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Participation in Thailand's Rulemaking:*

Toward Policy-making Accountability

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Abstract

The Thai government has often suffered from low public trust, which is the outcome of its lack of accountability. This shortcoming has resulted in an adversarial relationship between the government and its citizens, as well as political instability. This article focuses on administrative rulemaking. It argues that the current law is not sufficient for creating accountable rulemaking. Government agencies promulgate rules that are flawed by factual errors or unsound rationale and that benefit one party over others. The article proposes that, in order to improve policy-making accountability, Thailand needs to introduce a better procedural safeguard that allows fairer and more meaningful rulemaking. The experience of informal rulemaking based on the American Administrative Procedure Act is examined, and suggestions are made for its application to Thailand's case.

KEYWORDS: rulemaking, Administrative Procedure Law, public participation, Thai Administrative Law.

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1. Introduction

Democracy is not defined only by a free and fair election. A ballot box is no longer sufficient to justify an administration. A government must complement its popular legitimacy with accountability in policy-making.[1] When the government makes a decision regarding a policy choice, either in the form of draft bills or executive rules, it must ensure the public that it has paid due attention to their concerns prior to making any decision, which must be reasonable and represent the whole polity. In order to ensure the making of good policy, the government should allow the public to participate in the decision-making process in various forms. Especially in the case of newly democratized countries, where governments need to work hard to gain trust from their citizens, public participation is highly important in garnering support for the regime.

1 SUSAN ROSE-ACKERMAN, FROM ELECTIONS TO DEMOCRACY 2-7 (2005).

Thailand has embraced the idea of good governance, which requires more public participation, since the adoption of the 1997 Constitution. But public participation is not mandatory in the decision-making process. The Thai Administrative Procedure Act B.E. 2539 (1996) (Thai APA) allows affected parties to participate in administrative adjudication, but it has left administrative rulemaking untouched. The incompleteness of Thai laws have lead to concerns regarding the quality and legitimacy of public policy. Thus, I propose that Thailand incorporate rulemaking procedures into Thai administrative procedure law. Public participation, which is the core of rulemaking procedures, can rectify these problems because it creates a forum for both supporters and opponents of regulations to voice their opinions. With a flow of information from both sides, governmental agencies will be able to make more suitable decisions, and can gain legitimacy by listening to the public's voice and providing the rationale behind their decisions.

The focus of this paper is primarily on the notice-and-comment process, which is well established in the United States Administrative Procedure Act (U.S. APA) that is used as the model for the Thai APA rulemaking procedure. However, public participation such as notice-and-comment also imposes a heavy burden on the administration. Thailand must design its own process to benefit from this mechanism while minimizing costs.

This paper begins with the problems in the policy-making process in Thailand. The next part discusses the benefits and costs of the notice-and-comment process of the U.S. APA, which is the origin of administrative procedure laws around the globe. The paper concludes with a comparison between the two jurisdictions and a recommendation for Thailand.

2. Public Participation in Administrative Rulemaking in Thailand

What is the current status of Thai laws concerning participatory rulemaking? More importantly, will the current situation jeopardize the country's development? Although the idea of public participation has become increasingly popular among civic society and lawyers, Thai laws do not demand participation in all forms of governmental activity. Deliberation in the form of administrative rule receives the least attention. It is absent in the Thai APA, the major statute governing administrative procedures, and other laws do not fully address it. This absence inevitably puts the country in danger of political crisis.

2.1 Rulemaking Procedure in Thailand

Thailand had undergone a major constitutional reform from 1992 to 1997 in order to engage the public in politics and secure democratization.[2] The lesser known administrative law reform also took place around the same time. A series of statutes were promulgated to improve transparency as well as accountability of the government: the Administrative Procedure Act (Thai APA),[3] the Freedom of Information Act,[4] and the Government Tort Act.[5] The Administrative Court Establishment and Procedure Act followed a few years later when the

2 ANDREW HARDING & PETER LEYLAND, THE CONSTITUTIONAL SYSTEM OF THAILAND: A CONTEXTUAL ANALYSIS 22-23 (2011).

3 พระราชบญญตวธปฏบตราชการทางปกครอง พ.ศ.๒๕๓๙ [The Administrative Procedure Act B.E. 2539] (hereinafter Thai APA) (1996) (Thai.).

4 พระราชบญญตขอมลขาวสารของทางราชการ พ.ศ.๒๕๔๐ [The Freedom of Information Act B.E. 2540] (1997) (Thai.).

5 พระราชบญญตความรบผดทางละเมดของเจาหนาท พ.ศ. ๒๕๓๙ [The Government Tort Act B.E. 2539] (1996) (Thai.).

1997 Constitution came into effect.[6]

The Thai APA was introduced to provide a procedural safeguard when an agency exercises its power. The law lists basic rights for parties likely to be affected by an agency's adjudication: the right to be heard,[7] the right to a fair and unbiased hearing,[8] the right to access evidence,[9] the right to reason-giving,[10] and the right to appeal.[11] However, Thailand's administrative law is concerned more with the implementation of the rule in each particular case rather than promulgating a rule with a general and abstract effect. Therefore, a rulemaking procedure was not included in the Thai APA.

The incompleteness of the Thai APA was due to the notion in Thai administrative law that rules are government dispositions that do not apply to a definite group of persons or circumstances.[12] An administrative rule does not have a direct or adverse effect on an individual's rights, properties, or liberty.[13] As a result, Thai APA addresses only grant affected parties the right to fair process in administrative adjudications while ignoring the participation of stakeholders in the rulemaking process.

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6 พระราชบญญตจดตงศาลปกครองและวธพจารณาคดปกครอง พ.ศ. ๒๕๔๒ [The Administrative Court Establishment and Procedure Act B.E. 2542] (1999) (Thai.).

7 Thai APA, §§ 12, 23-24.

8 *Id.* §§ 13-14.

9 *Id.* § 30.

10 *Id.* § 37.

11 *Id.* §§ 44-48.

12 *Id.* § 5 para. 4; *see* ชยวฒน วงศวฒนศานต [CHAIWAT WONGWATTANASAN], กฎหมายวธปฏบตราชการทางปกครอง [ADMINISTRATIVE PROCEDURE LAW] 163-64 (1997) (Thai.).

13 คาสงศาลปกครองสงสดท ฝ. ๑๐/๒๕๔๙ [The Supreme Administrative Court Order No. F10/2549] (2006) (Thai.).

