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**New Legal Frameworks towards
Political and Institutional Reform under
the New Constitution of Thailand**

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PREFACE

The evolution of the market-oriented economy and the increase in cross-border transactions have brought an urgent need for research and comparisons of judicial systems and the role of law in the development of Asian countries. Last year, in FY 2000, the Institute of Developing Economies, Japan External Trade Organization (IDE-JETRO) conducted legal researches in Asian countries with two main themes. The first theme was to figure out the role of law in social and economic development and the second was to survey the judicial systems and the ongoing reform process thereof. We organized joint research projects with research institutions in Asia and had a roundtable meeting entitled “Law, Development and Socio-Economic Change in Asia” in Manila. The outcomes of the joint researches and the meeting were published in March 2001 as *IDE Asian Law Series No. 1-10*.

This year, in FY 2001, based on the last year’s achievement, we established two research committees: the Committee on “Law and Political Development in Asia” and the Committee on “Dispute Resolution Process in Asia”. The former committee focused on legal and institutional reforms following democratic movements in several Asian countries. Since late 1980s many Asian countries have experienced drastic political changes by the democratic movements with mass action, which have resulted in the reforms of political and administrative system for ensuring the transparency and accountability of the political and administrative process, human rights protection, and the participation of the people to those process. Such reforms are essential to create the stability of the democratic polity while law and legal institutions need to function effectively as designed for democracy. The latter committee conducted a comparative study on availability of the court system and out-of-court systems (namely Alternative Dispute Resolutions), with the purpose of determining underlying problems in the courts. As social and economic conditions drastically change, Asian countries face challenges to establish systems for fairly and effectively resolving the variety of disputes that arise increasingly in our societies. For dispute resolution, litigation in the court is not the only option. Mediation and arbitration proceedings outside the courts are important facilities as well. In order to capture the entire picture of dispute resolution systems, a comprehensive analysis of both the in- and out-of-court dispute resolution processes is essential.

In order to facilitate the committees' activities, IDE organized joint research projects with research institutions in seven Asian countries. This publication, titled *IDE Asian Law Series*, is the outcome of research conducted by the respective counterparts. This series is composed of papers corresponding to the research themes of the abovementioned committees, i.e. studies on law and political development in Indonesia, the Philippines and Thailand, and studies on the dispute resolution process in China, India, Malaysia, the Philippines, Thailand and Vietnam. The former papers include constitutional issues that relate to the recent democratization process in Asia. Studies conducted by member researchers investigated the role of law under those conditions while taking up such subjects as rule of law, impeachment, Ombudsman activities, human rights commissions, and so on. The latter papers include an overview of dispute resolution mechanisms for comparative study, such as court systems and various ADRs, as well as case studies on the dispute resolution process in consumer, labor and environmental disputes.

We believe that this work is unprecedented in its scope, and we hope that this publication will make a contribution as research material and for the further understanding of the legal issues we share.

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Institute of Developing Economies

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The democratic movements subsequent to the “Bloody May” Event in Thailand have indeed led to a plethora of reforms in legal frameworks dedicated to ensuring dexterous political representation, clean government and effective scrutiny of the exercise of state powers. The reforms have substantially been embedded in the new Constitution of 1997 – the “Popular Constitution”. It is fortunate that IDE-JETRO have included in their projects the study of law and political development in Thailand and have entrusted the Faculty of Law, Thammasat University to undertake this study and produce this Final Report.

It is hoped that this Final Report will, more or less, be of assistance to those interested in exploring political and institutional development in the Thai context. Contributors are, however, grateful to Mr. Bhatjarit Ninsanit for his kindest help in collecting relevant data and also owe debts of gratitude to Mr. Yodchatr Tasarika and Mr. Mana Wongchan for the labourious proof-reading and for unfailing support throughout the stressful period encountered.

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CHAPTER 1

OVERVIEW OF POLITICAL AND LEGAL REFORM IN THAILAND

In Thailand, apparent political and legal reform concretely transpired in the wake of the “Bloody May” event of 1992 which led to an overthrow of the short-lived military autocratic government and the subsequent promulgation of the new Constitution which is, in deed, claimed to be the “Popular Constitution”. As a major legal foundation, the Constitution makes numerous improvements in such areas as the transparency and accountability, popular participation, protection of the human rights, election systems, local government, anti-corruption and judicial review. This work seeks to explore each of these aspects at certain length.

We will, first, revisit the reform made towards the improvement of transparency and accountability on the part of the government. Legal frameworks for transparency and accountability in public-sector administration are brought to light.¹ In this regard, prior to the current Constitution, the Official Information Act, B.E. 2540 (1997) has, for the first time, been enacted to recognise the right of the people to know and inspect official information. This legislation guarantees public access to government-held information or documents.

Another momentous development in the sphere of transparency and accountability has been reflected in the requirement of public consultation, of which the main form is the public hearing, in the decision-making process. The development in this direction was, in fact, initiated by the Banharn Silpa-acha government and was subsequently supported through the issuance of the Rule of the Office of the Prime Minister on Hearing Public Opinions by Means of a Public Hearing Process B.E. 2539 (1996). The establishment by the new Constitution of several principal supervisory (judicial and non-judicial) organs, such as the

¹ See Chapter 2, *infra*.

Constitutional Court, the Administrative Court and the Parliamentary Ombudsman, will contribute to enhanced accountability in the government service as well.

A separate chapter of this work is dedicated to discussing popular participation under the new Constitution. It intends to shed light on how the new Constitution recognises and endeavours to put into real effect the right of the people to participate in state activities. Indeed, the rights of popular participation as embodied in the current national charter reflect the individualism ideology. We will see that, according to the Constitution, the holders of the rights of popular participation range from the private individual, groups of persons, traditional communities to local government organisations. Moreover, the Constitution spells out duties of the state in various respects in order to encourage and facilitate appropriate participation by the people in the tasks of the state.²

Another novelty that forms part of the reform after the democratic movement of Thailand is the protection of human rights. The new Constitution, unlike previous ones, places particular emphasis on measures and mechanisms dedicated to the protection of human rights. The importance attached to human rights protection is such that the so-called Human Rights Protection Commission is constitutionally set up for, primarily, investigating human rights violations. This area deserves further exploration in this work.³

One of the most substantially reformed creatures is the election systems. It has long been felt that the success of legislative and executive roles is much dependent on fairness in a general election as well as other elections. The Constitution sets up the Election Commission to take charge of supervision of elections and ensure their fairness. The Constitution imposes on Thai citizens a duty to voter and it also introduces some new electoral systems. For example, it accommodates proportional representation which opens up the opportunity for widely acceptable candidates to be elected as members of the House of Representatives and it introduces the Party List system whereby members of the

² See Chapter 3, *infra*.

³ See Chapter 4, *infra*.

House of Representatives can be elected from a Party List prepared by a political party. We will consider the reform in this area at full length.⁴

The Constitution strives to shove necessary reform of local government as well. Indeed, 10 sections of the new Constitution are devoted to local government. All these provisions result in many changes to local government, be its internal structure, responsibility, finance, personnel administration or popular participation. In addition, several organic laws are enacted in this connection, especially, the Act Determining Plans and Processes of Decentralisation, B.E. 2541 (1998). For the sake of completion, this work spares some room for discussions of all these changes.⁵

Further, there has been reform surrounding anti-corruption measures. The Constitution establishes the National Counter Corruption Commission, developing it from the former 'Commission of Counter Corruption', as an efficient body in charge of fighting corruption. A number of novel measures have been introduced in this instance, including the requirement that holders of political positions declare accounts showing particulars of assets and liabilities.⁶

Reform in respect of judicial review systems has remarkably been in place under the framework of the new Constitution. The Constitution sets up the Constitutional Court for making the determination of consitutionality issues. Most notably, Administrative Courts have been founded to review administrative actions by State agencies or State officials, with the result that State agencies and State officials will have to be more prudent in the exercise of their powers, as will be explained in the penultimate chapter.⁷

⁴ See Chapter 5, *infra*.

⁵ See Chapter 6, *infra*.

⁶ See Chapter 7, *infra*.

⁷ See Chapter 8, *infra*.

CHAPTER 2

TRANSPARENT AND ACCOUNTABLE GOVERNMENT IN THAILAND

I. Background and Introduction

Passing through the chain of three turbulent political events, namely, money politics in the Chatichai Chunnhavan government, the then military coup and subsequent violent upsurge known as Black May in the early-1990s, Thailand demanded that the public sector administration and politics as a whole be reformed to be efficient and incorrupt. The idea of “Good Governance” popularised by the World Bank of which emphasis is on transparency and accountability has, indeed, served that reform purpose in Thailand.

The transparency and accountability need legislation. It was Anand Panyarachun administration that started to develop and to make many efforts for laying down the legal framework for transparency and accountability in public sector administration. The government initiated the policy on the transparency and accountability as its principle in administration. Pursuant to the policy, the government order issued by Anand Panyarachun himself required that government agencies disclose their information under their possession to the public and the media.

The highlighted case indicating the effort dealing with the transparency and accountability in government action in the Anand government is the open process of the negotiation between the government and the private-owned C.P. Telecom Co. Ltd. for reviewing and revising the 3-million telephone line concession contract. As a resolution of the Council of Ministers, the process thereof was ordered open to the public and media for the purpose of comprehensive check-up and publication.

The real action by the Anand government regarded as the major initiative for transparency and accountability was drafting three laws: (a) a law guaranteeing the right to know (later completed in the General Chawalit Yongchaiyut government as

the Official Information Act, B.E. 2540 (1997)), (b) the Act on Private Participation in State Undertaking, B.E. 2535 (1992) and (c) the Act on Promoting and Conserving Environmental Quality B.E. 2535 (1992).

In the case of the Act on Private Participation in State Undertaking, B.E. 2535 (1992), the Anand government imposed the definite criteria for permitting private sector to join the government and a State agency in a public enterprise project exceeding 1 billion baht in value. Previously, any private sector could participate in any public enterprise mega project or could obtain a concession only when it secured approval from one person, that is, the Minister concerned. The approval was, in effect, a matter of favouritism rather than a fair rule for all. One possibility the favouritism always brings is the corruption problem. The introduction of the definite criteria is a solution for the old-fashioned approval based on favouritism.

In the case of the Act on Promoting and Conserving Environmental Quality B.E. 2535 (1992), it requires that the information concerning environmental matters be available to the public.

Another important development is the public hearing implementation in Banharn Silpa-acha government. The development is supported by the imposition of the Rule of the Office of the Prime Minister on Hearing Public Opinions by Means of a Public Hearing Process B.E. 2539 (1996).

Upon the promulgation of the new constitution, the well-established legal framework for transparency and accountability is visualized, as will be expounded below.

II. Legal Framework for Transparency and Accountability in Thailand

Before the emergence of the new constitution and the Official Information Act under which the right of the people to know official information was, for the first time, recognised in 1997, public access to government-held information or documents has been very limited. This limitation resulted from the enforcement of

many laws empowering state agencies and officials to make a closure of information on the ground that the disclosure of that information might affect the public safety and national security. Moreover, a closure of information was regarded as a kind of official discipline. Subject to the Rule on National Safety Maintenance B.E. 2517 (1974), that is the most important instrument for a closure of official information as it imposes the criteria and method for information classification in terms of confidentiality, the contents of official information are always deemed confidential. Also, the National Statistics Act B.E. 2508 (1965) prohibits competent officials from disclosing to any person statements or numerical data, except such statements or numerical data as provided by laws. Officials also considered that their functions or performance should be of internal affairs and that they had the discretionary power in approving any disclosure. As a result, the decision making process in the public sector administration has been kept out of public sight, thereby providing much room for corruption.

As far as the freedom of the press is concerned, there were many laws giving authority to the government to examine news contents, to forbid the publication of undesirable printed matters and to close down the pressing house. The Publication Act, B.E. 2484 (1941), the Anti-Communism Act, B.E. 2495 (1952) and the Order of the National Reform Council No. 42 were among these laws.

1. Transparency in the Thai Context

Whenever the term “transparent government” is discussed, there are three major pillars concerned. The first is the widest possible access of the general public to documents in the possession of state agencies and officials. This will guarantee that activities of decision-making political bodies and the administration are conducted under the control and observation of the public. The second is the freedom of the press and the last one is the public consultation by which the people can take part in the government’s key decision-making process.

In the case of Thailand, provisions supporting transparency can be seen in the new constitution, the Official Information Act, B.E. 2540 (1997) and the Rule of the Office of the Prime Minister on Hearing Public Opinions by Means of a Public

Hearing Process, B.E. 2539 (1996). The people's accessibility to official information is affirmed as a citizen right as provided in section 58¹ of the Constitution while the freedom of the press is guaranteed in section 39² and the public hearing is accepted in section 59³.

¹ **Section 58:** A person shall have the right to get access to public information in possession of a State agency, State enterprise or local government organisation, unless the disclosure of such information shall affect the security of the State, public safety or interests of other persons which shall be protected as provided by law.

² **Section 39:** A person shall enjoy the liberty to express his or her opinion, make speeches, write, print, publicise, and make expression by other means.

The restriction on liberty under paragraph one shall not be imposed except by virtue of the provisions of the law specifically enacted for the purpose of maintaining the security of the State, safeguarding the rights, liberties, dignity, reputation, family or privacy rights of other person, maintaining public order or good morals or preventing the deterioration of the mind or health of the public.

The closure of a pressing house or a radio or television station in deprivation of the liberty under this section shall not be made.

The censorship by a competent official of news or articles before their publication in a newspaper, printed matter or radio or television broadcasting shall not be made except during the time when the country is in a state of war or armed conflict; provided that it must be made by virtue of the law enacted under the provisions of paragraph two.

³ **Section 59:** A person shall have the right to receive information, explanation and reason from a State agency, State enterprise or local government organisation before permission is given for the operation of any project or activity which may affect the quality of the environment, health and sanitary conditions, the quality of life or any other material interest concerning him or her or a local community and shall have the right to express his or her opinions on such matters in accordance with the public hearing procedure, as provided by law.

1.1 The Official Information Act and the Public Access

The purposes of the Official Information Act, B.E. 2540 (1997)⁴ are twofold: (1) guaranteeing that the people will have broad opportunities to obtain access to official information for exercising their political rights effectively and for protecting their interest, and 2) guaranteeing that the individuals will have access to personal information of which they are subject held on by government agencies.

According to the section 7 of the Official Information Act B.E. 2540 (1997), the people can get access to major official information involving the government activities.

“Section 7. A State agency shall at least publish the following official information in the Government Gazette:

- (1) the structure and organisation of its operation;
- (2) the summary of important powers and duties and operational methods;
- (3) a contacting address for the purpose of contacting the State agency in order to request and obtain information or advice;
- (4) by-laws, resolutions of the Council of Ministers, regulations, orders, circulars, Rules, work pattern, policies or interpretations only insofar as they are made or issued to have the same force as by-laws and intended to be of general application to private individuals concerned; ...”

Moreover, those who are not interested persons can get access to other important official information for inspection as provided in section 9. The list established by this section includes the following:

- (1) a result of consideration or a decision which has a direct effect on a private individual including a dissenting opinion and an order relating thereto;

⁴ This Act has taken effect as from 9th December 1997 during General Chawalit Yongchaiyut government.

(2) a policy or an interpretation which does not fall within the scope of the requirement of publication in the Government Gazette under section 7 (4);

(3) a work-plan, project and annual expenditure estimate of the year of its preparation;

(4) a manual or order relating to work procedure of State officials which affects the rights and duties of private individuals;

(5) a concession contract, agreement of a monopolistic nature or joint venture agreement with a private individual for the provision of public services;

(6) a resolution of the Council of Ministers or of such Board, Tribunal, Commission or Committee as established by law or by a resolution of the Council of Ministers; provided that the titles of the technical reports, fact reports or information relied on in such consideration shall also be specified.

In case a person exercises his or her right as provided by section 11⁵ by making a request for any official information to any government agency, it will have to provide the information within a reasonable period of time.

However, the people can not get access to the information not subject to disclosure as provided by sections 14-20. The list of major information not subject to disclosure under those provisions includes the official information which may jeopardise the Royal Institution, the official information of which the disclosure will

⁵ **Section 11:** If any person making a request for any official information other than the official information already published in the Government Gazette or already made available for public inspection or already made available for public studies under section 26 [historical information held by the Fine Arts Department or other State agencies as specified in the Royal Decree] and such request makes a reasonably apprehensible mention of the intended information, the responsible State agency shall provide it to such person within a reasonable period of time, unless the request is made for an excessive amount or frequently without reasonable cause

jeopardise the national security, international relations or national economy or financial security, the information of which its disclosure will endanger the life or safety of any person, and will encroach upon the right of privacy.

In case any request by any person for the official information is rejected by the government agency making an order prohibiting the disclosure of that official information, the person whose request for the information has been rejected might appeal to the Information Disclosure Tribunal. The Tribunal is appointed by the Council of Ministers upon the recommendation of the Official Information Board (a body established by the Official Information Act).⁶ It has the power and duty to consider and decide an appeal against an order prohibiting the disclosure of information under section 14⁷ or section 15⁸, order dismissing an objection under

⁶ See *infra*.

⁷ **Section 14** : Official information which may jeopardise the Royal Institution shall not be disclosed.

⁸ **Section 15** : A State agency or State official may issue an order prohibiting the disclosure of official information falling under any of the following descriptions, having regard to the performance of duties of the State agency under the law, public interests and the interests of the private individuals concerned :

(1) the disclosure thereof will jeopardise the national security, international relations, or national economic or financial security;

(2) the disclosure thereof will result in the decline in the efficiency of law enforcement or failure to achieve its objectives, whether or not it is related to litigation, protection, suppression, verification, inspection, or knowledge of the source of the information;

(3) an opinion or advice given within the State agency with regard to the performance of any act, not including a technical report, fact report or information relied on for giving opinion or recommendation internally;

(4) the disclosure thereof will endanger the life or safety of any person;

section 17⁹ and order refusing the correction, alteration or deletion of personal information under section 25¹⁰.

(5) a medical report or personal information the disclosure of which will unreasonably encroach upon the right of privacy;

(6) an official information protected by law against disclosure or an information given by a person and intended to be kept undisclosed;

(7) other cases as prescribed in the Royal Decree;

An order prohibiting the disclosure of official information may be issued subject to any condition whatsoever, but there shall also be stated therein the type of information and the reasons for non-disclosure. It shall be deemed that the issuance of an order disclosing official information is the exclusive discretion of State officials in consecutive levels of command; provided that, a person who makes a request for the information may appeal to the Information Disclosure Tribunals as provided in this Act.

⁹ **Section 17:** In the case where a State official is of the opinion that the disclosure of any official information may affect the interests of a person, the State official shall notify such person to present an objection within the specified period; provided that, reasonable time shall be given for this purpose which shall not be less than fifteen days as from the date of the receipt of the notification.

The person having been notified under paragraph one or a person knowing that the disclosure of any official information may affect his interests has the right to present an objection in writing against such disclosure to the responsible State official.

In the case where there is an objection, the responsible State official shall, without delay, consider the objection and notify the result thereof to the person presenting it. In the case where an order dismissing the objection is made, State officials shall not disclose such information until the period for an appeal under section 18 has elapsed or until the Information Disclosure Tribunal has made a decision permitting the disclosure of such information, as the case may be.

¹⁰ **Section 25:** Subject to section 14 and section 15, a person shall have the right to get access to personal information relating to him. When such person makes a request in writing,

Since the promulgation of the Official Information Act, B.E. 2540 (1997), a large number of people have exercised their rights to inspect the government information. Two cases deserve a mention here. The first is concerned with a request made by a lady, Mrs Sumalee Limpawwat, to the Kasetsart University Demonstration School for disclosure of the documents evincing the examination result. The second is one in which the representatives of the press and the non-governmental organisations made a request to the National Counter Corruption Commission for the disclosure of the investigatory information involving the corrupted procurement of medicine products within the Ministry of Public Health.

the State agency in control of such information shall allow him or his authorised representative to inspect or obtain a copy of the same, and section 9 paragraph two and paragraph three shall apply *mutatis mutandis*.

In the case where there exists a reasonable ground to disclose a medical report relating to any person, State officials may disclose it only to doctors entrusted by such person.

A person who considers that any part of personal information relating to him is incorrect shall have the right to make a request in writing to the State agency in control of such information to correct, alter or delete that part of information. The State agency shall consider the request and notify its result to such person without delay.

In the case where the State agency fails to correct, alter or delete the information pursuant to the request, such person shall have the right to appeal to the Information Disclosure Tribunal within thirty days as from the date of the receipt of the notification of the order refusing to correct, alter or delete the same. The appeal shall be submitted through the Official Information Board and, in any case, the person who is the subject of the information shall have the right to require the State official to attach his request to the relevant part of the information.

Such person as specified in the Ministerial Regulation shall have the right to take action under section 23, section 24 and this section on behalf of a minor, an incompetent person, a quasi-incompetent person or the deceased person who was the subject of the information.

In the above-mentioned cases, the problems of the enforcement and the interpretation of the provisions in the Official Information Act are raised. The problems have resulted in conflicts between the State agencies holding the information requested and the persons making a request for the official information and among the State agencies.

As for the purpose of the disclosure of official information, the Official Information Act sets up the Official Information Board which has powers and duties as follows: (1) to supervise and give advice with regard to the performance of duties of State officials and State agencies for the implementation of the Act, (2) to give advice to State officials or State agencies with regard to the implementation of this Act as requested, (3) to give recommendations on the enactment of the Royal Decrees and the issuance of the Ministerial Regulations or the Rules of the Council of Ministers under this Act, (4) to consider and give opinions on the complaints under section 13, (5) to submit a report on the implementation of this Act to the Council of Ministers from time to time as appropriate but at least once a year, (6) to perform other duties provided in this Act and (7) to carry out other acts as entrusted by the Council of Minister or the Prime Minister.

According to section 27, the Official Information Board consists of Minister entrusted by the Prime Minister as Chairman, Permanent Secretary for the Office of the Prime Minister, Permanent Secretary for Defence, Permanent Secretary for Agriculture and Co-operatives, Permanent Secretary for Finance, Permanent Secretary for Foreign Affairs, Permanent Secretary for Interior, Permanent Secretary for Commerce, Secretary-General of the Council of State, Secretary-General of the Civil Service Commission, Secretary-General of the National Security Council, Secretary-General of the House of the Representatives, Director of the National Intelligence Agency, Director of the Bureau of the Budget and nine other qualified persons appointed by the Council of Ministers from the public sector and the private sector as members.

1.2 Public Consultation

As far as transparency is concerned, the government is not only required to provide as wide access as possible to information held by it, but is also required to consult the public in the formulation and implementation of policies, especially when carrying out any project affecting the environment and the interested party.

Thailand has been applying the public hearing method since the Banhan Silpa-acha government. In this connection, the government has introduced the Rule of the Office of Prime Minister on Hearing Public Opinions by Means of the Public Hearing Process, B.E. 2539 (1996).

In the Banhan Silpa-acha administration, the Political Reform Committee chaired by Chumpol Silpa-acha was set up to design the political reform plan. The committee set up the so-called Sub-committee Considering the Improvement of the Constitutional Provisions, Laws, Rules, Regulations, Orders and Practices hindering the Political Reform. The Sub-committee, headed by the then Minister to the Office of the Prime Minister (Dr. Pokin Polakul), carried out the study of the public hearing method and drew up the draft Rule of the Office of the Prime Minister on Hearing Public Opinions by Means of Public Hearing Process, B.E. as a guideline for State agencies in conducting a public hearing in the government projects that may affect the environment, community and interested parties before the final decision-making. The draft Rule was approved by the Council of Minister in the Banhan Silpa-acha administration and has come into effect as from 3rd February 1996.

Under such Public Hearing Rule, the advisory committee on the public hearing has been set up and has powers and duties to supervise the public hearing process, to design rules and means of the public hearing, to answer any inquiries about the matters provided in the Rule and to prepare the annual report on the result of the public hearing process for the Council of Ministers.

According to the said Rule, the public hearing process should be applied in respect of any government project that may harm the environment, culture, vocation, safety or ways of lives or endanger the community or may cause the controversy

among many parties. Indeed, after the introduction of the Rule, the public hearing method has been applied to a plethora of cases.¹¹

2. Accountability under the New Constitution

Under the new Constitution, several major organs are erected to, *inter alia*, promote accountability of the government. Of significant importance are the Constitutional Court, the Ombudsman and the Administrative Court.

2.1 Accountability under the Constitutional Court

Under the new Constitution, the Constitutional Court has powers to consider laws and guarantee that they are not contrary to or inconsistent with the Constitution and has other functions as provided by laws. The powers and functions of the Constitutional Court may not candidly deal with the inspection of the exercise of State power and powerful officials. However, thorough analysis reveals that the powers and functions of the Constitutional Court under the provisions of the new Constitution can in some way lead to such inspection.

In principle, the major function of the Constitutional Court is to consider the constitutionality. It will consider and decide whether any statement in the bill or in the organic law bill is contrary to or inconsistent with the Constitution, or whether any enacted legislation is at variance with the provisions in the new Charter.

But the Constitutional Court is unable to raise by itself the issue about the constitutionality for its consideration and decision. Such issue needs to be referred to the Constitutional Court through organs or persons specified in the Constitution. In this respect, no private individual is entitled to submit the issue about the

¹¹ Two outstanding cases are, firstly, the case of the draft law on community forests (in which the commission called “the Public Hearing Commission on the Community Forests Bill” was appointed by the government to supervise the public hearing process) and, secondly, the case of the controversial Thai-Malaysia Gas Pipeline Project.

constitutionality to the Constitutional Court, simply because the Constitution does not confer such right to the people. Notwithstanding, individuals have some indirect ways to submit the issue as to the constitutionality to the Constitutional Court for its consideration and decision.

In the first place, the people can resort to the Ombudsman channel. In this instance, they can lodge a complaint stating the unconstitutionality issue to the Ombudsman. The Ombudsman will, then, submit the issue to the Constitutional Court for its determination. In other words, the Ombudsman will take action as a representative of the complainant-people.

Next, apart from the Ombudsman strait, the Constitution provides for a referral by certain bodies or organs of the constitutionality issue to the Constitutional Court, so that people can bring any given unconstitutionality to the attention of such bodies or organs with a view to its further referral to the Constitutional Court for making the determination. Under the Constitution, the right to make a referral of the constitutionality issue to the Constitutional Court is exercisable by the President of the National Assembly, the President of the House of Representatives, the President of the Senate or the Prime Minister where it is considered that provisions of any bill or of organic law bill are contrary to or inconsistent with the Constitution or the provisions of the Constitution (section 262¹² and section 263)¹³. In addition, any

¹² **Section 262:** After any bill or organic law bill has been approved by the National Assembly under section 93 or has been reaffirmed by the National Assembly under section 94, before the Prime Minister presents it to the King for signature:

(1) if members of the House of Representatives, senators or members of both Houses of not less than one-tenth of the total number of the existing members of both Houses are of the opinion that provisions of the said bill are contrary to or inconsistent with this Constitution or such bill is enacted contrary to the provisions of this Constitution, they shall submit their opinion to the President of the House of Representatives, the President of the Senate or the President of the National Assembly, as the case may be, and the President

Court, in its trial and adjudication, can stay proceedings and refers the matter to the Constitutional Court when it is of the opinion, or when the party raises an objection, that the provisions of any law to be applicable to the case before it is unconstitutional.¹⁴ In effect, several other provisions of the Constitution mandate

of the House receiving such opinion shall then refer it to the Constitutional Court for decision and, without delay, inform the Prime Minister thereof;

(2) if not less than twenty members of the House of Representatives, senators or members of both Houses are of the opinion that the provisions of the said organic law bill are contrary to or inconsistent with this Constitution or such organic law bill is enacted contrary to this Constitution, they shall submit their opinion to the President of the House Representatives, the President of the Senate or the President of the National Assembly, as the case may be, and the President of the House receiving such opinion shall then refer it to the Constitutional Court for decision and, without delay, inform the Prime Minister thereof;

(3) if the Prime Minister is of the opinion that the provisions of the said bill or organic law bill are contrary to or inconsistent with this Constitution or it is enacted contrary to the provisions of this Constitution, the Prime Minister shall refer such opinion to the Constitutional Court for decision and, without delay, inform the President of the House of Representatives and the President of the Senate thereof.

