is not intended here to articulate precisely what those differences might be but it is hoped that some appreciation of the differences will emerge from the comments here made.

#### IV. *Formal Law and Practice*

Although Thailand has a well-structured, formal legal system, in some areas the adoption of Western-based law has had little effect on the practice of the people. There appears to exist the formal written law, taught in the law schools and applied by the Courts in the infrequent situations where a Court must make a decision favouring one litigant or the other, and the informal binding and accepted practices understood by the people and frequently employed by officials.

As one observer put it, "as one manoeuvres daily through the minefield of Thai society strewn with shattered fragments of laws more honored in the breach than in the observance, one loses respect for the rule of law".<sup>20</sup> This author takes the view that it is the divergence of the formal, positive law and custom that is the cause of this apparent disrespect for the law. Another author indirectly provides insight into this

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18. William J. Klausner, "Conflict Resolution" in W.J. Klausner, *Reflections on Thai Culture* (Bangkok: The Siam Society, 2nd ed., 1983) at 178.

19. Engel, *supra*, note 17, at 133-134.

20. William J. Klausner, "Law and Society" (1984), 3 *Chulalongkorn Law Review* 1.

when he suggests that indigenous Thai positive law did not presume to create significant rules for individuals and that when rules were adopted they were based on Western experience, not Eastern experience. Hence, people regard the formal, positive law as alien, designed only for a small community and not them, and unrelated to their experience or needs.<sup>21</sup>

In the area of labour standards, for example, it has been argued that the extensive Thai legislation was adopted to appease Western observers and that there was only a minimal expectation that it would be enforced except where violations were flagrant.<sup>22</sup> The rights and duties of Thai citizens found in the 1968 Constitution have been described as representing “goals to be attained” rather than positive statements of law that were to be used.<sup>23</sup> These perspectives on the written law are not inconsistent with one observer’s view that the indigenous positive law, the Code of Three Seals, “was not really meant to be utilized or exercised in the everyday life sense, but more as an abstract entity, constantly reminding one to conform to proper conduct”.<sup>24</sup> It has also been commented that, “Western legal concepts are incompatible with Eastern philosophies and, without the support of the local people, their effectiveness is reduced to a minimum.”<sup>25</sup>

Three areas of law were utilized in the course on Thai law to accent this perceived dichotomy in the Thai legal system — family law, land tenure law and labour standards law.

Issues of inheritance, matrimonial property, divorce and the rights of husbands and wives have long been dealt with by codifications in Thailand. The Code of Three Seals had a section dealing with these issues that, unlike some other aspects of the Code, was accepted and utilized by the general population when there were disputes. Much of the current family law of Thailand remains based on this traditional law. There is no other area of modern Thai law where traditional patterns remain as evident.<sup>26</sup> This explains why the informal system and formal family law system operate in *relative* harmony.<sup>27</sup>

21. Petchsiri, *supra*, note 2, at 60, 74, 79-80 and 121.

22. Bevars D. Mabry, *The Development of Labour Institutions in Thailand* (Ithaca, N.Y.: Cornell University, 1979) at 95 and 108-109.

23. R.H. Hickling, “The Legal System of Thailand” (1972), 2 Hong Kong Law Journal 8 at 15. See also Mya Saw Shin, *The Constitution of Thailand* (Washington: Library of Congress, 1981) at 43.

24. Sarasin Viraphol, “Law in Traditional Siam and China: A Comparative Study” (1977), 65 Journal of the Siam Society 81, at 122.

25. Petchsiri, *supra*, note 2, at 120-121.

26. “Administration of Justice”, *supra*, note 11, at 257.

27. See, however, A. Wichiencharoen and L.C. Nestisastra, “Some Main Features of Modernization of Ancient Family Law in Thailand” in D.C. Buxbaum, ed., *Family Law and Customary Law in Asia: A Customary Perspective* (The Hague: Martinus Nijhoff, 1968) at 105.

Despite the general harmony between the traditional law and the codified law in the family law area, it was an issue of family law, monogamy versus polygamy, which created the most debate when the Civil and Commercial Code was being discussed and adopted. Polygamy had long been practised in Thailand, yet Western society accepted only monogamy and expected “civilized” countries to do the same. As articulated by King Vajiravudh (Rama VI) in 1913, the primary difficulty was that the basis of Western marriage law was the Christian religion, with the consequence that the acceptance of monogamy might be an indication of an inferior position for the Buddhist religion. He also expressed concern that the written law would not be applied in practice and that this would lead to disrespect for the law.<sup>28</sup> In the end, however, Thailand accepted monogamy as the law of the land.

The relative harmony that exists in family law between formal and informal law did not exist, at least earlier in this century, with respect to land tenure law. Traditional land tenure in Thailand was based upon occupation. Early in this century the Torrens land-title system was introduced and the basis of land tenure became documentary ownership rather than factual occupation. The reasons why the Thai government adopted the title deed system for land tenure were not related to the political motivations responsible for the revision of the rest of the legal system. Rather, the title deed system provided a practical solution to the ever-increasing number of land disputes that were occurring in Bangkok as land became more valuable. Moreover, the new system was designed to facilitate land tax collection and allow the elite to become absentee landowners since legal ownership was to be separate from use.