In general, most administrative rules can be promulgated through a simple process, with the exception of royal decrees. Royal decrees prescribes the time, place, and other important details regarding the implementation of laws, as required by statutes, and therefore requires a more elaborate procedure. A royal decree must be approved by the cabinet, and signed by the Crown before coming into effect.[14] Other forms of rules can simply be issued by the head of the relevant agency. It is fair to conclude that public participation in the administrative rulemaking process is often overlooked.

The absence of an "umbrella" statutory requirement for public participation does not mean there is absolutely no public participation in rulemaking. The lack of accountability has been inconsistent with the spirit of the larger constitutional system.[15] Hence, though imperfect, there are a few substitutes to the Thai APA, yet they fail to provide Thai administrative law with an exact and definite vision of a good participatory rulemaking process.

(a) Constitutions

When procedural safeguards are absent from the administrative law, the public can only turn to those prescribed in the Constitution. Since 1997, the Thai legal system has embraced the idea of accountable policy-making.[16] In the 1997 and the 2007 Constitutions, any governmental activity with an adverse impact cannot be implemented unless

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14 รัฐธรรมนญูแหงราชอาณาจกรไทย พทธศกราช ๒๕๕๐ [Thai Constitution B.E. 2550] (2007), § 187.

15 HARDING & LEYLAND, *supra* note 2, at 135-39.

16 Pasuk Phongpaichit, *Democratization, Decentralization, and Environmental Governance in Thailand*, *in* DEMOCRATIZATION, DECENTRALIZATION, AND ENVIRONMENTAL GOVERNANCE IN ASIA 104, 104-05 (Akihisa Mori ed., 2012).

stakeholders have participated in the decision-making process.[17] Nonetheless, constitutional protection is limited. An activity refers almost exclusively to physical projects such as the construction of a dam, a sea port, or a power plant, but not rulemaking in an abstract sense. It focuses mainly on the environmental aspect, and even in that case, not every interested party is able to participate. Only the communities that are located in the vicinity and are directly affected are able to exercise this right.

In 2004, the Office of the Prime Minister issued a regulation on public hearing to comply with constitutional mandate: A project that has adverse and direct impact on the environment and the health of the public must undergo public hearing with prior notice and an actual forum.[18] But it still provides vast discretion to the relevant agency. Usually, a prior notice contains scant and biased information, and attendees are selected to favor the agency.[19] A group of conservationists challenged the hearing procedure in one case in the Administrative Court, but the court dismissed it based on legal technicality, ruling that the case was not ripe for judicial review.[20] So far, there has been no court

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17 รัฐธรรมนญูแหงราชอาณาจกรไทย พทธศกราช ๒๕๔๐ [Thai Constitution B.E. 2540] (1997), § 56; รัฐธรรมนญูแหงราชอาณาจกรไทย พทธศกราช ๒๕๕๐ [Thai Constitution B.E. 2550] (2007), §§ 56, 67.

18 ระเบยบสานกนายกรฐมนตรวาดวยการรบฟงความคดเหนของประชาชน พ.ศ. ๒๕๔๘ [The Office of the Prime Minister's Regulation on Public Hearing B.E. 2548] (2005) (Thai.).

19 See the case of the Water Management Plan in Khemthong Tonsakulrungruang, *Public Participation in Thailand's Mega-Projects*, presented at Law in Asia: Balancing Tradition & Modernization, the 11th Asian Law Institute Conference, Kuala Lumpur, Malaysia, May 29, 2014.

20 ศาลปกครองสงสด ยกฟอง จดการนา ๓.๕ แสนลาน รบ. ยงลกษณ [*The Supreme Administrative Court Dismissed the 3.5 Billion Water Management Plan*], THAIRATH NEWSPAPER, Oct. 31, 2014 (Thai.).

decision outlining a proper form of public participation.

In other cases, the Administrative Court agreed that government projects in question needed public participation. But these were mostly tort cases. The Administrative Court focused on whether these projects fell within constitutional requirements or whether the substance of the attached feasibility studies were sufficiently convincing. In case where agencies failed to properly involve the community in their impact assessments, the court only demanded that these agencies pay compensation, not that they conduct a proper participation process.[21] The Administrative Court defers to agency's discretion on how to conduct public participation.

Another problem in Thailand is the chronic political crisis that ends democratic constitutions prematurely. There is no guarantee that in such an undemocratic atmosphere the upcoming constitution will provide a guarantee of public participation and a positive outlook for living in a good environment. The 2014 coup d'état abolished the 2007 Constitution, and with it, the protection it accorded. Despite heavy lobbying attempts from non-governmental groups, the 2016 draft controversially removed the community's right to be consulted.[22]

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21 คาวนจฉยศาลปกครองเชยงใหมท ๔๔-๔๙/๒๕๕๒ [The Chiang Mai Administrative Court Decision No. 44-49/2552] (2009) (Thai.), คาสงคมครองชวคราวศาลปกครองกลางท ๕๘๖/๒๕๕๒ [The Central Administrative Court Injunction No. 586/2552] (2009) (Thai.), คาวนจฉยศาลปกครองพษณโลกท ๑๖๓/๒๕๕๕ [The Pitsanulok Administrative Court Decision No. 163/2555] (2012) (Thai.), and คาวนจฉยศาลปกครองกลางท ๑๐๒๕/๒๕๕๖ [The Central Administrative Court Decision No. 1025/2556] (2013) (Thai.).

22 Paritta Wangkiat, *Environmentalists Slam Draft Charter*, BANGKOK POST (Feb. 18, 2016, 5:46 AM), http://www.bangkokpost.com/news/politics/868180/environmentalists-slam-draft-charter.

(b) Statutes

Certain statutes may require additional procedures for rulemaking, some of which may include public consultation. But such participation can be incomplete or impractical. For example, before a new city plan comes into effect, the draft must be placed at the administrator's office or another public place for affected parties to review.[23] An affected party is eligible to make a complaint to the relevant agency within 90 days, asking for modification or cancellation of the draft plan.[24] However, this participation is rarely possible in practice. The notice regarding the new city plan is not always well announced.[25] Few people know about it. Even fewer are able to access it and make complaints.

(c) Internal rules and practices

At the operational level, administrative agencies usually consult with some stakeholders before a decision is made. For the drafting of legislative bills, the Council of State, the legal advisory body to the cabinet, issues a legislative checklist that requires agencies to hold a hearing with stakeholders before proposing the bill to the cabinet.[26] Although this checklist is an internal guideline, failure to comply with it will result in the cabinet's refusal to introduce the draft bill to the Parliament.

