By Carolyn Raffensperger

# In Thailand, A Green Court Rethinks Law

Every first year law student knows that the court system and especially torts are supposed to have a deterrent effect on bad behavior. But for the past 150 years courts have looked the other way if low-grade harmful activities are contributing meaningfully to the economy even if they are also polluting the earth. Oliver Wendell Holmes articulated this position in 1881: "The public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor." Rather than deterrence, the U.S. judicial consensus has continued with the Holmsian position.

The aggregate, cumulative effects of individual activity are dramatically different than in Holmes's era. For one thing the world population has increased from about 1.7 billion people (by 1900) to around 5.9 billion people today. This explosive growth has combined with increased technological prowess to fundamentally alter the life support system for all living things, the global ecosystem.

In 2005 the United Nations released a report entitled the Millennium Ecosystem Assessment. Conducted by 1,300 experts in 95 countries, the assessment said that approximately 60 percent of the ecosystem services of the planet — "fresh water, capture fisheries, air and water regulation, and the regulation of regional climate, natural hazards, and pests" — are being degraded or used unsustainably. If the ongoing degradation continues, it is likely that the earth's systems will suffer from abrupt changes that will seriously affect human well-being. These changes include "the emergence of new diseases, sudden changes in water quality, creation of 'dead zones' along the coasts, the collapse of fisheries, and shifts in regional climate."

The assessment carries with it a challenge: can humans reverse the degradation of ecosystems while meeting increasing human demands? The authors argue that we can succeed, but it will require significant policy and institutional changes, none of which are underway.

The courts can lead the way in instituting the changes necessary for survival by implementing precautionary judicial policies to prevent future harm and redress past harms to the commons. But they will have to rethink the pragmatic Holmsian approach. A fresh example comes from abroad, bringing to mind Justice O'Connor's admonition that "because of the scope of the problems we face, understanding international law is no longer just a legal specialty; it is becoming a duty."

The Supreme Court of Thailand is in the vanguard of judicial applications of the precautionary principle and other institutional changes that take seriously the world environmental condition. The procedural changes the court has adopted will alter the outcome of cases. "We would like environmental cases to be special cases because they affect the life, health, and well-being of the public. If the court deliberation is slow or has to wait for any side effects to emerge it may be too late for the environment or people's lives," said Apichart Sukhagganond, who is president of Thailand's new "Green Bench."

This environmental division of the Supreme Court will streamline the case load so that cases can be concluded in three years or less (rather than the current five years). In perhaps its most significant change, the environmental court will put the burden of proof on defendants, thereby adopting the precautionary principle. In addition, like bankruptcy courts, the decisions will extend to all damaged parties, not just plaintiffs. The rationale for granting a remedy to everyone who has suffered from environmental damage is that by extending the remedy to potential plaintiffs, the number of cases brought to the court will be reduced substantially. Finally, the court will significantly reduce or waive court fees for poor plaintiffs so that they have the wherewithal to sue industrial polluters.

Interestingly, the Thai environmental court is a result of a U.S. Agency for International Development project called US-AEP, the Asia Environment Partnership. A report on US-AEP's website describes the problem it seeks to address: "Enforcing environmental laws in Thailand remains a significant challenge, due to overlapping authorities and capacity and financial limitations. While Thai citizens bring environmental cases to court to seek monetary damages or the closure of factories, trial judges who are unfamiliar with environmental legal principles and law routinely dismiss cases or narrowly interpret Thai law in favor of defendants. As a result, there is no effective floor for environmental law enforcement."

This project began in 2001 with an examination of Thailand's administrative courts and key legal decisions. In 2003, US-AEP formed a partnership with the Office of the President of the Supreme Court. The partners did their research through consultations with stakeholders and judges from around the world, including the United States and other Asian countries. This process culminated in a judges forum in Bangkok, where the court presented the results of its research and proposals for creating an environmental court with effective judicial procedures for protecting Thailand's public health and natural resources.

Sadly, but not surprisingly, US-AEP's judicial project has been shuttered because of funding cuts by USAID. But Thailand has it right — especially if the Millennium Ecosystem Assessment's prediction of abrupt, systemic change is accurate. Internationally and domestically, all countries need to foster changes in their courts so that their corrective pressures can speedily produce system-wide changes in patterns of industry and "individual activity."

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