The reform of the land law early in this century was not very successful as the surveys necessary for the issuance of the title deed were often not done and farmers simply never bothered to obtain title deeds. The informal system, whereby occupation gave certain accepted rights, continued to exist. Recognition of this informal system came in the 1936 and 1954 Land Codes, which accepted that documents something less than title deeds existed and could confer certain rights respecting the land. While peasants seem to accept that some type of paper is necessary to ensure use of land, the multitude of documents that exist creates confusion. There have been various legislative attempts to fuse the formal and informal land tenure systems.<sup>29</sup>

In Thailand there is a perceived dichotomy between standards set by formal, legislative acts and the actual practices in those areas. The issues

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28. King Rama VI's 1913 memorandum is reproduced in *Family Law, id.*, at 89-98.

29. Concerning land tenure in Thailand, see generally Jeremy H. Kemp, “Legal and Informal Land Tenures in Thailand” (1985), 15 *Modern Asian Studies* 1-23.

highlighted by this dichotomy involve the pros and cons of setting standards that are unrealistic given prevailing economic and social conditions, and the problem of inadequate enforcement. Labour standards legislation is a useful illustration since, on paper, Thailand's labour standards are very high; however, it is recognized that in practice these standards are not always attained.

During the course a lively discussion arose on the perceived differences regarding enforcement of law in North America and Thailand. The class identified the following possible reasons for the perceived occasional unwillingness to enforce standard-setting legislation in Thailand. First, in the labour area in particular, the few officials charged with the responsibility of enforcement were usually very junior and were most frequently forced to deal with powerful and influential people from an inferior position, which resulted in an unwillingness to confront them. Second was the general unwillingness to be confrontational, which would be necessary if there was to exist vigorous enforcement of legislation. Third was the perceived attitude that one should show restraint in exercising one's advantage over another (in this case, application of strict law). A fourth possibility was that the formal labour law was designed for Western consumption and not to be applied vigorously against Thais, although it may be so applied against foreigners. The economic factor was a possible fifth reason for an unwillingness to enforce legislation. In particular, it was recognized that the application of minimum-wage and labour standards would lead in many instances to unemployment and individual hardships worse than the poor pay or working conditions the measures were designed to remedy.

##### *V. Individual Rights and Constitutional Law*

Most Western legal systems are premised to a greater or lesser extent on the concept of individual rights and equality in the eyes of the law. The United States since 1787 and Canada since 1982 have had constitutional instruments which are utilized by the courts to guarantee to citizens certain civil and political rights and fairness in legal proceedings. Western societies, particularly the United States, give the appearance of being so preoccupied with rights that the duties of their citizens to society are ignored. However, Thailand, like other Eastern societies, is not as a generality rights-oriented but is duty-oriented, and this is reflected in the law and use of the legal system. This major difference between the Thai and North American legal systems was explored at length in the course.

Societal relations in Thailand are an interaction of mutual duties, as is clear from the entourage model of Thai society. It is interesting to note that traditionally the sovereign was duty-bound to follow the

*dharmasatra* in his actions. Buddhism, the principal religion that permeates the Thai philosophy of life, stresses that the assertion of rights is improper. This stress on duty does not, however, mean that the Thais are not strongly individualistic; as one author states "(i)ndividualism is mentioned again and again as an outstanding trait among Thai people".<sup>30</sup> One discovers, however, that although the 1978 Thai Constitution contains many provisions that deal with the rights of citizens, arguments utilizing these provisions are infrequently heard by courts and apparently have never been the basis of a court decision. There is not a tradition in Thailand of pursuing, exercising or perceiving individual legal rights.

One area where there has been a development of individual legal rights is the status of women in Thailand. The 1978 Constitution, for the first time, indicates that the sexes are to be treated equally. More significantly, changes were made in the mid-1970s to the family law sections of the Civil and Commercial Code which removed many of the provisions that left women in an inferior position respecting divorce and control over family assets. It would be overstating the situation to say that inequality does not exist, but much of the legislatively-sanctioned discrimination has been removed.

Legal protection of individual rights is not unfamiliar to Thais. Although Thailand does not have a comprehensive legal aid system, provisions have always existed in the Criminal Procedure Code directing that in cases involving potentially severe punishment the Court is to appoint counsel where an individual has none. The Supreme Court of Thailand has quashed convictions where a trial judge has found an accused guilty without inquiring about counsel and, if necessary, providing counsel. Recent legislation has expanded both the right to counsel and the role of counsel in protecting the rights of criminal suspects.<sup>31</sup>

Since the end of the absolute monarchy in 1932, Thailand has had 13 different constitutions, all of which have recognized the continuing presence of the monarch.<sup>32</sup> These constitutions have laid out the government institutional machinery and generally acknowledge civil and political rights for Thai citizens. The Constitution, while legally important as the foundation of government, has not been important in the protection of individual rights. Moreover, the court system is precluded from utilizing the provisions of the Constitution to restrain government action. Only a special Constitutional Tribunal, as provided for in the

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30. Engel, *supra*, note 17, at 69.