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23 พระราชบญญัตผงเมอง พ.ศ. ๒๕๑๘ [The City Planning Act B.E. 2518] (1975), § 23 (Thai.).

24 *Id*. § 24.

25 See an example of the latest change in city plan without public participation at Chularat Saengpassa & Pongphon Sarnsamak, *New City Plan 'Could Ravage' the Verdant Bang Krachao*, THE NATION (Apr. 8, 2014, 0:00 AM), http://www.nationmultimedia.com/news/national/aec/30231068.

26 คณะกรรมการปฏรปกฎหมาย, คณะกรรมการกฤษฎกา [Law Reform Committee, the Council of State], บทตรวจสอบ ๑๐ประการ [Legislation Checklist no. 10] (2004) (Thai.).

For administrative rules, the Royal Decree on Good Governance B.E. 2546 requires that for tasks affecting the public, the responsible agency shall (1) hold a public hearing or (2) brief the public on the benefits for the whole community.[27] The standard is far from stringent, and an agency still retains the freedom to decide its public hearing procedure. In practice, opinions are exchanged privately between the agency and some chosen parties. A policy might even be initiated by some powerful interest groups. Sometimes, if the draft rule is controversial, opposing interest groups manage to pressure the agency into creating a forum in which they can voice their concerns. Another example of public participation is when the agency hires an expert to prepare the draft rule. The agency would include in the terms and conditions of the hiring contract that the expert must obtain comments from the affected party by either public hearing or questionnaires.[28]

Nonetheless, these hearings are far from meaningful for three reasons. Firstly, they are often conducted in a closed manner. The forum is not open to everyone interested in that regulation. The venue and date are not announced to the public. Usually, the agency invites participants whom they consider to be "major actors" in that area. The hearing is held briefly. In this way, the agency can manipulate the outcome by

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27 พระราชกฤษฎีกาบรหารจดการบานเมองทด พ.ศ.๒๕๔๖ [The Royal Decree on Good Governance B.E. 2546] (2003), § 8(3) (Thai.).

28 For example, the Civil Service Commission hired King Prajadhipok's Institute to study the feasibility of allowing civil servants to register as the union labor. In the contract, the Civil Service Commission required King Prajadhipok's Institute to hold at least nine hearings covering every region of the country and send questionnaires to no less than 1,500 civil servants. *See* KING PRAJADHIPOK'S INSTITUTE, รางพระราชกฤษฎีกากาหนดหลกเกณฑ วธการ และเงอนไขในการรวมกลมขาราชการพลเรอนสามญ พ.ศ. [PUBLIC SECTOR UNION] 30-31 (2009) (Thai.).

inviting only stakeholders who support the rule while ignoring others, particularly the opponents. Even if a public hearing is held, since there is no provision on the procedure, the manner of the hearing could be informal and insufficient for creating a meaningful exchanges of ideas. Details of a hearing are posted at the agency's office or website, which are rarely visited. Most importantly, the content of the draft is not disclosed. Unable to review the draft regulation prior to the hearing, the public is unable to make any concrete and meaningful comments. Weak procedural safeguards affect not only the rulemaking process, but also the substance of that rule.

Secondly, communication through these hearings is often one-sided. There is no guarantee that the agency will take any comment seriously. Since there have been no court decisions concerning the substance of a public hearing, the standard for a proper hearing is not clear. Must an agency keep records of communications made with all stakeholders? Is an explanation required if the agency acts contrary to the opinion of the public? If so, how formal and detailed should that explanation be? Currently, no explanation is required. The agency might be able to act arbitrarily without recourse because it is not required to formally acknowledge and respond to comments.

Lastly and above all, such hearings are only voluntary. Agencies have has discretion on whether and how to hold a hearing. Should an agency decide that a hearing is too costly or unnecessary, or that it will not consider the concerns of the public, it can opt not to hold a hearing.

2.2 Concerns on the Lack of Public Participation

When there are no procedural safeguards on rulemaking, two concerns arise. The first is bad regulation. The second is the legitimacy

of such regulation.

When an agency is able to choose participants in a hearing on a proposed rule, there is a risk that it may listen only to supporters of the rule while ignoring those who oppose it. The agency may not include certain costs in the feasibility study. The agency may place too much emphasis on the benefits and fail to take any downsides into consideration. Overly optimistic, the agency may not correctly assess the impact of the regulation. The rule may affect a much wider group of people than originally expected. Furthermore, the rule may simply be unreasonable if compliance is impractical for the affected parties. The rule may favor a single powerful group that has had a chance to communicate with the agency and might impose costs on others who are less fortunate. Simply put, this kind of self-selection bias could result in a bad regulation.

Isolation from public pressure could lead the agency to promulgate a rule that, in the eyes of the public, looks ridiculous. The Ministry of Industry (MoI) once issued an MoI Regulation listing 13 plants as category-1 controlled substances, which can only be possessed and used under the agency's supervision.[29] These 13 plants are local herbs widely used by local farmers as substitutes for more expensive and dangerous chemical pesticides.[30] The regulation purportedly protected farmers

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29 พระราชบญญตวตถอนตราย [The Hazardous Substance Act B.E. 2535] (1992), § 18(1) (Thai.); จเลกประกาศ "สมนไพร 13 ชนด" เปน "วตถอนตราย" [*Revoke the MoI Regulation*], ประชาไท [PRACHATHAI ONLINE NEWSPAPER] (Feb. 12, 2009, 4:24 AM), http://prachatai.com/journal/2009/02/19980 (Thai.).

30 13 สมนไพร หรอใครกนแนทเปน 'วตถอนตราย'? [*Which Is More Hazardous?*], FOUNDATION FOR THAI CONSUMERS (May 12, 2012, 12:49 PM), http://www.manager.co.th/Daily/ViewNews.aspx?NewsID=9520000019377 (Thai.).

from unsafe products.[31] However, the MoI regulation would significantly increase the cost of organic pesticide business.[32] At first glance, the MoI Regulation did not show favoritism toward any particular group, as both large and small businesses appeared to face the same restrictions. But most organic pesticide producers are small and local. Thus, such regulation acted as a big hurdle for local businesses to compete with large corporations. As a result, the listing and permission system discouraged farmers from switching from more expensive chemical pesticides to cheaper organic substances.[33] The regulation also proved procedurally flawed. The agency hastily passed the regulation prior to its planned hearing date because the incumbent of the Controlled Substance Board was about to complete his term.[34] The voluntary hearing showed the lack of transparency since only certain stakeholders were invited. After the MoI encountered heavy resistance, the Department of Agriculture withdrew the regulation.

