article 2
of the International Covenant on Civil and Political Rights
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special edition

Thailand's struggle *for* constitutional survival

any person whose rights or freedoms are violated shall have an effective remedy, determined by competent judicial, administrative or legislative authorities

The meaning of article 2: Implementation of human rights

All over the world extensive programmes are now taking place to educate people on human rights. As a result today there exists a vast number of persons and organisations firmly committed to human rights; more than at any other time in the history of humankind. Yet human rights continue to be monstrously violated.

It is time for the global human rights movement to examine why it may not yet be achieving real improvement in the global human rights situation. One factor hindering honest examination is the belief that improvement of knowledge about human rights will by itself end human rights violations. This is a myth based on the corresponding belief that education is itself capable of improving things.

In reality human rights can only be implemented through a system of justice. If this system is fundamentally flawed, no amount of knowledge—no amount of repetition of human rights concepts—will by itself correct its defects. Rather, these need to be studied and corrected by practical actions. Hence research and intimate knowledge of local issues must become an integral part of human rights education and related work.

article 2 aims to do this by drawing attention to article 2 of the International Covenant on Civil and Political Rights, and make it a key concern of all partners in the global human rights community. This integral article deals with provision of adequate remedies for human rights violations by legislative, administrative and judicial means. It reads in part:

> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

Sadly, article 2 is much neglected. One reason for this is that in the 'developed world' the existence of basically functioning judicial systems is taken for granted. Persons from those countries may be unable to grasp what it means to live in a society where 'institutions of justice' are in fact instruments to deny justice. And as these persons guide the global human rights movement, vital problems do not receive necessary attention. For people in many countries, international human rights discourse then loses relevance.

Other difficulties also arise with article 2. One is the fear to meddle in the 'internal affairs' of sovereign countries. Governments are creating more and more many obstacles for those trying to go deep down to learn about the roots of problems. Thus, inadequate knowledge of actual situations may follow. A further and quite recent disturbance is the portrayal of national human rights institutions and their equivalents as surrogate agencies for dealing with article 2 related issues. Some state parties may agree to new national human rights institutions taking on this role because they know that by doing so they may avoid criticisms of a more fundamental nature.

Thus after many years of work, the Asian Legal Resource Centre began publishing *article 2* to draw attention to this vital provision in international law, and to raise awareness of the need to implement human rights standards and provide effective remedies at the local level in Asia.

Relevant submissions by interested persons and organizations are welcome.

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Editorial board, *article 2*

Human rights, the rule of law and constitutionalism in Thailand have been set back many years since the return to power by the military on 19 September 2006. Within hours of taking power, the coup group, headed by General Sonthi Boonyaratglin, abrogated the 1997 Constitution and abolished the Constitutional Court and introduced a swathe of other measures that would allow for the army to proceed with its own agenda over the subsequent months, behind other facades: among them, the writing of a new bogus constitution and use of the senior judiciary and criminal investigators to take action against the former prime minister and his political apparatus.

Shortly thereafter, this publication carried an article on the coup by the Asian Human Rights Commission (AHRC) that rightly anticipated the real intentions of the military and spoke to the extent of damage that it would cause to the nascent constitutionalism of 1997 ('Thailand: The return of the military & the defiance of common sense', *article 2*, vol. 5, no. 5, October 2006). The AHRC noted that whereas earlier constitutions in Thailand had served only to validate the power of the ruling group, the 1997 Constitution was the first to be written with widespread involvement and the public interest genuinely at heart.

PHOTO: CHIANG MAI 108

One of the important features of the 1997 Constitution, the article recalled, was that it made significant changes to the management of criminal justice in Thailand. Quite apart from the provisions in the chapter on rights and liberties, the constitution also guaranteed many procedural rights. These included strict limitations on the police making arrests without warrants and handing the power of issuing warrants to the courts (section 237); consideration of bail application "without delay", the setting of reasonable amounts for bail, and grounds being given where bail is refused and the right to appeal (section 239); the right to a speedy, continuous and fair trial, and to a lawyer during interrogation (section 241); and, witness and victim protection (sections 244 & 245), which paved the way for the country's first law on witness protection and a government office to deal with protection matters (see the special report, 'Protecting

witnesses or perverting justice in Thailand?', *article 2*, vol. 5, no. 3, June 2006). It also allowed for innocent persons who had been wrongly detained by state officers to claim compensation (section 246). (See appendix for extracts from these and other sections.)

"Prior to September 2006 courts were correctly absorbing and interpreting the approach of the constitution to protection of rights"

Many of the provisions of the 1997 Constitution have now been incorporated into the country's law on criminal procedure and also codified in other specific laws. However, those provisions and laws, and the institutions intended to give them life, are facing new immense challenges, both as a result of the perversion of justice institutions during the time of the government of Thaksin Shinawatra, himself a former police lieutenant colonel, and even more so, since the resumption of military control of government in Thailand.

This special edition of *article 2* furthers this discussion at a time that the survival of constitutionalism in Thailand is under serious threat. In part it is a celebration of the 1997 Constitution amid limited debate about an inferior and non-participatory substitute, the draft 2007 charter, and in part it is a call for the end to military interference in the affairs of the civilian population there. It includes an article by the director of the AHRC as well as one on the 1997 Constitution and political history of Thailand by Dr Thanet Aphornsuvan of Thammasat University, written some years prior to the coup.

At the heart of the edition is a set of human rights cases decided by the courts in Thailand under the principles and provisions of the 1997 Constitution. These show how prior to September 2006 some courts were correctly absorbing and interpreting the approach of the constitution to protection of human rights in cases where state officers were concerned. They include cases in favour of petitions and actions by local residents to protect the environment, the right to assemble and demonstrate, and the rights of special groups in society, as well as rights to free expression and privacy.

Some would say that the process of bringing the provisions of the constitution into the activities of the courts was too slow; however, it is normal for the courts to proceed with caution and a degree of conservatism when matters of intense public interest are being decided. This was in fact the characteristic of courts in the United States that in the 19th century Alexis de Tocqueville noted was their great advantage in addressing matters of national importance was that they could only make changes to law and political life "little by little... [through] repeated blows". Unfortunately for Thailand, with the changing again of the constitution under force of the military, it remains to be seen where and how the judiciary in Thailand may land its blows in the near future.

The constitutional tribunal: A single blow

"When judges themselves are responsible for rubbishing their own institutions then what are the consequences?"

One circumstance in which a blow from Thailand's judiciary is apparently now assured is when it is presented with an unequivocal target, such as at the end of May 2007, when senior judges participated in a charade to dissolve the former ruling party that was not of their making but was, thanks to their acquiescence to the country's military regime, made to appear one of their doing.