31. See generally Jaran Pukditanakul, "Legal Aid in Thailand" (1984), 7 *Asian Law Journal* 88-94.

32. See generally Shin, *supra*, note 23.

1978 Constitution, can hear such a case. It is interesting to note that the composition of this special tribunal would include not only judges, but bureaucrats, politicians and other individuals not necessarily legally trained, appointed by the National Assembly. The Constitutional Tribunal has seldom been called into action.

Constitutions are more politically and socially important than legally important in Thailand. As a pragmatic matter the various constitutions that have existed in Thailand attempt to legitimize the rights of the usurper to power and to establish the rules for retaining legitimacy. Also, it is understood that there is a need to establish an orderly manner of governing, and this is frequently assisted by a constitution. Moreover, because certain Western states place a great emphasis upon written constitutions, to appease these entities the easiest solution was to provide a constitution. It is also suggested that the Code of Three Seals was like a constitution in that in theory its precepts were to restrain the power of the monarchy, and modern Thai constitutions can be seen as only an extension of this idea. Modern Thai constitutions, as aspirational documents, are similar to the Code of Three Seals, certain parts of which were a statement of political and individualistic ideals.

## VI. *Doing Business in Thailand*

The final section of the course dealt with issues of business law and the doing of business by foreign interests in Thailand. This is one area where there is no lack of helpful literature.<sup>33</sup> Because the course was not designed to deal with detailed aspects of Thai law, it was only possible to make some general comments on business law.

Few surprises exist for a foreign businessperson regarding basic contract and commercial law. Much of the technical commercial law is based upon English precedents, and more generally, upon the "law merchant". Contract law, being derived from the Civil Law, takes a different approach than Common Law to the theory of contract, although this creates no serious difficulty in practice. It is interesting to note that when Thai Courts are faced with contractual matters they almost without fail uphold the strict wording of the contract. It should be noted, however, that in civil and commercial litigation matters Thai court procedure is ponderous and cases can be quite lengthy, because the spreading of trials over a series of monthly hearings better realizes the goal of encouragement of a settlement between the parties.

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33. See Baker and McKenzie, *Thailand: A Legal Brief* (Bangkok: 1987), and International Legal Counsellors Thailand, *Thailand Business Legal Handbook* 6th ed. (Bangkok: Chase Manhattan Bank, 1984).

Commercial arbitration is accepted in Thailand as a means of solving disputes. The Civil and Commercial Code recognizes arbitration-in-the-court and arbitration-outside-the-court. The former arises where the parties are already before the court and, with the approval of the court, opt to remove the dispute to arbitration. It is infrequently used. Arbitration-outside-the-court is utilized where the parties agree to arbitrate prior to reaching court. This covers most foreign and domestic arbitrations. No distinction is drawn in Thai law between arbitration awards given in Thailand (domestic awards) and those given outside Thailand (foreign awards). In both cases the award is enforceable as a contractual obligation through the Thai court system. No specific legislation exists regarding the enforcement in Thailand of foreign judgments and such enforcement is a delicate and difficult issue.<sup>34</sup>

There exist investment promotion laws which attempt to encourage foreigners to invest in particular industries and businesses by providing relief from taxes and other restrictive legislation. The Board of Investment is charged with the responsibility of encouraging investment in Thailand. Canadian direct investment in Thailand has not been very significant. Canada-Thai trade is expected to increase but at the moment each accounts for approximately one per cent of each other's imports and exports. To facilitate relations Thailand and Canada concluded a Double Taxation Treaty in 1985 and in 1983 a Foreign Investment Insurance Agreement was signed.

The major difficulty perceived by Thai lawyers in advising foreign clients about doing business in Thailand is that, of course, all documentation must be in Thai, which is expensive and frustrating for foreigners. A second difficulty is that, unlike in North America and other Western countries, it is difficult to give clients reasonably assured answers about uncertainties in legal practice since few cases give guidance and, in any event, the cases are not strictly binding. Finally, it is extremely difficult to obtain the government policy directives that influence and guide officials who have to exercise discretion in granting exemptions, permits or whatever. Hence, when advising foreign business people a Thai lawyer frequently ends up being quite vague about the system in which he or she has to operate.

## VII. *Conclusion*

Examining the legal system of Thailand may seem like an exotic

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34. See generally Suwit Suwan, "International Commercial Arbitration and Enforcement of Foreign Judgements" and Athueck Asvanund, "Introduction to Arbitration Under Thai Laws", papers presented to the Seventh Lawasia Conference held in Bangkok in August 1981.



adventure while travelling the mainstream of law school. However, being able to deal comfortably with foreign law, in particular the legal systems of Asian countries, is becoming increasingly more important for law professionals in British Columbia and Canada. Few can doubt that there are significant differences respecting the idea of law and approaches to law between Eastern and Western societies. Most fundamentally, Western societies' high regard for the rule of man-made law and formal modes of dispute settlement is not necessarily shared by Eastern societies. Understanding and exploring the differences regarding the idea of law and approaches to law is the basic goal of comparative law and the course on Thai law. While Thailand as a country may be exotic, the adventure of studying the country and its law is not.