If the listing of controlled substances demonstrated unreasonableness and a problematic promulgation procedure, the delisting of the red-whiskered bulbul showed an example of a rule that was prepared in favor of a small group of people at the expense of the public.

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31 พชสมนไพรอนตรายปะทอารมณ "ไบโอไทย"จใจกรมวชาการเกษตร [*Hot Debate over Dangerous Plants, NGO-MOI*], MATICHON ONLINE NEWSPAPER (Feb. 21, 2009), https://www.matichon.co.th/matichon/view_news.php?newsid=01lif01210252&sectionid=0132&day=2009-02-21 (Thai.).

32 คาแถลงของเครอขายภาคประชาชน และองคกรสาธารณะประโยชนเรยกรองใหยกเลกคาประกาศใหพชอาหารและสมนไพร 13 ชนดเปนวตถอนตราย [*Open Letter to the Prime Minister on Ministry of Industry's Regulation on Hazardous Substance*], ประชาไท [PRACHATHAI ONLINE NEWSPAPER] (Feb. 12, 2009, 4:24 AM), http://prachatai.com/journal/2009/02/19980 (Thai.).

33 *Id.*

34 *Which Is More Hazardous?*, *supra* note 30.

The red-whiskered bulbul (Pycnonotus jocosus) is a popular songbird protected under the Wildlife Protection Act, which prohibits any possession without a permit.[35] Despite legal protection, birds are illegally but openly trapped and kept for singing competitions worth several million baht.[36] The network of red-whiskered bulbul traders and keepers finally convinced the Department of National Parks, Wildlife and Plants Conservation (DNP) to remove the bird from the list of protected species, thereby allowing free movement of the bird trade. The network claimed that the breeding stock was then sufficient to supply the market.[37]

This attempt to remove the red-whiskered bulbul angered conservationists, since the removal contradicted the fact that thousands of illegal birds were still often confiscated from poachers, indicating that the breeding stock was not sustainable and marketable as claimed.[38] Initially, the DNP had not invited opponents to the consultation. But media pressure forced the DNP to do so. Opponents then had a chance to present the flipside of the delisting and voice their dismay.[39] The plan

35 พระราชบญญตสงวนและคมครองสตวปา พ.ศ. ๒๕๓๕ [The Wildlife Protection Act B.E. 2535] (1992), § 18 (Thai.).

36 *See* รงสฤษฎ กาญจนะวณชย [Rungsrit Kanjanavanit], กรงไมใชบาน [*A Cage Is No Home*], 159 SARAKADEE MAG. 120 (2011) (Thai.).

37 ประทวงกรมอทยานฯปลดนกกรงหวจกออกจากบญชสตวปาคมครอง [*Call for Delisting of the Bulbul*], BANGKOK BUSINESS ONLINE NEWSPAPER (Feb. 4, 2010, 3:27 PM), http://www.savebird.com/Forum/index.php?topic=992.0 (Thai.).

38 *See* Kanjanavanit, *supra* note 36; *see also* Bird Conservation Society of Thailand, *the Checklist of Birds of Thailand* (2012), http://www.phuketbirdwatching.com/wp-content/uploads/2012/02/Notes-on-Checklist_V29Jan.pdf.

39 โปงวด (นามสมมต) [Pong-Wid (pseudonym)], เสยงจากคนรกธรรมชาต ขอ "คดคาน" การปลดนกปรอดหวโขน ออกจากสตวปาคมครอง [*Call from Nature Lovers*], BLUE PLANET (May 12, 2012, 1:17 PM), http://www.pantip.com/cafe/blueplanet/topic/E8886696/E8886696.html (Thai.); ปรญญา ผดงถน [Parinya Padungtin], นกปรอดหวโขนยงตอง "คมครอง" [*The Bulbul Still Needs Legal Protection*], KAO SOD DAILY NEWSPAPER (May 13, 2012, 10:33 PM), http://seminarsweet.blogspot.

was postponed indefinitely.

Large corporations can also suffer from the lack of transparency. The Ministry of Public Health introduced a larger warning on cigarette packages to discourage young smokers.[40] The new warning label would occupy more than half of the package surface and the packaging must contain no advertisement.[41] Tobacco companies were concerned that the new policy would affect their business without any scientific evidence of its effectiveness, but the Ministry did not involve tobacco companies in the drafting of the rule. Tobacco companies finally filed a complaint to the Administrative court that the Ministry of Public Health's plain packaging regulation had not gone through consultation with key stakeholders as mandated by the Royal Decree on Good Governance before the regulation came to effect.[42] So far, this was the only case that challenged the legality of the rule-making process. But the Administrative Court has not ruled on the case.

The concern of bad regulation, one may argue, can be corrected by having a few extra experts in that field in order to provide more well-rounded opinions. But there is a second concern of legitimacy that even the best body of experts cannot fix. Modern democracy requires both

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tw/2010/02/blog-post_21.html (Thai.).

40 Jonathan Liberman, *From Australia to Thailand - Defending Tobacco Packaging Laws Against Multinational Tobacco Industry Lawsuits*, MCCABE CENTRE (Mar. 27, 2016, 10:30 AM), http://www.mccabecentre.org/blog/from-australia-to-thailand.html.

41 ประกาศกระทรวงสาธารณสข เรอง หลกเกณฑ วธการ และเงอนไขการแสดงขอความเกยวกบพษภยและอนตรายจากการบรโภคผลตภณฑยาสบใ นฉลากของบหรซกาแรตตามพระราชบญญตควบคมผลตภณฑยาสบ พ.ศ. ๒๕๓๕ (ฉบบท ๑๘) พ.ศ. ๒๕๕๘ [Ministry of Public Health Regulation on Warning Label of Cigarette Package No. 18, B.E. 2558] (2015) (Thai.).

42 ศาลปกครองกลาง คดเลขท ๑๓๒๔/๒๕๕๖ [The Central Administrative Court Case 1324/2556] (2013) (Thai.).

representative and participatory democracy. Policy can no longer be made only by technocrats.[43] Rulemaking cannot be justified by technocratic legitimacy. It is being replaced by democratic legitimacy, which stems from public involvement. The deliberation process must be transparent so that an agency can be held accountable for its actions. Direct participation from the public helps the executive branch oversee the agency.