The military-appointed Constitutional Tribunal—comprising of six Supreme Court judges and three Supreme Administrative Court judges, including their presidents—on May 31 dissolved the Thai Rak Thai party on grounds of endangering and acting against the democratic state under the 1998 Organic Act on Political Parties, and removed the electoral rights of over one hundred party board executives, including Thaksin, for five years in accordance with Announcement No. 27 of the military coup group. Thus a group of judges appointed by an unelected and antidemocratic military regime made a decision on the actions of an elected political party that was alleged to have undermined democratic process. The decision was made on the basis of law established under a constitution that was scrapped by that very same military regime, with punishment approved and meted out to a group of individuals under one of its orders.

A number of previous issues of *article 2* dealt clearly and explicitly with the former government's gross human rights violations, abuses of power, wanton manipulation of national institutions, blatant disregard for international standards and the rule of law and strengthening of the police as an agency for crude infringements upon citizens' lives (see for instance 'Rule of law versus rule of lords in Thailand', vol. 4, no. 2, April 2005; and, 'Extrajudicial killings of alleged drug traffickers in Thailand', vol. 2, no. 3, June 2003). So there can be no doubt about what sort of government was in power up to last September. But let there also be no doubt that neither this ostensible tribunal nor the junta that birthed it could do anything other than make things worse. As has become painfully clear since last September, the military is set upon dragging the country back to a 1980s model of authoritarian control, and has spent most of its energies since in getting all necessary institutions firmly under its command before it steps down from its caretaker role.

However, whereas the army cannot be expected to protect the interests of the judiciary, when judges themselves are responsible for rubbishing their own institutions then what are the consequences? Quite aside from the effect of the May 31 decision on political parties, the real unanswered question is what effect will this judgment have on the courts, and notions of the rule of law and constitutional order in Thailand?

For an answer, there is an important and highly relevant precedent, although it is not among those from former military takeovers in Thailand that the judges cited in their ruling. Rather, it is from the Supreme Court of the United States, which in 2000 was asked to decide on a handful of votes in Florida upon which the presidency was to be decided. Although the court upheld the petition of the current incumbent, four dissenting judges made clear that they should never have taken up the matter in the first place. Justice Breyer opened his dissenting opinion by flatly observing that, "The Court was wrong to take this case." He continued

> Of course, the selection of the President is of fundamental national importance. But that importance is political, not legal. And this Court should resist the temptation unnecessarily to resolve tangential legal disputes, where doing so threatens to determine the outcome of the election.

He concluded that above all else in cases of immense political importance the courts should be extremely wary to wade in and find a solution without carefully examining their standing and the consequences of their actions:

> Those who caution judicial restraint in resolving political disputes have described the quintessential case for that restraint as a case marked, among other things, by the "strangeness of the issue," its "intractability to principled resolution," its "sheer momentousness, . . . which tends to unbalance judicial judgment," and "the inner vulnerability, the self doubt of an institution which is electorally irresponsible and has no earth to draw strength from." Bickel, [*The least dangerous branch*, 1962], at 184. Those characteristics mark this case.
>
> At the same time, as I have said, the Court is not acting to vindicate a fundamental constitutional principle, such as the need to protect a basic human liberty. No other strong reason to act is present... And, above all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure. It has been built slowly over many years... It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself... we do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation.
>
> I fear that in order to bring this agonizingly long election process to a definitive conclusion, we have not adequately attended to that necessary "check upon our own exercise of power," "our own sense of self-restraint." *United States v. Butler*, 297 U. S. 1, 79 (1936) (Stone, J., dissenting). Justice Brandeis once said of the Court, "The most important thing we do is not doing." Bickel, supra, at 71. What it does today, the Court should have left undone.

Justice Stevens went further. What underlay the petition to the Supreme Court, he said, was "an unstated lack of confidence in the impartiality and capacity of the state judges" to do their jobs. And he continued,

"Those who caution judicial restraint in resolving political disputes have described the quintessential case for that restraint as marked by the 'strangeness of the issue,' its 'intractability to principled resolution,' its 'sheer momentousness... which tends to unbalance judicial judgment'"

— Breyer J., US Supreme Court

> The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

"The coup was an enormous demonstration of a lack of confidence in the capacity of the senior judiciary to resolve thorny political and legal problems and review the legality of government actions in Thailand"

It is worthy to note just how many of Justice Breyer's and Stevens's observations are applicable to what happened in Thailand this May (leaving aside the fact that the tribunal in Thailand had no constitutional principle to consider, in the absence of any constitution worthy of the name). Nothwithstanding, the warning about the dangers to public confidence caused by incautious handling of a highly-politicised and loaded case went unheeded in Bangkok as it had done in Washington DC: a single blow, not hundreds of little ones, brought down the Thai Rak Thai party. But that is not all that it hit.

The coup of September 19 was itself an enormous demonstration of a lack of confidence in the capacity of the senior judiciary to resolve thorny political and legal problems and review the legality of government actions in Thailand. By appointing a new tribunal in the stead of the Constitutional Court and in the absence, for practical purposes, of any constitution at all, setting it on the former ruling party, the coup group cynically called upon the tribunal members not only to endorse the army's displacement of the preceding political order, but also its attack on an emerging legal order that may in time have posed a threat to its interests. By complying, the judges wounded their own authority and greatly risked lasting damage to public confidence in their integrity. Whether or not time will one day heal the wounds in Thailand remains to be seen, but as in the United States seven years earlier the identity of the real loser was undoubtedly the nation's confidence in the courts. Indeed, given the amount of attention it received, the decision will have caused a great deal of confusion about the role of the judiciary in its entirety.

Justice versus legality

In the lead up to the tribunal's May decision, the King of Thailand spoke twice about the importance of judges "maintaining justice". The king pointed out that more than ever there was a question of public confidence in the judiciary and that the courts would be vital to the peace and survival of the country.

The question that these remarks naturally prompt is whether or not it is possible to maintain any kind of justice in the contaminated moral and political atmosphere of a military dictatorship? What happens to justice when the army throws away

the only genuine constitution that the country ever had? What happens to justice when it shuts down a higher court and sets up something else in its stead?

> "Even totalitarian states mostly act according to the laws of their countries; they show how it is impossible to maintain true judicial independence in the contaminated moral environment of an authoritarian state"
> *— Lord Steyn, UK House of Lords*

Here the distinction between justice and legalism is important. A strict adherence to legality is certainly possible under any kind of government, as observed by a British law lord, Steyn:

> History has shown that majority rule and strict adherence to legality is no guarantee against tyranny... in Nazi Germany, amid the Holocaust, pockets of the principle of legality (for what it was worth) sometimes survived. In Nazi Germany defendants sentenced to periods of imprisonment before the Second World War were left alone during the terms of their sentences. Only when their sentences expired did the Gestapo wait for them at the gates of the prisons and transport them to the death camps. So even in Nazi Germany an impoverished concept of legality played some role...
>
> In the apartheid era millions of black people in South Africa were subjected to institutionalised tyranny and cruelty in the richest and most developed country in Africa. What is not always sufficiently appreciated is that by and large the Nationalist Government achieved its oppressive purposes by a scrupulous observance of legality. If the judges applied the oppressive laws, the Nationalist Government attained all it set out to do. That is, however, not the whole picture. In the 1980s during successive emergencies, under Chief Justice Rabie, almost every case before the highest court was heard by a so-called "emergency team" which in the result decided nearly every case in favour of the government. Safe hands were the motto. In the result the highest court determinedly recast South African jurisprudence so as to grant the greatest possible latitude to the executive to act outside conventional legal controls.
>
> Another example is Chile. Following the coup d'etat in September 1973, thousands were arrested, tortured and murdered on the orders of General Pinochet. The civilised and constitutionally based legal system of that country had not been formally altered. It was not necessary to do so. The police state created by General Pinochet intimidated and compromised the judiciary and deprived citizens and residents of all meaningful redress to law...
>
> Here I pause to summarise why I regard these examples of some of the great tyrannies of the twentieth century as containing important lessons. They demonstrate that majority rule by itself, and legality on its own, are insufficient to guarantee a civil and just society. Even totalitarian states mostly act according to the laws of their countries. They demonstrate the dangers of uncontrolled executive power. They also show how it is impossible to maintain true judicial independence in the contaminated moral environment of an authoritarian state. ('Democracy, the Rule of Law and the Role of Judges', The Attlee Foundation Lecture, 11 April 2006).

Thus, simple adherence to the law is not sufficient to ensure justice. This is the fundamental distinction between the rule of law, and the rule by law. So upon what does justice, as opposed to legality, depend?

> "I don't agree with holding public hearings, because what will the people know? Even I haven't read the previous constitutions..."
>
> *— General Suchinda Kraprayoon, 1991 coup leader*

First, justice depends upon all persons being subject to ordinary laws and courts. But today in Thailand, certain categories of persons are beyond the law. Soldiers, police and other officials acting under emergency regulations in the south, or martial law that remains in effect in over half of the country, are protected from prosecution for acts that would otherwise be considered criminal. The coup leaders have also had an immunity clause for themselves inserted into the interim constitution, which will be carried over in some form or another after their time is up. Hence, there are no grounds upon which calls for justice can be made in Thailand until these differences before the law are addressed.

Second, justice depends upon some kind of judicial review of executive and legislative actions. It means that the courts are capable of commenting upon the legality or illegality of actions by the other parts of the state. Before the army took power last September 19 there had been a strong acknowledgment of the need for judicial review, in light of the many abuses of the former administration. Since that time, all discussion of the notion has ceased. As previously, the superior courts quietly acquiesced to the military takeover, and the judiciary was again made a subordinate, rather than an equal, of the other branches of government: the May 31 ruling being the superlative example of its compliance with the demands of the rulers of the day; hence, rule by, rather than of, law. As in South Africa during the apartheid era, the judges of Thailand have demonstrated to the regime that their hands can be safely relied upon. Thus, until this much more difficult problem of judicial subordination to other parts of government too is addressed, there can be no reason to anticipate a functioning "justice" system in Thailand soon. And unfortunately, whereas the 1997 Constitution had laid the foundations for the building of an independent judicial department of equal strength with the legislature and executive, no such thing can be expected of any constitution devised under the current military regime, no matter how hard it—and the drafters of the charter—may try to make it appear otherwise.

What's it got to do with anyone anyway?

Around the six-month anniversary of the coup, a Bangkok newspaper contained a lengthy interview with a former coup leader, General Suchinda Kraprayoon. The general led the prior military takeover, in 1991. He was forced out of the prime ministership that he took unelected in 1992 after massive protests in Bangkok, in which hundreds were killed and injured. Asked whether or not he still agreed with the idea that it is not necessary for the prime minister to be elected, Suchinda replied that he agrees "100 per cent", and continued

> And I don't agree with a constitution so full of details that it is impossible to move. The constitution shouldn't have many sections, only what's necessary. It should be written broadly... I also don't agree with holding public hearings, because what will the people know? Even I myself haven't read the previous constitutions, because I'm not a person who's

> interested in politics. Go and ask the people how many sections there are [in a constitution]—they don't know. So for what reason will you hold public hearings? What do the people know? (*Matichon*, 12 March 2007)

General Suchinda revealed the real thinking of Thailand's coup leaders, whether 2006, 1991 or earlier. In its plainest terms, it consists of the following: ordinary people know nothing; politicians have no legitimacy; constitutions are irrelevant. The question that must then be asked is, what kind of constitutionalism can be developed under persons who have no genuine interest in constitutions?

> "I think that there will always be coups if there is cause for them"
>
> *— General Saprang Kalayanamitr, 2006 coup group member*

In modern times, the basic tool for establishing a functioning state and building institutions on rule of law principles is a constitution. While not universally applied, and none are perfect, all constitutions establish guidelines for the functioning of the state that minimise arbitrariness, together with institutional arrangements to ensure the rational settling of disputes. Where the basic guidelines of a constitution are more-or-less respected and slowly developed, the state too can be expected to progress.

By contrast, a coup is the most arbitrary of all behaviour. It is the ultimate denial of the rule of law. It sends the message that there exist no such guidelines, however imperfect, and that some persons are entitled to act according to another set of standards altogether. In scrapping one constitution and ordering the writing of a new one, coup leaders send out a message that constitutions are unimportant, elected officials have no special legitimacy, and the public has no authoritative voice concerning what goes on in their country. The message is reinforced by statements that reserve the right for the military to conduct future coups whenever so inclined, such as those by one of the current coup group, General Saprang Kalayanamitr, that, "I think that there will always be coups if there is cause for them." The overall effects are to make the notion of genuine constitutionalism anyhow meaningless, whether or not something labelled as a "constitution" exists.

Thus, coup leaders feel comfortable to let some people go on drafting a new supreme law, knowing that it anyhow doesn't apply to them. The current military regime has even consistently expressed its enthusiasm for the principles underlying the very constitution that it ripped up while at the same time its prime minister has encouraged ordinary folks to get involved in the rigged constitution-writing process. According to some reports, in areas of the country where hearings into the new draft were held the government's enthusiasm for getting people to attend pointless discussions about the proposed document—in parody of the genuinely participatory meetings that were held across the country in the lead up to the 1997 Constitution—went so far as to use the same sorts of populist techniques as those of the former government that it has so consistently criticised: such as giving participants free lunches and handouts.

"The Coup d'Etat by the Council for Democratic Reform... is not related to the authorities and functions of [the] Attorney General"
— Office of the Attorney General of Thailand

In the weeks after the military takeover, the AHRC received a letter from the Office of the Attorney General of Thailand concerning four former government ministers who had been detained without charge by the coup group in the first days after September 19. The letter was in response to an appeal sent on their behalf. In it, the office wrote that

> We would like to inform you that we understand your anxiety, but your complaint mentioned above concerns the Coup d'Etat by the Council for Democratic Reform, which is not related to the authorities and functions of [the] Office of the Attorney General.