¹³ **Section 263:** The provisions of section 262 (2) shall *apply mutatis mutandis* to draft rules of procedure of the House of Representatives, draft rules of procedure of the Senate and draft rules of procedure of the National Assembly which have already been approved by the House of Representatives, the Senate or the National Assembly, as the case may be, but remain unpublished in the Government Gazette.

¹⁴ **Section 264:** In the application of the provisions of any law to any case, if the Court by itself is of the opinion that, or a party to the case raises an objection that, the provisions of such law fall within the provisions of section 6 and there has not yet been a decision of the Constitutional Court on such provisions, the Court shall stay its trial and adjudication of the case and submit, in the course of official service, its opinion to the Constitutional Court for consideration and decision.

certain bodies to refer the constitutionality question to the Constitutional Court. An illustration is a referral to be made by the National Counter Corruption Commission where this Commission prescribes necessary regulations for the performance of its duties in the implementation of the Constitution.¹⁵

In the case where the Constitutional Court is of the opinion that the objection of a party under paragraph one is not essential for decision, the Constitutional Court may refuse to accept the case for consideration.

¹⁵ **Section 321:** The Commission of Counter Corruption and the Office of the Commission of Counter Corruption under the law on counter corruption shall be the National Counter Corruption Commission and the Office of the National Counter Corruption Commission under this Constitution, as the case may be, until the National Counter Corruption Commission has been appointed or the Office of the National Counter Corruption Commission has been established in accordance with the provisions of this Constitution, which shall be done within two years as from the date of the promulgation of this Constitution.

For the purpose of implementing this Constitution, the National Counter Corruption Commission under paragraph one shall prescribe necessary regulations for the performance of its duties under this Constitution. Such regulations shall be submitted to the Constitutional Court for consideration of their constitutionality before their publication in the Government Gazette and shall be in force until the organic law on counter corruption comes into force.

In the initial period, while there is no the President of the Supreme Administrative Court, the Selective Committee for members the National Counter Corruption Commission under section 297 paragraph three shall have fourteen members consisting the President of the Supreme Court of Justice, the President of the Constitutional Court, Rectors of all State higher education institutions which are juristic persons, being elected among themselves to be seven in number, and representatives of all political parties having a member who is a member of the House of Representatives; provided that each party shall have one representative and all such representatives shall elect among themselves to be five in number.

The scrutiny by the Constitutional Court of compliance with constitutional requirements is not only in the form of the Constitutional Court overseeing that legislation or draft legislation will not run counter to provisions of the Constitution. In many instances, the Constitution expressly states that violation of its provisions must be referred to the Constitutional Court for decision thereon, as envisioned, for example, in the case of failure by a holder of a political position to submit the account showing assets and liabilities.¹⁶

2.2 Accountability under the Ombudsman

The people can lodge to the Ombudsman their complaint stating their grievance and suffering resulting from unjust practice by the functions and duties of the State.

Unlike other constitutional organs in charge of the inspection of the exercise of the State power (such as the Administrative Court and the Court of Justice), Ombudsmen have no power to issue an order or adjudication. But Ombudsmen may present their report and suggestions to other organs especially Parliament to exercise the power for the purpose of political control over the state agency and/or to present them to the press and the public with a view to public opinions.

¹⁶ **Section 295:** Any person holding a political position who intentionally fails to submit the account showing assets and liabilities and the supporting documents as provided in this Constitution or intentionally submits the same with false statements or conceals the facts which should be revealed shall vacate office as from the date of the expiration of the time limit for the submission under section 292 or as from the date such act is discovered, as the case may be, and such person shall be prohibited from holding any political position for five years as from the date of the vacation of office.

When the case under paragraph one occurs, the National Counter Corruption Commission shall refer the matter to the Constitutional Court for further decision, and when the decision of the Constitutional Court is given, the provisions of section 97 shall apply *mutatis mutandis*.

Ombudsmen have only a single power, that is, presenting the report about the complaint stating the issue of the constitutionality to Parliament and publishing and distributing the report to the public for information.

The new Constitution has the provisions governing the power and duty of the Ombudsmen in sections 197 and 197 as follows:

(1) to consider and inquire into the complaint for fact-findings in the following cases:

(a) failure to perform in compliance with the law or performance beyond powers and duties as provided by the law of a Government official, an official or employee of a State agency, State enterprise or local government organisation;

(b) performance of or omission to perform duties of a Government official, an official or employee of a State agency, State enterprise or local government organisation, which unjustly causes injuries to the complaint or the public whether such act is lawful or not;

(c) other cases as provided by law;

(2) to prepare reports and submit opinions and suggestions to the National Assembly;

(3) In case where the Ombudsman is of the opinion that the provisions of the law, rules, regulations or any act of any person under sections 197 (1) begs the question of the constitutionality, the Ombudsman shall submit the case and the opinion to the Constitutional Court or Administrative Court for decision in accordance with the procedure of the Constitutional Court or the law on the procedure of the Administrative Court, as the case may be.

From the above provisions, it can be seen that the Ombudsman channel can be resorted to by the people for the purpose of inspecting the exercise of the State power.

2.3 Accountability under the Administrative Court

As stated in section 276 of the Constitution,¹⁷ the Administrative Court has the power to try and adjudicate cases of dispute between a private individual on one part and State agency and State official on the other part on the administrative act, the administrative order and the administrative juristic act. The Administrative Court will make a decision as to whether any administrative act, any administrative order or any administrative juristic act complained of by the aggrieved persons is lawful or not.

The Administrative Court is, therefore, a kind of mechanism to control the exercise of the state power in order to maximise the efficiency of the administration and to create justice in the government. In effect, under the inquisitorial procedure of the Administrative Court, the court will have to find facts in the case and evidence from all parties including third persons. The burden of proof is thus not absolutely placed on the aggrieved litigant, As a consequence, the inspection of the exercise of the State power through an administrative action is much feasible.

¹⁷ **Section 276:** Administrative Courts have the powers to try and adjudicate cases of dispute between a State agency, State enterprise, local government organisation, or State official under the superintendence or supervision of the Government on one part and a private individual on the other part, or between a State agency, State enterprise, local government organisation, or State official under the superintendence or supervision of the Government on one part and another such agency, enterprise, organisation or official on the other part, which is the dispute as a consequence of the act or omission of the act that must be, according to the law, performed by such State agency, State enterprise, local government organisation, or State official, or as a consequence of the act or omission of the act under the responsibility of such State agency, State enterprise, local government organisation or State official in the performance of duties under the law, as provided by law.

There shall be the Supreme Administrative Court and Administrative Courts of First Instance, and there may also be the Appellate Administrative Court.

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CHAPTER 3

POPULAR PARTICIPATION UNDER THE CONSTITUTION

I: Introduction

Since the political transformation from the absolute monarchy to the constitutional monarchy, Thailand has had 15 constitutions, with a varied extent of political participation being catered for thereunder. The democratic regime of the country is generally classified as the *representative democracy*, by which the people have had no political power to take part in political activities except in a general election of members of the House of Representatives¹. Some constitutions recognised the people's right to participate, in some form, in the exercise of the sovereignty, for example, the Constitution of the Kingdom of Thailand B.E. 2492 (1949), the Constitution of the Kingdom of Thailand B.E. 2511 (1968) and the Constitution of the Kingdom of Thailand B.E. 2517 (1974). These constitutions conferred on the King the prerogative to call for a referendum for the purpose of approving the draft Constitution Amendments. However, in fact, no referendum took place for that very purpose. Until now, the popular political participation in Thailand has been visualised in the form of casting votes in general elections and participating in demonstrations that even led to series of political violences.

The representative democracy in Thailand has reflected a number of weaknesses ranging from the instability of the government to corruption, lack of political vision and transparency deficiency. These weaknesses have led to the non-democratic and unconstitutional form of political change, that is, the coup d'état². Thus, efforts are enshrined in the current constitution to unravel the problems. One of the solutions is to ameliorate popular political participation by framing the constitution in the direction of facilitating more participatory democracy. To this end,

¹ Amorn Chandara-Somboon, "*The Election Day: The 'Final Chapter' or the 'Introductory Chapter' and After the Democracy*", Essays on Legal Structures and Mechanisms of the Constitution, Bangkok: the Institute of Policy Studies, 1992, p. 68.

² Amorn Raksasat, "*Introduction: the Government and the People*", Thai Government and Politics under the Popular Constitution, Bangkok: V. J. Press, 2001, p. 15.

there have been established measures with regard to the referendum, the people's right to propose a Bill and to remove key persons from office. Furthermore, supervisory systems by means of qualified persons have also been introduced.³ In effect, in the process of drafting the current Constitution, a public hearing was actually conducted for comments on the draft as prepared by members of the Constituent Assembly, who were indeed indirectly elected by the people. Thus, the current Constitution emerges as a fruit of the people's mutual assent and sense of belonging. The people agree to abide by this national charter.⁴

Several chapters and sections in the current Constitution recognise the popular political participation. New rights, that have found no precedented recognition under previous Constitutions, are proclaimed by the present Constitution. Given that the rights and liberties as recognised by the current Constitution are directly binding upon the National Assembly, the Council of Ministers, Courts and other State organs in enacting, applying and interpreting laws, it follows, therefore, that the Thai people can invoke such rights and liberties regardless of whether or not subordinate laws are subsequently enacted to accommodate them (section 27⁵). The Chapter on Directive Principles of Fundamental State Policies states that the State shall promote and encourage public participation in laying down policies, making decisions on political issues, preparing economic, social and political development plans, and inspecting the exercise of State powers at all levels (section 76) and that the State shall promote and encourage public participation in the preservation and the protection of the natural resources and the environment (section 79⁶). The

³ Anek Laothammathat, "*Self-Determination Democracy*", Thai Folkway: An Essay in Commemoration of A Century of Predee Panomyong, Series 2, Political Thoughts, Bangkok: Children Foundation Press, 2001, pp. 5 - 6.

⁴ Bowornsak Uwano, Good Governance in Thai Society, Bangkok, Duantula Press, 1999, pp. 92 – 93.

⁵ **Section 27:** Rights and liberties recognised by this Constitution expressly, by implication or by decisions of the Constitutional Court shall be protected and directly binding on the National Assembly, the Council of Ministers, Courts and other State organs in enacting, applying and interpreting laws.

⁶ **Section 79:** The State shall promote and encourage public participation in the preservation, maintenance and balanced exploitation of natural resources and biological diversity and in the promotion, maintenance and protection of the quality of the environment in accordance

provisions of this Chapter are apparently intended to serve as directive principles for preparing legislation and determining policies for the administration of the State affairs. In this connection, the Council of Ministers that will assume the administration of the State affairs is also required to make a clear statement to the National Assembly as regards the activities it intends to carry out in the implementation of the constitutional directive principles. The Cabinet must as well prepare and submit to the National Assembly an annual report on the result of the implementation, including problems and obstacles encountered (section 88). As a result, any government which will assume the administration of the State affairs must take action in accordance with the directive principles of fundamental State policies as provided in the section 76 and the section 79 above⁷.

As the Constitution recognises the popular political participation as ‘the civil right’ of the Thai People, it thus follows that only Thai citizens can be the holders of this right. Other rights of popular participation, other than those recognised as the rights of the Thai people, can be exercised by non-Thai citizens as provided by law. Obviously, the rights of the popular participation embodied in the current Constitution reflect the individualism ideology. However, the holders of the rights of the popular participation under the present Charter range from the private individual, the group of persons, the traditional community to the local government organisation. This diversity regarding the holders of rights of popular participation is, in effect, consistent with the customs of Thai society, leading, in turn, to efficacy in the administration of state affairs as a whole. Moreover, the Constitution strives to lay down measures and mechanisms for protecting and safeguarding the rights and liberties of the people by spelling out duties of the state in various respects in order that the people can appropriately take part in the tasks of the state in line with the spirits of the Constitution.

with the persistent development principle as well as the control and elimination of pollution affecting public health, sanitary conditions, welfare and quality of life.

⁷ Parinya Dhavanarumitkul, “The Popular Political Participation under the New Constitution and the Direct Democracy”, *The Administrative Law Journal*, Vol. 17, Part 2, 1998, p. 63.

To understand the ideas underlying the recognition of the right of the popular political participation in the current Constitution, the following three aspects need to be closely examined, viz, (1) the popular participation in respect of the holder of the right, (2) the exercise of the right of the popular participation and the duty of the State, and (3) measures and mechanisms facilitating effective and practical popular participation. All this will be dealt with in turn.

II: Popular Participation in Respect of the Right Holders

According to the current Constitution, the holder of the right of the popular political participation can be classified into four categories: 1) a private individual, (2) a group of persons, (3) a local community, and (4) a local government organisations.

1. The Right of the Popular Participation Exercisable by Private Individuals

Rights to participate in political activities may be exercised by the individual as such. This is the fundamental mode of exercising rights. Each individual person can take part in political and administrative activities and in the inspection of the exercise of state powers.

1.1 The Rights and Liberties to Participate in Political Activities and in the Administration

An analysis of provisions of the Constitution reveal that any person can enjoy the following rights and liberties to take part in political and administrative affairs: the right and liberty to assemble peacefully and without arms (section 44⁸), the right and liberty to unite and form an association or organisation (section 45⁹), the right

⁸ **Section 44:** A person shall enjoy the liberty to assemble peacefully and without arms.

The restriction on such liberty under paragraph one shall not be imposed except by virtue of the law specifically enacted for the case of public assembling and for securing public convenience in the use of public places or for maintaining public order during the time when the country is in a state of war, or when a state of emergency or martial law is declared.

⁹ **Section 45:** A person shall enjoy the liberty to unite and form an association, a union, league, co-operative, farmers' group, private organisation or any other group.

and liberty to unite and form a political party (section 47¹⁰), right and liberty in preservation and protection of natural resources and environment (section 56¹¹), right to get access to public information (section 58¹²), right in public hearing

The restriction on such liberty under paragraph one shall not be imposed except by virtue of the law specifically enacted for protecting the common interest of the public, maintaining public order or good morals or preventing economic monopoly.

¹⁰ **Section 47:** A person shall enjoy the liberty to unite and form a political party for the purpose of making political will of the people and carrying out political activities in fulfilment of such will through the democratic regime of government with the King as Head of the State as provided in this Constitution.

The internal organisation, management and regulations of a political party shall be consistent with fundamental principles of the democratic regime of government with the King as Head of the State.

Members of the House of Representatives who are members of a political party, members of the Executive Committee of a political party, or members of a political party, of not less than the number prescribed by the organic law on political parties shall, if of the opinion that their political party's resolution or regulation on any matter is contrary to the status and performance of duties of a member of the House of Representatives under this Constitution or contrary to or inconsistent with fundamental principles of the democratic regime of government with the King as Head of the State, have the right to refer it to the Constitutional Court for decision thereon.

In the case where the Constitutional Court decides that such resolution or regulation is contrary to or inconsistent with fundamental principles of the democratic regime of government with the King as Head of the State, such resolution or regulation shall lapse.

¹¹ **Section 56:** The right of a person to give to the State and communities participation in the preservation and exploitation of natural resources and biological diversity and in the protection, promotion and preservation of the quality of the environment for usual and consistent survival in the environment which is not hazardous to his or her health and sanitary condition, welfare or quality of life, shall be protected, as provided by law.

Any project or activity which may seriously affect the quality of the environment shall not be permitted, unless its impacts on the quality of the environment have been studied and evaluated and opinions of an independent organisation, consisting of representatives from private environmental organisations and from higher educational institutions providing studies in the environmental field, have been obtained prior to the operation of such projects or activity, as provided by law.

The right of a person to sue a State agency, State enterprise, local government organisation or other State authority to perform the duties as provided by law under paragraph one and paragraph two shall be protected.

¹² **Section 58:** A person shall have the right to get access to public information in possession of a State agency, State enterprise or local government organisation, unless the disclosure of such information shall affect the security of the State, public safety or interests of other persons which shall be protected as provided by law.

(section 59¹³), right to participate in the decision-making process of State officials in the performance of administrative functions which affect or may affect the individual's own rights and liberties (section 60¹⁴), right to resist peacefully the coup d' état (section 65¹⁵), right to submit a Bill with votes of not less than fifty thousand in number (section 170¹⁶), right to remove persons from office in local government organisations (section 286¹⁷), and right to submit local ordinances (section 287¹⁸).

¹³ **Section 59:** A person shall have the right to receive information, explanations and reasons from a State agency, State enterprise or local government organisation before permission is given for the operation of any project or activity which may affect the quality of the environment, health and sanitary conditions, the quality of life or any other material interest concerning him or her or a local government and shall have the right to express his or her opinion on such matters in accordance with the public hearing procedure, as provided by law.

¹⁴ **Section 60:** A person shall have the right to participate in the decision-making process of State officials in the performance of administrative functions which affect or may affect his or her rights and liberties, as provided by law.

¹⁵ **Section 65:** A person shall have the right to resist peacefully any act committed for the acquisition of the power to rule the country by a means which is not in accordance with the modes provided in this Constitution.

¹⁶ **Section 170:** The persons having the right to vote of not less than fifty thousand in number shall have a right to submit a petition to the President of the National Assembly to consider such law as prescribed in Chapter 3 and Chapter 5 of this Constitution.

A bill must be attached to the petition referred to in paragraph one.

The rules and procedure for the petition and the examination thereof shall be in accordance with the provisions of the law.

¹⁷ **Section 286:** If persons, having the right to vote in an election in any local government organisation, of not less than three-fourths of the number of the voters who are present to cast ballot consider that any member of the local assembly or any administrator of that local government organisation is not suitable to remain in office, such member or administrator shall vacate the office, as provided by law.

The voting under paragraph one shall be made by not less than one-half of the total number of the persons having the right to vote.

¹⁸ **Section 287:** Persons, having the right to vote in any local government organisation, of not less than one-half of the total number of the persons having the right to vote in that local government organisation shall have the right to lodge with the President of the local assembly a request for the issuance by the local assembly of local ordinances.

The request under paragraph one shall be accompanied by the draft local ordinances.

The rules and procedure for the lodge of request and the examination thereof shall be as provided by law.

1.2 The Rights and Liberties to Participate in the Inspection of the Exercise of State Powers

Under the Constitution, the rights and liberties to take part in the inspection of the exercise of State powers include the right to bring a lawsuit in the event where the individual's rights or liberties as recognised by the Constitution are violated (section 28¹⁹, paragraph two), the right to sue a State agency, State enterprise, local government organisation or other State authority to perform the duties as provided by law (section 56²⁰ paragraph three), the right to present a petition (section 61²¹), right to sue a State agency, State enterprise, local government organisation or other State authority which is a juristic person to be liable for an act or omission (section 62²²), the right to request State officials or their superiors to explain reasons and act

¹⁹ **Section 28:** A person can invoke human dignity or exercise his or her rights and liberties in so far as it is not in violation of rights and liberties of other persons or contrary to this Constitution or good morals.

A person whose rights and liberties recognised by this Constitution are violated can invoke the provisions of this Constitution to bring a lawsuit or to defend himself or herself in the court.

²⁰ **Section 56:** The right of a person to give to the State and communities participation in the preservation and exploitation of natural resources and biological diversity and in the protection, promotion and preservation of the quality of the environment for usual and consistent survival in the environment which is not hazardous to his or her health and sanitary condition, welfare or quality of life, shall be protected, as provided by law.

Any project or activity which may seriously affect the quality of the environment shall not be permitted, unless its impacts on the quality of the environment have been studied and evaluated and opinions of an independent organisation, consisting of representatives from private environmental organisations and from higher educational institutions providing studies in the environmental field, have been obtained prior to the operation of such project or activity, as provided by law.

The right of a person to sue a State agency, State enterprise, local government organisations or other State authority to perform the duties as provided by law under paragraph one and paragraph two shall be protected.

²¹ **Section 61:** A person shall have the right to present a petition and to be informed of the result of its consideration within the appropriate time, as provided by law.

²² **Section 62:** The right of a person to sue a State agency, State enterprise, local government organisation or other State authority which is a juristic person to be liable for an act or omission done by its Government official, official or employee shall be protected, as provided by law.

in compliance with law (section 70, paragraph three²³), and the right with voters of not less than fifty-thousand in number to request the Senate to remove persons from political positions (section 304²⁴).

2. The Right of the Popular Participation Exercisable by Groups of Persons

Certain rights afforded to individuals under the current Constitution also fall under conditions, whereby private individuals, rather than exercising their rights in their own capacity, will have to do so collectively or in collaboration with others. These rights include the right and liberty to unite and form an independent organisation to present opinions evincing environmental impacts assessment for a project or activity that may seriously affect the quality of the environment (section 56, paragraph two), the right to unite and form an independent organisation to present opinions on consumer protection (section 57²⁵), the right to be member of

²³ **Section 70:** A Government official, official or employee of a State agency, State enterprise or local government organisation and other State official shall have a duty to act in compliance with the law in order to protect public interest, and provide convenience and services to the public.

In performing the duty and other acts relating to the public, the persons under paragraph one shall be politically impartial.

In the case where the persons under paragraph one neglect or fail to perform the duties under paragraph one or paragraph two, the interested person shall have the right to request the persons under paragraph one or their superior to explain reasons and request them to act in compliance with the provisions of paragraph one or paragraph two.

²⁴ **Section 304:** Members of the House of Representatives of not less than one-fourth of the total number of the existing members of the House or voters of not less than fifty-thousand in number have the right to lodge with the President of the Senate a complaint in order to request the Senate to pass a resolution under section 307 removing the persons under section 303 from office. The said request shall clearly itemise circumstances in which such persons have allegedly committed the act.

Senators of not less than one-fourth of the total number of the existing members of the Senate have the right to lodge with the President of the Senate a complaint in order to request the Senate to pass a resolution under section 307 removing a senator from office.

The rules, procedure and conditions for the lodging of the complaint by the voters under paragraph one shall be in accordance with the organic law on counter corruption.

²⁵ **Section 57 :** The right of a person as a consumer shall be protected as provided by law.

The law under paragraph one shall provide for an independent organisation consisting of representatives of consumers for giving opinions on the enactment and

the National Economic and Social Council (section 89²⁶), the right to initiate and propose a bill (section 170), the right to remove persons from local government organisations (section 286), the right to propose local ordinances (section 287), the right to request the Senate to remove persons from political positions (section 304).

3. The Popular Participation Exercisable by Local Communities

For a local community to enjoy the right of the popular participation, it is necessary that residents of that local community assemble as a traditional community. Once a traditional community is formed, it shall, under the Constitution, have the right to conserve or restore their customs, local knowledge, arts or good culture and participate in the management of natural resources and the environment (section 46²⁷).

4. The Popular Participation Exercisable by Local Government Organisations

The concept of the popular participation exercisable by a local government organisation aims to promote the self-government democracy. Unlike the popular participation exercisable by local communities above, this philosophy is not a novelty; it has, in effect, been embedded in several former constitutions. The current Constitution attempts to put forward more independent and participatory local government organisations by recognising a number of rights that each local

issuance of law, rules, and regulations and on the determination of various measures for consumers protections.

²⁶ **Section 89:** For the purpose of the implementation of this Chapter, the State shall establish the National Economic and Social Council to be charged with the duty to give advice and recommendations to the Council of Ministers on economic and social problems.

A national economic and social development plan and other plans as provided by law shall obtain opinions of the National Economic and Social Council before they can be adopted and published.

The composition, source, powers and duties and the operation of the National Economic and Social Council shall be in accordance with the provision of law.

²⁷ **Section 46:** Persons so assembling as to be a traditional community shall have the right to conserve or restore their customs, local knowledge, arts or good culture of their community and of the nation and participate in the management, maintenance, preservation and exploitation of natural resources and the environment in a balanced fashion and persistently as provided by law.

government organisation may exercise. Towards this direction, local government organisations have autonomy in laying down policies for their governance, administration, personnel administration and finance and have powers and duties particularly on their own part (section 284²⁸ paragraph one). In addition, they have the right to form the Local Officials Committee (section 288²⁹), the right to provide

²⁸ **Section 284:** All local government organisations shall enjoy autonomy in laying down policies for their governance, administration, personnel administration, finance and shall have powers and duties particularly on their own part.

The delineation of powers and duties between the State and a local government organisation and among local government organisations themselves shall be in accordance with the provisions of the law, having particular regard to the promotion of decentralisation.

For the purpose of the continual development of decentralisation to a higher level, there shall be the law determining plans and process of decentralisation, the substance of which shall at least provide for the following matters:

(1) the delineation of powers and duties in the management of public services between the State and a local government organisation and among local government organisations themselves;

(2) the allocation of taxes and duties between the State and a local government organisation, having regard to burdens of the State *vis-a-vis* the local government organisation and those among local government organisations themselves;

(3) the setting up of a committee to perform the duties in (1) and (2) consisting, in an equal number, of representatives of relevant Government agencies, representatives of local government organisations and qualified persons possessing the qualifications as provided by law.

In the case where the delineation of powers and duties and the allocation of taxes and duties under (1) and (2) have been made for any local government organisation, the committee under (3) shall review them every five years as from the date of the delineation of powers and duties or the date of the allocation of taxes and duties, as the case may be, in order to consider the suitability of the delineation of powers and duties and the allocation of taxes and duties previously made, having particular regard to the promotion of decentralisation.

The proceeding under paragraph four shall be effective when the approval of the Council of Ministers has been obtained and the National Assembly has been notified thereof.

²⁹ **Section 288:** The appointment and removal of officials and employees of a local government organisation shall be in accordance with the need of and suitability of each locality and shall obtain prior approval from the Local Officials Committee, as provided by law.

The Local Officials Committee under paragraph one shall consist, in an equal number, of representatives of relevant Government agencies, representatives of local government organisations and qualified persons possessing the qualifications as provided by law.

education and professional training in accordance with the suitability to and the need of the locality (section 289³⁰) and the right to promote and maintain the quality of the environment in the locality and to participate in the preservation of natural resources and environment outside the area of the locality only in the case where the livelihood of the inhabitants in the area may be affected.

III. The Exercise of the Right of the Popular Participation Analysed by Reference to the Duty of the State

Based on the classical German-style classification, the right of the popular participation considered by reference to the duty of the state can be divided into three types, namely, (1) the right as the individual liberty (*status negativus*), (2) the right enjoyable only when the state creates it (*status positivus*) and (3) the right to participate in the exercise of state powers or to create the political will (*status activus*).³¹ Let us explain these rights in more detail below.

1. The Right as the Individual Liberty (*status negativus*)

The ‘right as the individual liberty’ signifies such right as may be enjoyed by a private individual with his or her own will, without any action of the state. Given that an individual is bestowed the right at the outset, the individual is to be protected against violation or restriction of such right by any action of the state. In the case where the right is intervened or violated by the state, the individual may seek remedies from the state.

The transfer, promotion, increase of salaries and the punishment of the officials and employees of a local government organisation shall be in accordance with the provisions of the law.

³⁰ **Section 289:** A local government organisation has the duty to conserve local arts, custom, knowledge or good culture.

A local government organisation has the right to provide education and professional training in accordance with the suitability to and the need of that locality and participate in the provision of education and training by the State; provided that it shall not be contrary to section 43 and section 81, as provided by law.