The lack of rulemaking procedure in Thai administrative law is dangerous to the country. The increase in the government's activities means a corresponding rise in the number of rules and regulations, especially since the cabinet often uses rules as a shortcut to passing bills. The Prime Minister, exercising his general authority, issue rules instead of going through other lengthier legislative processes. Sometimes the legislators themselves avoid making hard decisions on controversial issues by deferring them to the responsible agencies to issue regulations. The increase in regulatory activities and the lack of procedural safeguards for rulemaking leads to regulatory uncertainty. In the case of the aforementioned MoI regulation, despite years of preparation, the agency, not expecting resistance from the public, had to revoke the rule shortly after its promulgation. It is also upsetting for the public to learn that an agency is vulnerable to lobbying and may not properly and duly perform its duty, as in the red-whiskered bulbul removal case. This could lead to costly and laborious lawsuits, as in the case of the plain-packaging policy. Such uncertainty and resentment creates distrust among various interest groups and the government.

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43 *See* Juli Ponce, *Good Administration and Administrative Procedures*, 12 IND. J. GLOBAL LEGAL STUD. 551, 558 (2005).

When there is no procedural constraint, challenging an unreasonable and badly written rule is highly difficult. People have to employ a political campaign approach rather than a legal one. But political campaigns are more costly and the outcome is less predictable. More importantly, political campaigns and legal challenges lead to confrontations between the agency and civil society organizations. Instead of cooperating and exchanging opinions which produce mutually beneficial outcomes, they meet on an adversarial battlefield, trying to defeat each other.[44]

If Thailand adopts rulemaking procedures, it would enhance the quality of the regulations and increase the legitimacy of the government as well as placate opponents to the rules. When an agency performs badly, public trust fades. Ultimately, the dispirited public no longer sees a democratic government as their only choice. The 2014 coup d'état is the latest manifesto of Thailand's failure to create a credible and reliable administration.

3. The U.S. Experience of Participatory Rulemaking

The Thai APA leaves a large gap in the area of rulemaking. This gap has partly contributed to Thailand's unstable political environment. Thailand has struggled to consolidate its democracy for more than eighty years. But the 2014 coup d'état showed that the country failed once again. The coup was a symptom of public distrust in an elected

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44 *See* KING PRAJADHIPOK'S INSTITUTE, การมสวนรวมของประชาชนในกระบวนการนโยบายสาธารณะ [PUBLIC PARTICIPATION IN PUBLIC POLICY MAKING] 20-21 (2009) (Thai.).

government. When the administration's policy appears corrupt and unresponsive, without tools for audit from the public, people blame the institution of democracy.[45] Ironically, ousting elected politicians only gives rise to unelected bureaucracy with ever fewer official avenues for accountability. Thai bureaucrats are known for their reliance on claims of technocratic expertise for legitimacy. If Thailand had increased its policy-making accountability, the political crisis may have been avoided.

Thailand's economy has also passed the developmental stage. In the social context, as citizens have become more aware of their rights and liberties and are more politically active, the government needs pay more attention to the call for accountability and transparency. By allowing the public to participate in rulemaking, the government should be able to promulgate better regulations that serve dimensions of development other than the economic one. Regulations should take into consideration the impact on the environment, social justice, and minorities' rights. But there has been no major change in Thai administrative law since the enactment of Thai APA in 1997 and the establishment of the administrative court in 1999. Thai APA addresses only adjudication while leaving rulemaking under-regulated. Thailand has fallen behind its East Asian neighbors in promoting democratic values.

If Thailand is to rethink its APA, from which country should it learn about participatory rulemaking?

The U.S. APA is chosen for its simplicity and effectiveness.

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45 For how the state and democracy need trust to operate and survive, *see* Susan Rose-Ackerman, *Trust, Honesty, and Corruption: Reflection on the State-Building Process*, 42 EUR. J. SOC. 526, 541-42 (2001); JUAN J. LINZ & ALFRED C. STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE 3-5 (1996).

According to Section 553 of the U.S. APA, the informal rulemaking procedure is paper based and requires only three steps for notifying the general public, receiving and responding to comments, and providing a statement. These steps are easy to understand and implement. Yet it is sufficient for creating meaningful dialogue between the state and concerned citizens. Informal rulemaking has allowed public participation in rulemaking at the greatest level. The law demonstrates the spirit of democracy that allows voices of all citizens to be heard. Its forty years of operation means that the effectiveness of the law has been thoroughly tested.

Moreover, in addition to the text, the U.S. APA comes with a large volume of literature that helps supplement the implementation of the participatory rulemaking idea. Judicial decisions have filled in gaps and voids in the APA. Advantages and disadvantages of section 553 of APA have been through countless discussions, providing a rich source of scholarship, cases, and empirical studies. These debates on benefits and criticisms could provide valuable lessons should Thailand wish to consider more participation in its rulemaking.

The success of the U.S. APA can be observed through its popularity. Although the ideas of participation and accountability originated in the U.S.A., they have been accepted by emerging democratic regimes around the world. Three of Thailand's East Asian neighbors, Taiwan, Japan, and Korea, have all adopted variations of the APA rulemaking model that allow greater input from the general public.[46] Like Thailand, these three nations once had enjoyed vast administrative discretion in

46 Tom Ginsburg, *Dismantling the "Developmental State"? Administrative Procedure Reform in Japan and Korea*, 49 AM. J. COMP. L. 585, 586 (2001).

their developmental stage of economic growth. The legislatures delegated broad authority to the governments to intervene in the economy.[47] The administrations used informal administrative guidance to maintain flexibility and to avoid extensive legal procedures, while the courts refrained from rigorous judicial review.[48] But all have moved beyond that point. Taiwan and South Korea, which have had economic success similar to Thailand's, adopted APA rulemaking long ago. Such requirements have generated more legitimacy and public acceptance of the governments.[49]

3.1 The U.S. Administrative Procedure Act

The Administrative Procedure Act (APA) is the most important source of administrative procedure. The statute was a result of the rapid growth of governmental agencies' actions in the New Deal. Due to the growing activities of agencies, Congress and the private bar tried to set a standard in order to curtail perceived abuses of administrative power. The two primary objectives of APA are "to subject all federal administrators to a common set of minimum procedural standards" and "to assure that those subject to regulation have an opportunity for court review of agency compliance with substantive and procedural limits on agency authority."[50] However, not until the New Dealers were leaving office in 1946 did both the Executive and the Legislative branches decide to pass the statute.[51] One of the reasons might have been to

47 *Id*. at 585-86.
48 *Id.*
49 Jeeyang Rhee Baum, *The Impact of Bureaucratic Openness on Public Trust in South Korea*, 16 DEMOCRATIZATION 969, 991 (2009).
50 JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW, THE AMERICAN PUBLIC LAW SYSTEM: CASES AND MATERIALS 151 (6th ed. 2009).
51 McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON.