In one sentence, a government bureaucrat inadvertently captured the problems at the heart of Thailand's struggle for constitutional survival. Ordinary private citizens, judges, petty functionaries and all other persons outside the circle of power defined by the coup group and its confidants have since last September been ordered to return to their historical role as spectators of the national stage. They have been given permission to applaud, or even cough politely or boo occasionally, but they are no longer entitled to participate. Constitutionalism, the rule of law, human rights: these are not for them to decide. Despite rhetoric to the contrary, a facade of legality, not justice, is the best that can be hoped for under the regime in Thailand today. The prospects for a return to incipient genuine constitutionalism, rather than the fraud that is now in the making, begin only once the military is gone. But it will be a long road back to where Thailand was before September 19—despite all the damage caused by the then-government—and its way will be far from smooth.

Two judges and a bureaucrat

As this edition of *article 2* was going to print, a remarkable recording was released that if true exposes the extent to which Thailand's senior judiciary is compromised and controlled by outsiders. The recording, made public by Jakrapob Penakir, a spokesperson of the former civilian regime and opponent of the military junta, is purportedly of a telephone conversation in mid-2006 between a top government official nicknamed "Phi Phed" and the then-secretary of the Supreme Court, Virat Chinvinijkul, together with Pairote Navanuch, a judge of the court. The parties discuss the problem of getting the members of the Election Commission to resign their posts over various serious allegations in connection with the former government, to pave the way for fresh elections (which were never held due to the military coup).

In the recording, the secretary and senior official share ideas on ways to get the commissioners to resign. The latter requests advice on how the government should proceed and is advised that if the commissioners do resign then the Supreme Court will appoint its own people in their stead (under section 138 of the 1997 Constitution). Then the government officer wonders what can be done about the fact that there are cases pending against the election commissioners in the Criminal Court and

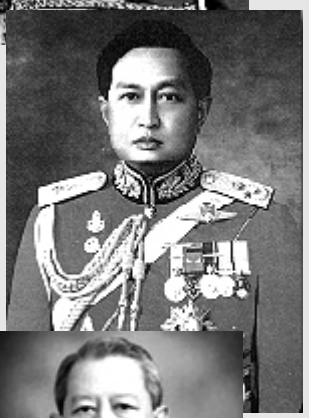
Administrative Court. Virat reassures him that, "I can say that the resigning of the Election Commission would have a good effect on the case(s) under prosecution..."

Further on, before Judge Pairote is brought into the conversation, the court secretary refers to him as having a "link" with the president of the Privy Council, the former unelected prime minister, General Prem Tinsulanonda. This link daily goes to the latter's house before the Supreme Court meets, whereafter the general puts in a call to the president of the court. Subsequently, Judge Pairote speaks directly with the senior official and agrees that the members of the Election Commission must be forced to resign and again guarantees that the criminal cases pending against them will be closed thereafter. The officer says that he will go and speak to the head of the commission personally, to which Judge Pairote replies, "You must tell him, or else it won't be safe for him." Of course, the commissioners refused to resign, forcing the judiciary's hand despite their attempts to avoid having to act on the case.

"A top judge and court official together with a senior government officer made a deal to get some people to quit their jobs, in exchange for which the courts would dispense with justice"

The recording is remarkable not only because it brings out the full truth of the extent to which the senior judiciary in Thailand has been subordinated to other parts of government but also because it shows how far removed it has been throughout the entire political and constitutional crisis from basic notions of legality. At no point does the upholding of justice, rather than political expediency, appear to have seriously entered the minds of its most senior persons. Rather, the contents of the recording boil down to this: a top judge and court official together with a senior government officer make a deal to get some people to quit their jobs, in exchange for which the courts will dispense with criminal procedure and justice and instead just let them off the hook. There is no thought of law here, just horse trading. The court is anyway subject to daily interference by outsiders. And that was before the September 19 coup: the May 30 special tribunal verdict against the former ruling party is an indication of how much worse things have become since, and how much worse they are yet to become.

Despite its contents, the recording—the veracity of which has not been denied—barely attracted any attention in the domestic media, and nor any details made known to the public, speaking to the very real fear and heightened control in Thailand under the military regime today. Thus, for the sake of public debate and simple openness, an edited version of the transcript is contained as an appendix to this report.



Coups, attempted coups and constitutions of Thailand, 1932-2006

CONSTITUTION **COUP/ REBELLION**

1. 1932 (interim): 27 June - 10 December 1932
2. 1932: 10 December 1932 – 9 May 1946

1. Coup: 20 June 1933
2. Boworadet Rebellion: 11 October 1933
3. Songsuradet Rebellion: 29 January 1939

3. 1946: 9 May 1946 – 8 November 1947

4. Coup: 8 November 1947

4. 1947 (interim): 9 November 1947 – 23 March 1949

5. Coup: 1 October 1948
6. "Grand Palace Coup": 26 February 1949

5. 1949: 23 March 1949 – 29 November 1951

7. "Manhattan Coup": 29 June 1951
8. "Silent Coup": 29 November 1951

6. 1932 (amended): 8 March 1952 – 20 October 1958

9. Coup: 16 September 1957
10. Coup: 20 October 1958

7. 1959: 28 January 1959 – 20 June 1968
8. 1968: 20 June 1968 – 17 November 1971

11. Coup: 17 November 1971

9. 1972: 15 December 1972 – 7 October 1974
10. 1974: 7 October 1974 – 6 October 1976

12. Coup: 6 October 1976

11. 1976: 22 October 1976 – 20 October 1977

13. Coup: 26 March 1977
14. Coup: 20 October 1977

12. 1977: 9 November 1977 – 22 December 1978
13. 1978: 22 December 1978 – 23 February 1991

15. Rebellion: 1 April 1981
16. Coup: 9 September 1985
17. Coup: 23 February 1991

14. 1991: 1 March 1991 – 9 December 1991
15. 1991: 9 December 1991 – 11 October 1997
16. 1997: 11 October 1997 – 19 September 2006

18. Coup: 19 September 2006

17. 2006 (interim): 1 October 2006 – present

Left: Some prime ministers of Thailand, from top to bottom— Field Marshall Pibulsongkram (1938-1944; 1948-1957); Field Marshall Thanom Kittikachorn (1958; 1963-1971; 1972-1973); Field Marshall Sarit Dhanarajata (1959-1963); General Suchinda Kraprayoon (1992); General Surayud Chulanont (2006-present)

Legal systems, like ecological systems, can be destroyed by adverse conditions

Basil Fernando, Executive Director, Asian Human Rights Commission & Asian Legal Resource Centre, Hong Kong

When a legal system is exposed to adverse conditions for a length of time its very existence may be endangered. In this respect, legal systems have much in common with ecological ones. However, whereas there is a global awakening to the threats now posed to our natural resources, no such awareness exists concerning our collective heritage of law and justice.

The decline in water resources throughout the world is a good metaphor for the problems of our legal systems. A number of inland seas, including the Dead Sea and Aral Sea, are now on the verge of disappearing due to human activities that have over time steadily reduced the flow of water into their basins, and polluted their remaining reserves. Similarly, where a legal system constantly suffers interruptions in flow due to military coups, suspending and alteration of constitutions, and reductions of civil liberties by emergency decrees and state security laws then that legal system also may be reduced to nothing more than a polluted pool instead of a vibrant, living sea.