In providing education and training in the locality under paragraph two, the local government organisation shall also have regard to the conservation of local arts, custom, knowledge and good culture.

The rights that rest upon the ‘*status negativus*’ class and bear relevance to the popular participation include the right to express opinions (section 39³²), the right to assemble peacefully and without arms and the right to unite and form an association or an organisation (section 45).

2. The Right Enjoyable Only Upon Creation by the State (*status positivus*)

This category explicates such right the exercise of which is not possible in the absence of some action by the state with respect to the right. Rights of this kind are generally the right to demand some state action and the right to take legal proceedings.

As far as the popular participation is concerned, under the Constitution, the *status positivus* category of rights include right to get access to public information (section 58) and right to participate in the decision-making process of State officials in the performance of administrative functions which affect or may affect the individual rights and liberties (section 60).

3. The Right to Participate in the Exercise of State Powers or to Create the Political Will (*status activus*).

³¹ Banjerd Sinkhaneti, *Fundamentals of Rights and Liberties and Human Dignity under the New Constitution*, Bangkok: Winyoochon Press, 2000, pp. 48 – 49.

³² **Section 39:** A person shall enjoy the liberty to express his or her opinions, make speeches, write, print, publicise, and make expression by other means.

The restriction on liberty under paragraph one shall not be imposed except by virtue of the provisions of the law specifically enacted for the purpose of maintaining the security of the State, safeguarding the rights, liberties, dignity, reputation, family or privacy rights of other person, maintaining public order or good morals or preventing the deterioration of the mind or health of the public.

The closure of a pressing house or a radio or television station in deprivation of the liberty under this section shall not be made.

The censorship by a competent official of news or articles before their publication in a newspaper, printed matter or radio television broadcasting shall not be made except during the time when the country is in a state of war or armed conflict; provided that it must be made by virtue of the law enacted under the provisions of paragraph two.

The owner of a newspaper or other mass media business shall be a Thai national as provided by law.

No grant of money or other properties shall be made by the Senate as subsidies to private newspaper or other mass media.

This type of right is recognised by law as the “civil right”. Only Thai citizens can exercise the right to participate in the exercise of state powers or to create the political will. This class of rights ranges from the right to cast a vote in a general election, the right to become candidate in an election, the right to form a political party or to have direct participation.

A survey through the Constitution reveals that this type of right encompass the right to elect members of the House of Representatives (section 104³³ and section 105³⁴), the right to elect Senators (section 123³⁵ and section 124³⁶), the right

³³ **Section 104:** In a general election, a voter shall have the right to cast ballot for only one list of candidates prepared by the political party and, in an election on a constituency basis, for one candidate in that constituency.

In an election of a member of the House of Representatives to replace the member of the House of Representatives elected on a constituency basis whose office becomes vacant under section 119 (2), a voter shall have the right to cast ballot for one candidate in that constituency.

The election shall be by direct suffrage and secret ballot.

In each constituency, the counting of votes from every polling station altogether shall be conducted and the result of the vote-counting shall be announced publicly at any single place in that constituency as designated by the Election Commission, except that in the case where necessity arises in a particular locality, the Election Commission may provide otherwise in accordance with the organic law on the election of members of the House of Representatives and senators.

The provisions of paragraph four shall apply *mutatis mutandis* to the counting and announcement of votes received by each party-list in each constituency under section 103.

³⁴ **Section 105:** A person having the following qualifications has the right to vote at an election:

- (1) being of Thai nationality; provided that a person who has acquired Thai nationality by naturalisation must hold the Thai nationality for not less than five years;
- (2) being not less than eighteen years of age on 1st January of the year of the election; and
- (3) having his or her name appear on the house register in the constituency for not less than ninety days up to the date of the election.

A voter who has a residence outside the constituency under section 103 within which his or her name appear in the house register, or who has his or her name appear in the house register in the constituency for the period of less than ninety days up to the date of the election, or who has a residence outside the Kingdom of Thailand shall have the right to cast ballot in an election in accordance with rules, procedure and conditions provided by the organic law on the election of members of the House of Representatives and senators.

³⁵ **Section 123:** The person having the right to vote at an election of senators may cast ballot, at the election, for one candidate in that constituency.

to become a candidate for a general election of members of the House of Representatives (section 107³⁷), the right to become a candidate for an election of Senators (section 125³⁸), the right to form a political party (section 47), the right

The election shall be by direct suffrage and secret ballot.

In the case where a *Changwat* can have more than one senator, the candidates who receive the highest number of votes in respective order in the number of senators that the *Changwat* can have shall be elected as senators.

³⁶ **Section 124:** The provisions of section 105 and section 106 shall apply *mutatis mutandis* to the qualifications and prohibitions to which a person having the right to be a candidate in an election of senators shall be subjected.

³⁷ **Section 107:** A person having the following qualifications has the right to be a candidate in an election of members of the House of Representatives:

- (1) being of Thai nationality by birth;
- (2) being not less than twenty five years of age on the election day;
- (3) having graduated with not lower than a Bachelor's degree or its equivalent except for the case of having been a member of the House of Representatives or a senator before;
- (4) being a member of any and only one political party, for a consecutive period of not less than ninety days, up to the date of applying for candidacy in an election;
- (5) a candidate in an election on a constituency basis shall also possess any of the following qualifications:
 - (a) having his or her name appear in the house register in *Changwat* where he or she stands for election for a consecutive period of not less than one year up to the date of applying for candidacy;
 - (b) having been a member of the House of Representatives in *Changwat* where he or she stands for election, a member of a local assembly or a local administrator of such *Changwat* before;
 - (c) being born in *Changwat* where he or she stands for election;
 - (d) having studied in an educational institution situated in *Changwat* where he or she stands for election for a consecutive period of not less than two academic years before;
 - (e) having served in the official service before or having had his or her name appear in the house register in *Changwat* where he or she stands for election for a consecutive period of not less than two years before.

³⁸ **Section 125:** A person having the following qualifications has the right to be a candidate in an election of senators:

- (1) being of Thai nationality by birth;
- (2) being of not less than forty years of age on the election day;
- (3) having graduated with not lower than a Bachelor's degree or its equivalent;
- (4) having any of the qualifications under section 107 (5).

with votes of not less than 50,000 in number to present a bill (section 170), the right to participate in a referendum (section 214³⁹), the right with votes of not less than 50,000 in number to submit a request to the Senate to remove persons from political positions (section 304), the right to remove persons from positions in a local government organisation (section 286), the right to present local ordinances (section 287), the right of the community to manage the natural resources and the environment (section 46), right in natural resource and environment (section 56), right for the public hearing (section 59), and the right to peacefully resist the coup d'état (section 65).

³⁹ **Section 214:** In the case where the Council of Ministers is of the opinion that any issue may affect national or public interests, the Prime Minister, with the approval of the Council of Ministers, may consult the President of the House of Representatives and the President of the Senate for the purpose of publishing in the Government Gazette calling for a referendum.

A referendum shall be for the purpose of public consultation as to whether the important issue under paragraph one, which is not the issue contrary to or inconsistent with this Constitution, will be approved or not. A referendum shall not be held on an issue specifically relating to any individual or group of persons.

The publication under paragraph one shall fix the date of the referendum, which shall not be earlier than ninety days and shall not be later than one hundred and twenty days as from the date of its publication in the Government Gazette, and the date of the referendum shall be the same throughout the Kingdom.

While the publication under paragraph one is in force, the State shall take action to ensure that persons who agree or disagree with such issue can express their opinions equally.

The persons having the right to vote in an election of members of the House of Representatives shall have the right to vote in a referendum.

If it appears from the referendum that the people voting in the referendum are less than one-fifth of the persons having the right to vote, the issue for which consultation is sought shall be deemed to be disapproved by a majority of people. If the people voting in the referendum are more than one-fifth of the persons having the right to vote and it appears that the people voting in the referendum approve it by a majority of votes, the issue for which consultation is sought shall be deemed to be approved by a majority of people.

The referendum under this section shall have the mere effect of advice given to the Council of Ministers on that issue.

The rules and procedures for voting in the referendum shall be in accordance with the organic law on referendum.

IV: Measures and Mechanisms Facilitating Efficacy of the Right of Popular Participation

Despite provisions of the Constitution dedicated to popular participation, such black letters will be of no real value if measures and mechanisms to facilitate the efficacy of popular participation are lacking. Such measures and mechanisms are discussed here.

In this instance, measures and mechanisms intended to foster the potency of the right of popular participation can be divided into two categories, viz, (1) measures and mechanisms expediting popular participation and (2) measures and mechanisms that direct State agencies to act in accordance with the Constitution. This will be explained in greater detail below.

1. Measures and Mechanisms Facilitating Popular Participation

The measures and mechanisms instrumental to popular participation can be visualised in two dimensions; first, the political dimension and, secondly, the legal perspective.

1.1 Political Measures and Mechanisms

The Constitution comes up with the Chapter on the Directive Principles of Fundamental State Policies. Under this very Chapter, the State is politically directed to take the following actions, which, in effect, apparently bolsters popular participation.

(1) Promoting and encouraging public participation in formulating policies and making decisions on political issues, preparing economic, social and political development plans, and inspecting the exercise of State powers at all levels (section 76);

(2) Decentralising powers to localities for the purpose of independence and self-determination of local affairs. (section 78);

(3) Promoting and encouraging public participation in the preservation, maintenance and balanced exploitation of natural resources and biological diversity. (section 79).

In this instance, the Constitution itself states in section 88 that the provisions of the Chapter on the Directive Principles of Fundamental State Policies are intended to serve as directive principles for legislating and determining policies for the administration of the State affairs and that the Council of Ministers assuming the administration of the State affairs shall clearly state to the National Assembly the activities intended to be carried out for the administration of the State affairs in the implementation of the directive principles of fundamental State policies and shall, in addition, prepare and submit to the National Assembly an annual report on the result of the implementation, including problems and obstacles encountered. Further, section 89 mandates the state to establish the National Economic and Social Council to be charged with the duty to give advice and recommendations to the Council of Ministers on economic and social problems for the purpose of the implementation in accordance with the directive principles of fundamental state policies.

1.2 Legal Measures and Mechanisms

The legal measures and mechanisms in support of popular participation in the national administration are also reflected in several provisions of the Constitution which allow representatives of people to join independent organisations playing vital roles in scrutinising the exercise of state powers in particular contexts specified, as illustrated by the following cases.

(1) In the case where any project or activity which may seriously affect the quality of the environment is to be undertaken, it is required that, prior to the operation of such project or activity, comments be sought from an independent organisation, consisting of representatives from private environmental organisations and from higher educational institutions providing studies in the environmental field (section 56 paragraph two).

(2) In the context of consumer protection, an independent organisation that consists of representatives of consumers must be approached for its opinions on the enactment and issuance of relevant law, rules and regulations and the determination of relevant measures (section 57).

2. Measures and Mechanisms Directing State Agencies to Act in Accordance with the Constitution

The following measures and mechanisms are in place for compelling state agencies to act in accordance with the Constitution.

2.1 Binding Effect of the Constitutional Rights and Liberties on the National Assembly, Council of Ministers, Courts and other State Organs

The right of popular participation is part of the rights and liberties recognised in the Constitution. The Constitution lays down the mechanism to support the sanctity of the right in the section 27. Under the section 27, rights and liberties recognised by the Constitution expressly, by implication or by decisions of the Constitutional Court shall be protected and directly binding on the National Assembly, the Council of Ministers, Courts and other State organs in enacting, applying and interpreting laws. It follows, therefore, that the provisions supporting the constitutional rights and liberties can be enforced albeit there is no enactment of subordinate laws.

2.2 Recognition of the Right to Bring a Lawsuit Challenging Violation of Constitutional Rights and Liberties.

Section 28 of the Constitution recognises the right of the people to bring a lawsuit or to invoke a defence in court in the case where his or her constitutional rights and liberties are violated. This being so, a person whose right of popular participation, that is recognised by the Constitution, is not properly accommodated can have a recourse to the court.

In order for the people to be able to bring a lawsuit to enforce their right of popular participation, the people must first understand jurisdictions of four Courts under the constitution, viz, the Constitutional Court, the Administrative Court, the Military Court and the Court of Justice. Any case which is not under the jurisdictions of the Constitutional Court, the Administrative Court and the Military Court falls within the jurisdiction of the Court of Justice. The case where the right of popular participation is violated should be under the jurisdiction of the Constitutional Court and the Administrative Court, as the case may be. According to the provisions on the Constitutional Court set forth in the Constitution, the Constitutional Court has powers and duties to make the determination in connection

with the constitutionality; it considers and decides whether any act or rule is contrary to or inconsistent with the Constitution. Indeed, the provisions regarding the Constitutional Court are of paramount significance and may affect the rights and liberties of the people. As far as the Administrative Court is concerned, it is independent from the Court of Justice and has powers and duties to try and adjudicate the administrative case involving a dispute arising as a consequence of an act or omission by a State agency, State enterprise, local government organisation, or State official or as a consequence of an act or omission under the responsibility of a State agency, State enterprise, local government organisation or State official in the performance of duties under the law (section 276).

Besides, the Constitution guarantees the independence of the judiciary and ensures that judicial procedure will be more independently conducted. Such guarantee is well envisioned in the criteria as follows:

- (1) The hearing of a case requires a full quorum of judges (section 236⁴⁰);
- (2) The trial of a case shall be speedy, continuous and fair (section 241⁴¹);
- (3) The trial and adjudication by judges shall not be subject to hierarchical supervision (section 249 paragraph two);
- (4) The distribution of case files to judges shall be in accordance with the rules prescribed by the law, not by absolute discretion (section 249 paragraph three);

⁴⁰ **Section 236:** The hearing of a case requires a full quorum of judges. Any judge not sitting at the hearing of a case shall not give judgment or a decision of such case, except for the case of *force majeure* or any other unavoidable necessity as provided by law.

⁴¹ **Section 241:** In a criminal case, the suspect or the accused has the right to a speedy, continuous and fair inquiry or trial.

At the inquiry stage, the suspect has the right to have an advocate or a person of his or her confidence attend and listen to interrogations.

An injured person or the accused in a criminal case has the right to inspect or require a copy of his or her statements made during the inquiry or documents pertaining thereto when the public prosecutor has taken prosecution as provided by law.

In a criminal case for which the public prosecutor issues a final non-prosecution order, an injured person, the suspect or an interested person has the right to know a summary of evidence together with the opinion of the inquiry official and the public prosecutor with respect to the making of the order for the case, as provided by law.

(5) The recall or transfer of case files shall not be permitted except in the case where justice in the trial and adjudication of the case shall otherwise be affected. (section 249 paragraph four);

(6) The transfer of a judge without the judge's prior consent shall not be permitted except in the case of termly transfer as provided by law, promotion to a higher position, being under a disciplinary action or becoming a defendant in a criminal case (section 249 paragraph five).

2.3 The Establishment of the Organs with Expertise to Guarantee the Rights and Liberties of the People

Under the current Constitution, some kinds of independent organisations are set up with an eye to promoting and keeping under control the exercise of the rights of the people and also protecting the rights and liberties as recognised by the Constitution. The independent organisations include the Ombudsman and the National Human Rights Commission.

(a) The Ombudsman

Under the provisions of the Constitution, a person can not directly submit the case to the Constitutional Court for considering and deciding the issue of the constitutionality and, in some cases, can not bring a lawsuit to the Administrative Court on his or her own volition. However, the Constitution, in establishing the Ombudsman, states that the Ombudsman has powers and duties to inspect the justification and appropriateness of the exercise of state powers. In the case where the Ombudsman is of the opinion that law, by-law, rule or any action of the State official exhibits unconstitutionality, the Ombudsman is empowered to present the case together with the opinion to the Constitutional Court or the Administrative Court, as the case may be, for consideration and decision. Therefore, where a person considers that his or her right or liberty is violated, that person may make a choice between a recourse to the Constitutional Court, through the Ombudsman, or bringing an action before the Administrative Court. With regard to a case involving the constitutionality issue, an individual may submit the case to a Court of Justice so that the Court of Justice makes a further referral to the Constitutional Court for

consideration and decision or, as an alternative, can lodge a complaint with the Ombudsman in order that the Ombudsman submits the case to the Constitutional Court for its determination. In the case where any Act or subordinate law is contrary to the Constitution, the people can protect their rights by bringing the case to the Administrative Court or lodging the case with the Ombudsman. The Ombudsman also has powers and duties to prepare a report together with opinions and suggestions to the National Assembly for the purpose of the revision of the laws.

(b) The National Human Rights Commission

The Constitution currently in force establishes the National Human Rights Commission to examine, and prepare a report on, the commission or omission of acts violating human rights in Thailand and to propose to the National Assembly and the Council of Ministers policies and recommendations with regard to the revision of laws, rules or regulations for the purpose of promoting and protecting human rights. Although most of the rights that are pertinent to popular participation are civil rights in nature, some rights can even be regarded as human rights. Illustrations are the right to assemble peacefully and without arms and the right to unite and form an association. The establishment of the National Human Rights Commission is an effort made to provide a greater safeguard of the right and liberty of popular participation.

CHAPTER 4
THE PROTECTION OF THE HUMAN RIGHTS
UNDER A NEW CONSTITUTIONAL FRAMEWORK

I: Introduction

The concept of protecting rights and human rights is aimed at protecting the rights and liberties of any person, regardless of the differences in race, nationality, sex, colour, language, culture, religion and so on, on the ground that every human being has these rights and liberties even before the emergence of the state.¹ The United Nations (UN) has subsequently adopted the concept and concretely translated it into the instrument called the Declaration on the Human Rights that was announced on 10th December 1948 for the purposes of, firstly, declaring member countries' intention to afford serious protection of human rights as required by the United Nations Charter and, secondly, applying the concept as the common standard among member countries and as the guideline for their own domestic affairs². In effect, the human rights concept as encapsulated in the aforesaid Declaration on the Human Rights had immense significance and much influence on members of the Constituent Assembly in drafting the Constitution of the Kingdom of Thailand B.E. 2492 (1949)³. The replication of this international instrument was, indeed, found both in the phraseology and conceptualisation. In this instance, the Chapter on Rights and Liberties of the Thai People as contained in the Constitution of 1949 reflects many concepts of human rights, especially the concept of the 'citizen's

¹ Worapot Wisarutpit, *Rights and Liberties under the Constitution*, Bangkok: Winyochoon, 1995, p. 36.

² Gulpol Polwan, *Human Rights in Thai Society*, p. 89.

³ Yud Sanguthai, quoted in Wissanu Kru-ngam, *Constitution of the Kingdom of Thailand*, Bangkok: Prachaniti, 1949, p. 884.

right' and the political right⁴. The Constitution of the Kingdom of Thailand B.E. 2517 (1974), largely based upon the Constitution of the Kingdom of Thailand B.E. 2492⁵ (1949), included the concept of human rights as well. Subsequent Constitutions such as the Constitution of the Kingdom of Thailand B.E. 2521 (1978), the Constitution of the Kingdom of Thailand B.E. 2534 (1991) or even the Constitution currently in force have derived influence from the human rights ideology. It must, however, be said that although the current Constitution has introduced certain measures and mechanisms dedicated to the protection of human rights, there have been encountered problems with regard to the enforcement. Of particular interest is the problem encircling the protection of rights and liberties of aliens or non-nationals due to the absence of clear-cut separation between human rights *per se* and the rights enjoyable by Thai citizens. In this Chapter, discussions of the protection of human rights under the current Constitution are advanced in three parts: (1) human rights under the current Constitution, (2) the problem concerning aliens as holders of rights and liberties and (3) measures and mechanisms for protecting human rights.

II: Human Rights under the Current Constitution

The present Constitution recognises more rights and liberties than ever visualised in previous Constitutions. The recognition of rights and liberties is principally found in two chapters, namely, Chapter III on the Rights and Liberties of the Thai People (section 26 to section 65) and Chapter VIII (which deals with Courts) Part I on General Provisions (section 233 to section 254). Moreover, section 4, in Chapter I on General Provisions, provides that human dignity, rights and liberties of the people shall be protected whilst section 5 expressly enunciates that the Thai people, irrespective of their origins, sexes or religions, shall enjoy equal protection under the Constitution. Although the Constitution makes no clear

⁴ Gulpol Polwan, *Development of the Human Rights*, Bangkok: Winyoochon, 1985, p. 126.

⁵ Minutes of the Meeting of Members of the Constituent Assembly No. 1/2516, dated Wednesday 31st October 1973, p. 8/1.

separation between ‘*human rights*’, on the one hand, and the rights and liberties that are regarded as the ‘*citizen’s rights*’ on the other, some rights and liberties are perceivably natural rights and liberties of the individual at birth, irrespective of citizenship of the State. The natural rights and liberties should be regarded as “human rights”, too. These natural rights and liberties under the current Constitution will be discussed at fuller length below.

1. The Human Dignity

Human dignity is, for the first time, given clear recognition in the Constitution, as embodied in several provisions. Most apparently, it is pronounced in section 4 that human dignity, rights and liberties of the people are afforded protection. Next, section 26 sets forth a requirement that all State authorities, in exercising their powers, have regard to human dignity, rights and liberties of the people in accordance with the provisions of the Constitution. In addition, section 28 allows an individual to invoke human dignity or exercise his or her rights and liberties in so far as it does not violate rights and liberties of other persons or run counter to the Constitution or good morals. Based on these three provisions, the Constitution intends to protect human dignity from intervention by State authorities, and the individual can be the subject of human dignity either among the individuals or between the individual and the State official.

However, some problems arise in defining the very new term “human dignity”. In fact, at the time of drafting, some have proposed the use of the expression ‘human right’ rather than the term ‘human dignity’. According to the German jurists and the Constitution (the Basic Law) of Germany⁶, the term “human dignity” connotes the human-being’s distinctive value that comes into existence as a consequence of being a human and that is free from any conditions such as race or religion. This special value is intended to give a human-being freedom to develop or improve personal personalities under his or her own responsibility and, in addition,

⁶ Montri Roobsuwan *et al*, *The Spirits of the Constitution*, Bangkok: Winyoochon, 1999, p. 86.

is based upon two essential fundamentals, namely, the right in life and body and the right to enjoy equality. In the case of Thailand, the Court of Justice is the major organ to give the definition and the scope of ‘human dignity’.

2 Right and Liberty to Act by Reference to Religious Principles and Personal Beliefs

An assertive statement is found in section 38 of the Constitution that a person shall enjoy full liberty to profess a religion. Given that persons with different beliefs can, in Thai society, be delicately assimilated and live together without conflicts, the Constitution allows personal adherence to individual beliefs as well. An illustration can be found in the recognition of the Islamic family law as the law applicable to Islamic residents in the four southernmost provinces of Thailand. However, such right and liberty must not be contrary to the duty of the citizen and must not be at variance with the public order or the good morals. For example, a Thai monk is, unlike in Japan, not allowed to have a spouse, for it is prohibited by the Act on Ecclesiastical Organisation B.E. 2505 (1962). Nevertheless, it is permissible to establish a new sect provided that legal requirements must be met.⁷

3. Rights of Children, Youth and Family Members

Since the children, youth and family members usually become the victim of violence and unfair conduct, as much witnessed in newspaper reports, the Constitution seeks to protect these people from such incidence. In this regard, section 53 paragraph one of the Constitution states that children, youth and family members shall have the right to be protected by the State against violence and unfair treatment. Indeed, it is for the first time that the Constitution gives recognition of rights of children, youth and family members.

4. Right and Liberty in Life and Person

Chapter III on the Rights and Liberties of the Thai People and Chapter VIII on The Courts (Part I: General Provisions) recognise the protection of the rights and liberties of life and person. It is for the first time that the rights and liberties are

⁷ *Ibid.*, pp. 103-104.

recognised in separate chapters of the same constitution. Such separation may probably be due to the difficulty in the distinction between the ‘human right’ and the ‘citizen’s right’, as previously discussed. In this connection, Chapter VIII of the Constitution (dealing with ‘Courts’) may aim to protect rights and liberties of the people, irrespective of their nationality, in criminal justice administration⁸.

The rights and liberties of life and person under the current Constitution are as follows.

4.1 Rights and Liberties in Life and Person

Section 30 of the Constitution protects a person from the torture, brutal act or punishment by a cruel or inhumane means. This provision aims to restrain actions of the State upon private individuals. For instance, no State official can commit the extraordinary killing except in the case of reasonable defence. By parity of reasons, punishment by death penalty is not permitted to be executed by a cruel or inhumane means.

4.2 The Right to Criminal Justice Administration

By and large, the rights involving criminal justice administration are recognised in the Penal Code. However, the current Constitution re-recognises such rights, as follows.

- 1) Protection of Right against an Arrest, Detention,
Issuance of a Warrant in a Criminal Case

Under section 237⁹, only the Courts have the power to issue a warrant of arrest. Previously, both the Court and the administrative official or the senior police

⁸ Pongthep Dhepkajana, “*The Courts under the Current Constitution*”, Essence of the Popular Constitution, Bangkok: Matichon, 1998, p. 309.

⁹ **Section 237:** In a criminal case, no arrest and detention of a person may be made except where an order or a warrant of the Court is obtained, or where such person commits a flagrant offence or where there is such other necessity for an arrest without warrant as provided by law. The arrested person shall, without delay, be notified of the charge and details of such arrest and shall be given an opportunity to inform, at the earliest convenience,

official had the power to issue a warrant of arrest or detention. In order to protect the right and liberty of the people, this section also states that a warrant of arrest or detention of a person may be issued where (a) there is reasonable evidence that such person is likely to have committed a serious offence which is punishable as provided by law or (b) there is reasonable evidence that such person is likely to have committed an offence and there also exists a reasonable cause to believe that such person is likely to abscond, tamper with the evidence or commit any other dangerous act. This requirement is apparently intended to play the check-and-balance role *vis-à-vis* the exercise of the State power. In addition, the section states that the arrested person shall, without delay, be given an opportunity to inform, at the earliest convenience, his or her relative, or the person of his or her confidence, of the arrest. For guaranteeing the right of the accused in a criminal case, the same section mandates that the arrested person being kept in custody be sent to the Court within forty eight hours as from the time that person arrives the office of the inquiry official in order for the court to consider whether there is a reasonable ground under the law for the detention of the arrested person or not.

his or her relative, or the person of his or her confidence, of the arrest. The arrested person being kept in custody shall be sent to the Court within forty eight hours as from the time of his or her arrival at the office of the inquiry official in order for the court to consider whether there is a reasonable ground under the law for the detention of the arrested person or not, except for the case of *force majeure* or any other unavoidable necessity as provided by law.

A warrant of arrest or detention of a person may be issued where:

(1) there is reasonable evidence that such person is likely to have committed a serious offence which is punishable as provided by law; or

(2) there is reasonable evidence that such person is likely to have committed an offence and there also exists a reasonable cause to believe that such person is likely to abscond, tamper with the evidence or commit any other dangerous act.

2) A Safeguard of Rights against a Search by the State Official

For the purpose of guaranteeing the right against a search by the State official and protecting the private right, section 238 of the current Constitution states that in a criminal case, a search in a private place shall not be made except where an order or a warrant of the Court is obtained or there is a reasonable ground to search without an order or a warrant of the Court as provided by law.

3) Rights of the Suspect or the Accused

The Constitution ensures that the suspect or the accused will obtain the efficient and fair trial. To this end, it is provided in section 241 of the Constitution that that, in a criminal case, the suspect or the accused has the right to a speedy, continuous and fair inquiry or trial. Apart from this safeguard, the suspect or the accused in a criminal case is afforded other significant rights as follows.

In the first place, the Constitution confers upon the suspect or the accused the right to have an advocate or a person of his or her confidence attend and listen to interrogations. This right is a novelty introduced by the current Constitution in order to guarantee that the suspect or the accused will be free from the inducement, promise, threat, deceit, torture, physical force or any other unlawful act by the State official. Any statement given or obtained in the course of a due inquiry may be admissible in evidence in court.