impose a constraint on the incoming Republicans not to abolish all the New Dealers' projects.[52]

APA establishes a uniform procedure for both rulemaking and administrative adjudication. For rulemaking, APA provides both the formal rulemaking procedure in sections 556 and 557 and the informal rulemaking procedure in section 553. If not specified by the statute, an agency could adopt either the formal or informal rulemaking procedure.[53] Formal rulemaking was similar to a court trial because it required elaborate procedures. The agency published the proposed rule and participants submitted written responses, followed by trial with testimony, cross-examination, and rebuttal. It was a costly and complicated procedure, therefore, formal rulemaking was later abandoned.[54] Meanwhile informal rulemaking has become a common standard with its requirement of a simple notice-and-comment. The Supreme Court held that rules that have legal effects must follow the notice-and-comment requirement. To determine whether the rule has a legal effect, absent that rule there would be no adequate legislative basis for enforcement action.[55]

Section 553 requires the agency to publish a notice of the proposed rulemaking in the Federal Register. A notice does not have to be a complete text of the draft rule, but only has to contain either "the terms

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& ORG. 180, 189-95 (1999); Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 276-78 (1978); Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 452-54 (1986).

52 McNollgast, *supra* note 51, at 192.

53 Automotive Parts & Accessories Association v. Boyd, 407 F.2d 330, 335 (D.C. Cir. 1968).

54 *See* MASHAW ET AL., *supra* note 50, at 507-12.

55 American Mining Congress v. Mine Safety & Health Administration, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

or substances of the proposed rule" or "a description of the subjects and issues involved."[56] It shall also include the time period and manner in which to file any comment. The agency, after publishing a notice, shall provide interested parties with an opportunity to submit any written comments.[57] The agency must also review these comments. Once the final rule is issued, the agency must incorporate in the rule a concise general statement of the rule's basis and purpose.[58]

In addition to section 553, court decisions impose additional procedural requirements to informal rulemaking. Comments and responses constitute a record which the agency uses to justify its rulemaking decision. The agency must rely only on the record for the basis and purpose of the rule, and the agency's decision must not be contrary to the evidence shown in the record.[59] Sound responses must be given to the comments. If the final rule is considerably modified from the originally proposed one, the agency must reopen the comment period.[60] If the agency fails to properly conduct notice-and-comment, the court can invalidate the rule on the grounds of being arbitrary and capricious.[61] Procedural review of rulemaking also allows the court to review the substance of that rule. Should the court consider the agency to have failed to give adequate responses to the party's questions, whether on scientific, economic, or technological aspects, the court can strike

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56 5 U.S.C. §553(b)(3) (2011).
57 5 U.S.C. §553(c) (2001).
58 *Id.*
59 The integrity of the decision was protected by the fact that it was supported by the record, at which most of the communications were kept. Sierra Club v. Costle, 657 F.2d 298, 402 (D.C. Cir. 1981).
60 Nat'l Mining Ass'n v. Mine Safety & Health Admin., 116 F.3d 520, 531 (D.C. Cir. 1997).
61 United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252 (2d Cir. 1977).

down that rule. The agency would then be forced to gather more records or provide sounder reasoning to support its rule.[62]

3.2 Costs and Benefits of Notice-and-comment

Notice-and-comment draws both support and criticism. Supporters argue that public participation in rulemaking leads to better regulations and greater legitimacy. But some people have become skeptical of this claim. Notice-and-comment is being challenged for *pro forma* participation and ossification of rulemaking. Discussion of its costs and benefits always involves the following four themes.

For the supporters of notice-and-comment, an agency is not always an expert in what it regulates. Sometimes it has to deal with unfamiliar territory. Comments will therefore alert the agency to what it still lacks, and bridge any knowledge gaps.[63] Public participation opens the channel for everyone to submit their comments, be it a mere concern, an argument, or an alternative to the proposed rule. These comments provide an agency with more information, allowing the agency to make the decision under a broader perspective, thus resulting in more reasonable and well-balanced decision making and a better regulation.[64] The process would check any excessive influence of powerful interest groups.[65]

Public participation is also a great source of legitimacy for the

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62 Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 276-83 (1987).

63 CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 158 (2d ed. 1999).

64 *Id*.

65 Stephanie M. Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 592 (2002).

agency. Expert and congressional delegation have lost their appeal as justifications for the agency's decisions because politics often play a role in the rulemaking process.[66] Allowing the public to participate in policy deliberation increases procedural fairness. The legitimacy of a rule can be perceived when the agency is seen to act reasonably. With notice-and-comment, the agency is "informed by the value of the entire polity."[67] This does not mean that the agency must surrender to the majority opinion since the majority is not always correct. But the agency must show adequate reasoning as to why its action contradicts or aligns with the will of the public.[68] Furthermore, public participation brings transparency into the administrative process. It ensures that the public has an opportunity to detect arbitrariness by the agency and to hold the agency accountable.

Public participation is a two-way process of communication. Notice of a proposed rule informs the public of that rule. At the same time, the agency is able to obtain comments before making a final decision. The public, knowing in advance of permissible and impermissible conducts, can better comply with it, and in the case of potentially affected parties, they can voice their opinions to support or object to the proposed rule to the agency.[69] These reactions help the agency foresee what it will encounter when the rule is implemented.[70] With acceptance of the rule, the agency can expect compliance. With resistance, the agency still has a

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66 Peter L. Strauss, *Speech: From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 755-57, 773 (1996).

67 Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 361 (2009).

68 *Id*. at 361-62.

69 Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 59 (1995).

70 KERWIN, *supra* note 63, at 159.

chance to make a revision to avoid potential problems. It is much more economical and efficient for the agency to resolve any conflicts internally before they escalate into lawsuits.

Although no one is absolutely against the idea of public participation, the meaningfulness of notice-and-comment has been questioned. The notice-and-comment requirement has been criticized for being *pro forma*.[71] Critics doubt whether comments can actually influence an agency's decision. Can a comment bring about a substantial change in a proposed rule?[72] The agency may regard public participation only as a rubberstamp or an administrative hurdle. Public participation then becomes a method for compiling records for judicial review instead of meaningful exchanges of information between the agency and the public.[73]

One factor that compromises public participation is how late it is held in the rulemaking process. In order to prepare a draft rule, an agency may have studied the subject for years. When the comment period begins, the rule is already nearly finalized.[74] This is especially true in cases in which the subject of the rules requires scientific knowledge. The rule is based on special expertise beyond a simple political process. For example, the Environmental Protection Agency (EPA) in the U.S.A. studied ozone regulation for 14 years and produced

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71 Dorit Rubinstein Reiss, *Tailored Participation: Modernizing the APA Rulemaking Procedures*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 321, 332-33, 335 (2009).