One of the most serious ways of interrupting the flow of a legal system is by constantly replacing or amending its written constitution. Where the constitution is subjected to repeated meddling, and particularly where it is changed every time a new government comes to power by force, it is very difficult for a sound legal tradition to be established. If constitutional life is characterised by constant changes over a long period of time then people fail to obtain the knowledge and habits associated with genuine constitutional government. This is particularly the case where changes are made to the constitution at the behest of military rulers who are intent upon restricting the powers of the judiciary and legislature. Ultimately, they may succeed in causing widespread disillusionment and all but cease attempts at recourse through the parliament and redress through the judiciary.

Displacement of constitutional law affects public law. Citizens' rights to challenge government actions depend upon constitutional protections. Where these are removed, restrained or subjected to repeated alterations, the practical activities of lawyers and human rights defenders in using the courts to defend human rights also are undermined. Judicial review of government actions may be tightly controlled or altogether eliminated. Restraints may be imposed on the use of writs or their equivalents. As the constitutional law on what constitutes abuse of power is shifting and confused, people steadily lose confidence and interest in the capacity of the courts to protect their interests as against those of the executive. Ultimately, notions of abuse of power may cease altogether, and confidence in the capacity of the courts to intervene in the interests of the public may be all but lost.

"While a constitution is suspended or being altered and public law is being diminished, the military will have many opportunities to expand powers through state security laws and other measures to block the flow of the legal system"

While a constitution is suspended or being altered and public law is being diminished, the military and other extant authorities will have many good opportunities to expand their powers through the introduction of state security laws, emergency laws, anti-terrorism laws and other measures and institutions to block the flow of the legal system. These all serve to remove whatever measures may have existed through the courts and other institutions to prevent or inhibit arbitrary arrest, detention, torture, extrajudicial killing and forced disappearance. Such laws may go so far as to remove the possibility of judicial inquiries into suspicious deaths, or render the inquiries pointless by granting impunity to the perpetrators, no matter what the findings of the courts. Thus, the authorities may keep some legal measures for defence of rights on the ordinary statute books for the sake of appearance, knowing full well that any complaints lodged under them will anyhow be futile. In this way, not only the flow of constitutional law, but ultimately that of the entire criminal justice system is reduced and polluted.

Another part of the legal system that is gravely affected under such conditions is that handling investigation: the police or other units responsible for criminal inquiries. When the military or another group takes power by force, and then expands its power by curtailing measures to protect citizens' rights and introducing new laws to its advantage, civilian policing is perverted and damaged. There may initially be some conflicts between police and the group in power, but as those on top cement their authority the result is that the role of the police is either manipulated or reduced. If the military exercises control over police, the latter are sure to be obliged to behave more in conformity with the rules and instructions of the former. The civilian characteristics of policing, to the extent that they may have existed earlier, are thus minimised. This is likely to have particularly bad consequences where accompanied by many allegations of abuse of power and gross violations of human rights by the military and its agents. The police will have neither the legal nor institutional power to initiate investigations in these cases as they would in

other instances of similar crimes where the accused are ordinary civilians. Those personnel who try to do their jobs are bound to face serious threats.

Proper criminal investigation techniques can only be obtained and refined through years of training and hard work. Civilian police have to adopt methods and strategies to find evidence that will lead to arrests and convictions. This takes years of study and practice. Senior officers impart knowledge to their subordinates over generations. Over time, habits become entrenched. Both the superior officers and their subordinates learn how to maintain discipline and make the system of investigation effective. None of this happens where powers of criminal investigation are suspended or constantly changed due to interruptions in constitutional law and the subsequent effects that have been described here. Where police learn that they should not deal with all crimes equally and that criminal investigation is only to be applied selectively, or even worse, where they learn that their role is not even so much to investigate as simply to maintain social order through use of force, and that this may also involve not the revealing of crime but its concealment, then the effects are long-lasting and drastic. Over time, such a police force becomes a caricature of what it should be, and it will be very difficult to make it even roughly resemble a proper functioning criminal investigation department. Even the revival of earlier powers under a new constitution and the removal of emergency laws will not be enough: the habits learnt throughout this period will have become ingrained, and it will take at least one or two generations to get them out again. It will take time to introduce or reintroduce a flow of professional thinking and habits throughout all phases of criminal investigation.

As with the ecological system, the consequences of a destroyed legal system are felt in all areas of life, not only within the legal system itself. As it is degraded it also contributes to the decline in political life. One of the enduring myths of recent times is that a vibrant parliament alone can sustain a healthy government. However, where no viable judiciary and criminal investigation exists to support and scrutinise the legislature, it too will be unable to function properly. Thus new authoritarian governments are most often characterised by the existence of bogus parliaments, which either lack genuine power or which exercise power on behalf of outside persons and agencies. Where a strong and independent judiciary does not exist, supported by the other parts of the legal system described above, it is not available either to back up or sanction the legislature.

“One of the enduring myths of recent times is that a vibrant parliament alone can sustain a healthy government; however, where no viable judiciary exists it too will be unable to function properly”

At this point, the danger posed to the legal system should be obvious to all, although as in the case of ecological systems under threat there will still be some naysayers insisting that everything is perfectly normal, or that things are not as bad as they appear. Some may say that this is all part of a natural cycle: hot then cold, coup then constitution. However, the reaction of ordinary

victims of abuse will show otherwise. From observation and experience, people will come to realise that lawyers, courts and even members of parliament cannot guarantee their rights. As life is now under the control of other agencies, the only way to obtain some redress is by appealing to them directly, even where they are the same ones responsible for wrongdoing. Thus a person whose son has been killed by the police may go to a senior police officer to request justice, instead of the courts. A person who has been tortured by soldiers may be taken to another agency or authority within the army to request some compensation and disciplinary action against the alleged perpetrators. Not only the legal system as a whole, but also the persons associated with it—judges, lawyers, public prosecutors and other judicial officers—are thus reduced in value in the eyes of the public. They may have the same titles and sit on the same chairs in the same buildings as before, but over time it becomes public knowledge that they too are powerless. In their stead we see the re-emergence of feudal behaviour, as the sophisticated legal system needed for survival of a healthy and functioning modern society is steadily reduced in size and capacity: even where its external appearances remain, below the surface its life is gone. Once at this point, talk about defence of human rights through institutions of justice is meaningless. Redress depends not upon order and rationality but upon circumstance and dumb luck.