Next, the suspect or the accused is allowed to inspect or require a copy of his or her statements made during the inquiry or documents pertaining to such statements. This right is, in effect, connected with the right to have an advocate or a person of confidence attend and listen to interrogations. The documentary examination will reveal whether the statements given at the inquiry are right or wrong.

4) The Right to Legal Aid from the State

Although the individual is protected by the Constitution in connection with criminal justice administration, a person may not be able to exercise the protected rights and liberties fully by reason of inability to afford an attorney. To curb this

practical restraint, the Constitution imposes on the State a duty to provide an advocate for the accused, as set forth in section 242.

5) Protection of Witnesses and the Injured in a Criminal Case

As a person acting as a witness in a criminal case is prone to dangers, it is usually the case that a person refuses to become the witness in the court. Such being the case, the criminal justice administration is fraught with much difficulty in seeking co-operation from witnesses. It is in response to this actuality that the Constitution strives to protect persons becoming witnesses in criminal cases. In this instance, the current Constitution states that a witness in a criminal case has the right to protection, proper treatment, necessary and appropriate remuneration from the State as provided by law.

As with the protection of the witness in a criminal case, the Constitution affords protection to the injured in a criminal case or his or her heirs as well.

6) Right to Compensation in the Event of Mistaken Criminal Proceedings

A person may suffer an injury from a mistake in criminal proceedings. The Constitution is determined to compensate the victim of such mistake. Sections 246 of the Constitution provides that any person who has become an accused in a criminal case and has been detained during the trial shall, if it appears from the final judgment of that case that the accused did not commit the offence or the act of the accused does not constitute an offence, be entitled to appropriate compensation, expenses and the recovery of any right lost on account of that incident, upon the conditions and in the manner provided by law.

III. The Problem Regarding Aliens as the Holders of Rights and Liberties

Although the rights and liberties under the Constitution can theoretically be divided, by reference to their sources, into two categories, namely, the 'human right' and the 'citizen's right', the Constitution contains no candid distinction between these two categories. In effect, the fact that the provisions setting out fundamental rights and liberties are located in the Constitution as an integral part of the chapter on "Rights and Liberties of the Thai People" leads to the question as to whether, even in respect of the human rights, the holders of the rights can be Thai citizens

only and non-nationals or aliens are thus placed outside the protective net of the Constitution.

With regard to this academic issue, it has been maintained by two leading experts in the Constitution Law – Prof. Dr. Yud Sanguthai¹⁰ and Prof. Dr. Wissanu Kreu-ngam¹¹ – that only Thai citizens can be the holders of rights and liberties that are recognised by the Constitution and this is the case with every constitution, the reason being that the constitution of any State determines the relationships between the State and its nationals. According to this proposition, although the constitutional provisions that set out rights and liberties of Thai people use the expression “any person shall have the right” or “any person shall have liberty”, the word “any person” must be perceived of as signifying only “Thai people”, that is to say, “Thai nationals” or “Thai citizens”.¹² If the Constitution intends to confer some particular rights or liberties upon aliens, such intention must specifically be made clear in the given provisions. In the absence of such a specific provision spelling out the right and liberty of non-citizens, their rights shall be in accordance with treaties and other laws rather than the Constitution.

At the time of the drafting of the current Constitution, members of the Constituent Assembly made an effort to dissolve the confusion by entitling the chapter as “Chapter III: Rights and Liberties of Persons” and dividing it into three parts: Part I on General Provisions, Part II on Fundamental Rights and Liberties and Part III on Rights and Liberties of Citizen. It was actually explained that the arrangement of provisions in this fashion would serve three purposes, viz:

¹⁰ Yud Sanguthai, *Constitution of the Kingdom of Thailand*, B.E. 2511 (1968), Bangkok: Bamrungsarn, 1968, p. 130.

¹¹ Wissanu Kreu-ngam, *The Constitution*, Bangkok: Sawangsit, 1987, p. 655.

¹² See also Pokin Polakun, *Problems and Some Thoughts in the Thai Constitution*, Bangkok: Public Policies Study Project, The Association of Social Science of Thailand, 1986, p. 99 (equating the term “Thai people” with “any Thai citizen”).

(1) to conceptualise the prioritisation of rights in the interest of interpretation in case of conflicting rights or liberties;

(2) to distinguish human rights (that emerge at birth) and citizen's rights (that stem from recognition by the state);

(3) to draw a clear demarcation between the protection of aliens and the protection afforded to the Thai citizens only.¹³

However, the approach mentioned above lapsed after an objection. As a result, the current Constitution still entitles the chapter that recognises fundamental rights and liberties as “Rights and Liberties of the Thai People” as ever. Nevertheless, non-nationals can invoke certain rights and liberties as the human rights as provided in other chapters in the Constitution. For example, an alien may call into play the rights and liberties in connection with criminal proceedings under Chapter VIII or may claim the rights and liberties under section 4 of the Constitution which provides that “the human dignity, right and liberty of any person shall be protected.” Perceivably, this provision covers the rights and liberties in life and person and in equality.¹⁴

IV: Measures and Mechanisms for Preventing Human Rights Violation

Section 27 of the Constitution states that rights and liberties by this Constitution shall be directly binding on the National Assembly, the Council of Ministers, Courts and other State organs. In other words, rights and liberties under the Constitution are binding upon the Executive, the Legislative and the Judiciary. The binding force indeed reflects the supremacy of the Constitution. In fact, even in the absence of such upfront mention in section 27, the provisions of the Constitution are already binding on all State organs. Section 27 merely restates this consequence.

¹³ Summary of the Meeting of the Working Group (appointed by the Committee on Constitution Drafting), held at the Imperial Queens Park Hotel, 17th – 20th April 1997, p. 25.

¹⁴ Banjerd Singkaneti, *Fundamental Principles of Rights, Liberties, and the Human Dignity under the New Constitution*, Bangkok: Winyoochon, 2000, pp. 65-67.

Given the binding effect of the provisions affording protection of human rights, the Constitution attempts to set forth several measures and mechanisms directed at forestalling violation of these rights, as will now be brought out.

1. The Requirement That Legislation by the Legislative Restricting Rights or Liberties Be under the Conditions Provided by the Constitution

In previous constitutions, the recognition of rights and liberties was found in two fashion. First, rights and liberties were recognised on certain conditions as directly spelled out in the constitution itself whilst, in another way, the recognition of rights and liberties was made “as provided by law”. The latter approach would apparently provide some room for the Legislature to distort or depart from the spirits of the Constitution by enacting laws having the effect of restricting rights and liberties of the people. Some legal scholars have expressed their opinion that the Legislative is permitted to pass only legislation that restricts rights and liberties but has no power to make any law to the effect of terminating constitutionally protected rights and liberties.¹⁵ Having said that, there has been no guarantee of such result. As a means to caution the Legislature or those exercising the legislative power that the law to be passed would not totally deprive the people of their basic rights and liberties, the Constitution sets forth crucial criteria in section 29, as follows.

Firstly, it requires that the restriction of rights and liberties shall not be imposed except by virtue of provisions of the law specifically enacted for the purpose determined by this Constitution. This requirement is aimed at guaranteeing rights and liberties of the people and assuring the supremacy of the constitution. In principle, enacting laws restricting rights and liberties recognised by the Constitution is not permitted except by virtue of provisions of the law specifically enacted for the purpose determined by the Constitution.

¹⁵ Yud Sanguthai, *Principles of the Constitution and the Law on General Election*, Lecture Notes for Graduate Studies, Faculty of Political Science, Bangkok: Thammasat University Press, 1970, p. 131.

Secondly, section 29 also mandates that that law that is passed to restrict rights and liberties of the people make a clear mention of the provision of the Constitution that authorises such restricting enactment. This requirement is, in fact, intended to give warnings to those concerned in the law-making; law-makers will need to have a check-list of the provisions of the Constitution that allow them to make the law that has the effect of restricting constitutional rights and liberties, thereby encouraging the law-makers to exercise this power with circumspection.

Further, it is set out in section 29 also that legislation that will be passed to restrict rights and liberties of the people must be of general application and must not be intended to apply to any particular case or any particular person. Obviously, this aims to prevent the issuance of administrative orders in the form of law.

2. The Protection of Human Rights by the Judiciary

In fact, the violation of the human rights can always be found. In principle, the State recognising the 'rule of law' will have the judiciary to inspect whether the exercise of state powers is in violation of rights and liberties of the people. In this regard, section 28 paragraph two of the Constitution states: "A person whose rights and liberties recognised by this Constitution are violated can invoke the provisions of this Constitution to bring a lawsuit or to defend himself or herself in the court." Under the Constitution, there are four main judicial bodies: the Court of Justice, the Administrative Court, the Military Court and the Constitutional Court. The Court of Justice is the court having the power to try and adjudicate all cases not falling under the jurisdiction of the Administrative Court, the Military Court and the Constitutional Court.

For the purpose of assuring judicial independence in trial and adjudication and promoting transparency in the personnel administration of the courts, the Constitution also establishes an open system for the selection of judges of the Constitutional Court and the Administrative Court, whereby qualified persons can be selected to join the judicial committee as well. The term of office of the qualified persons on the committee is determined by the Constitution. The trial of a case in the Constitutional Court will not be subject to the hierarchical supervision and only the judges conducting the hearing can deliver judgment of the case. The distribution,

recall and transfer of case-files can be made as provided by laws and a transfer of any judge is permissible only when the judge gives consent to the transfer.

The Constitution also prescribes certain measures for preventing and combating corruption in the judiciary circle in order to create a transparent and fair trial. Such measures include the requirement as to the declaration of assets and liabilities and the removal of judges from office, as contained in section 331 (2).

3. Protection of Human Rights and Examination of
Violation of Human Rights under the Supervision
of the National Human Rights Commission

The Constitution provides for a complimentary measure for protecting human rights and inspecting human rights violation. The measure is through the setting up of the National Human Rights Commission. The Commission has powers and duties to examine whether the exercise of state powers affects human rights and to prepare a report to the National Assembly and the Council of Ministers for further proceeding. It is expected that the Commission's power in connection with the examination of the exercise of state powers will, to some extent, result in encouraging improvement of laws intended to protect human rights.

CHAPTER 5

REFORM OF THE ELECTORAL SYSTEM FOR MEMBERS OF THE HOUSE OF REPRESENTATIVES AND SENATORS UNDER THE CONSTITUTION

I: Introduction

The underlying theme in the present Constitution is based on the subject of political reform prompted by past failures in the development of Thai politics. The preceding Constitution of 1991 was unable to prevent the use of dishonest devices for the attainment of political power, and a common occurrence in the political setting during an election, at both national and local levels, was the sale and purchase of votes¹ which undermined democratic principles in the election of representatives. Such problems gave rise to a political reform by a revision of the democratic regime by means of representatives or the system of representation. Various electoral systems for members of the House of Representatives were proposed and widely debated upon on their pros and cons and their suitability for implementation to Thai political and domestic cultures. In the end, the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) provided for an electoral system on a **proportional representation** basis, rather than on a **relative majority** basis, even though in the initial period all had spoken in one voice of the difficulties and inappropriateness of proportional representation in Thailand². There are, in fact, difficulties in the implementation of all novel and unaccustomed electoral systems,

¹ Thippaporn Tantisunthorn, "Introduction to the Institute of Educational Policies", in *A New Electoral System: Why Thais Should Vote*, Chaowana Traimas, 2nd edn., Bangkok: Institute of Educational Policies, 1999, p. i. and Pinai Nanakorn, "History and Evolution of the Constitutions in Thailand: From the Abrogation of the Absolute Monarchy to the Political Reform", *Administrative Law Journal*, Vol. 16 (Special Issue), 1997, p. 212 at 242.

² Thippaporn Tantisunthorn, "Introduction to the Institute of Educational Policies," in *How to Vote Without the Loss of Opportunity by Thais or Thailand*, Chaowana Traimas, 2nd edn., Bangkok: Institute of Educational Policies, 2000, page iii.

but if a thorough study is undertaken, any electoral system would not be rendered beyond the capabilities of the Thai people³.

II: PROLOGUE TO THE ELECTORAL SYSTEM OF MEMBERS OF THE HOUSE OF REPRESENTATIVES AND SENATORS

The first election law in Thailand was enacted on 16th December 1932 in an Act called the Election Act, B.E. 2475 (1932)⁴. Section 3 of the Act provided for an election procedure whereby the people in each *Tambon* voted for one representative who would in turn vote for one representative for each *Changwat*, i.e. a system of indirect elections was established. Section 31 of the Act provided for an electoral system by **absolute majority**, or in other words, a person would only be elected if the number of votes received exceeded half the total number of voters. This law was, however, never applied to any election due to the National Assembly being in recess, during which the Act was amended twice. The amended law was subsequently applied to its first real election on 15th November 1933, which was still by way of an indirect election, but in certain places, the election was on a basis of combined constituencies where a *Changwat* was prescribed as one constituency. Section 30 paragraph one of the Act amended the electoral system, or count of votes, from that based upon absolute majority to that of **relative majority**, where a person was considered elected when he received the greatest number of votes of all candidates without having to obtain the votes of more than half the total number of voters.

The 2nd election was subsequently held on 7th November 1937 under the Election Act, B.E. 2475 (1932) as amended by the Election Act (No. 3), B.E. 2479 (1936), which was the first of its kind to employ the direct election of representatives and single member constituencies. Nevertheless, the electoral system was still by relative majority and no further changes from the 2nd election

³ Boonsri Meewongse-Ukos, *Texts on Comparative Constitutional Law: the German Constitution*, Bangkok: Textbooks and Supplementary Teaching Materials Project, Faculty of Law, Thammasat University, 1992, p. 110.

⁴ Somyos Cheuthai, *Texts on General Constitutional Principles*, 2nd edn., Bangkok: Textbooks and Supplementary Teaching Materials Project, Faculty of Law, Thammasat University, 1992, pp. 122-126.

were made for the 3rd election on 12th November 1938 and the 4th election on 6th January 1946)⁵.

The 5th election on 29th January 1948 to the 9th election on 10th February 1969 reverted to the use of combined constituencies⁶. Subsequently, however, the Constitution of the Kingdom of Thailand, B.E. 2517 (1974) adopted the rule of divided constituencies where a *Changwat* was divided into many constituencies, while retaining the electoral system of relative majority in the order of the number of votes cast for each number. Further changes were made by the Constitution of the Kingdom of Thailand, B.E. 2521 (1978) where combined constituencies were once again adopted with the exception of Bangkok, which was divided into 3 constituencies. The Constitution retained the electoral system of relative majority, but the rule of election on an individual or a numerical basis was amended to an election of a team or political party, called a combined number.

In 1985, the Constitution of the Kingdom of Thailand, B.E. 2521 (1978) was further amended to allow elections by both multiple and single member constituencies depending on the number of members of the House of Representatives that could be elected in each *Changwat*. In other words, the rule of combined constituency applied to any *Changwat* where no more than 3 members could be elected, and the boundaries of such *Changwat* were considered as a constituency. Whereas in a *Changwat* where more than 3 members of the House of Representatives could be elected, the *Changwat* boundaries were further divided on the basis that a *Changwat* with 4 Members of House of Representatives would be divided into 2 areas of 2 Members each, and a *Changwat* with more than 4 Members would be equally divided into areas of 3 Members each, but where this was not possible, the areas would initially be divided into areas of 3 Members while the remaining areas could not have less than 2 Members each, e.g. a *Changwat* with 7 Members was divided into 3 constituencies of one constituency with 3 Members while the two remaining constituencies had 2 Members each. Meanwhile, the

⁵ Kramol Thongthamachati, Somboon Suksamran and Preecha Hongskrailes, *The Election of Political Parties and Governmental Stability*, Bangkok: Research Section, Faculty of Political Science, Chulalongkorn University, 1988, pp. 35-36.

⁶ *Ibid.* p. 37.

electoral system remained by relative majority but in the order of the number of votes cast for each number.

The subsequent constitution was the Constitution of the Kingdom of Thailand, B.E. 2534 (1991), in which the electoral process of combined and divided constituencies were still employed, along with the electoral system of relative majority in the order of votes cast for each number, no different from the Constitution of the Kingdom of Thailand, B.E. 2521 (1978) as amended, B.E. 2528 (1985).

It may be concluded that in the past, Thailand has held direct elections of representatives only for members of the House of Representatives. The elections were by relative majority and alternated between the use of single numbers and combined numbers, as well as between the use of multiple and single member constituencies. In the end, however, a mixture of both multiple and single member constituencies were concurrently employed. On the other hand, it never appeared that the people could directly vote for Senators.

III: REFORM OF THE ELECTORAL SYSTEM FOR MEMBERS OF THE HOUSE OF REPRESENTATIVES AND SENATORS

The reformation of the Thai political system in 1996 included the electoral system as one of its agendas. It was hoped that a new electoral system would provide for elections which are fair and honest, reduce the opportunities for the sale and purchase of votes, eliminate corruption by influential political groups and open up the opportunity for more virtuous and able candidates⁷. Thus, the present Constitution prescribed a number of essential qualities for the electoral system, namely⁸, by prescribing a duty to vote on the Thai people; providing for Senators to be directly elected by the people; allowing for eligible voters overseas or residing outside their constituency based on their original domicile to exercise the right to vote; establishing an Election Commission as an independent unit in charge of the

⁷ Chaowana Traimas, *A New Electoral System: Why Thais Should Vote*, *op. cit.*, note 1 *supra*, pp. ix-x.

⁸ *ibid.* p. ix.

elections free from any governmental intervention and placing it at the heart of the process of political reformation under the new Constitution⁹ and at the same time giving elections the character of being under the control of the Election Commission¹⁰; prescribing election procedures and those elected on a single member constituency basis, derogating political rights under the law from those who fail to exercise their right to vote without reasonable grounds; and finally, providing for proportional representation in sections 98-104 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), in lieu of relative majority. The present Constitution therefore calls for a consideration of the following matters:

1. The Basic Principles of an Election

The majority of experts in public law consider these basic election principles to be rights which are the entitlements of eligible voters and candidates under public law. These legal entitlements are equal in status to constitutional rights or basic political rights and are universally applicable to all stages of elections of all level and in all electoral system¹¹. The principles are as follows:

(1) **Universal Suffrage**¹². A person should be given the right to be a candidate and the right to vote without being excluded by reason of sex, social and economic status, religion, race, education, occupation, political views or membership of a political party. These principles are enacted in both section 105(1) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) and section 103(1) of the Constitution of the Kingdom of Thailand, B.E. 2534 (1991). Anything done in contravention of these general principles will violate the rule of equality in section 30 of the B.E. 2540 (1997) Constitution unless exempted by the general exclusions, being, the restriction of rights in children, the mentally disabled or lunatics, prisoners or those whose right to be a candidate have been derogated.

⁹ Surapon Nitikraipot, “*The Legal Implications of the Transitory Provisions upon the Promulgation of the New Constitution*”, *Jurisprudence Review*, Vol. 3, 27th Year, September, 1997, p. 778 at 787.

¹⁰ *Ibid.* p. 783.

¹¹ *Op. cit.*, note 3 *supra*, pp. 91-92.

¹² *Op. cit.*, note. 3 *supra*, p. 92 and *op. cit.*, note 4 *supra*, p. 111.

These exceptions appear in both sections 105 and 106 of the 1997 Constitution and section 103 and 104 of the 1991 Constitution.

(2) **The principle of direct elections**¹³. This principle provides for representatives to be directly elected by the people. The prohibition of intermediaries applies not only to the election of electoral colleges, but also to organisations wishing to act as an agent of the voters and exercising the votes at its discretion. These principles appear in both section 104 paragraph 3 of the 1997 Constitution and section 102 paragraph 2 of the 1991 Constitution. Any election involving a person or organisation acting as an intermediary is an indirect election.

(3) **Liberty and independence of votes**¹⁴. Under this principle, votes should be made freely, without any undue influence, psychological pressure, economic duress or other influences. Hence, this principle is an essential condition for any election, and is at the same time at the heart of the reform of the electoral system. This principle appears in both sections 44-48 of the Organic Act on Elections of Members of the House of Representatives and Senators, B.E. 2541 (1998) and sections 35 and 37 of the Act on Elections of Members of the House of Representatives, B.E. 2522 (1979). The 1998 Act protects the electorate from foreigners¹⁵ and State officials¹⁶ as well as penalising an eligible voter who sells his vote¹⁷. Any election not conducted in accordance with this principle will in effect render other basic election principles meaningless and the election may not be labeled as one conducted in a democratic administrative system. On the contrary, a fair and honest election would result in the selection of representatives which truly reflects the intentions of the people. Thence, the people's power will manifest itself and the word sovereignty will be made meaningful¹⁸. Any act which violates this

¹³ *Op. cit.*, note 3 *supra*, p. 93 and *op. cit.*, note 4 *supra*, p. 114.

¹⁴ *Op. cit.*, note. 3 *supra*, p. 93 and *op. cit.*, note. 4 *supra*, p. 111.

¹⁵ Organic Act on the Election of Members of the House of Representatives and Senators, B.E. 2541 (1998), section 46 and section 106.

¹⁶ Organic Act on the Election of Members of the House of Representatives and Senators, B.E. 2541 (1998), section 47 and section 101.

¹⁷ Organic Act on the Election of Members of the House of Representatives and Senators, B.E. 2541 (1998), section 63 and section 111.

¹⁸ *Op. cit.*, note. 7 *supra*, p. v.

principle of liberty of votes will be in contravention of the principle of equality and liberty under sections 30 and 28 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

(4) **Equal suffrage**¹⁹. Under this principle, the votes of all eligible voters shall have equal weighting. This principle appears in both section 102 paragraph 1 and section 104 paragraph 1 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) and in section 102 paragraph 1 of the Constitution of the Kingdom of Thailand, B.E. 2534 (1991).

(5) **Secret vote**²⁰. Under this principle, a person cannot discover how other voters cast their votes. Even if such voter does not intend for his vote to be kept secret, compliance with the principle is still mandatory. This principle appears in both section 104 paragraph 3 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) and in section 102 paragraph 2 of the Constitution of the Kingdom of Thailand, B.E. 2534 (1991). This principle is an essential characteristics of a democratic system and acts as a safeguard for liberal election. Unless elections are conducted secretly, not only will protections for individual voters be disabled, but the common interests will also be left unguarded. Such elections cannot be conducted liberally under the principle of liberty of votes. This principle is applied in practice by sealing a ballot paper in an envelope or depositing it in a ballot box. The polling place must also be discreet.

Therefore, the reform of the electoral system under the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) retains all the basic principles of an election that were provided for in the Constitution of the Kingdom of Thailand, B.E. 2534 (1991), its purpose being to guarantee basic political rights for the people.

¹⁹ *Op. cit.*, note. 3 *supra*, p. 95.

²⁰ *Ibid.*, p. 97 and *op. cit.*, note. 4 *supra*, p. 112.

2. The electoral system for Members of the House of Representatives and Senators

The electoral system of members of the House of Representatives and Senators under the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) is different from that under the B.E. 2534 (1991) Constitution in a number of ways, namely:

(1) The B.E. 2534 (1991) Constitution provided that²¹ only members of the House of Representatives came from elections. There were a total of 360 members with each *Changwat* having the number of members calculated by the proportion of people per member published by the Ministry of the Interior²². If a *Changwat*'s population is less than the published proportion of people per member, such *Changwat* would be given 1 member of the House of Representatives. Whereas if a *Changwat*'s population exceeded the published proportion of people per member, such *Changwat* shall have an additional member of the House of Representatives for every multiple of the proportion of people per member reached. Yet, if there were still less than 360 members from every *Changwat*, an additional member was allocated to the *Changwat* with the highest remaining fraction of the proportion until 360 members could be obtained.

In an election in each *Changwat*, if less than 3 members of the House of Representatives could be elected, such *Changwat* would be considered to be a constituency. If more than 3 members could be elected in the *Changwat*, the *Changwat* boundaries would be divided into several constituencies. A *Changwat* where 4 members could be elected would be divided into 2 constituencies of 2 members each, while a *Changwat* of more than 4 members would be divided into constituencies of 3 members each, but if this was not possible, the *Changwat* would initially be divided into constituencies of 3 members each and the remaining constituencies could not have less than 2 members each and the constituencies determined in this way had to be adjoining areas and there could only be slight differences in the proportions of people to the total number of members allocated to

²¹ Constitution of the Kingdom of Thailand, B.E. 2534 (1991), sections 99 - 102 and section 94.

each of the constituencies. Thus, a voter had the right to vote for as many candidates as the number of members of the House of Representatives allowed in that constituency. The candidate obtaining the greatest number of votes would be the elected member while a draw would be determined by lots. In a constituency where more than one member could be elected, the elected member was determined by the order of the number votes obtained by each candidate and a draw was also determined by lots²³. However, if the number of candidates in a constituency did not exceed the number of members that could be elected for that constituency, the candidates were deemed as elected without the need to cast votes²⁴.

Therefore, the electoral system under the 1991 Constitution was by relative majority where direct elections of representatives were only held for members of the House of Representatives. The successful candidate was determined by the order of votes and the electoral process involved the use of both combined and single member constituencies.

(2) The Constitution of the Kingdom of Thailand, B.E. 2540 (1997)²⁵ provided for an electoral system where both members of the House of Representatives and senators acquired office from elections. There are a total of 500 members of the House of Representatives, consisting of 100 members elected on a party-list basis whilst the remaining 400 members are elected on a constituency basis. At the same time there are altogether 200 Senators.

2.1 In an election of members of the House of Representatives on a party-list basis, the country's boundaries constitutes a constituency. Each political party prepares one party-list and the voters may only cast a vote for one list. Thereafter, the proportion of Members of House of Representatives allocated to each party would be calculated, subject to the rule that no member would be allocated to the

²² Act on the Election of Members of the House of Representatives, B.E. 2522, section 6.

²³ Act on the Election of Members of the House of Representatives, B.E. 2522 (1979), section 77.

²⁴ Act on the Election of Members of the House of Representatives, B.E. 2522 (1979), section 7.

²⁵ Constitution of the Kingdom of Thailand, B.E. 2540 (1997), sections 98-104 and sections 121-123.

party-list of a political party receiving less than 5 per cent of the total number of votes cast in the country. Thus, a party-list receiving more than 5 percent of the total number of votes cast would be included in the allocation of Members of House of Representatives on the following basis²⁶:

2.1.1 The total number of votes cast is calculated from the sum of votes received by each party-list, and thereafter the 5 per cent mark shall be calculated.

2.1.2 Any party-list failing to achieve the 5 per cent mark shall be eliminated and a sum of the votes for the remaining party-lists shall be calculated. That sum shall be divided by 100 and the quotient obtained shall be deemed as the average number of votes for the allocation of one member of the House of Representatives.

2.1.3 The number of votes received by the party-list of each political party passing the 5 per cent mark shall be divided by the average number of votes per member of the House of Representatives (calculated in 2.1.2 above) and the quotient obtained shall be deemed as the number of members of the House of Representatives allocated to such political party with the candidates elected in the order in which their names appear on the party-list.

2.1.4 In the case where the number of Members of House of Representatives allocated to each political party do not add up to 100, the political party whose quotient calculated in 2.1.3 above has the greatest remaining decimal fraction shall receive an additional member, and so will the party with the next greatest decimal fraction and so forth until 100 Members of House of Representatives are obtained. In any case, the number of members allocated to each political party shall not exceed the number of names appearing in the party-list of such party.

2.1.5 Once the proportion of members for each political party has been obtained, the successful candidates for each political party would be those whose names appear in the top order of the party-list by the number of members allocated to such party.

