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Veröffentlichungsversion / Published Version

Zeitschriftenartikel / journal article

Empfohlene Zitierung / Suggested Citation:

Schaffar, W., & Guth, R. (2013). Constitutionalism in Thailand: key questions of an on-going research. *ASEAS - Austrian Journal of South-East Asian Studies*, 6(1), 183-187. <https://doi.org/10.4232/10.ASEAS-6.1-10>

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Constitutionalism in Thailand: Key Questions of an On-Going Research

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Citation Schaffar, W. & Guth, R. (2013). Constitutionalism in Thailand: Key questions of an on-going research. *ASEAS - Austrian Journal of South-East Asian Studies*, 6(1), 183-187.

Our research project³ analyzes the Thai political crisis with reference to, firstly, the global trend towards rights-based development and specific liberal democratization trajectories. Secondly, the project is based on a micro-level analysis of the strategic positioning of and debates within social movements concerning a quest for fundamental rights and a rejection of a 'judicialization' of politics. This focus leads to critical questions about democratization processes along liberal constitutional ideas in general. As the situation in Thailand points beyond the particular case, its analysis has implications on a regional and global level, both for democratic and political theory and also for the practice of development cooperation. We would like to outline some of these critical core questions in the following.

Since the political crisis in Thailand fully unfolded with the military coup in 2006, it continuously intensified and preliminarily culminated in the protests, clashes, and eventually the violent crackdown of red-shirt demonstrations in May 2010. When Pheu Thai, the party close to the red-shirts and ousted Prime Minister Thaksin Shinawatra, won a majority in Parliament in July 2011, it immediately sparked rumors of a new coup; two years later, the party faces severe criticism by supporters for seeking reconciliation with the military, including amnesty for the shootings of 2010, and resistance from opponents for trying to amend or even re-draft the constitution of 2007.

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3 This research project is funded by the Jubilee Fund of the Oesterreichische Nationalbank (Austrian National Bank), Project-nr.: 14710, and is situated at the Department of Development Studies, University of Vienna.

When we talk about the deep crisis of Thai political institutions, we have to keep in mind that for a whole decade, the democratization process of Thailand was hailed as one of the most promising in all South-East Asia: It started with the strong pro-democracy movement in 1992, which pushed the military out of politics, and many analysts saw the adoption of the People's Constitution in 1997, with its institutional arrangements and its orientation towards good governance and human rights, as the culmination and the institutional enshrinement of the democratization process. Yet, the optimism soon gave way to tensions within society when, in 2001, Thaksin Shinawatra became Prime Minister and large parts of society became alienated by his political and economical agenda (Pye & Schaffar, 2008). Ultimately, he was mentioned along with Silvio Berlusconi and Hugo Chavez as a prototype of new populism (Mizuno & Pasuk, 2009). Since the military coup of 2006, the introduction of far-reaching media censorship, and the curtailment of political rights and civil liberties, Thailand is widely regarded as an example of the return of authoritarianism (Case, 2009).

The case of Thailand requires questioning the basic assumptions about the framing of state institutions (or polity). As their implementation is often schematically promoted, certain state institutions remain the unquestioned *target* of democratization and development processes worldwide – and not the unanticipated *outcome* of such processes. This problem lies at the center of our research project. The aim is to capture the struggle for democracy as something *processual*. In Europe and North America, this process has produced different systems of government, like the British Westminster system, the Swiss consensus democracy, or the US-American checks and balances model of liberal constitutional democracy. Neither of these systems is uncontested or ideally democratic, and all of them are under attack by de-democratization tendencies in the wake of globalization as well as by the most recent political developments in reactions to the worldwide financial and economic crisis (Guth, 2013). The critical analysis of institutional diversity forms one of the theoretical bases of the project and focuses on a particular observable global development of the past years and decades: the increasing *judicialization* of politics (cf. Hirschl, 2004a, 2004b).