"While government propaganda may try to give the appearance of a decent and harmless coup, the effect of removing the paramount law of a country by force is to make clear that the country is lawless"

Ultimately, the notion of a constitution being replaced by military force is, from a legal perspective, an absurdity. While government propaganda may try to give the appearance of a decent and harmless coup, the effect of removing the paramount law of a country by force is to make clear that the country is lawless. The final arbiters in any conflict are not the courts but those with the firepower. The constitution, whatever constitution, has no real value. By implication, all the laws of the country, which are established under the constitution, are of limited worth, compared to that authority obtained by the barrel of the gun. Thus the country has devolved to an extremely primitive condition that will have lasting bad effects for generations, which, as in the case of ecological systems, can be reversed only through deliberate systematic measures to mitigate the damage already caused and prevent further harm from occurring.

Constitutionalism and human rights in Asia

Human Rights Correspondence School,
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The structure of modern nations has been shaped with government being divided into executive, legislative and judicial bodies, with the commonly accepted notion that these bodies and their powers must be separated. This is one of the most fundamental tenets of modern governance, and as such is a key characteristic of any constitution. Of course, the separation of powers does not mean these bodies function alone; rather they work interdependently, but maintain their autonomy. Other tenets include the idea of limited government and the supremacy of law. Together, these can be termed the concept of constitutionalism.

In other words, constitutionalism is the idea that government should be limited in its powers and that its authority depends on its observation of these limitations. In particular, these limitations relate to legislative, executive and judicial powers. A constitution is the legal and moral framework setting out these powers and their limitations. This framework must represent the will of the people, and should therefore have been arrived at through consensus.

If these are taken to be the basic tenets of constitutionalism, then not all states with constitutions will have embraced constitutionalism; authoritarian governments or military dictatorships do not fulfil the tenets of the supremacy of law or the separation of powers. The judiciary in Cambodia for instance, is highly subordinate to the executive, blurring boundaries between the two arms of government. The huge number of disappearances of alleged political activists in Pakistan is a clear violation of the rule of law. The message sent to society in these cases is clear: it is not the constitution that reigns, but those in power. It is therefore important to distinguish between adopting

This article consists of edited extracts from Lesson Series 49 of the Human Rights Correspondence School, Asian Human Rights Commission, on constitutionalism and human rights. The second half of the lesson consists of a case study on the 1997 Constitution of Thailand. The full lesson can be read online: www.hrschool.org.

a constitution and genuine constitutionalism. This distinction becomes particularly important when constitutions are adopted to protect the interests of the ruling regime. A constitution is not merely a document introduced by the state with the title of 'constitution'. Many authoritarian regimes introduce such documents to justify arbitrary rule. Thailand for instance, has had a new constitution virtually every time there is a change of power. A genuine constitution however, is an attempt to limit and reverse all forms of arbitrariness.

"Authoritarian governments are by their very nature unconstitutional"

Democracy and constitutionalism

Authoritarian governments are by their very nature unconstitutional. Such governments think of themselves as above the law, and therefore see no necessity for the separation of powers or representative governance. Constitutionalism however, is primarily based on the notion of people's sovereignty, which is to be exercised—in a limited manner—by a representative government. Thus, there is a very important and basic link between democracy and constitutionalism.

Just as mere constitutions do not make countries constitutional, political parties and elections do not make governments democratic. Several Asian countries have been termed 'illiberal democracies', for while they have periodic elections, they are not governed by the rule of law and do not protect the rights and liberties of their citizens. India and Sri Lanka are examples of such countries, where the politicization of public institutions is common, where politicians and government officials are deemed above the law and where there is significant violence against minorities and marginalized groups. Genuine democracies rest on the sovereignty of the people, not the rulers. Elected representatives are to exercise authority on behalf of the people, based on the will of the people. Without genuine democracy, there can be no constitutionalism.

Rule of law

Rule of law refers to the supremacy of law, applied equally to all persons, including government and state officials (See Lesson Series 40 for a detailed study of the rule of law and human rights in Asia). There are two aspects to the relationship between constitutionalism and rule of law: not only is constitutionalism the institutional basis for rule of law in any society, it is also safeguarded by the rule of law. Following basic principles of constitutionalism, common institutional provisions used to maintain the rule of law include the separation of powers, judicial review, the prohibition of retroactive legislation and habeas corpus. The independence of law making bodies is established, as is independence for judges in articulating and interpreting laws. Genuine constitutionalism therefore provides a minimal guarantee of the justice of both the content and the form of law.

On the other hand, constitutionalism is safeguarded by the rule of law. Only when the supremacy of the rule of law is established, can supremacy of the constitution exist. Constitutionalism additionally requires effective laws and their enforcement to provide structure to its framework.

> "There must be considerable public debate and discussion prior to the adoption of any constitution"

Process of constitution making

It is now clear that the constitution is an essential document, laying out the framework of a nation's political, economic and social structure. How should such an important document come into being? First, it is necessary to note that not all constitutions are written documents. The greatest example of a constitution that cannot be found in a written format is the British constitution, which has been developed slowly over many centuries. Modern constitutions though, tend to be found in written documents.

A framework for a country's governance and structure cannot be laid out without deep intellectual and societal agreements on political, legal and moral issues. In order to arrive at such agreements, there must be considerable public debate and discussion prior to the adoption of any constitution. Such discussion must take into account that all societies will have conflicting interests. While certain interests will inevitably predominate, the impartial protection of rights and liberties should ensure that such dominant interests do not harm others. Drafting a constitution is therefore very much related to democracy and the rule of law.

Human rights judgments under the 1997 Constitution of Thailand

Lawyers Council of Thailand &
Asian Legal Resource Centre, Hong Kong

Mine threatens environment and heritage

Black Case No. 218/2545, Khon Kaen Administrative Court

Somphong Chinsaeng and 392 other residents of Dongmafai, in Suwankhuha District, Nong Bua Lamphu Province, filed a case against the Minister of Industry and Dusit Triwatsuwan, the holder of a ten-year mining concession, alleging that the concession had been granted illegally. They had petitioned the authorities against mining in the area since 1999, because the area of the concession is an important watershed that also contains prehistoric paintings. But the petition was not heard before the authorities granted the concession to a private company. The litigants then petitioned the National Human Rights Commission of Thailand, which in 2001 investigated and recommended that government agencies halt the concession; however, they did not comply. The litigants used the findings of the commission as evidence in their plaint.

Judge Warawuth Siriyuthwattana of the Khon Kaen Administrative Court found that although the minister had authority to grant the concession, it had to be done in accordance with section 59 of the 1997 Constitution:

> 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 this case, the concession was granted without consideration of its effects on the environment and community. The court observed that even though the prehistoric paintings are remote and inconvenient to serve as a tourist site, their true value

cannot be measured only in terms of economic revenue; national artistic and cultural heritage is important for the study of nationality, society and ethnicity, and is of academic interest. Thus the concession was revoked.

Protest at approval to build power plant

Black Case No. 1480/2545, Red Case No. 3283/2546, Prachuab Khiri Khan Provincial Court; Court of Appeal

The public prosecutor brought charges of trespass against Jinthana Kaewkhao for organising the Ban Krut villagers to invade the 13 January 2001 celebratory banquet organised by the Union Power Development Company, which had successfully obtained a concession to build a 1400-megawatt power plant at nearby Hin Krut. The villagers pelted eggs and excrement at the 2000-head party, causing it to be abandoned. In response, that night shots were fired into Jinthana's house.