²⁶ Organic Act on the Election of Members of House of Representatives and Senators, B.E. 2541, section 76.

2.2 As for the election of members of the House of Representatives on a constituency basis, the proportion of people per member shall first of all be calculated from the total number of people in the country divided by the 400 members that could be elected. The number of members for each *Changwat* shall thereafter be calculated based on the proportion people per member. Any *Changwat* with less people than the proportion of people per member would be given 1 member. Whereas, a *Changwat* whose population exceeded the proportion for one member would be given an additional member for every multiple of the proportion reached. If such allocations of members still did not yield 400 Members of House of Representatives, the *Changwat*'s with the greatest remaining fractions of proportions would be given an additional member until 400 members are obtained.

A *Changwat* where not more than one member of the House of Representatives could be elected would be considered a constituency. A *Changwat* with more than one member would, however, be further divided into several single member constituencies, in the number of members for that *Changwat*. The division of constituencies shall result in adjoining constituencies, each with a similar number of inhabitants.

2.3 In an election of senators, the boundaries of a *Changwat* shall be a constituency. The calculation of the number of senators for each *Changwat* shall be calculated from the proportion of people per member as in the election of members of the House of Representatives on a constituency basis. Each voter shall cast a vote for only 1 candidate.

Hence, the following amendments to the electoral system were made under the new Constitution:

(1) Proportional representation was employed for the first time. Voters may now cast votes for candidates on both constituency and party-list bases. The election on a party-list basis gives rise to representation at a national level, while the election on a constituency basis enables local representation.

(2) The amalgamation of the country into one constituency under the party-list basis for an election of members of the House of Representatives and the

division into single member constituencies under the constituency basis were the first of their kind and never appeared in previous Constitutions.

(3) The successful candidate is elected either from the order in which his name appears in the party-list for an election of members of the House of Representatives on a party-list basis, or from single member constituencies, in an election on a constituency basis. The single member constituency was previously employed in the 2nd election on 7th November 1937 under the Election Act, B.E. 2475 (1932) as amended by the Election Act (No. 3), B.E. 2479 (1936).

(4) The National Assembly is created by the direct election of representatives by the people, viz, members of the House of Representatives and senators must be directly elected by the people.

3. The Election Commission

The Election Commission under the Constitution of the Kingdom of Thailand, B.E. 2540, (1997) was placed at the heart of the political reformation process. An election therefore bears the characteristics of one being conducted under the charge and control of the Election Commission, whose status is that of an independent organisation free from any government intervention. Essentially stated²⁷:

1. The Election Commission consists of a Chairman and other four Commissioners from persons of apparent political impartiality and integrity, and who are not members of the House of Representatives or the Senate, a political official or a member of a local assembly or a local administration. An Election Commissioner shall not be a member or holder of any other position in a political party throughout the period of five years preceding the holding of office, an Ombudsman, a member of the National Human Right Commission, a judge of the Constitutional Court, a judge of the Administrative Court, a member of the National Counter Corruption Commission or a member of the State Audit Commission. An Election Commissioner shall also not be a Government official holding a permanent position or receiving salary, an official or employee of a State agency, State enterprise or local government organization, and he or she shall not hold any

²⁷ Constitution of the Kingdom of Thailand, B.E. 2540, (1997), sections 136-148.

position in a partnership, a company or an organization carrying out businesses for sharing profits or incomes, or be an employee of any person or engage in any other independent profession. When the Senate elects any person as an Election Commissioner, such elected person can only commence the performance of duties when he or she has resigned from the above mentioned positions or has satisfied that his or her engagement in such independent profession ceased to exist, this being done within fifteen days as from the date of the election. If that person has not resigned or ceased to engage in the independent profession within the specified time, it shall be deemed that such person has never been elected to be an Election Commissioner in order to ensure that all Election Commissioners are genuinely politically impartial.

2. The selection of a Chairman and Election Commissioners shall proceed in the following manner:

2.1 There shall be a Selective Committee of ten members consisting of the President of the Constitutional Court as Chairman, President of the Supreme Administrative Court, Rectors of all State higher education institutions which are juristic persons, being elected among themselves to be four in number, and representatives of all political parties having a member who is a member of the House of Representatives, provided that each party shall have one representative and all such representatives shall elect among themselves to be four in number, to be in charge of the consideration and selection of five suitable Election Commissioners. The names of those selected shall, with the consent of the nominated persons, be nominated to the President of the Senate, by a resolution of not less than three-fourths of the number of all existing members of the Selective Committee. The Supreme Court of Justice shall thereafter at its general meeting consider and select five suitable persons for such positions, whose names will be nominated to the President of the Senate within thirty days as from the date when a ground for the selection of persons to be in such office occurs.

2.2 In the case where the Selective Committee is unable to make a nomination or all nominations in the complete number within the prescribed time, the Supreme Court of Justice shall, at its general meeting, make all the necessary

nominations to fill the offices within fifteen days as from the date of expiration of the Selective Committee's nomination time.

2.3 The President of the Senate shall convoke the Senate for passing, by secret ballot, a resolution electing the nominated persons. The first five persons who receive the highest votes which are more than one half of the total number of the existing senators shall be elected as Election Commissioners, but if the number of the said elected persons is less than five, the name-list of those elected in that first occasion shall be submitted to the senators for another consecutive round of voting. In such case, persons receiving the five highest numbers of votes shall be deemed to be elected. On this occasion, if there are persons receiving equal votes in any order causing more than five persons to be elected, the President of the Senate shall draw lots to determine the elected person.

2.4 The elected Election Commissioners shall meet and elect among themselves a Chairman of the Election Commission, the result of which shall thereafter be reported to the President of the Senate who shall subsequently report to the King for further appointment.

3. Election Commissioners hold office for a term of seven years as from the date of their appointment by the King and shall serve for only one term as a guarantee of their independence from politics and their being free from any political suppression.

4. The control and supervision of Election Commissioners is made possible by a procedure conferring a right on members of the House of Representatives and the Senate or members of both Houses of not less than one-tenth of the total number of the existing members of the two Houses to lodge with the President of the National Assembly a complaint that any Election Commissioner is disqualified or is under any of the prohibitions under the Constitution or has acted in contravention of any of the Constitutional prohibitions, and the President of the Senate shall refer that complaint to the Constitutional Court who shall decide whether that Election Commissioner should vacate his or her office.

When the Constitutional Court has passed a decision, it shall notify the President of the National Assembly and the Chairman of the Election Commission of such decision.

5. The Election Commission shall have the following powers and duties:

5.1 To control and hold, or cause to be held, an election of members of the House of Representatives, senators, members of a local assembly and local administrators including the voting in a referendum in order that they be proceeded in an honest and fair manner.

5.2 The Chairman of the Election Commission shall have the charge and control of the execution of the organic law on the election of members of the House of Representatives and senators, the organic law on political parties, the organic law on the voting in a referendum and the law on the election of members of local assemblies or local administrators and he shall also be the political-party registrar.

5.3 To issue such Notifications as are necessary for the control, holding or causing to be held of an election of members of the House of Representatives, senators, members of a local assembly and local administrators including the voting in a referendum for the purpose of rendering it to proceed in an honest and fair manner.

5.4 To give orders instructing Government officials, officials or employees of a State agency, State enterprise or local government organisation or other State officials to perform all necessary acts for the control, holding or causing to be held of an election of members of the House of Representatives, senators, members of a local assembly and local administrators including the voting in a referendum in order that it be proceeded in an honest and fair manner.

Government officials, officials or employees of a State agency, State enterprise or local enterprise or local government organisation or other State officials shall have the duty to comply such orders given by the Election Commission.

5.5 To conduct investigations and inquiries in order to find facts or reach a decision on problems or disputes arising under the organic law on political parties,

organic law on the voting in a referendum and the law on the election of members of local assemblies or local administrators.

Such investigation and inquiry shall forthwith be conducted in the following cases:

5.5.1 A voter, a candidate in an election or a political party whose member stood for the election in any constituency raises an objection that the election in such constituency has proceeded wrongfully or unlawfully.

5.5.2 There appears to be convincing evidence that, before being elected, any member of the House of Representatives, senator, member of a local assembly or local administrator had committed any dishonest act to enable him or her to be elected, or has dishonestly been elected as a result of an act committed by any person or political party in violation of the organic law on the election of members of the House of Representatives and senators, the organic law on political parties or the law on the election of members of local assemblies and local administrators.

5.5.3 There appears to be convincing evidence that the voting in a referendum did not proceed lawfully or an objection has been raised by a voter that the voting in a referendum in any polling station proceeded inappropriately or unlawfully.

Upon the completion of such investigations and inquiries, the Election Commission shall pass a decision forthwith.

5.6 To order a new election or a new voting at a referendum to be held in any or all polling stations when there is convincing evidence that the election or the voting at a referendum in that or those polling stations has not proceeded in an honest and fair manner.

5.7 To announce the result of elections and referendums.

5.8 To summon any relevant document or evidence from any person or summon any person to give statements as well as to request the Courts, public prosecutors, inquiry officials, State agencies, State enterprises or local government organisations to take action to assist the Election Commission in their performance of duties, conduct of investigations and inquiries or passing of a decision.

5.9 To appoint persons, groups of persons or representatives of private organisations to perform such duties as entrusted.

Hence, the role, power and duties of the Election Commission encompasses both elections at a national level, being the election of members of the House of Representatives and Senators, and those held locally.

4. Voters and Candidates

The new Constitution has implemented a change in its method for compelling voters to cast votes. The change was from a duty to vote in good faith²⁸, without any penalty for a failure to exercise the right to vote, to a duty to exercise such rights. Thus, a person who fails to exercise his or her right to vote at an election without notifying an appropriate cause will lose such rights as provided by law²⁹. It is hoped that by stimulating the majority of dormant voters, corruption will be more effectively suppressed, as it is contemplated that the cost and difficulties of vote-buying would increase with the overall rise in the number of votes.

Changes were also made to certain aspects of candidate qualifications, such as the requirement of a Bachelor's degree or its equivalent for candidates of members of the House of Representatives, with an exception for previous members of the House of Representatives or the Senate who do not have to meet this requirement. Candidate senators are, however, not entitled to this exemption³⁰. Other changes include the repeal of prohibitions on the deaf and mute from exercising the right to be a candidate in an election of members of the House of Representatives and the Senate in order that political rights of participation can be conferred on the disabled; the prohibition on Election Commissioners, Ombudsmen, members of the National Human Right Commission, judges of the Constitutional Court, judges of an Administrative Court, members of the National Counter Corruption Commission or members of the State Audit Commission or any other person under a prohibition from holding a political position from exercising the right

²⁸ Constitution of the Kingdom of Thailand, B.E. 2534 (1991), section 26 and section 51.

²⁹ Constitution of the Kingdom of Thailand, B.E. 2540 (1997), section 68.

³⁰ Constitution of the Kingdom of Thailand, B.E. 2540 (1997), section 107 and section 125.

to be a candidate in an election of members of the House of Representatives³¹; and a prohibition on members of a local assembly or local administrators, members of the House of Representatives, Election Commissioners, Ombudsmen, members of the National Human Right Commission, judges of the Constitutional Court, judges of an Administrative Court, members of the National Counter Corruption Commission or members of the State Audit Commission or any other person under a prohibition from holding a political position from exercising the right to be a candidate in an election of senators³².

IV. Conclusion

The following provisions have been enacted in the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) as a basis for the reform of the electoral system with a view to the suppression of corrupt practices³³:

1. The implementation of proportional representation which opens up the opportunity for candidates approved by a majority of the population to be elected as members of the House of Representatives and to prevent the use of local influences. Contrary to past practices, these members represent the Thai population as a whole, and not just an particular locality.

2. The establishment of an Election Commission, an independent organisation with apparent political impartiality, to control and supervise elections at both national and local levels such that they be conducted in an honest and fair manner.

3. The imposition of a duty to vote and penalties by means of the derogation of political rights for a voter who fails to exercise his or her right to vote without any prior notification of an appropriate cause for such failure. Such measures are intended to stimulate dormant voters, who form a majority of the voters, to exercise their right to vote. It is hoped that this group of voters will change the election setting to one where corrupt practices are difficult to achieve as a direct result of the

³¹ Constitution of the Kingdom of Thailand, B.E. 2540 (1997), section 109.

³² Constitution of the Kingdom of Thailand, B.E. 2540 (1997), section 126.

³³ Pinai Nanakorn, *op. cit.*, note 1 *supra*, pp. 246-247.

increase in the costs and difficulties of vote-buying from the rise in overall number of votes.

CHAPTER 6
LOCAL GOVERNMENT REFORM IN THAILAND
UNDER THE NEW CONSTITUTION

I. Background and Introduction

Before the emergence of the new constitution in 1997, Thailand had a weak local government. Its weakness was principally reflected in local government's few responsibilities and obligations, low revenues, state-dominated internal structure and insufficient staff. Local government in every form – Provincial Administrative Organisation (hereinafter “PAO”), Municipality, Sanitary District, *Tambon* Administrative Organisation (“TAO), City of Pattaya or even Bangkok Metropolitan Administration (“BMA”)¹ – was given few responsibilities, by the central government, for providing some simple public services such as garbage collection, waste disposal, road and waterway maintenance and market management. Most of important public services in localities such as those related to universities, hospitals, high ways and airports were provided by central government agencies, either ministries, departments or state enterprises.

Financially, local government was granted by central government the authority to levy limited categories of taxes and duties, most of which are the property tax, local maintenance tax, commercial plate tax and livestock slaughter duty. Furthermore, before the fiscal year of 2001, all local government units in the country were annually allocated by central government only 10 percent of total state revenues. Most of the budget received was expended on staff salaries and office equipment.

¹ BMA still had limited responsibility even though it had additional responsibilities including city planning, structure construction and building control and transportation.

As for the permanent staff, all local government bodies had totally the workforce of 57,115 persons in 1995, compared to 947,536 officials and employees of the central government (Anek 2000 : 8). Amongst staff of local governments, BMA, municipalities and City of Pattaya have had the largest staff, whilst most of TAOs have had only 3 officials; the TAO administrative officer, civil work officer and treasury. Moreover, the recruitment, promotion and punishment of the local government staff, with the exception of that of BMA², is determined by the personnel administration commission of central government. In the case of municipalities, City of Pattaya and TAO, their personnel administration system has been under the same central body – the commission on officials of municipalities, composed of only high-ranking central government officers especially officers from the Ministry of Interior.³ Sanitary District's personnel administration was directed by the central commission on officials of Sanitary Districts, nearly all members of which were central government officials.⁴

² BMA has had its separate personnel administration.

³ The members of the commission included Interior Minister, Permanent Secretary of the Ministry of Interior, Director-General of the Local Administration Department, Deputy Director-General of the Local Administration Department in charge of local government affairs, Director-General of the Public Works Department, Comptroller-General, Secretary-General of the Teachers' Council, Secretary-General of the Civil Service Commission and representatives from the Ministry of Public Health.

⁴ The 10-member Commission included Permanent Secretary of the Ministry of Interior, Director-General of the Local Administration Department, Deputy Director-General of the Local Administration Department in charge of local government affairs, Director-General of the Police Department, Director-General of the Public Works Department, Comptroller-General, representatives from the Ministry of Public Health, Secretary-General of the Civil Service Commission and two qualified representatives from Sanitary District.

As far as internal structure is concerned (except that of BMA and a municipality),⁵ some delegates of central government, especially officers of the Ministry of Interior, performed their assigned tasks, at both executive and legislative levels, in all local government bodies - provincial governors as the *ex officio* President in the case of PAOs; subdistrict headman, village headman and subdistrict medical officer as *ex officio* members in the case of TAOs; chief district officer, assistant chief district officer and subdistrict headman as *ex officio* members of a Sanitary District Committee. The Interior Minister also appointed eight persons as members of City of Pattaya Council. In the Thai context, the existence of the central government delegates in the internal structure of local government was, in effect, greatly responsible for low development of local government.

Granted few unimportant responsibilities, depending on state subsidies, with insufficient permanent staff and state-dominated internal structure, local government had a very low degree of autonomy and capacity in dealing with its local affairs. It is accepted in Thai academic circle that Thai local government is not “local self-government” but “local state government”, signifying territorial expansion of central government agencies.

As a result, providing public services determined by central state agencies is not responsive to the needs of the people of different localities. Moreover, given its limited authority, local government has largely constituted discouragement of public participation. The lowly-developed local government, as argued by Anek⁶, is a fundamental cause of national political problems, namely, money politics and corruption.

⁵ Since its establishment, a municipality has had elected Mayor and council whilst, for BMA, election of governor was first introduced in 1985.

⁶ Anek Laothammatas, *Local Cause of Problems of National Politics and Government Resulting from Insufficient Local Government*, Bangkok: Bopit Press, 2000.

This situation has prolonged nearly 100 years since the establishment of the first local government body (Bangkok Sanitary District) in 1897, until the promulgation of the new constitution in 1997. ‘The new constitution brings about such unprecedented extensive and comprehensive local government reform.’⁷ In this article, we will take a panoramic view towards this reform.

II. Local Government in Thailand’s New Constitution

Prior to the new constitution, the movement of decentralisation was first launched by political parties, during the election campaign in 1992. As a result, Thailand has the *Tambon* Administrative Organisation Act, B.E. 2537 (1994) which has eventually led to establishing nearly 7,000 TAO units nationwide. However, the decentralisation program did not have a secure place until its affirmation as “a state policy” in the new constitution.

In this connection, 10 sections of the new constitution are devoted to local government; section 78 of Chapter V (Directive Principles of Fundamental State Policies) and sections 282-290 of Chapter IX (Local Government). Amongst these ten provisions, sections 78, 282, 283 and 284 are particularly concerned with local government autonomy. Section 285 mandates the application of the elected council-mayor structure of a local government organisation. Section 286 lays down a mechanism for recalling members of a local assembly and local administrators whilst section 287 sows the seeds of the right of local residents to initiate local ordinance. These two last mentioned provisions are, indeed, based upon the principle of direct democracy. Section 288 is directed at local personnel administration and the last two sections, viz, sections 289 and 290, are concerned with two major duties of local government: the provision of education and the handling with natural resources and environmental matters.

⁷ Somkid Lertpaitoon, “Local Government Reform in accordance with New Constitution”, *Popular Constitution in Essence* by the Constituent Assembly, pp. 361-402 Bangkok: Matichon Press, 1998.

All these provisions of the constitution result in many changes to the local government, be its internal structure, responsibility, finance, personnel administration or popular participation. It may be said that the constitution intends to institutionalise the local government.⁸

The new Constitution mandates the state to give autonomy to localities, as encapsulated in sections 78, 282, 283 and 284. For the purposes of analysis, the wording of these provisions is herebelow quoted.

Section 78 “The State shall decentralise powers to localities for the purpose of independence and self-determination of local affairs, develop local economics, public utilities and facilities systems and information infrastructure in the locality thoroughly and equally throughout the country as well as develop into a large-sized local government organisation a province ready for such purpose, having regard to the will of the people in that province.”⁹

Section 282 “Subject to section 1, the State shall give autonomy to the locality in accordance with the principle of self-government according to the will of the people in the locality.”¹⁰

Section 283 “Any locality which meets the conditions of self-government shall have the right to be formed as a local government organisation as provided by law...”¹¹

⁸ Supasawat Chatchawal, Proper Structure for Local Government in Thailand (unpublished paper), Thammasat University 2001.

¹⁰ The Constitution of the Kingdom of Thailand, Official Translation by the Council of State, in Administrative Law Journal Vol. 16, 1997 p. 118

¹⁰ Administrative Law Journal, *ibid.*, p. 182.

¹¹ Administrative Law Journal, *ibid.*, p. 182.

Section 284 “All local government organisations shall enjoy autonomy in laying down policies for their governance, administration, personnel administration, finance and shall have powers and duties particularly on their own part. ...”¹²

For the realisation of local autonomy, the constitution, as embodied in section 284, makes it compulsory for the state to enact a law setting out details as to the process of the decentralisation and body in charge of it.¹³ To this end, the Act Determining Plans and Process of Decentralisation was promulgated in 1999 under which a tripartite commission on decentralisation to local government organizations is erected, namely, the “Commission on Decentralisation to Local Government Organisation”, which is responsible for manipulating the process.

The Act requires a transfer by the State of its responsibilities and obligations with regard to managing public services and financing, personnel, and allocation of not less than 35 percent of national budgets, to local government organisations. Indeed, these statutory requirements will have to be completed within 10 years.

Apart from mandating the state to decentralise powers to localities, the constitution, in its section 285, requires the localities to apply the single form of

¹² Administrative Law Journal, *ibid.*, p. 182.

¹³ **Section 284** “..... For the purpose of the continual development of decentralisation to a higher level, there shall be the law determining plans and process of decentralisation, the substance of which shall at least provide for the following matters.

.....

(3) the setting up of a committee to perform the duties in (1) and (2) consisting, in an equal number, of representatives of relevant Government agencies, representatives of local government organisation and qualified persons possessing the qualifications as provided by law....”: Administrative Law Journal, *ibid.*, p. 183.

organisation, that is, the “elected Council-Mayor” form, which is, in effect, a replication of the national parliamentary democracy model.¹⁴

Section 285 “A local government organisation shall have a local assembly and local administrative committee or local administrators.

Members of a local assembly shall be elected.

A local administrative committee or local administrators shall be directly elected by the people or shall be from the approval of a local assembly...”¹⁵

The spirits of this section have been carried into real effect through the imposition of five laws which change the localities’ internal structures accordingly.¹⁶ The first law, known as the Act Elevating Status of Sanitary District to Municipality, B.E. 2542 (1999), changes the Sanitary District, based upon the committee form of organisation, into Municipality adapting the elected council-mayor form. Next, under the Provincial Administrative Organisation Act (No.2), B.E. 2542 (1999), President of the POA must be from elected members of that PAO, thereby replacing the previous system under which this post was assumed by Provincial Governor *ex officio*. The third legislation, the Municipality Act (No.10), B.E. 2542 (1999), changes the indirect election of Mayor into the direct election system.¹⁷ Further, under the recent Administration of Pattaya City Act, B.E. 2542 (1999), all councillors, some of which formerly appointed, will now be elected and

¹⁴ Certain academics have advanced an argument that the locality should have autonomy in choosing its internal structure form.

¹⁵ Administrative Law Journal, *ibid.*, p. 183.

¹⁶ Formerly, there existed 3 forms of internal structure of a local government in Thailand: 1) Council-Mayor form applied in BMA, PAO, Municipality and TAO, 2) Committee form applied in Sanitary District and 3) Council-Manager System applied in City of Pattaya.

¹⁷ Town Municipalities and City Municipalities, except *Tambon* municipality, have directly elected mayors.

the city manager system was replaced by a new one - a directly elected mayor. Finally, the *Tambon Council and Tambon Administrative Organisation Act* (No.3), B.E. 2542 (1999) similarly requires that both *Tambon* councillors and *Tambon* administrators, some of which formerly appointed, be from election.

The new constitution (sections 286¹⁸ and 287¹⁹) also introduces the direct democracy in the form of the “Recall and Local Ordinance Initiation by People” at a local government level. This philosophy is subsequently put in a place in the Act on Voting for the Removal from Office of Members of Local Assemblies and Local Administrators B.E. 2542 (1999) and the Act on the Local Ordinance Initiation, B.E. 2542 (1999).

Under the Act on Voting for the Removal from Office of Members of Local Assemblies and Local Administrators, the people, one third of the eligible voters in each locality, can request a recall of a member of their local government organisation. In the Act on the Local Ordinance Initiation, the people, at least half of eligible voters in each locality, can lodge a petition initiating a local ordinance. However, a criticism has been advanced that there is too little, if not at all,

¹⁸ **Section 286** “If persons, having the right to vote in an election in any local government organisation, of not less than three quarters of the number of the voters who are present to cast ballot consider that any member of the local assembly or any administrator of that local government organisation is not suitable to remain in office, such member or administrator shall vacate the office, as provided by law...”: see *Administrative Law Journal, op. cit.*, p. 184

¹⁹ **Section 287** “Persons, having the right to vote in any local government organisation, of not less than one-half of the total number of the persons having the right to vote in that local government organisation shall have the right to lodge with the President of the local assembly a request for the issuance by the local assembly of local ordinances...”: see *Administrative Law Journal, op. cit.*, p. 184

possibility for the people to exercise their right to initiate local ordinances as long as the number of residents required is too much.²⁰

Moreover, the constitution (sections 289²¹ and 290²²) mandates the state to delegate to localities major functions in connection with, for instance, education, public health and environmental and natural resource. In the sphere of environmental and natural resources management, the constitution aims for enactment of particular legislation. There is, however, no initiation of any law concerning this matter.

²⁰ Parinya Dhevanarumitkul, “Popular Political Participation in the New Constitution and the Direct Democracy”, *Administrative Law Journal*, Vol. 17, August 1998, p. 79.

²¹ **Section 289** “.... A local government organisation has the right to provide education and professional training in accordance with the suitability to and the need of that locality and participate in the provision of education and training by the State;...” *Administrative Law Journal*, *op. cit.*, p. 185.

²² **Section 290** “For the purpose of promoting and maintaining the quality of the environment, a local government organisation has powers and duties as provided by law.

The law under paragraph one shall at least contain the following matters as its substance:

(1) the management, preservation and exploitation of the natural resources and environment in the area of the locality;

(2) the participation in the preservation and exploitation of natural resources and environment outside the area of the locality only in the case where the living of the inhabitants in the area may be affected;

(3) the participation in considering the initiation of any project or activity outside the area of the locality which may affect the quality of the environment, health or sanitary conditions of the inhabitant in the area.”: *Administrative Law Journal*, *op. cit.*, p. 185.

As for local personnel administration, the constitution (section 288²³) requires that a local government organisation have its own committee with tripartite composition, being made up of representatives of central government, local government and qualified persons. The Committee's principal function is to set forth conditions and standards of the personnel recruitment, transfer, promotion, for all localities of the same kind.

Along the line of the constitutional provision, there has been enacted the Act on Local Personnel Administration, B.E. 2542 (1999) according to which PAOs have the PAO Officials Committee, provincially and nationally; Municipalities have provincial and central (national) Committee on Municipality Officials; and TAOs have local and central TAO Officials Committee. With regard to the City of Pattaya, it has its own committee as well – Pattaya City Officials Committee – but at national level its personnel administration is still under the Committee on Municipality Officials. In the case of BMA, the same concept is found in the “BMA Administrative Organisation Act (No.2), B.E. 2542 (1999).” It can thus be seen that local personnel administration is no longer in the hands of central government; rather, tripartite committees look after it by prescribing common standard of personnel recruitment, punishment and salary scales for localities. In fact, new local

²³ **Section 288** “The appointment and removal of officials and employees of a local government organisation shall be in accordance with the need of and suitability to each locality and shall obtain prior approval from the Local Officials Committee, as provided by laws.

The Local Officials Committee under paragraph one shall consist, in an equal number, of representatives of relevant Government agencies, representatives of local government organisation and qualified persons possessing the qualifications as provided by law.

The transfer, promotion, increase of salaries and the punishment of the officials and employees of a local government organisation shall be in accordance with the provisions of the law.”: Administrative Law Journal, *op. cit.*, p. 184

personnel administration committees under all these laws have already been established.

A mention must also be made of another significant development in local government. There will be, for the first time, a separate election law, indeed constitutionally originated, for application to local elections. This is now contained in the Bill on Election of Members of Local Councils and Local Administrators, B.E.” At present, this draft law is still in its legislative progress.

III. Decentralisation in Practice: Decentralisation to Local Government Organisations Commission and Its Plan

Actually, the current decentralisation process in Thailand is dependent on the Act Determining Plans and Process of Decentralisation, B.E. 2541 (1998) and vital apparatuses thereunder, namely, the Decentralisation to Local Government Organisations Commission; the Decentralisation to Local Government Organisations Plan and the (forthcoming) Action Plan.