Generally, judicialization means the development of legal strategies to address social problems, or that “the exercise of political power is increasingly being transferred from the legislature to instances of case-by-case decision-making by individual

judges” (Fischer-Lescano & Christensen, 2012, p. 94). Increasing judicialization can be observed at different levels: Various social and political problems are negotiated in a rights discourse, while progressive judicialization is also the focus of most strategies of development cooperation. The problem of inequality between men and women, of discrimination against the disabled and against ethnic, religious, and other minorities is usually met through means of a definition of enforceable rights or anti-discrimination legislation. An example is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (UN, 1979/2008), which is referred to by the United Nations as a ‘bill of rights for women’. Also the United Nations Development Programme (UNDP) pursues a rights-based poverty reduction program under the concept of Legal Empowerment of the Poor and the Eradication of Poverty (LEP) (UN, 2009). At the micro level, which is in the everyday relationships between people, the globalization of law and legal norms is reflected in the development of a specific *legal consciousness* (Merry, 2006). Only the development of a particular self-perception and interpretation of one’s own position in legal categories makes global initiatives such as CEDAW or the LEP applicable. This point is receiving increasing attention in legal sociological and anthropological research.

Legal sociologists and anthropologists have interpreted the democratization process in Thailand, especially the People’s Constitution, as an originally Thai articulation of a developed legal consciousness (Munger, 2006/2007). The People’s Constitution is distinguished precisely by a variety of institutional innovations that reflect a judicialization: a detailed charter of fundamental rights and a variety of newly created constitutional institutions that monitor compliance with these rights, e.g. a Human Rights Commission, an Anti-Corruption Commission, and, above all, an active Constitutional Court. As such, this constitutional model corresponds to the global trend of constitutional innovations of the 1990s and to the concept of good governance, which was at the center of many programs of international development cooperation.

The failure of Thailand’s constitution therefore raises questions beyond the individual case and regarding liberal constitutional models in general; it also points to critical implications and risks inherent to strategies of increased judicialization as a means of emancipatory politics. One aspect of the political crisis in Thailand is the politicization of the judiciary, engaging ever more openly in the political process of

the country, and the failure of the numerous constitutional bodies that had been established for the protection of fundamental rights.

Contrary to the above mentioned interpretations, Engel's (2005) in-depth empirical investigation of litigation cases shows an increasing reluctance to get involved with the judicial system. Our investigation of the strategic orientation of social movements point in the same direction as Engel, yet our interpretation is different. In contrast to what Engel perceives as decay of legal consciousness and as a move to irrational patterns of behavior and beliefs, we interpret the strategies of the social movements as a very rational and creative search for an alternative to the rights-based approaches to democratization.

Our empirical work on social movements is based on the assumption that social movements have two different broad strategies to pursue their goals: a judicial and a political strategy. While the judicial strategy is based on a legal discourse and involves the courts as a central arena of conflict, the latter relies on various forms of protests, demonstrations, and so forth, to achieve a shift in the balance of power and influence the processes of norm-setting. The focus of the investigation is thus on the discourse and practice of social movements on these strategic orientations. The extent up to which various movements pursue a rights-based strategy or focus on the participation in and influence on political processes of negotiation in their everyday practical political work is investigated by using the example of three movements: the health movement – in particular, people living with HIV and AIDS and their struggle for access to drugs; the labor movement; and groups working for internet freedom. Based on preliminary studies (e.g. Schaffar, 2007; Schaffar & Ziai, 2011), the research showed that the failure of the institutions introduced by the liberal constitutional model of 1997 is one reason why social movements in Thailand do not rely on actors such as the Human Rights Commission, the Administrative Courts, and the Constitutional Court, but rather look for alternative negotiating methods and opportunities for political participation as a quest for alternative forms of democratic government beyond liberal constitutionalism.

Considering examples of social movements in Latin America (Unterberger, 2012) and critical judicialization trends in Europe (Guth, 2013), the results of this research project will be interpreted in a comparative perspective and made available through publishing, lectures, and conference presentations.

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