Judges Panjaphon Sanesangkhom and Siriphon Nannaruemit in the Court of First Instance in Prachuab Khiri Khan Province considered that this case related to a conflict between villagers and local influential persons (i.e. business and mafia figures), where a villager was the accused. They dismissed the case on grounds of freedom of expression under section 39(1) of the 1997 Constitution; and freedom of assembly under its section 44(1) and 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.

The court noted that the intention of these provisions was to develop a more democratic administration that would encourage greater public participation than under previous constitutions. Therefore, the law should not be used to harass persons legitimately exercising these rights.

However, in the Court of Appeal, Judges Chachawan Bunnag, Kiatisak Kiantidamrong and Prayun na Ranong reversed the lower court verdict and convicted the accused without taking constitutional rights into consideration and without admitting evidence that the defendant was leading a group of villagers in a battle against influential persons who had the means to intimidate witnesses. The case was also referred for further investigation.

The police closed the investigation into the shooting at Jinthana's house after claiming that they lacked evidence, despite having recovered a bullet casing from nearby.

Gas pipeline protest

Black Case No. 195/2546, Red Case No. 2321/2547, Songhkla Provincial Court

On 20 December 2002 Ratchada Watanasak and 19 other defendants together with their accomplices travelled by pick-up trucks from Chana to Had Yai in Songhkla Province, in order to interrupt a mobile cabinet meeting organised in the south on the following two days. The group was opposed to the construction of a gas pipeline across the Malaysian border, and a related plant.

The police responsible for the security of the mobile cabinet meeting had been informed that on the day approximately a thousand people would assemble peacefully, travel to Had Yai to present a petition to the prime minister asking for a review of the project, and return home on 21 December 2002. The police officers agreed that the assembly could take place and were ready to make the necessary arrangements. The group gathered together and proceeded in the manner that they had informed the police.

On the way police officers manning checkpoints stopped and inspected the vehicles. Negotiations between the police and protestors allowed for a way to be opened for the convoy to travel to Had Yai as had been agreed. But on reaching Juti-anuson Road at the foot of Jutibunsung Uthit Bridge, en route to the JB Hotel, the protestors found the way blocked by many police officers manning metal barriers. There they refused to be subjected to more searches by the police, having already had their vehicles checked along the way, and refused to turn off from the agreed route and go to another a site that the government agencies had designated for the rally.

The protest group stopped at the bridge and for about one hour waited for the results of negotiations with government agencies. The court later observed that the protestors seemed to believe at the time that the negotiations would be successful. During this time speakers took turns to attack the project, and protestors shouted in response, but the court noted that none of this was unusual for a protest rally or in any way illegal. Nonetheless, the police officers subsequently moved together to force back the protestors until they dispersed. A melee ensued and damage was caused to government property. The accused were then charged with damaging public property, carrying arms without permission, conspiring with more than ten persons to create a disturbance, failing to disperse when ordered and assaulting government officials.

The lawyers for the accused defended the case with reference to the constitutional rights of assembly, protection of natural resources and participation in decision-making in projects affecting local residents.

In their judgment of 30 December 2004, Judges Phongsathon Hemathanon and Tophong Phongseri considered the reason for the protestors to have gathered. The Thai-Malaysian natural gas pipeline and gas separation plant project was a large energy project that would likely affect the quality of the environment, health and living conditions of the local people. The 1997 Constitution stipulated that people, communities and local administrative organizations must receive information, express their opinions and participate in planning, appraisals and public hearings processes in accordance with the law (section 59). Any person had the right to express his or her opinion on the project, and to rally against it in accordance with the law. In keeping with this provision, the government had organised two public hearings on the project. However, persons opposed to the plan had gathered to demonstrate until violence had twice erupted. It had by then become clear that the government would go ahead with the project no matter what.

The court found that the protestors had gathered together and proceeded to Had Yai lawfully in accordance with their constitutional rights. They had not intended to commit offences. However, despite agreeing to accommodate the protestors, the concerned authorities had not been able to agree on which site the protestors could use to stage their rally in Had Yai, despite having had sufficient notification. The relevant government agencies had failed to coordinate and were not fully prepared. Traffic jams resulted from the police officers blocking the Asia Highway and Jutibunsung Uthit Bridge. The authorities did not have justification for changing the route or searching the protestors.

The court upheld the defendants' constitutional right to assembly, and held that to the extent that there was damage to property and violence against government officials, it was not premeditated but occurred in response to the authorities' actions. None of the vehicles, electrical equipment, loudspeaker equipment or other objects brought by the protestors was brought with the intention of committing illegal actions, and none of the objects were themselves illegal.

Banchong Nasae, one of the defendants, said afterwards that the most important factor in winning the case had been that "we did only what we have the right to do according to the constitution". The victory was a landmark judgment in support of constitutional rights, Sangchai Ratanaseriwong, one of the lawyers for the group, said.

The protestors later claimed compensation from the police and provincial authorities for injuries sustained and damage to property.

Local councils refuse mining concession

Red Case No. 665/2546, Central Administrative Court

Simongkhon Agricultural Cooperative Ltd brought a case against the Saiyok District Officer, Simongkhon Tambon [Sub-district] Administrative Organisation (TAO) and four others on the complaint that the district administration had failed to do anything when the TAO had apparently organised local villagers in Kanchanaburi, west of Bangkok, to protest against the cooperative in order to be able to refuse it a phosphate mining concession. The litigant appealed to the court to order the district officer to set aside the opinion of the TAO.

The court found that the TAO had refused the concession for environmental reasons; local residents also opposed the mine. The actions of the citizens and local administrators had been in accordance with the 1997 Constitution; whether or not the state had a policy to support cooperatives was in that respect irrelevant. The members of the TAO and local village head also had the same rights as others under the constitution to express their opinions freely in accordance with section 39(1) so long as they did not violate the law or incite others to do so. Local residents had assembled peacefully and without arms, as was their right under section 44. Therefore there were no grounds upon which the district officer might investigate or take disciplinary action against the TAO to set aside its decision, and the case was dismissed.

Disabled lawyer applies to serve as public prosecutor

Red Case No. 142/2547, Supreme Administrative Court

Simit Munmuun complained that the Public Prosecution Commission had acted unlawfully in rejecting his application to do the selection exam to become a public prosecutor in February 2000, citing the fact that he is physically disabled and thus his appearance would be unsuitable for the work of a public prosecutor. The litigant claimed that this was a violation of section 30(3) of the 1997 Constitution: "Unjust discrimination against a person on the grounds of difference in... physical or health condition... shall not be permitted."

In a judgment of 17 June 2003 Judge Siriwan Julpo dismissed Simit's plaint in the Administrative Court, on grounds that the Public Prosecution Commission had the right to require that applicants undergo a medical checkup, and that the Constitutional Court had endorsed its regulations. The judge ruled that the medical requirement of the commission was applied to all applicants without discrimination and that anyone who failed it was denied the right to proceed with his or her application.