72 *See* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 442, 457-59 (2005).

73 E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).

74 Reiss, *supra* note 71, at 334; Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 931 (2009).

285 pages covering almost 200 studies before making a notice of the proposed rule.[75] By that time, it was difficult for anyone to make any arguments against the EPA's decision. Moreover, it is doubtful that comments from individuals can counter those of powerful interest groups when the latter have better channels to communicate with the agency rather than through submission of comments.

Public participation through notice-and-comment is also sometimes accused of being too adversarial in nature. Different parties often take extreme positions and do not listen to each other.[76] The agency is more occupied with offering counterarguments than with seriously considering comments. Part of this hostility stems from a fear that the rule would be overturned by the judiciary. If the agency substantially changes the draft rule after reviewing comments, the agency may be required to hold a second round of hearings.[77] The agency becomes risk-averse and tries to defend its original draft.

In addition to meaningfulness, public participation raises concerns about the ossification of rulemaking. "Hard look" judicial review heightens the procedural demands in drafting a rule.[78] The agency does not know in advance the standard of review by the court. Which issues will the court consider important and worth responding to? Years of hard work could be struck down by the court. With such uncertainty, the agency tries to justify its actions through lengthy notices[79] and by

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75 *See* Whitman v. American Trucking Association, Inc., 531 U.S. 457 (2001).

76 Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 11-12 (1997).

77 MASHAW ET AL., *supra* note 50, at 151.

78 Pierce, *supra* note 69, at 65.

79 FDA's notice of the rule regulating cigarettes and smokeless tobacco products ran over 450 pages.

addressing any issue submitted.[80] A general statement of basis and purpose is no longer concise since the agency has to respond to every single comment, all of which are deemed "significant." The statement may grow to several hundred pages.[81] As a result, it demands more time and effort from the agency to promulgate a rule. Rulemaking becomes more expensive, and fewer rules can be passed.[82] Ossification obstructs the agency from realizing its policy goal.[83] For a rule that has already been promulgated, it tends to be "frozen in place, immune to change that advances in scientific knowledge would warrant."[84] The agency does not want to revisit it. The agency then avoids rulemaking and resorts to other alternatives that are less transparent, such as adjudication, policy guidance, or negotiation.[85]

Nonetheless, despite the above concern, empirically notice-and-comment does not significantly impede rulemaking. Although it is true that a rule governing sunscreen labeling took more than 33 years to complete,[86] and a final rule on the reduction of *Salmonella* in the egg supply began in 1999 and was issued in 2010,[87] each year, the number

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80 Reiss, *supra* note 71, at 328.

81 The preamble of the rule in *supra* note 50 was 217 pages in the Federal Register.

82 OSHA, for example, has been able to issue regulations on only 24 toxic substances out of hundreds. Its attempt to issue one generic rule regulating most toxic substances was, however, struck down by a court, although it did support its proposed rule with several hundred pages of statement. *See* Pierce, *supra* note 69, at 61.

83 Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1391 (1992).

84 CARNEGIE COMMISSION ON SCIENCE, TECHNOLOGY, AND GOVERNMENT, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING 108 (1993).

85 *See* MASHAW ET AL., *supra* note 50, at 651-52.

86 Jason Webb Yackee & Susan Webb Yackee, *Delay in Notice and Comment Rulemaking: Evidence of Systematic Regulatory Breakdown?*, *in* REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION 163, 164 (Cary Coglianese ed., 2012).

87 *Id*.

of rules and their volume grow. On a larger scale, more than half of proposed rules take no more than 13 months before coming into effect.[88] Even "important" rules that require the Office of Management and Budget's review are promulgated at the same speed. In fact, half of these important rules are finalized within a year.[89] The agency does not seem to be significantly slowed down by the additional procedure. The volume of rules has grown steadily since 1946.[90] The government has issued an average of about 4,000 new rules annually for the past couple of decades.[91] In 2006, pages in the Code of Federal Regulations grew 33 per cent larger than that in the 1980's.[92] These numbers indicate that extreme delay occurs only in individual cases and is in fact uncommon. Systematically, notice-and-comment rulemaking is still doing fine. Increased cost is still acceptable and does not exceed the benefit of rulemaking.[93] Delay is more about the nature of the rule rather than the procedure. A controversial rule will always be delayed despite going through a simpler process.

More difficult is the assessment of meaningfulness and legitimacy. A large portion of proposed rules may receive no comments at all,[94] while a controversial one may receive over a million,[95] significantly

88 *Id.* at 168.
89 *Id*. at 169.
90 Cary Coglianese, *Rhetoric and Reality of Regulatory Reform*, 25 YALE J. ON REG. 85, 91 (2008).
91 *Id*.
92 *Id*.
93 Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 964 (2008).
94 During the first half of 1991, forty per cent of rules published in the Federal Register received no comments at all, *see* Cuéllar, *supra* note 72, at 472-73.
95 Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 623 (2003).

ossifying the process of that particular rule. We cannot expect the same amount of public attention on every rule. Participants who submit comments are quite diverse. Comments come in various formats, ranging from form letters as a part of a political campaign to sophisticated letters written by attorneys representing business groups.[96] Sometimes comments from laypeople outnumber those from organized groups,[97] but many of them are only form letters. The various forms of comments and diverse background from which they come support the notion that notice-and-comment does allow more groups of people to participate in rulemaking. In some cases, though not often, agencies have changed the substance of the rules based on comments.[98] The literature review supports the claim of the meaningfulness and democratic legitimacy of informal rulemaking. Yet, the tendency of agencies to pay more attention to concerns from large corporations remains.[99] However, the overall benefits, such as procedural legitimacy, probably outweigh most setbacks. Such benefits are even more apparent in the case of Thailand, where the state suffers low democratic legitimacy and needs more policy-making accountability.