The Act sets up the Decentralisation to Local Government Organisations Commission. (At present, its secretariat – Office of the Centralisation to Local Government Organisations Commission – is attached to the Office of the Permanent Secretary of the Prime Minister’s Office.) Also, the Act determines the scope of powers and duties of local government bodies in providing public services. Under the Act, the Municipality, City of Pattaya and TAO have powers and duties, for example, in connection with formulating local development plans, providing and maintaining streets, waterways and sewerage, providing and keeping under control markets, piers and parking lots, promoting tourism activities, promoting commercial activities and investments.²⁴

As for local revenues, the Act determines the allocation of tax revenue for the local government bodies. In this instance, the Municipality, City of Pattaya and

²⁴ Section 16.

TAO, may have revenues from collecting approximately 20 categories of taxes, duties and fees as well as from other gains. They may, for example, levy the property tax, local maintenance tax, commercial plate tax, value added tax, excise tax, automobile tax and gamble tax.

The Decentralisation to Local Government Organisations Commission draws up the Decentralisation to Local Government Organisations Plan. The current Plan takes effect from 17th November 1999. The Commission has powers and duties in accordance with section 12 of the 1998 Act establishing it as well as section 284 of the Constitution. Aside from designing the above-mentioned Plan, the Commission also formulates the action plan.

1) Structure of the Commission

According to the New Constitution, the Commission must be composed of three kinds of representatives at the same proportion: from government agencies concerned, local government organisations and the qualified persons. In this instance, the exact number of members of the Commission is set out by the Act Determining Plans and Process of Decentralisation, B.E. 2541 (1998), as to which the Commission is made up of 36 persons, of which 12 (as *ex officio* members) from representatives of the government agencies concerned, 12 from representatives of local government organisations, and 12 from the qualified persons.²⁵

Twelve representatives from the government agencies concerned as *ex officio* members include (a) 3 politicians in the Executive (Prime Minister or Deputy Prime Minister as entrusted by the Prime Minister, Minister of Interior and Minister of Finance) and (b) 9 government officials in the government agencies concerned (2 from the Ministry of Interior (Permanent Secretary and Director-General of the Local Administration Department), 1 from the Ministry of Finance (Permanent Secretary) 1 from the Ministry of Education (Permanent Secretary) 1 from the Ministry of Public Health (Permanent Secretary) and another 4 from the Secretary-

²⁵ Section 6.

General of the Council of State, Secretary-General of the Civil Service Commission, Secretary-General of the National Economic and Social Development Board and Director of the Bureau of the Budget.

Twelve representatives from the administrators of the local government organisations include (a) 5 administrators representing 6,747 TAOs nationwide, (b) 3 administrators representing 1,129 Municipalities nationwide, (c) 2 administrators representing 75 PAOs nationwide and, finally, (d) Governor of Bangkok (representing BMA) and Mayor of the City of Pattaya.²⁶ With regard to 12 qualified persons, it is required that they possess knowledge and expertise in government administration, local development, economics, local government and law.²⁷

2) Implications of the Decentralisation to Local Government Organisations Plan (2000)

²⁶ At the time of this article, representatives from local government organisations are as follows: (1) Chanchai Silpaouychai, President of Prae PAO; (2) Pinyo Tanwiset, President of Chonburi PAO; (3) Surapong Poothanapiboon, Mayor of Rayong City Municipality, Rayong Province, (4) Weenrawat Paktaranikorn, Mayor of Yasodhorn Municipality, Yasodhorn Province; (5) Somchai Kunpleum, Mayor of Sansuk Tambon Municipality, Chonburi Province; (6) Noppadol Kaewsapat, Chairman of Omkred TAO, Nontaburi Province; (7) Niyom Klongdee, Chairman of Mukdaharn TAO, Mukdaharn Province; (8) Sorasak Jiradhampradab, Chairman of Chumpol TAO, Nakornnayok Province; (9) Apichart Sangkhachart, Chairman of Klonghae TAO, Songkhla Province; (10) Kittisak Mekkhajorn, Chairman of Kheelek TAO, Chiangmai Province; (11) Samak Sundaharavej, BMA Governor; and (12) Sundhorn Prasertdee, Mayor of Pattaya City.

²⁷ At the time of this paper, a List of qualified persons is as follows: (1) Kowit Posayanont; (2) Charas Suwanmala; (3) Chan Karnjanakpan; (4) Thongthong Chantarangsu; (5) Naris Chaiyasutra; (6) Pairot Suchinda; (7) Wuttillert Dhewakul; (8) Somkid Lertpaitoon; (9) Somchai Ruchupan; (10) Somchai Grusunsombat; (11) Anek Sittiprasart; (12) Wuttisarn Tanchai (replacing Anek Laothammatas who has become a Party List MP of the Democrat Party).

The Decentralisation to Local Government Organisations Plan is a master plan establishing conceptual framework, goal and guidelines of decentralisation; the action plan must also be set up in line with the master plan.²⁸ In this connection, the Decentralisation to Local Government Organisations Plan has recently received cabinet approval. Notwithstanding, there is, in practice, no guarantee that real decentralisation and real local self-government will come into existence.

Why is real local self-government needed to be promoted? The correct answer to this question lies in that decentralisation to local government organisations is a basic state policy as proclaimed in the new constitution. Members of the Constitution Drafting Assembly (CDA) paid so much attention to this matter that they gave it top priority.

The fact that the local government has many problems appears to be the common knowledge. Indeed, most of local government organisations have had common problems, namely, no (or too little) autonomy in policy-making and management, inefficient management and budget and fiscal problems. In this regard, a view has vibrantly been expressed by Somkid Lertpaitoon (a former CDA member, who now sits as a qualified member in the Decentralisation to Local Government Organisations Commission), in 1998 (two years prior to the introduction of the Decentralisation to Local Government Organisations Plan):

“In fact, local government organisations in Thailand have limited powers and duties and little public service delivery. This situation should be explained by the fact that the provisions of laws empowering local government organisations have been ‘subject to other laws’” (Somkid, 1998 : 364)

²⁸ According to the Act Determining Plans and Process of Decentralisation, B.E. 2542 (1999), the action plan is required to be reported to Parliament after its approval by the Council of Ministers.

About the fiscal problem, many Thai scholars including Dhanes Charoenmuang²⁹ advocate that local government organisations have limited revenue simply because they have little fiscal powers. This situation leads to local government organisations relying on subsidies from the central government.

The conceptual framework for the decentralisation to local government organisations designed by the Commission is thus based upon the following principles of significant importance, viz, first, autonomy in policy-making and management, secondly, definite division between national administration and local administration, and, finally, enhanced efficiency in management of local government organisations.

With regard to autonomy in policy-making and management, it is felt by the Commission that a local government organisation shall enjoy autonomy in making policies relating to the government, management, personnel management and finance and budget. As for the sharp division between national administration and local administration, the Commission believes that the state has to decentralise the power to local government organisations by changing roles and responsibilities which are under the control of central government agencies and regional government agencies, and by putting local government organisations into such roles and responsibilities. Central and regional government agencies' responsibilities should simply be limited to macro-level ones and some kinds of responsibilities that local government organisations can not handle, supervising policy-making and legal capacity of local government organisations, giving them technical support and assessing their performance.

Now, as far as the last principle – enhanced efficiency in management – is concerned, the Commission is of the opinion that the state has to decentralise the power to the local government organisations in order that people will get better-quality public services and management, with a greater degree of transparency, efficiency and responsiveness to the people, and, as a result, the people, civil society

²⁹ Dhanes Charoenmuang, 1997 pp. 236-238.

and community will be promoted to participate in decision-making, co-operation and monitoring.

To materialise decentralisation, the Commission sets five goals of the Plan. First, responsibilities in the public service delivery must be transferred from the state to local government organisations within 4 years (in the first phase) or within 10 years and, also, there must be determined the definite scope of responsibility between the state and local government organisations and amongst local government organisations. Secondly, the Commission must work out the proper amount of tax revenue, subsidies and other incomes to be allocated to local government organisations for financing their responsibilities. Out of the total national revenue, the proportion to be allocated to local government organisations should increase by not less than 20% within 2001 and not less than 35% within 2006. Next, the central government has to provide local government organisations with subsidies for public service delivery, as stated in annual appropriations, in accordance with the necessity and the need of local government organisations. Further, there will be a transfer of personnel and staff of central government agencies to local government organisations to serve the responsibilities transferred. Finally, laws and regulations concerned must be amended to accommodate the shift of responsibilities.

In concrete, the Plan will be in the form of transferring responsibilities, personnel, budget and assets. As planned, the Commission determines the first four years (2001-2004) as the period for strategy development and readiness preparation for transferring, for amendment of legislation concerned, and for improving internal management of local government organisations as well as of central and regional government administration. The next six years (2005-2010) will be the important transition period. During the period, the roles of central government agencies, regional government agencies and local government organisations will be changed. The relationship between local government organisations and regional administration will also be adapted. Amendment of relevant laws will also be carried out.

According to the Commission, the transfer will be founded upon several general principles including the following. In the first place, the transfer of responsibility as planned will not embrace the responsibilities or activities concerning national security, court trial and judgment, foreign affairs and national monetary and fiscal affairs. Secondly, responsibilities due to be transferred are mainly those belonging to government agencies while a transfer of responsibilities of state enterprises and public corporate can only be done when warranted by properness and as a matter of government policy. In addition, the transfer will depend on the considerations of potential consequences and impacts on the people residing in the territory of respective local government organisations. In effect, apart from its emphasis on these principles, the Commission also states that the action plan covers at least 6 aspects: (1) infrastructure, (2) life quality promotion, (3) community/society order and public order maintenance, (4) planning and promoting investment, commerce and tourism, (5) environmental and natural resources management and conservation and (6) art, culture, custom and local wisdom.

According to the action plan, more than 200 major responsibilities assumed by 50 agencies (except those of agencies within the Sub-ministry of University Affair) will certainly be shifted to the hands of local government bodies. The process concerning the transfer alluded to requires about 40 laws, ministerial regulations and rules to be amended.³⁰

The Commission has, however, expressed their optimistic view that, during the transitional period, public services to be provided by the local government organisations will be more responsive to local people, that local people will be encouraged to participate in local management and that local government organisations will build and improve their capacity in carrying out activities with efficiency and transparency. In this regard, it is expected by the Commission that the

³⁰ There was also a seemingly radical view that the completion of the decentralisation process would need the amendment of about 200 laws: see, Anek Laothammatas, *Vision of Local Government and Decentralisation Plan* Bangkok: Mitimai Press, 2000, p. 23 .

daily life of local people after 2011 will be better and that local residents will have fair and equitable access to all public services and will, as well, have major roles in decision-making, supervising, monitoring and giving full support to activities launched by local government organisations.

One of purposes in mind of the Commission is that regional administration agencies will change their active role as “public services providers” into a new role as the “technical supporter and supervisor”.

A latest situation of the decentralisation reform driven by the Thaksin government is that the reform is not an easy process. This is, indeed, reflected in the comments made in Bangkok Post³¹ by PM’s Office Minister Chaturon Chaisaeng, Chairman of a sub-committee on preparation for decentralisation to localities. Chaturon states: “all education and public health services need not be transferred to local administrations by 2004 as required by the law on decentralisation..... There were problems with the transfers of education and public health services since ministries were not sure if local administration could handle them.” The action plan has received the cabinet approval but the plan does not include the transfer of responsibilities in connection with education and public health services.

According to Chaturon, a conclusion is reached as regards what to do with education and public health services. For education, local committees will be set up to work together with agencies to develop potential and readiness for local bodies. Education services would be transferred to them once they are ready. Importance will be attached to standards and quality. Another problem obstructing the decentralisation of education management has been the unwillingness of existing personnel to be transferred to local government organisations. Much work has yet to be done to ensure financial security, welfare and promotional opportunities. A plan is afoot for local government organisations to recruit their own personnel in the future. For public health services, the Ministry of Public Health has agreed to set up

³¹ Bangkok Post, October 22, 2001 Issue, p.3

local public health committees to prepare for the transfer of work to local government organisations.

3) The Action Plan and TAOs in the Future

TAO which is a juristic person is the smallest unit of local government organisation. So far, nearly 6,747 TAOs have been officially announced and established by the Ministry of Interior. TAOs vary in many aspects in terms of demography, geography and revenue. In the demographical aspect, Bangpleeyai TAO in Amphur Bangplee, Samut Prakarn, is the most populated, with 47,133 inhabitants while Yangchumnoi TAO in Amphur Yangchumnoi, Srisaket, is the least, with only 21 inhabitants. Bangboathong TAO in Amphur Bangboathong, Nonthaburi, is No. 1 in generating revenue (75,563,537.02 Baht in 1999 compared to 1,222,134.95 Baht collected by Banghak TAO in Amphur Panthong, Chonburi). Three TAOs which can generate revenue for more than 50 million Bath a year are Bangboathong TAO in Bangboathong, Nonthaburi, Bangpleeyai TAO and Bangsaothong TAO in Samut Prakan.

As a result of the action plan, TAOs nationwide will receive many heavy-duty responsibilities which used to belong to government agencies within various Ministries.

So far, much doubt has been cast about relying on a local government organisation's personnel force and capacity to meet its emerging heavy-duty responsibilities. Under the Act on *Tambon* Councils and TAOs, B.E. 2537 (1994), as amended by the Act (No. 2), B.E. 2540 (1997) and (No. 3), B.E. 2542 (1999), the structure of a TAO has 3 parts as follows:³²

1) TAO Council: consisting of members elected by local residents in each village, two members from each village.

³² Tesapiban 96th Year, Feb. 2001, p. 36.

2) Executive Board: comprising 3 members, Chairman and two executive members, elected by a resolution of the TAO Council. The TAO administrative head officer is a secretary to the Executive Board.

3) TAO routine staff: being made up of four parts, namely, TAO Office Administrative Head Officer, Treasury, Public Works Officer and Public Health Officer. The number of staff depends on the grade of the TAO.

TAO – Grade 1 (74 TAOs) has staff of 21 persons;

TAO – Grade 2 (78 TAOs) has staff of 12 persons;

TAO – Grade 3 (205 TAOs) has staff of 6 persons;

TAO – Grade 4 (843 TAOs) has staff of 4 persons; and

TAO – Grade 5 (5,546 TAOs) has staff of 3 persons.

The Number of Staff in TAOs Nationwide³³

	Male	Female	Total
TAO routine staff	11,786	9,087	20,873
Permanent Employees	485	2,132	2,617
Temporary Employees	5,380	6,313	11,693
Total	17,651	17,532	35,183

As a matter of fact, the routine staff force, rather than members of the TAO Council or of the Executive Board, are the key factor in fulfilling activities and responsibilities. At present, each TAO has at most 21 routine staff members (excluding permanent and temporary employees). From now on, TAOs nationwide will certainly need more routine staff force (or even permanent and temporary

³³ Adaptation from Tesapiban 96th Year, Feb. 2001, p. 40.

employees), money supply and greater skill and expertise to meet the new needs resulting from the heavy-duty burden after the transfer of responsibilities.

Pursuant to the Act, each TAO has powers and duties with regard to the development in the economic, social and cultural aspects. Many duties that TAOs have to perform are, for example, providing and maintaining waterways and roads; cleaning roads, waterways, pathways and public places, garbage disposal, preventing communicable diseases, preventing public danger and providing relief, promoting educational, religious and cultural activities, promoting development programmes for women, children, the youth, elderly and disabled, protecting environment and natural resources, conserving art, tradition, local wisdom and local culture and carrying out assignments requested by central government agencies.

Many duties TAOs are allowed by law to do are, for example, providing water for consumption and agriculture, providing street lights, building and maintaining sewerage, providing and maintaining meeting halls, stadiums, recreational places and parks, promoting farmers' groups and co-operatives, promoting household industries, promoting vocations, protecting and maintaining public assets and property, making benefits from assets belonging to TAOs, providing markets and piers, managing city planning, running tourism activities and undertaking commercial activities.

Financially, TAOs are allowed to collect some categories of taxes and fees: local maintenance tax, property tax, commercial plate tax, livestock slaughter duty, etc. TAOs are allowed to gain revenue from making benefits from their assets, public facility bills, commercial activities, licence fees and fine, cash or assets from donors, fund allocated by government agencies or central government and subsidies from central government. However, there is no guarantee that TAOs can enforce its power to collect taxes and, if so, there is still no guarantee that the amount of tax revenue can meet their expenditure because most TAOs are in needy rural areas, with no expertise like central government agencies and with insufficient money.

According to the (unpublished) draft action plan for the transfer of responsibilities to local government organisations, TAO will have to deal with many

mega-level responsibilities which need expertise, consume a large amount of money and used to be under the control of ministries. The responsibilities surely need capable routine staff, financial resource and technical skill and expertise. Some examples of ministries' responsibilities are as follows.

1) Ministry of Interior will have to transfer the power to issue licences for the hotel construction to TAOs in 2003.

2) Ministry of Agriculture and Co-operatives will have to transfer its Center of Community Agricultural Technology Transfer and Services to TAOs in 2003-2004.

3) Ministry of Science, Technology and Environment will have to transfer its powers in connection with monitoring environmental quality concerning water, air and sound to TAOs in 2003.

4) Ministry of Education will have to transfer the power and duty to provide the maintenance of ancient places to TAO in 2002.

Responsibilities due to be transferred to TAOs are highly valuable (in case of five-star hotel construction) and need advanced expertise (in case of agricultural technology like GMOs). TAOs from now on will play new and important roles. Personnel staff have to be highly capable, with new and update skill and technological expertise. Proper training and development needed for the routine staff will be costly. As mentioned above, TAOs need capable routine staff, financial resource and technical skill and expertise. Unlike other local government bodies, TAOs may face a problem in generating revenue. In fact, there was, in the past, much trepidation that a local government body like a TAO would fail because of its inability of generate adequate revenue for its responsibilities. Despite such fear, TAOs have survived amid their heavy-duty burdens. That having been said, doubts remain as to TAOs efficiency in management.

IV. Concluding Remarks

Despite the well-established legal framework on decentralisation, the achievement in the real local government reform in Thailand is in question. Lack of willingness of the state officials and state agencies is mainly responsible for the failure in transferring the responsibilities and tasks to the local government organisations. The claim usually used by the central government is that the populace in the locality has never been ready for self-government due to paucity of skill, corruption and disqualified leaders. Phenomenal violence and widespread corruption in the local government bodies seemingly affirmed that never-ending claim. Also, the insufficient political support from the government is another obstacle. The policy on local government reform is not put on top priority.

It is expected that there will be no effective co-operation from the state agencies and officials for the process of the local government reform driven by the decentralisation to the Local Government Organisation Commission. The process of the local government reform is, therefore, the thorny path.

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CHAPTER 7

COUNTER CORRUPTION REFORM IN THAILAND

I. Background and Introduction

Corruption has been in existence in Thailand for a long time and the incidence has seemingly been felt as a normal phenomenon of the country. We have indeed witnessed many forms of corruption, ranging from a gift of goodwill, dishonesty in the performance of duty, “tea money”, “under-table money” to bribery. The corruption problem is mostly found in the government service. Corrupt behaviours are committed with a view to deriving some benefits from the government such as an opportunity to be a successful bidder, quota allocation or subsidies or with a view to avoiding costs which would otherwise arise from compliance with potentially costly government rules and regulations such as those related to tax, customs, environment and safety. In the context of corruption in the government procurement process, the problem normally involves large sums of money and complicated networks of politicians, bureaucrats as well as private individuals.

A remark has been advanced on corrupt practices in government procurement processes as follows:

“Corruption in government procurement normally involves a network consisting of a politician who supervises the department in question, high-ranking bureaucrats in the department, as well as lower-ranking officials in charge of the project concerned. The network normally includes key government officers in other government agencies that are involved in the approval of the project, particularly those in the Bureau of the Budget. The departmental head is, however, the key player. If he fails to give a green light to the project, there is much likelihood of his being transferred to an inactive post by the politician in charge. The network helps facilitate corruption processes. Through the network, it is possible to inflate the budget allocated for the project. When a new minister is appointed, the minister can easily change the nature of the project with the assistance of his or her network to ensure that the project will benefit his or her cronies.

Most importantly, those involved in corruption practices, particularly the politicians, have built up a strong protective system for members of their groups. They normally carry out the procurements strictly according to specified rules and regulations, leaving no evidence to implicate the strongman of the network.”¹

The problem of corruption has occurred in the military government and the elected government alike. In the past, continuous corruption practices in the Sarit Thanarat government were discovered after his death. At that time, it was estimated that his wealth arising from the corrupt practice was worth up to Baht 2.8 billion.

In 1975, the watchdog body entitled the Commission of Counter Corruption was set up by the then government to combat corruption. There were, however, some weaknesses in the laws and their enforcement as well as in financial and human resources.

The ineffectiveness of the government anti-corruption schemes and of the institutions concerned was very obvious in the Chatichai government which won the general election. In the Chatichai government, the cabinet had the power to grant approval to mega projects that required a large amount of government-guaranteed loans whilst the minister was empowered to approve mega projects and concessions under his or her supervision. It was believed that corruption would be in the form of commission fee in exchange for granting approval or permission. The mega projects in the Chatichai government that fell under public criticisms as to the corruption scandal included the Baht 42,000-million Lavalin railway project and the Baht 150,000-million 3-lines telephone project. The corruption scandal indeed led to a coup d'état conducted by the so-called National Peace Keeping Council (NPKC) headed by Gen. Sunthorn Kongsompong in February 1991. The corruption scandal was claimed by NPKC as one of the five reasons for its decision to make a takeover of the state power.

After the takeover, NPKC formed the Asset Inspection Committee, with the power to inspect politicians and out-going ministers who were alleged to become “unusually wealthy” and the power to seize such persons’ unusually acquired assets.

¹ Nippon Poapongsakorn *et al*, “*Corruption in the Thai Public Sector: Case Study and Anti-Corruption Strategies from an Economic Perspective*”, *Anti-Corruption Strategies in Thailand in the Year 2000*, p. 8.

In February 28, 1991, the committee declared seizure of the property of the first 22 persons who were former ministers and politicians including their children and spouses.² However, after the inquiries and clarifications, the short-list of the unusually wealthy persons shrank only to 10 persons.³

Under the political circumstances in which the corruption scandal justified the military takeover, the society as a whole believed that the Commission of Counter Corruption was faced with numerous limitations and, as a result, the public demanded the political reform and new anti-corruption measures in order to prevent and combat corruption in politics and the public administration. In fact, the Commission was

² The list of those persons consisted of the following: General Chatichai Chunnhavan as Prime Minister; Mr. Pitak Intarawityanan as advisor to General Chatichai Chunnhavan; Mr. Dej Bunlong as Deputy Secretary to General Chatichai Chunnhavan; Mr. Korn Dhabbarangsi as Minister to the Prime Minister's Office; Captain Chalerm Yoobamrung as Minister to the Prime Minister's Office; Pol. General Praman Adireksarn as Industry Minister; Mr. Sanoh Tienthong as Deputy Interior Minister; Mr. Santi Chaiwiratna as Deputy Interior Minister; Mr. Wattana Aswahem as Deputy Interior Minister; Mr. Prachuab Chaisarn as Minister of Science and Technology; Mr. Banharn Silpa-acha as Finance Minister; Gen. Sanan Kachornprasart as Deputy Prime Minister; Mr. Samarn Pummakarnjana as Deputy Industry Minister; Mr. Trirong Suwankiri as Deputy Interior Minister; Mr. Suchon Champunut as Deputy Finance Minister; Mr. Pinya Chuayplod as Deputy Commerce Minister; Gen. Tienchai Sirisampan as Education Minister; Mr. Narong Wongwan as Agriculture Minister; Mr. Samak Sundaravej as Communications and Transport Minister; Mr. Chaisiri Rueingkanjanaset as Minister to the Prime Minister's Office; Mr. Udomsak Tangthong as Deputy Agriculture Minister and Mr. Montri Pongpanit as Deputy Communications and Transport Minister.

³ The finally shorted listed persons are General Chatichai Chunnhavan (with unusual wealthiness of about Baht 284.27 million); Mr. Pitak Intarawityanan (Baht 335.88 million); Mr. Pramual Sapawasu (Baht 70.7 million); Pol. General Praman Adireksarn (Baht 139.7 million); Mr. Sanoh Tienthong (Baht 62.68 million); Mr. Subin Pinkayan (Baht 608 million); Captain Chalerm Yoobamrung (Baht 31.72 million); Mr. Pinya Chuayplod (Baht 61.79 million); Mr. Wattana Aswahem (Baht 4 million); and Mr. Montri Pongpanit (Baht 336.5 million).

absolutely dominated by the political power, had limited powers in suppression and enforcement and was inefficient in fighting corruption.⁴

Therefore, the need is felt for legal reform of the body in charge with combating corruption. New legal frameworks with regard to anti-corruption in response to social demand can be seen in the new 1997 Constitution and relevant organic laws. In fact, according to section 76⁵ and section 77⁶ of the new Constitution, combating and preventing corruption is one of fundamental state policies. The new independent organisation – the National Counter Corruption Commission (NCCC) – was set up by the new Constitution and an organic law to replace the inefficient Commission of Counter Corruption. Major legal frameworks for combating corruption have been established in accordance with the constitutional provisions governing the Inspection of the Exercise of the State Power (Chapter X), consisting of (a) the Declaration of Accounts Showing Particulars of Assets and Liabilities, (b) the National Counter Corruption Commission, (c) The Removal from Office, (d) Criminal Proceedings Against Persons Holding Political Positions and (e) State Audit (Chapter XI). These measures will be discussed below.

II. The National Counter Corruption Commission

The NCCC, as an independent agency replacing the Commission of Counter Corruption⁷, is set up under the sections 297 – 302 of the current Constitution as well

⁴ Udom Ratamarit, *The Inspection of the Exercise of State Powers in accordance with the Organic Law Act on Counter Corruption*, B.E. 2542 (1999), Center for Democracy Development Studies, Thammasat University, pp. 1-3.

⁵ **Section 76:** The State shall promote and encourage public participation in laying down policies, making decision on political issues, preparing economic, social and political development plans, and inspecting the exercise of State power at all levels.

⁶ **Section 77:** The State shall prepare a political development plan, moral and ethical standard of holders of political positions, Government officials, officials and other employees of the State in order to prevent corruption and create efficiency of the performance of duties.

⁷ Subject to section 321, as a transitory provision of the new Constitution, the preceding Commission of Counter Corruption and Office of the Commission of Counter Corruption assumed the functions of the National Counter Corruption Commission or those of the Office of the Commission of Counter Corruption *de tempore* until the National Counter Corruption Commission has been appointed and the Office of the National Counter Corruption Commission has been established in accordance with the provisions of the Constitution, which shall be done within two years as from the date of the promulgation of the Constitution (i.e. 11th October 1997)

as under the Organic Act on Counter Corruption, B.E. 2542 (1999). The NCCC, as provided by the section 297⁸ of the new Constitution, consists of the President and eight qualified members appointed by the King with the advice of the Senate.⁹

The National Counter Corruption Commission has an independent secretariat, with the Secretary-General of the National Counter Corruption Commission as the superior directly answerable to the President of the National Counter Corruption Commission. The appointment of the Secretary-General of the National Counter Corruption Commission must be approved by the National Counter Corruption Commission and the Senate. The Office of the National Counter Corruption

Section 321: The Commission of Counter Corruption and the Office of the Commission of Counter Corruption under the law on counter corruption shall be the National Counter Corruption Commission and the Office of the National Counter Corruption Commission under this Constitution, as the case may be, until the National Counter Corruption Commission has been appointed or the Office of the National Counter Corruption Commission has been established in accordance with the provisions of this Constitution, which shall be done within two years as from the date of the promulgation of this Constitution.