4. From the U.S.A. to Thailand: Toward Better Policy-making Accountability

Should Thailand incorporate rulemaking procedure into the Thai APA? The answer is in the affirmative. The two recent Constitutions

96 Cuéllar, *supra* note 72, at 461.
97 *Id*. at 460, 467.
98 *Id.* at 463.
99 ROSE-ACKERMAN, *supra* note 1, at 225.

recognize and expand the right of the public to participate in governmental projects that are harmful to the environment and health of the locals. This constitutional protection sets a promising but inadequate beginning, since the constitution requires public participation only of projects with environmental ramifications. But as a few selected cases above have shown, the impact from the government's regulatory power goes beyond environmental concerns. It also touches on other aspects such as business and agriculture.

In the nearly two decades since the enactment of the Thai APA in 1997, Thai society has gained much experience in policy deliberation. The Thai public has participated in both national and local legislation and also in several other government activities.[100] If they are granted the opportunity, they will be active in administrative rulemaking as well. Although Thai civil society is still seen as being too weak to introduce its policies to governmental agencies and its readiness to participate in rulemaking is sometimes doubted, it has been successful in blocking many governmental decisions that overlook its interests. Some conventional groups such as labor unions may have become less important both in size and role. But other groups, particularly local environmental, energy, and farmers' movements, are especially active. Improvements in information technology allow them to join forces with networks across the country.[101] The local body protesting the power plant project on the Eastern coast of Thailand can get support from similar movements in the North and South. Even when they are ignored

100 See cases of civic movement in social and economic development in KING PRAJADHIPOK'S INSTITUTE, *supra* note 44, at 24-39.

101 See an example of the latest movement against the government's project at Asina Pornwasin, *Mae Wong Battle Goes Online*, THE NATION (Sep. 24, 2013), http://www.nationmultimedia.com/politics/Mae-Wong-battle-goes-online-30215514.html.

by mainstream media, these activists are able to draw attention from the mass public using alternative channels and online communities, giving them more leverage to lobby for the public policy they want.[102]

As several Thai cases have shown earlier, the court always defers to the agency's discretion on how to design a participatory process, which is often described by civic society as insincere and insufficient. As this trend continues to grow, civic society cannot avoid running into conflicts with the state, whose law does not allow for better channels for public participation than adversarial protesting. The Thai government should start thinking seriously about introducing more effective rulemaking procedures into the Thai APA. A clearer statutory mandate that formalizes public participation will provide a better guideline for both the agency to follow and the judiciary to review the agency's final product.

Yet notice-and-comment rulemaking is not without problems. It will put more pressure on agencies. Without public insight, an agency will suffer from low policy-making accountability. But if its policy is constantly blocked by lengthy procedures, the agency would suffer from poor performance. Thus, Thailand needs to find a balance, a meaningful rulemaking procedure that helps governmental agencies reach accurate and legitimate policy decisions without ossification.

The American experience teaches us that the fear of ossification may be exaggerated, but still, the APA rulemaking procedure can

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102 On Facebook (www.facebook.com), there are groups that cover topics from a protest against a local project to the regional concern of Dawei Seaboard in Myanmar and Xayaburi Dam in Lao PDR. They are able to communicate directly to followers and friends about their activities and the latest progress of each project. Since then, the movement has grown constantly in size and numbers.

significantly hinder important policies. Massive political campaigns and rigorous judicial reviews are two main sources of delay. But the delay may be more welcomed in Thailand. Thai agencies often enjoy greater freedom in interpreting legislative mandate to promulgate rules than their American counterparts because the prime minister always controls the majority of the lower house. Legislative oversight is therefore lenient, as the legislative branch tends to defer to the executive branch's delegation of policy-making power. Delay provides time for affected parties to find new evidence, to promote political campaigns against an agency's decision, or to prepare for a lawsuit. In this case, blocking a proposed rule may be considered a strategic success.

However, no provision can demand that an agency be less defensive or adversarial. Providing reasons can only make an agency appears to be as neutral and rational as possible. Unfortunately, there is no legal mechanism to guarantee that an agency will listen to or be convinced by sound comments. Even the APA could not give a concrete solution to this challenge. Creating real, meaningful participation may have more to do with the attitude of an agency and the attentiveness of the public. Each agency must view the public as a counterpart or a colleague, not a foe. It must realize that participation can help prevent more costly lawsuits, or worse, violent protests.

5. Conclusion

Several questions are posed by the prospect of adopting a participatory rulemaking procedure from a fully democratic country to the one which is less so. How would agencies, civic society, and the

judiciary respond to the APA notice-and-comment? Because Thailand's democracy is intermittent, the cabinet is significantly weaker than the American executive branch in controlling the administrative branch. unelected Thai agencies enjoy great independence from elected politicians, who suffer from high political instability. Agencies are familiar with top-down policy-making, claiming expert status for themselves so as to ignore civic society's voice. Will the agencies faithfully follow the new mandate to create a meaningful policy-making process? Will the courts become more assertive in adopting rigorous scrutiny of the rulemaking, similar to a hard-look judicial review in the U.S.? Will civic society find a delay helpful in slowing down the agencies' arbitrariness? Despite all the doubts, notice-and-comment is necessary for Thailand.

The dichotomy between an abstract rule and individual adjudication is no longer important. An abstract rule can affect the rights and responsibilities of a person as much as individual adjudication can. Therefore, public participation in rulemaking becomes the norm for a good administration. Participatory rulemaking promotes an accountable, rational, and democratic government, by making an agency listens to its polity before making any policy decision and by ensuring that the agency is able to justify it. Although Thailand promulgated its administrative procedure law in 1997, it does not provide procedural safeguards for administrative rulemaking. The importance of the APA-style rulemaking is vital if Thailand wishes to improve its policy-making accountability.

Participatory rulemaking would fill the gap in Thai administrative law as well as offer as an example of accountable rulemaking for other emerging democracies in Southeast Asia. It would help refine and

supplement the existing hearing and consultation process in Thai administrative law, and align it with the universal standard. Thailand could then begin on the path toward a mature and consolidated democracy.

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泰國行政命令制定程序中的民眾參與
—— 政策制定之課責

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摘要

泰國政府民意支持度經常低落之原因乃在於其欠缺課責性。這個缺陷導致政府與公民之間的敵對關係以及政局的不穩定。本文聚焦於行政命令之制定，並主張現行法不足以制定具課責性的法規。政府機關所頒布之法規因事實上的錯誤或不周備的理由，以至於偏好特定政黨而有所缺陷。本文主張為了要增進政策的課責性，泰國需要引入更妥善的程序保障以使行政命令的制定更公平與更具意義。本文探討美國行政程序法中非正式行政命令的制定經驗，並提出可供泰國採納的建議。

關鍵詞：命令制定、行政程序法、民眾參與、泰國行政法。

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