For the purpose of implementing this Constitution, the National Counter Corruption Commission under paragraph one shall prescribe necessary regulations for the performance of its duties under this Constitution. Such regulations shall be submitted to the Constitutional Court for consideration of their constitutionality before their publication in the Government Gazette and shall be in force until the organic law on counter corruption comes into force.

etc.

etc.

⁸ **Section 297:** The National Counter Corruption Commission consists of the President and eight qualified members appointed by the King with the advice of the Senate.

Members of the National Counter Corruption Commission shall be persons of apparent integrity, with qualifications and without any of the prohibitions under section 256.

The provisions of section 257 and section 258 shall apply to the selection and election of members of the National Counter Corruption Commission *mutatis mutandis*. For this purpose, the Selection Committee for members of the National Counter Corruption Commission shall consist of fifteen members, viz, the President of the Supreme Court of Justice, the President of the Constitutional Court, the President of the Supreme Administrative Court, Rectors of all State higher education institutions which are juristic person, being elected among themselves to be seven in number, and representatives of all political parties having a member who is a member of the House of Representatives; provided that each party shall have one representative and all such representatives shall elect among themselves to be five in number.

The President of the Senate shall countersign the Royal Command appointing the President and members of the National Counter Corruption Commission.

⁹ The first group of persons appointed as members of the Commission includes Mr. Opas Arunin as President, Mr. Kamol Prachuabmoh, Mr. Kirkkiat Pipatseritham, Mr. Nat Sriwihok, Mr. Prasit Damrongchai, Khunying Priya Kasemsan Na Ayudhya (later resigned), Mrs. Ruedi Jiwaluk, Mr. Wirat Wattanasiritham and Mr. Sawat Orrungroj, as members.

Commission, equivalent in status to a Department, has autonomy in personnel administration, budget and other activities as provided by law.

The NCCC Against Corruption

Subject to the new Constitution and the Organic Act on Counter Corruption, the NCCC has powers and duties in connection with the prevention and suppression of corrupt behaviours and corruption in the government and in connection with the inspection of unusually wealthy holders of political positions. According to the new Constitution and the Organic Act on Counter Corruption, the holders of political posts that fall under the ambit of the Act include Prime Minister, Minister, Member of the House of Representatives, Senator, Governor of Bangkok Metropolitan Administration, Deputy Governor of Bangkok Metropolitan Administration and etc.

For the purposes of counter corruption, section 301 of the new Constitution prescribes the powers and duties of the NCCC as follows:

(1) to inquire into facts, summarise the case and prepare opinions to be submitted to the Senate upon receipt of the request for removing any person from office according to section 305¹⁰ of the Constitution;

¹⁰ **Section 305:** Upon receipt of the request under section 304, the President of the Senate shall refer the matter to the National Counter Corruption Commission for investigation without delay.

When the investigation is complete, the National Counter Corruption Commission shall prepare a report thereon for submission to the Senate. The said report shall clearly state whether, and to what extent, the accusation put in the request has a *prima facie* case and shall state the reasons therefor.

In the case where the National Counter Corruption Commission is of the opinion that the accusation put in the request is an important matter, the National Counter Corruption Commission may make a separate report specifically on the said accusation and refer it to the Senate in advance.

If the National Counter Corruption Commission passes a resolution that the accusation has a *prima facie* case, the holder of the position against whom the accusation has been made shall not, as from the date of such resolution, perform his or her duties until the Senate has passed its resolution. The President of the National Counter Corruption Commission shall submit the report, existing documents and its opinion to the President of the Senate for proceeding in accordance with section 306 and to the Prosecutor General for instituting prosecution in the Supreme Court of Justice's Criminal Division for Persons Holding Political Positions. If the National Counter Corruption Commission is of the opinion that the accusation has *no prima facie* case, such accusation shall lapse.

(2) to inquire into facts, summarise the case and prepare opinions to be submitted to the Supreme Court of Justice's Criminal Division for Persons Holding Political Positions in the case where any holder of political office has been accused of becoming unusually wealthy or of committing malfeasance in office according to the Penal Code or a dishonest act in the performance of duties or corruption in accordance with section 308¹¹ of the Constitution;

(3) to inquire and decide whether a State official has become unusually wealthy or has committed an offence of corruption, malfeasance in office or malfeasance in judicial office in order to take further action in accordance with the organic law on counter corruption (the Organic Act on Counter Corruption, B.E. 2542 (1999));

(4) to inspect the accuracy, actual existence as well as change of assets and liabilities of the persons holding positions under section 291¹² and section 296¹³ of the Constitution as stated in the account and supporting documents submitted;

In the case where the Prosecutor General is of the opinion that the report, documents and opinion submitted by the National Counter Corruption Commission under paragraph four are not so complete as to institute prosecution, the Prosecutor General shall notify the National Counter Corruption Commission for further proceedings and, for this purpose, the incomplete items shall be specified on the same occasion. In such case, the National Counter Corruption Commission and the Prosecutor General shall appoint a working committee, consisting of their representatives in an equal number, for collecting complete evidence and submit it to the Prosecutor General for further prosecution. In the case where the working committee is unable to reach a decision as to the prosecution, the National Counter Corruption Commission shall have the power to prosecute by itself or appoint a lawyer to prosecute on its behalf.

¹¹ **Section 308:** In the case where the Prime Minister, a minister, member of the House of Representatives, senator or other political official has been accused of becoming unusually wealthy, or of the commission of malfeasance in office according to the Penal Code or a dishonest act in the performance of duties or corruption according to other laws, the Supreme Court of Justice's Criminal Division for Persons Holding Political Positions shall have the competent jurisdiction to try and adjudicate the case.

The provisions of paragraph one shall also apply to the case where the said person or other person is a principal, an instigator or a supporter.

¹² **Section 291:** Persons holding the following political positions shall submit an account showing particulars of assets and liabilities of themselves, their spouses and children who have not yet become *sui juris* to the National Counter Corruption Commission on each occasion of taking or vacating office:

- (1) Prime Minister;
- (2) ministers;

(5) to submit an inspection report and a report on the performance of duties together with remarks to the Council of Ministers, the House of Representatives and the Senate annually and publish that report for dissemination;

(6) to carry on other acts as provided by law.

For the purpose of the inspection of assets and liabilities, for example, the holders of political positions are required by the new Constitution to submit an account showing particulars of assets and liabilities of themselves, their spouses and children who have not yet become *sui juris* to the NCCC on each occasion of taking or vacating office. In case a holder of a political position intentionally fails to submit the account detailing assets and liabilities as well as supporting documents or intentionally submits the same with false statements or conceals the facts which should be revealed in accordance with sections 291 and 295 of the Constitution¹⁴, the

(3) members of the House of Representatives;

(4) senators;

(5) other political officials;

(6) local administrators and members of a local assembly as provided by law.

The account under paragraph one shall be submitted together with the supporting documents evidencing the actual existence of such assets and liabilities as well as a copy of the personal income tax return of the previous fiscal year. The declarer shall certify the accuracy of the account and copies of the submitted documents by affixing his or her signature on every page thereof.

¹³ **Section 296:** The provisions of section 291, section 292, section 293 paragraph one and paragraph three and section 295 paragraph one shall apply *mutatis mutandis* to other State officials as provided by the organic law on counter corruption.

¹⁴ **Section 295:** Any person holding a political position who intentionally fails to submit the account showing assets and liabilities and the supporting documents as provided in this Constitution or intentionally submits the same with false statements or conceals the facts which should be revealed shall vacate office as from the date of the expiration of the time limit for the submission under section 292 or as from the date such act is discovered, as the case may be, and such person shall be prohibited from holding any political position for five years as from the date of the vacation of office.

When the case under paragraph one occurs, the National Counter Corruption Commission shall refer the matter to the Constitutional Court for further decision, and when the decision of the Constitutional Court is given, the provisions of section 97 shall apply *mutatis mutandis*.

Section 97: The vacation of the office of a member of the House of Representatives or a senator after the day on which his or her membership terminates or the day on which the Constitutional Court decides that the membership of any member terminates does not affect any act done by such member in the capacity as member including the receipt of emolument or other remuneration by such member before he or she vacates office or the President of the

NCCC shall refer the matter to the Constitutional Court for the Court's decision to remove such person from office and prohibit the person from holding any political position for the period of five years.

Recently, Klanarong Chantik, Secretary-General of the NCCC, has, in exercise of the powers and duties under section 301 of the Constitution, lodged a request, on behalf of the NCCC, to the Constitutional Court for decision against former politicians and former high-ranking officials. Among these persons was Prime Minister Thaksin Shinawatra. In this connection, the issue needing determination by the Constitutional Court *vis-à-vis* Prime Minister Thaksin was whether he intentionally failed to submit the account showing assets and liabilities and supporting documents or intentionally submitted the account and the supporting documents with false statements or concealed the facts which should be revealed in accordance with section 295. The Constitutional Court, however, by a very critically small majority, delivered judgment dismissing the accusation against Thaksin, in the face of public opinions.

III. Declaration of Accounts Showing Particulars of Assets and Liabilities as a Legal Framework

Previously, at least two laws required holders of political positions to prepare and declare accounts detailing particulars of their assets and liabilities. Firstly, the Act on Counter Corruption, B.E. 2518 (1975) set forth a requirement that holders of major positions in the government service as well as politicians submit their accounts showing particulars of assets and liabilities to the Commission of Counter Corruption on each occasion of taking or vacating office. The parallel requisite was also found in the Act on Declaration of Accounts Showing Particulars of Assets and Liabilities of Members of the House of Representatives and Senators, B.E. 2539 (1996), according to which Members of the House of Representatives and senators were under the

House of which such person is a member has been notified of the decision of the Constitutional Court, as the case may be, except that in the case of vacation of office on the ground of his or her being elected in violation of the organic law on the election of members of the House of Representatives and senators, emolument and other remuneration received from being in office shall be returned.

obligation to submit their accounts demonstrating details of their assets and liabilities to the President of the House of Representatives.

However, the legal measures enshrined by those laws were vastly inefficient because there was no statutory provision empowering the Commission of Counter Corruption to inspect the accuracy of the accounts showing particulars of assets and liabilities. As a result, there was no prosecution against any politician. The statutory requirement as to the declaration of accounts appeared to be no more than dead black-letters.

Under the circumstance, the new Constitution lays down the provisions requiring holders of political positions to submit the declaration of accounts showing particulars of assets and liabilities in Chapter X, Part I, sections 291-296 and provides that an organic law on counter corruption must be enacted to prescribe forms and means of a declaration and to found the National Counter Corruption Commission in the implementation of the Constitution with the function of inspecting accounts submitted.

The organic law on counter corruption has eventually emerged under the name the “Organic Act on Counter Corruption, B.E. 2542 (1999)”. Unlike the two previous laws, the Organic Act on Counter Corruption, B.E. 2542 (1999) provides that holders of certain political positions, as specified by the Act itself, must submit a declaration of their accounts showing particulars of assets and liabilities to the National Counter Corruption Commission and that the NCCC is empowered to inspect the accuracy, actual existence and change of assets and liabilities of the holders of those positions. The Act expressly introduces an effective sanction for non-compliance with the declaration requirements. Under the Act, any holder of a political position who intentionally fails to submit the account showing assets and liabilities and the supporting documents or intentionally submit it with false statements or conceals the facts which should be revealed must be ousted from office and, as an additional penalty, is prohibited from holding any political position for five years.

Under section 291 of the new Constitutions, persons holding the following political positions are required to submit an account showing particulars of their assets and liabilities and those of their spouses and children who have not yet become *sui*

juris to the National Counter Corruption Commission on each occasion of taking or vacating office: (1) Prime Minister, (2) Ministers, (3) members of the House of Representatives, (4) senators, (5) other political officials (such as Secretary-General to Prime Minister and secretary to minister) and (6) local administrators and members of a local assembly as provided by law.

The account revealing assets and liabilities that is required to be submitted to the NCCC must be accompanied by supporting documents evidencing the actual existence of such assets and liabilities as well as a copy of the personal income tax return of the previous fiscal year. In effect, the declarer must certify the accuracy of the account and copies of the submitted documents by affixing his or her signature on every page of the account and documents. The submission of the copy of the personal income tax return is apparently required for the purpose of inspecting payment of the personal income tax, which can, in turn, lead to discoveries of asset.¹⁵

As for holders of executive positions such as Prime Minister, Ministers, local administrators and members of a local assembly, the new Constitution also makes it compulsory for them to resubmit an account showing particulars of assets and liabilities within thirty days as from the date of the expiration of one year after the vacation of office. This requirement reassures that the likelihood of corruption by position holders will not easily evade the statutory inspection net.

The account and supporting documents submitted by the Prime Minister and Ministers must be disclosed to public. The public can thus be informed about the

¹⁵ The time within which an account showing particulars of assets and liabilities must be submitted is fixed as follows:

(1) in the case of the taking of office, within thirty days as from the date of taking office;

(2) in the case of the vacation of office, within thirty days as from the date of the vacation;

(3) in the case where the position holder who has already submitted the account dies while being in office or before submitting the account after the vacation of office, an heir or an administrator of an estate of such person shall submit an account showing the particulars of assets and liabilities existing on date of such person's death within ninety days as from the date of the death.

amount of assets and liabilities of the persons holding political positions. This will facilitate public scrutiny of corruption within the cabinet and, in effect, promote public participation. In the case of position holders other than Prime Minister and Ministers, their accounts of assets and liabilities will not be publicly disclosed unless the disclosure will be useful for the trial and adjudication of cases or for the making of a decision and is requested by the courts or the State Audit Commission.

After receiving the accounts, the President of the NCCC shall convene a meeting of the Commission to inspect the accuracy and the actual existence of assets and liabilities without delay. The new Constitution prevents the problematic state of affairs that occurred in the past, that is, holders of political positions declared the account showing the assets and liabilities exceeding the actual existence so as to avoid an accusation of having unusually increased asset after vacating office. In the case where the submission of the account is made by reason of the vacation of office or death of a position holder, the NCCC will also inspect the change of assets and liabilities of such person and prepare a report of the inspection. Such report is to be published in the Government Gazette as well.

If it appears that the assets of the person holding the position have unusually increased, the President of the NCCC will subsequently send all documents together with the inspection report to the Prosecutor General to institute an action in the Supreme Court of Justice's Criminal Division for Persons Holding Political Positions so that the Court will order that the unusually increasing assets become the property of the State.

Also, where the person holding the position intentionally fails to submit the account showing the assets and liabilities and the supporting documents or intentionally submits the account with false statements or conceals the facts which should be revealed, the NCCC must refer the matter to the Constitutional Court for its decision. Notably, only the Constitutional Court, not the NCCC, can give a decision on this issue.

In fact, the counter corruption legal framework in the form of the declaration of accounts showing particulars of assets and liabilities is not sufficient in and by itself. It is also necessary to rely on other constitutional provisions governing the

Removal from Office, Criminal Proceedings Against Persons Holding Political Positions and State Audit, as will be expounded below.

IV: Removal of Corrupt Position Holders from Office

According to the current Constitution, a measure so-called “The Removal from Office” is laid down primarily to control and supervise the exercise of state powers by persons holding political positions and key positions. The positions brought under the ambit of the Constitution include Prime Minister, Minister, member of the House of Representatives, senator, President of the Supreme Court of Justice, President of the Constitutional Court, President of the Supreme Administrative Court, Prosecutor General, Election Commissioner, Ombudsman, Judge of the Constitutional Court, member of the State Audit Commission, judge, public prosecutor or high ranking official in accordance with the organic law on counter corruption. Any person holding any of these positions will be removed from office when found under the circumstance of unusual wealthiness or under circumstances indicative of the commission of corruption, malfeasance in office, malfeasance in judicial office or an intentional exercise of power contrary to the provisions of the Constitution or law.

Pursuant to section 303¹⁶ of the Constitution, the Senate is the institution which has the power to remove the accused person from office. Under section 304¹⁷ of the Constitution, the persons who have the right to lodge with President of the

¹⁶ **Section 303:** A person holding a position of Prime Minister, Minister, member of the House of Representatives, senator, President of the Supreme Court of Justice, President of the Constitutional Court, President of the Supreme Administrative Court or Prosecutor General, who is under the circumstance of unusual wealthiness or under circumstances indicative of the commission of corruption, malfeasance in office, malfeasance in judicial office or an intentional exercise of power contrary to the provisions of the Constitution or law, may be removed from office by the Senate.

¹⁷ **Sections 304:** Members of the House of Representatives of not less than one-fourth of the total number of the existing members of the House or voters of not less than fifty-thousand in number have the right to lodge with the President of the Senate a complaint in order to request the Senate to pass a resolution under section 307 removing the persons under section 303 from office. The said request shall clearly itemise circumstances in which such persons have allegedly committed the act.

Senators of not less than one-fourth of the total number of the existing members of the Senate have the right to lodge with the President of the Senate a complaint in order to request the Senate to pass a resolution under section 307 removing a senator from office.

Senate a complaint in order to request the Senate to pass a resolution removing any person from office are (a) members of the House of Representatives of not less than one-fourth of the total number of the existing members of the House, (b) voters of not less than fifty-thousand in number and (c) senators of not less than one-fourth of the total number of the existing members of the Senate.

Upon receipt of such a request, the President of the Senate shall refer the matter to the National Counter Corruption Commission for investigation. When the investigation is complete, the National Counter Corruption Commission is required to prepare a report for submission to the Senate. The said report must clearly state whether, and to what extent, the accusation put in the request has *prima facie* case. To ensure transparency, the Constitution makes it compulsory that the report state the reasons in support of the findings as well. In addition, where the National Counter Corruption Commission is of the opinion that the accusation put in the request is an important matter, the NCCC may make a separate report specifically on the said accusation and refer it to the Senate in advance.

If the National Counter Corruption Commission passes a resolution that the accusation has a *prima facie* case, the holder of the position against whom the accusation has been made is, as from the date of such conclusion, not allowed to perform his or her duties until the Senate has passed its resolution.

Upon receipt of the report, the President of the Senate shall convoke a sitting of the Senate for considering the said matter. A senator shall have autonomy in casting a vote, which must be by secret ballot. A resolution for the removal of a particular person from office shall be passed by votes of not less than three quarters of the total number of the existing members of the Senate. The person who is removed from office is regarded as vacating office or released from government service as from the date of the resolution of the Senate. Further, such person is also deprived of the right to hold any political position or to serve in the government service for five years.

The rules, procedure and conditions for the lodging of the complaint by the voters under paragraph one shall be in accordance with the organic law on counter corruption.

V. Criminal Proceedings Against Corrupt Position Holders

In addition to being removed from office and prohibited from holding a political position or serving the government service for a reasonable length of time, the person who is found corrupt is subject to criminal proceedings, too. For this purpose, the Constitution establishes a special procedure called “Criminal Proceedings Against Persons Holding Political Positions”, as contained in sections 308 – 311. In effect, the Constitution mandates the establishment in the Supreme Court of Justice of a special division – the “Criminal Division for Persons Holding Political Positions” for trial and adjudication of a case brought against the corrupt position holder.

Where the Prime Minister, a minister, member of the House of Representatives, senator or other political official has been accused of becoming unusually wealthy, or of the commission of malfeasance in office according to the Penal Code or a dishonest act in the performance of duties or corruption according to other laws, the Supreme Court of Justice’s Criminal Division for Persons Holding Political Positions shall have the competent jurisdiction to try and adjudicate the case. In a trial, although the Supreme Court of Justice’s Criminal Division for Persons Holding Political Positions must rely on the file prepared by the National Counter Corruption Commission, the Court may conduct an investigation in order to obtain additional facts or evidence as it thinks fit. An adjudication of a case is by a majority of votes but each judge constituting the quorum is required to prepare his or her written opinion and make oral statements to the meeting prior to the passing of a resolution.

VI: The State Audit

Thailand has had the state audit since the reign of King Rama IV and at that time the Auditors Office was set up to inspect the state audit. Later, in 1979, the Office of State Audit was established as a government agency and ascribed a status equivalent to Department, with direct answerability to the Prime Minister.

Due to the problems with regard to autonomy and impartiality, the Office of the State Audit was unable to perform its functions with efficiency. Therefore, the current Constitution gives a new paragon to the Office of the State Audit. Under the new model, the Office is an independent and autonomous agency answerable directly

not to any ministerial post but to a specially set up commission called the “State Audit Commission”. This special body is equipped with principal powers and duties to formulate state audit policies and prescribing criteria and standards of the state audit.

The Constitution requires enactment of an organic law in the implementation of the legal framework generally erected by the Constitution. This organic law – the Organic Act on State Audit, B.E. 2542 (1999) has now been promulgated and entered into force. Under the Constitution and the said Organic Act, the State Audit Commission consists of the Chairman and nine other members appointed by the King with the advice of the Senate, from persons with expertise and experience in state audit, accounting, internal audit, finance and other fields. Members of the State Audit Commission serve for a definite term of six years from the date of their appointment by the King and may not be re-appointed. This is an endeavour to guarantee the member’s freedom from interference by any persons. The Auditor-General, who is the superior of the Office of the State Audit (that serves as a secretariat of the State Audit Commission) is appointed by the King with the advice of the Senate.

The Organic Act on State Audit also sets out qualifications and selection procedures of members of the State Audit Commission as well as of the Auditor-General. The determination of these qualifications and procedures is, in fact, in a manner which can secure persons of appropriate qualifications an integrity and which can provide for guarantee of the independence in the performance of duties of such persons.

VII: Conclusion:

We have seen significant reform in the context of anti-corruption. The Constitution strives to lay down many mechanisms to prevent and combat the incidence of corrupt practices. Of particular note are the requirements as to the declaration of property, through the submission of accounts listing assets and liabilities of persons holding political positions as well as key positions in the government service. Those found corrupt or in violation of the constitutional requirements are not only subject to removal from office but also to criminal proceedings. It is hoped that all this novelty will help build up clean and good governance. However, a real effectiveness in this matter will be dependent upon the

performance of functions of each member of the National Counter Corruption Commission and each judge of the Constitutional Court, too. If members of these organs are, for example, led by personal connections or otherwise inappropriately motivated in their conclusion or judgment as regards corrupt or violating conduct of holders of political positions, these culprits will unfortunately evade the constitutional and statutory teeth. In fact, in Thailand, the scandal concerning Thaksin Chinawatra's declaration of assets and liabilities does not seem to have survived public criticisms surrounding impartiality and integrity of the majority judges of the Constitutional Court. It is, again, hoped that this kind of incidence will not frequently occur.

CHAPTER 8

JUDICIAL REVIEW UNDER THE NEW CONSTITUTION

I: Introduction

According to the constitutionalism notion, the constitution, to be consistent with the rule of law principle, has to embody the separation of state powers as a measure for safeguarding the rights and liberties of the people and it must be recognised as the supreme law of the country. In line with that conception, legislative actions must be constitutional whilst all actions of the executive and the judiciary have to be lawful as well. Moreover, in order to prevent the state from abusing its powers in a manner jeopardising rights and liberties of the people, actions by state agencies will have to be subject to judicial review.

Following such idea of constitutionalism, the Constitution of the Kingdom of Thailand lays down measures safeguarding the rights and liberties of the people. As a preventive measure, the Legislature is prohibited from enacting laws restricting such rights and liberties of the people as recognised by the Constitution, except by virtue of provisions of the law specifically enacted for the purpose and only to the extent of necessity and provided that they shall not affect the essential substances of such rights and liberties. Such provisions of the law must, in addition, be of general application and may not be intended to apply to any particular case or person. No matter so well this preventive measure has been inserted into the Constitution, in practice, the exercise of state powers, whether the legislative power, the executive power or the judicial power, which is done through a person, will unavoidably encroach upon rights and liberties of private individuals. For this reason, the Constitution also enshrines a corrective measure, that is, making a violating action by state official subject to a review by a judicial or non-judicial body. Our examination in this Chapter will be limited to judicial review.

As already explained in other Chapters, the Constitution has established 4 categories of Courts with different jurisdictions. Certainly, such division

occasionally gives rise to the jurisdictional problem. In this Chapter, discussions will be focused on the following: (1) the judicial system under the Constitution (2) the relationship among courts and (3) problems relevant to the relationship among courts.

II. The Judicial System under the Current Constitution

Provisions of Chapter VIII on Courts establish the quartet judicial system. There are four main courts, namely, the Constitutional Court, Courts of Justice, Administrative Court and Military Court. The court of each category has independent and different functions.

1. The Constitutional Court

Although the Constitutional Court is not at the top of the hierarchy in the quartet judicial system, it is regarded as the most important court in view of its jurisdiction over the determination of constitutionality-related issues. The inspection system over the constitutionality-related issues in Thailand changed over time. Early constitutions regarded the House of Representatives as having supreme competence to interpret the constitution, as can be seen in the Constitutions of 1932. At the second stage, the constitution conferred such competence upon the National Assembly and the Constitutional Tribunal (as envisioned in the Constitution of 1946, the Constitution of 1947, the Constitution of 1949, the Constitution of 1952, the Constitution of 1974 and the Constitution of 1978). At a later time, only the Constitutional Tribunal was recognised by the constitution as competent to interpret the constitution¹. In the drafting process of the current Constitution, some studies suggested that the Constitutional Tribunal was fraught with much difficulty, it encountered the lack of autonomy and inability to perform functions on a continuous fashion. The defects were occasioned by its inappropriate composition that was largely made up of politicians and, in addition, by the fact that the term of

¹ Amorn Chandara-Somboon, “*The Constitutional Court*”, *Administrative Law Journal*. Vol. 12, December, 1993, pp. 519-609.

office of its member was dependent on the term of the House of Representative.² Therefore, there was made a proposal for the establishment of a Constitutional Court to bridle those shortcomings. This proposal was adopted and has given rise to several provisions in the present Constitution dealing with the 'Constitutional Court'. We will now discuss two major functions of the Constitutional Court: firstly, the determination of constitutionality issues and, secondly, the determination of powers and duties of organs established by the Constitution.

1.1 The Constitutionality Determination Role

The power to determine the constitutionality of legislation is of significant importance. The Constitutional Court considers whether any provision of any law is contrary to or inconsistent with the Constitution. A legal provision that is found unconstitutional will be nullified or void. The Constitutional Court can make the determination about the constitutionality both before promulgation of the legislation in question (that is, at the stage of a Bill) or after the law has already been promulgated.

(1) Determining the Constitutionality of A Bill

Any bill approved by the National Assembly can be examined by the Constitutional Court as to whether it is contrary to or inconsistent with the Constitution. In this connection, a request may be directed to the Constitutional Court for considering a Bill before the Prime Minister presents it to the King for the King's signature. If the Constitutional Court decides that a statement contained in the bill is contrary to or inconsistent with the Constitution and that statement constitutes the essential component of the Bill, then the bill will lapse in its entirety. If the problematic statement does not form the essential element of the Bill, it will follow that only such statement will have to be scrapped.

² Rachata Promwan, Directions for Developing the Autonomy of the Members of the Constitutional Tribunal in Thailand, Thesis, Faculty of Law, Thammasat University, p. 106,

(2) Determining the Constitutionality of an Act

Even though the Constitution attempts to forestall unconstitutionality at the outset through the mechanism by which a Bill can be challenged as unconstitutional, certain bills may probably elude the unconstitutionality censorship and may eventually be promulgated. It is for this reason that the Constitution also provides for a measure for deciding on the constitutionality of a promulgated Act. In a case brought before the Court of Justice, if the Court is of opinion that, or if a party to the litigation raises an objection that, the provisions of the Act at issue are contrary to or inconsistent with the Constitution and there has not been a decision of the Constitutional Court with regard to such provisions, the Court of Justice is obligated to stay the trial and adjudication of the case and refer the constitutionality issue to the Constitutional Court for its consideration and determination.

1.2 Determining Powers and Duties of Constitutional Organs

Now that the Constitution establishes several supervisory organs in charge of inspecting the exercise of state powers, conflicts may possibly arise as to powers and duties of those organs. This will, no doubt, have impacts on the exercise of state powers along the line of the spirits of the Constitution. The Constitution, therefore, confers upon the Constitutional Court the power to make the determination of the emerging conflicts.³

The justifications for empowering the Constitutional Court to settle this kind of conflict are twofold. First, given that the conflict arises as regards the powers and duties of organs established by the Constitution, the Constitutional Court should be in a better position than any other body to determine the conflict. Secondly, it must be recalled that the Constitutional Court has the power to interpret provisions of the Constitution. A conflict regarding powers and duties of organs under the Constitution is, in reality, the conflict needing interpretation of the provisions of the

cited in Banjerd Singkaneti, *General Concepts Underlying the Constitutional Court*, Bangkok: Winyoochon, 2001, p. 129.

³ However, in case of a conflict over jurisdictions of courts, such conflict, according to the Constitution, is to be resolved by a separate specially established commission rather than by the Constitutional Court. (Before the current Constitution, a jurisdictional conflict between courts was to be referred to the Constitutional Tribunal.)

Constitution concerned, with a result that it falls within the competence of the Constitutional Court accordingly.

2. The Court of Justice

According to Chapter VIII, Part 3 of the Constitution, the Court of Justice has competence to try and adjudicate all cases except those specified to be within the jurisdiction of other special courts. There are three levels of Courts of Justice, namely, the Court of First Instance, the Court of Appeal and the Supreme Court of Justice.

In the Supreme Court of Justice, the Constitution also establishes a special division – the Criminal Division for Persons Holding Political Positions – dedicated to trying accusations made against those holding political positions, as initially discussed in the previous chapter. According to the Organic Act on Criminal Procedure for Persons Holding Political Positions B.E. 2542 (1999), the trial and inquiry conducted by the Supreme Court of Justice's Criminal Division for Persons Holding Political Positions shall be based on the case-file prepared and referred to it by the National Counter Corruption Commission, but the Supreme Court of Justice's Criminal Division for Persons Holding Political Positions may conduct additional hearings for fact finding as it thinks fit. A decision will be by a majority of votes and each member of the quorum is required to prepare a written opinion and to give a verbal statement at a meeting of the quorum before a final resolution is passed by the quorum. An order and judgement of the Supreme Court of Justice's Criminal Division for Persons Holding Political Position is to be taken as final and is also required to be published.

The Constitution provides for a safeguard of judicial independence of judges of Courts of Justice. The promotion of judges is not dependent on ministerial or administrative officials but is within attentive oversight by the 'Judicial Commission of the Courts of Justice' which is set up by the Constitution and composed of judges from all levels of the Courts of Justice. Under the new Constitution, the Court of Justice also has an independent administrative office in charge of studying and evaluating performances and gathering judicial precedents.

3. The Administrative Court

The present Constitution adopts the dual judicial system whereby the Administrative Court is separated from the Court of Justice. Under section 276 of the Constitution, the Administrative Court have the powers to try and adjudicate (a) cases of dispute between a State agency, State enterprise, local government organisation, or State official under the superintendence or supervision of the Government on one part and a private individual on the other part, or (b) cases of dispute amongst State agencies, State enterprises, local government organisations, or State officials under the superintendence or supervision of the Government. The dispute must be as a consequence of the act or omission of the act that the law requires to be performed by such State agency, State enterprise, local government organisation, or State official, or as a consequence of the act or omission of the act under the responsibility of such State agency, State enterprise, local government organisation or State official in the performance of duties under the law.

The Organic Act on the Establishment of Administrative Courts and Administrative Court Procedures, B.E. 2542 (1999), which has been enacted in the implementation of the Constitution, specifies the following cases as falling within the jurisdiction of the Administrative Court:

(1) the case involving a dispute in relation to an unlawful act committed by an administrative agency or the State official, be it in connection with the issuance of a by-law or an order or in connection with any other act, by reason of acting without or beyond the scope of the powers and duties or inconsistently with the law or the form, process or procedure which is the material requirement for such act or in bad faith or in a manner indicating unfair discrimination or causing unnecessary process or excessive burden to the public or amounting to undue exercise of discretion;

(2) the case involving a dispute in relation to an administrative agency or State official neglecting official duties required by the law to be performed or performing such duties with unreasonable delay;

(3) the case involving dispute in relation to a wrongful act or other liability of an administrative agency or State official arising from the exercise of power under the law or from a by-law, administrative order or other order, or from the neglect of official duties required by law to be performed or the performance of such duties with unreasonable delay; and

(4) the case involving a dispute in relation to an administrative contract.

In sum, the Administrative Courts, as established for the first time by the Constitution and the Act on the Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999), will play a vital role in inspecting lawfulness or legality of administrative acts. Such scrutiny will, in turn, result in a better safeguard of rights and liberties of individuals as well as more transparent and accountable administrative performance.

4. The Military Court

The Military Court has competence to try and adjudicate military criminal cases. There are three levels of the Military Court: (1) the Military Court of First Instance, (2) the Central Military Court and (3) the Supreme Military Court. The Military Court will try and adjudicate only criminal cases in which criminal offences are committed by military officers; the Military Court has no competence over civil disputes. The prime justification for establishing the Military Court as a separate judicial body from ordinary Courts of Justice lies in an attempt to impose a more stringent control on military members. This will help prevent military officers from committing unpeaceful acts rather than performing peace-keeping duties.

III. Relationship among Judicial Bodies

As spelled out above, four types of Courts have been established by the Constitution, namely, the Constitutional Court, the Court of Justice, the Administrative Court and the Military Court. In effect, some relationships can be found in the classification. We will here look at, first, the relationship between the Constitutional Court and other Courts and, secondly, the relationships among the Court of Justice, the Administrative Court and the Military Court.

1. Relationships between the Constitutional Court and other Courts

The relationships between the Constitutional Court and other Courts can be explored in two dimensions: the relationship in connection with the jurisdiction and the relationship in the aspect of the binding force of decisions of the Constitutional Court on other Courts.

1.1 Jurisdictional Relationship

The Constitutional Court has specific competence in interpreting provisions of the Constitution. This competence does not vest in other Courts. No other Court can, therefore, decide constitutionality of given legislation or disputes involving powers and duties of the organs established by the Constitution. Other Courts may have a part in the constitutionality-determination process only by way of referring the issue to the Constitutional Court where such issue is perceived by the Court itself or is raised by the litigant party, in litigation *ex casu* before the Court.

1.2 Binding Effect of the Constitutional Court's Decisions

Under section 27⁴ of the Constitution, a decision of the Constitutional Court is binding on other Courts in the enforcement and interpretation of laws. Further, section 268⁵ provides that a decision of the Constitutional Court shall be deemed final and binding on other Courts, provided, however, that it will not prejudice final judgments of other Courts.⁶

⁴ **Section 27:** Rights and liberties recognised by this Constitution expressly, by implication or by decision of the Constitutional Court shall be protected and directly binding on the National Assembly, the Council of Ministers, Courts and other State organs in enacting, applying and interpreting laws.

⁵ **Section 268:** The decision of the Constitutional Court shall be deemed final and binding on the National Assembly, Council of Ministers, Courts and other State organs.

⁶ This qualification is expressly stipulated in section 264 paragraph three of the Constitution.

Section 264: In the application of the provisions of any law to any case, if the Court by itself is of the opinion that, or a party to the case raises an objection that, the provisions of such law fall within the provisions of section 6 and there has not yet been a decision of the Constitutional Court on such provisions, the Court shall stay its trial and adjudication of the case and submit, in the course of official service, its opinion to the Constitutional Court for consideration and decision.

2. The Relationships among the Court of Justice, the Administrative Court and the Military Court

As mentioned above, the Court of Justice is the court with general competence to try and adjudicate all cases not falling under the jurisdiction of other special Courts. However, there may occur a dispute between different courts over their jurisdiction to try a case in question. Such jurisdictional dispute is considered and determined by a jurisdictional committee specifically set up for this purpose. The committee is chaired by the President of the Supreme Court and consists of the President of the Supreme Administrative Court, Head of the Office of Military Judges, the President of other Courts (in case other special Courts are established), and other qualified persons (not exceeding four in number).

The Committee takes charge of considering and making the determination of a jurisdictional issue as referred to it by a Court or a party to a case. More precisely, three scenarios of conflicts can be referred to the Committee for deliberation; first, the conflict as to the jurisdiction of different courts, second, the conflict emerging from different final judgments or different orders of Courts and, finally, the conflict between Courts in connection with provisional measures before judgment, the filing of a motion with the Court before litigation as provided by law, the taking of evidence before litigation, the execution of judgment or order and the performance of other duties of the Courts.

IV: Problems Involving Relationships among the Judiciary

We have now experienced a critical problem in connection with the relationship among judicial bodies. The problem, indeed, takes root from a decision of the Constitutional Court No. 24/2543 which was concerned with the Regulation of the Election Commission on Calling for a New Election Before the Announcement of the Result of the Election of Senators (No. 2), B.E. 2543 (2000).

In the case where the Constitutional Court is of the opinion that the objection of a party under paragraph one is not essential for decision, the Constitutional Court may refuse to accept the case for consideration.

The decision of the Constitutional Court shall apply to all cases but shall not affect final judgments of the Courts.

This Regulation intended to bar a person from being a candidate in an election of a senator if that person was a candidate in a previous election of a senator and, at that prior election, was refused an announcement of the election result on more than one occasion. The facts of this saga and the much criticised decision of the Constitutional Court can succinctly be explained below.

The Ombudsman received a complaint from a candidate in an election of a senator for Udonthani Province. It was alleged that the Regulation issued by the Election Commission was unconstitutional by reason of its repugnance to section 126⁷ of the Constitution, and based upon such allegedly unconstitutionality, it was requested that the Ombudman refer the matter to the Constitutional Court for its decision, in accordance with section 198⁸ paragraph one of the Constitution.

Although the Constitutional Court is a competent organ to make the determination as to constitutionality of legislation, the Constitutional Court, in the instant case, went on to consider whether this matter would fall within the jurisdiction of the Administrative Court in accordance with section 276 of the Constitution. In this instance, the Constitutional Court's interpretation of section 276 of the Constitution has sparked a serious problem surrounding the jurisdiction of the Administrative Court.

⁷ **Section 126:** A person under any of the following qualifications shall have no right to be a candidate in an election of senators:

- (1) being a member of or holder of other position of a political party;
- (2) being a member of the House of Representatives or having been a member of the House of Representatives and his or her membership has terminated for not yet more than one year up to the date of applying for the candidacy;
- (3) being or having been a senator in accordance with the provisions of this Constitution during the term of the Senate preceding the application for the candidacy;
- (4) being disfranchised under section 109 (1), (2), (3), (4), (5), (6), (7), (8), (9), (11), (12), (13) or (14).

⁸ **Section 198:** In the case where the Ombudsman is of opinion that the provisions of the law, rules, regulations or any act of any person under section 197 (1) begs the question of the constitutionality, the Ombudsman shall submit the case and the opinion to the Constitutional Court or Administrative Court for decision in accordance with the procedure of the Constitutional Court or the law on the procedure of the Administrative Court, as the case may be.

The provision in question – section 276 paragraph one of the Constitution – which is the general provision spelling out the competence of the Administrative Court states “The Administrative Courts have the powers to try and adjudicate cases of dispute between a State agency, State enterprise, local government organisation, or State official *under the superintendence or supervision of the Government* on one part and a private individual on the other part, or between a State agency, State enterprise, local government organisation, or State official *under the superintendence or supervision of the Government* on one part and another such agency, enterprise, organisation or official on the other part as provided by law” (emphasis added). The Constitutional Court has decided that the Administrative Court in this case had no power to decide the legal status of the Regulation issued by the Election Commission, the reason being that the Election Commission, as an independent organ under the Constitution itself, is not “a State agency, State enterprise, local government organisation, or State official *under the superintendence or supervision of the Government*”. This being so, the constitutionality of the Regulation of the Election Commission in the case under discussion would straightforwardly fall under the jurisdiction of the Constitutional Court, and, with regard to the constitutionality, the Constitutional Court was of the opinion that the said Regulation ran counter to the Constitution – it was inconsistent

The Constitutional Court or Administrative Court, as the case may be, shall decide the case submitted by the Ombudsman under paragraph one without delay.

with section 29 paragraph one⁹ and section 126¹⁰ of the Constitution – and, thus became unenforceable, in accordance with section 6.¹¹

The decision of the Constitutional Court No. 24/2543 has, inadvertently or not, produced at least two major consequences. Independent organs established by the Constitution are, firstly, not under the jurisdiction of the Administrative Court, with the immediate result that there will be a dual system of judicial review.

1. Jurisdiction of the Administrative Court over Independent Constitutional Organs

As a result of the decision of the Constitutional Court above, an independent organ set up by the Constitution will not be under the jurisdiction of the Administrative Court, simply because it is not a State agency under the superintendence or supervision of the Government. Independent constitutional organs can be classified into four categories: (1) offices of the Courts and offices of the independent agencies, (2) agencies or bodies supervising the exercise of state powers, (3) the organ overseeing elections and (4) other organs under the Constitution.

1.1 The Offices of the Courts and Offices of the Independent Agencies

The Constitution establishes several offices of courts and offices of independent bodies that enjoy autonomy in personnel administration, budget and other activities. The list of these offices appears as follows: (1) Office of the

⁹ **Section 29:** The restriction of such rights and liberties as recognised by the Constitution shall not be imposed on a person except by virtue of provisions of the law specifically enacted for the purpose determined by this Constitution and only to the extent of necessity and provided that it shall not affect the essential substances of such rights and liberties.

The law under paragraph one shall be of general application and shall not be intended to apply to any particular case or person; provided that the provision of the Constitution authorising its enactment shall also be mentioned therein.

The provisions of paragraph one and paragraph two shall apply *mutatis mutandis* to rules or regulations issued by virtue of the provisions of the law.

¹⁰ See note 7, *supra*.

¹¹ **Section 6:** The Constitution is the supreme law of the State. The provisions of any law, rule or regulation, which are contrary to or inconsistent with this Constitution, shall be unenforceable.

Constitutional Court, (2) Office of the Court of Justice, (3) Office of Administrative Courts, (4) Office of the National Counter Corruption Commission (NCCC) and (5) Office of the State Audit.

(1) Office of the Constitutional Court

According to section 270 of the Constitution, the Constitutional Court has its independent secretariat, with the Secretary-General of the Office of the Constitutional Court as the superior responsible directly to the President of the Constitutional Court. It is additionally specified that this Office has autonomy in personnel administration, budget and other activities as provided by law.

(2) Office of the Courts of Justice

Section 275 of the Constitution also mandates that the Courts of Justice have an independent secretariat, with the Secretary-General of the Office of the Courts of Justice as the superior responsible directly to the President of the Supreme Court of Justice. Likewise, the Office of the Courts of Justice has autonomy in personnel administration, budget and other activities as provided by law.

(3) Office of the Administrative Court

The Constitution, as set forth in section 280, directs that the Administrative Courts have an independent secretariat, with the Secretary-General of the Office of the Administrative Courts as the superior responsible directly to the President of the Supreme Administrative Court. The Office of the Administrative Courts has autonomy in personnel administration, budget and other activities as provided by law.

(4) Office of the National Counter Corruption Commission

Under section 302 of the Constitution, the National Counter Corruption Commission has an independent secretariat, with the Secretary-General of the National Counter Corruption Commission as the superior responsible directly to the President of the National Counter Corruption Commission. The Office of the National Counter Corruption Commission has autonomy in personnel administration, budget and other activities as provided by law.

(5) Office of the State Audit

It is provided in section 312 of the Constitution that the State Audit Commission shall have an independent secretariat, with the Auditor-General as the superior responsible directly to the Chairman of the State Audit Commission.

1.2 Agencies or Bodies Supervising the Exercise of State Powers

The agencies or bodies that are to supervise the exercise of state powers under the Constitution can be listed as (1) the National Counter Corruption Commission, (2) the State Audit Commission, and (3) the Ombudsman.

(1) The National Counter Corruption Commission

According to the Constitution, the National Counter Corruption Commission is the major organ in combat of corruption. The National Counter Corruption Commission has the power to conduct a preliminary investigation for the purpose of removing key persons from office (section 305¹²) and the power to refer the matter

¹² **Section 305:** Upon receipt of the request under section 304, the President of the Senate shall refer the matter to the National Counter Corruption Commission for investigation without delay.

When the investigation is complete, the National Counter Corruption Commission shall prepare a report thereon for submission to the Senate. The said report shall clearly state whether, and to what extent, the accusation put in the request is *prima facie* case and shall state the reasons therefor.

In the case where the National Counter Corruption Commission is of the opinion that the accusation put in the request is an important matter, the National Counter Corruption Commission may make a separate report specifically on the said accusation and refer it to the Senate in advance.

If the National Counter Corruption Commission passes a resolution that the accusation has a *prima facie* case, the holder of the position against whom the accusation has been made shall not, as from the date of such resolution, perform his or her duties until the Senate has passed its resolution. The President of the National Counter Corruption Commission shall submit the report, existing documents and its opinion to the President of the Senate for proceeding in accordance with section 306 and to the Prosecutor General for instituting prosecution in the Supreme Court of Justice's Criminal Division for Persons Holding Political Positions. If the National Counter Corruption Commission is of the opinion that the accusation has no *prima facie case*, such accusation shall lapse.

In the case where the Prosecutor General is of the opinion that the report, documents and opinion submitted by the National Counter Corruption Commission under paragraph four are not so complete as to institute prosecution, the Prosecutor General shall notify the National Counter Corruption Commission for further proceedings and, for this purpose, the incomplete items shall be specified on the same occasion. In such case, the National Counter Corruption Commission and the prosecutor General shall appoint a working committee, consisting of their representatives in an equal number, for collecting

and its opinion to the Supreme Court of Justice's Criminal Division for Person Holding Political Positions in order that such judicial body will consider criminal liability of the accused position holders (section 308¹³). Furthermore, the NCCC has the power to inquire and reach a decision as to whether a State official has become unusually wealthy or has committed an offence of corruption, malfeasance in office or malfeasance in judicial office, and to inspect the accuracy, actual existence as well as change of assets and liabilities of the persons holding political positions and State officials.

(2) The State Audit Commission

According to Chapter 11 of the Constitution (as seen in section 312¹⁴) and the Organic Act on the State Audit, B.E. 2542 (1999), the State Audit Commission

complete evidence and submit it to the Prosecutor General for further prosecution. In the case where the working committee is unable to reach a decision as to the prosecution, the National Counter Corruption Commission shall have the power to prosecute by itself or appoint a lawyer to prosecute on its behalf.

¹³ **Section 308:** In the case where the Prime Minister, a minister, member of the House of Representatives, senator or other political official has been accused of becoming unusually wealthy, or of the commission of malfeasance in office according to the Penal Code or a dishonest act in the performance of duties or corruption according to other laws, the Supreme Court of Justice's Criminal Division for Persons Holding Political Positions shall have the competent jurisdiction to try and adjudicate the case.

The provisions of paragraph one shall also apply to the case where the said person or other person is a principal, an instigator or a supporter.

¹⁴ **Section 312:** The State audit shall be carried out by the State Audit Commission and the Auditor-General who is independent and impartial.

The State Audit Commission consists of the Chairman and nine other members appointed by the King with the advice of the Senate, from persons with expertise and experience in state audit, accounting, internal audit, finance and other fields.

The State Audit Commission shall have an independent secretariat, with the Auditor-General as the superior responsible directly to the Chairman of the State Audit Commission, as provided by the organic law on state audit.

The King shall appoint the Auditor-General with the advice of the Senate from persons with expertise and experience in state audit, accounting, internal audit, finance or other fields.

The President of the Senate shall countersign the Royal Command appointing the Chairman and members of the State Audit Commission and the Auditor-General.

Members of the State Audit Commission shall hold office for a term of six years from the date of their appointment by the King and shall serve for only one term.

has powers and duties to set out state audit policies, formulate rules and procedures in connection with the budgetary and fiscal disciplines, give consultancy, give suggestions for improving the state audit, determine administrative penalties, and carry out the consideration and decision upon the disciplinary, budgetary and fiscal offences.

(3) The Ombudsman

The Ombudsman is the constitutional organ which is conferred a crucial role of inspecting the exercise of state powers. In this regard, it is empowered to consider and inquire into the complaint for fact-findings in the following cases: (a) failure to perform in compliance with the law or performance beyond powers and duties as provided by the law of a Government official, an official or employee of a State agency, State enterprise or local government organisation and (b) performance of or omission to perform duties of a Government official, an official or employee of a State agency, State enterprise or local government organisation, which unjustly causes injuries to the complainant or the public, whether such act is lawful or not.

1.3 The Organ Supervising Elections

According to the Constitution, the Election Commission is established as the supervisory organ to supervise an election of members of the House of Representatives, an election of senators, as well as an election of members of a local assembly and local administrators. In addition, the Election Commission oversees the voting in a referendum for the purpose of rendering it to proceed in an honest and fair manner. Under section 144 paragraph two of the Constitution, the Election Commission has powers and duties to find facts and make a decision on any problem or any dispute arising under the organic law on the election of members

Qualifications, prohibitions, selection, election, and vacation of office of members of the State Audit Commission and the Auditor-General as well as powers and duties of the State Audit Commission, the Auditor-General and the Office of the State Audit Commission shall be in accordance with the organic law on state audit.

The determination of qualifications and procedure for the election of persons to be appointed as members of the State Audit Commission and the Auditor-General shall be made in the manner which can secure persons of appropriate qualifications and integrity and which can provide for the guarantee of the independence in the performance of duties of such persons.

of the House of Representatives and senators, the organic law on political parties, the organic law on the voting in a referendum and the law on the election of members of local assemblies or local administrators.

1.4 Other Constitutional Bodies.

There are two remaining constitutional organs. These are the National Human Rights Commission and the frequency distribution agency pursuant to section 40¹⁵ of the Constitution.

(1) The National Human Rights Commission

According to the Constitution, the National Human Rights Commission has the powers and duties to (a) examine and report the commission or omission of acts which violate human rights, (b) propose appropriate remedial measures to the person or agency committing or omitting such acts for taking action, (c) propose to the National Assembly and the Council of Minister policies and recommendations with regard to the revision of laws, rules or regulations for the purpose of promoting and protecting human rights, and (d) prepare an annual report for the appraisal of situations in the sphere of human rights in the country and submit it to the National Assembly.

(2) The Frequency Distribution Agency

Section 40 of the Constitution sets up an independent regulatory body to be charged with the duties to distribute frequencies and supervise radio or television broadcasting and telecommunications businesses.

Having pointed out all the independent organs under the Constitution, it must be recalled that the decision of the Constitutional Court above establishes a

¹⁵ **Section 40:** Transmission of frequencies for radio or television broadcasting and radio telecommunication are national communication resources for public interest.

There shall be an independent regulatory body having the duty to distribute the frequencies under paragraph one and supervise radio or television broadcasting and telecommunication business as provided by law.

In carrying out the act under paragraph two, regard shall be had to utmost public benefit at national and local levels in education, culture, State security, and other public interest including fair and free competition.

precedent to the effect that all these agencies or bodies are placed outside the jurisdiction of the Administrative Court.

2. Administrative Disputes under Dual Jurisdiction: A Mistake?

Now that we are now bound by the decision of the Constitution Court No. 24/2543 above that actions by independent agencies established by the Constitution do not fall within the jurisdiction of the Administrative Court, we will have yet to find it hard to explain why such agencies' actions elude the scrutiny net of the Administrative Court albeit those actions are administrative in nature and concern the exercise of administrative powers as well. Illustrations include orders given in connection with personnel appointment, removal or disciplinary punishment. If, for example, Head of an independent agency under the Constitution issues an order dismissing its official and it is challenged that the order is unlawfully made, then, the dispute in question, based on the decision of the Constitutional Court No. 24/2543, is outside the jurisdiction of the Administrative Court. In this connection, section 271 of the Constitution provides: "The Courts of Justice have the powers to try and adjudicate all cases except those specified by this Constitution or by the law to be within the jurisdiction of other courts." It follows, therefore, that the dispute in the hypothetical dismissal order case above is to be submitted to the Court of Justice.

It is questionable whether it is intended by the Constitution that administrative acts by independent bodies under the Constitution are to be within the jurisdiction of the Court of Justice rather than the Administrative Court or whether it is merely an unexpected consequence of the decision of the Constitutional Court. Indeed, according to section 9 paragraph two of the Organic Act on the Establishment of the Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999), the Administrative Court has the power to try and adjudicate all general administrative disputes, except the disputes specified by law to be under the jurisdiction of other courts. It seems that we will have to bear the uneasy sentiment on this point.

CHAPTER 9

CONCLUSION

As we have seen from previous Chapters, political and legal reforms resulting from the promulgation of the current Constitution and the organic laws are underway and lead to a plethora of changes.

In the aspect of transparency and accountability, the Constitution and the Official Information Act B.E. 2540 (1997) provides the public with wider opportunities to have access to information in hands of State agencies, thereby promoting transparency and accountability in the exercise of state powers. In fact, Thai people now begin to get accustomed to requesting official information from various agencies and obtaining their personal information possessed by any official agencies. Indeed, a number of cases have been brought before the Administrative Court by private individuals against the agencies possessing official information. In addition, the exercise of powers by state agencies or officials are seriously under the supervision of several constitutional supervisory bodies, including the Constitutional Court, the Administrative Court and the Ombudsman. Accountability on the part of those involved in the discharge of official functions is thus strengthened.

As individuals are more assiduous in exercising their rights in accordance with the Constitution and the Official Information Act (through the Constitutional Court, the Administrative Court and the Ombudsman), government officials take greater care in their performance of functions as provided by law. This truism is also fostered by the fact that both the public and the media are keeping an eye on the government and its officials. This is perceivably a movement towards real transparent and accountable government in Thailand.

In addition to the legal measures guaranteeing the transparency and accountability of the government, the Constitution also recognises and, in effect, promotes a wider range of popular participation in political activities, which will, in turn, help bolster the more transparent and accountable government. At present, individuals may participate in political activities in various forms. Such participation

can, in effect, be initiated by a group of persons, a local community and a local government organisation as well.

The legal reform in the context of human rights protection is much evident, too. In this instance, the Constitution has implanted various legal measures and mechanisms for this purpose. Most importantly, the National Human Rights Commission is the major mechanism to supervise actions violating human rights in Thailand.

The new Constitution invests more attempts towards the betterment of local government. In fact, the Constitution imposes on the State the duty to develop local government and promote popular political participation in the locality. Indeed, the real independence and potentiality of local government is being under the process. However, expectations and doubts are mixed in this the matter.

Another reform can be envisioned in the anti-corruption maneuvers in the government and administration. The Constitution and the organic law on counter corruption has redesigned the organ in charge of combating corruption - the National Counter Corruption Commission. But, given that corruption in Thai society is deep-rooted, the Commission will have to be fast-paced in this respect, and not only the Commission but also the society as a whole should cope with the problem hand in hand.

Judicial review stands in the realm of recent reform as well. The Constitution empowers judicial bodies to supervise and remedy the encroachment upon people's constitutional rights and liberties. Most remarkably, Administrative Courts are established for the first time in the Thai history to try and adjudicate disputes of administrative nature, especially between a State official and a private individual. Undoubtedly, the reform of the judicial system within the framework of the Constitution is expected to bring into being an effective safeguard against violations of the people's rights and liberties as recognised by the Constitution.

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