However, on appeal the Supreme Administrative Court in February 2005 decided in Simit's favour. The court noted that he had been able to work as a lawyer for five years without obstacle, and that the work of a public prosecutor was no different.

It cited testimonies from a provincial judge in Kamphaeng Phet and the provincial lawyers' council in support of his claims. The court upheld the appeal both under section 30(3) of the constitution and also found it to be an illegal discretionary act under article 33(11) of the Government Service Regulations (Public Prosecution Section) Act 1978 (BE 2521). It ruled that the Public Prosecution Commission was obliged to spell out in detail under its regulations what physical handicaps would be deemed to hinder the capacity of an applicant to do the job of a prosecutor.

In reaching the decision, the court effectively overturned the earlier decision of the Constitutional Court on the applications of two persons who had suffered from polio for the post of judge. That court had held that the Judicial Commission had not violated the same section of the constitution by disbarring Sirimit Boonmul and Boonjuti Klubprasert (Case No. 16/2545), on the grounds that a judge walking with a limp would not inspire the required public respect. The decision had attracted considerable public criticism.

Criminal defamation for critiquing prime minister's business interests

Black Case No. 3091/2546, Red Case No. Aor 685/2549, Criminal Court (Bangkok)

The Shin Corporation sued Supinya Klangnarong and four others for criminal defamation over an article published in the Thai Post newspaper on 16 July 2003 quoting the first defendant as saying that its profits had increased three to four times since its founder, Pol. Lt. Col. Thaksin Shinawatra, had become prime minister. The other defendants were the editors and publishers of the Thai Post.

In the article, Supinya explicitly linked the increase in profits to the political power of Pol. Lt. Col. Thaksin and his Thai Rak Thai party being used to support Shin Corporation's mobile phone, satellite and television interests, despite the fact that these were deemed to be resources in the public interest (as defined under section 40 of the 1997 Constitution). In the interview, she gave specific warnings about the integration of business and political interests under the then-government, and suggested that Shin Corporation was looking to monopolise high-speed Internet services in Thailand. She said that her advocacy group, the Campaign for Popular Media Reform, had released a report on these and other conflicts of interest.

The corporation sued the five defendants on the grounds that the allegations were false and had damaged its reputation, and sought that a judgment convicting them be published in all major daily Thai language newspapers for a month at the expense of the accused.

In reaching their decision of 15 March 2006, Judges Nawachart Yamasmith and Mom Luang Chalermchai Kasemsant found that although Pol. Lt. Col. Thaksin was no longer legally a part of the Shin Corporation, as he had been its founder and his

SUPINYA KLANGNARONG

relatives had remained on its board of directors, there was clearly a connection between him and the company. Furthermore, the company was engaged in public activities. The first defendant had studied these in detail and commented in good faith and in the public interest, and the newspaper had acted likewise acted in good faith in publishing her remarks. Thus the case was dismissed. A civil case was also dismissed in May 2006.

Villagers' nationality revoked

Red Case No. Oo 117/2548, Supreme Administrative Court

Phongsi Inlu and 865 others brought a case against the Department of Local Administration Department, Chiang Mai Provincial Administration and Mae Ai District Officer on grounds that the concerned agencies and official had illegally revoked their nationality. They had all been born in the hilly areas of northern Thailand but fire in the district office destroyed the district house registration list for their village during 1976. They had applied to the district and received approval to have their names recorded on the list, along with other family members, totalling 1243 persons. But subsequently a new district officer on 5 February 2002 revoked the approval and ordered that they return their identity cards and registration documents to the Mae Ai Registration Office within 30 days, in accordance with the orders of the Local Administration Department and Chiang Mai Provincial Administration. Instead they were issued with temporary displaced persons identity cards. Thereafter they lost entitlements to insurance, and several villagers in state employment also were sacked from their jobs.

In April 2002 the litigants petitioned the court that they had not been given any opportunity to contest the order, explain or present witnesses or evidence and that the order amounted to unlawful use of discretionary powers.

The Chiang Mai Administrative Court in April 2004 found the Mae Ai District Officer to have acted unlawfully with reference to the cases of 840 of the litigants, and instructed that the order be revoked in their cases.

On appeal by the provincial and district administrations, Chief Justice Pratheep Woraniti of the Supreme Administrative Court found on 8 September 2005 that the action of the Mae Ai District Officer in revoking the house registrations had the effect of permanently changing the status of the rights and duties of these individuals. It observed that the Mae Ai District Officer did not inform all the persons affected by the announcement that their Thai nationality would be revoked and they would be accorded only a secondary administrative status, and they did not have the opportunity to contest the order or provide any witnesses or evidence to assert their rights (c.f. sections 61 & 62 of the 1997 Constitution). The officer did not follow the criteria and procedures that are essential for the issuance of administrative orders, and therefore the order was issued illegally and that all 1243 persons affected must have their nationality restored.

MAE AI VILLAGERS GATHER TO DISCUSS THE CASE (PHOTO: CHIANG MAI MAIL)

Financial records of five activists investigated

Red Case No. 216/2548, Central Administrative Court

Chaiphan Praphasawat and four others (Phakphum Withansirawat, Baramee Chaiyarat, Nanthachote Chaiyarat and Prayong Doklamyai) brought a case against the Anti-Money Laundering Office (AMLO) and its secretary-general, and the director of the Information Monitoring and Evaluation Centre on the ground that they had violated their authority by investigating the five in October 2001 under the Prevention and Suppression of Money-Laundering Act 1999 (BE 2542). The authorities had ordered financial institutions to provide information related to the financial transactions and assets of the five—among about 20 persons in total, including journalists, members of non-government organisations and human rights defenders—all of who were activists or advisors of the Assembly of the Poor, a rural action group that had been organising demonstrations and other activities in protest at the government. According to the authorities, the investigation had followed an anonymous tip-off on October 3. Some news of the investigation was published in the press.

On 18 February 2005 the majority opinion of the court found that the respondents had used authority without reasonable cause and wrongfully used their discretionary powers. The respondents knew that it was unlawful to collect information on the private bank accounts and transactions of five ordinary citizens, and a violation of the right to privacy and section 420 of the Civil and Commercial Code. However, as this was done confidentially in the course of official duties and as the information was destroyed after the secretary-general cancelled the investigation on 1 July 2002, the damage to the litigants was mitigated and therefore it was not appropriate for them to receive compensation.

Judge Chachiwat Sikaew differed from the majority on the question of compensation for the litigants. He concluded that the officials' knowledge of the deposit accounts, loans and transactions of the five litigants was damage in itself, and it was not necessary to prove that they had incurred a specific loss. The Prevention and Suppression of Money-Laundering Act does not grant government officials unlimited authority; the respondents were obliged to act in accordance with section 26 of the 1997 Constitution: "In exercising powers of all State authorities, regard shall be had to human dignity, rights and liberties in accordance with the provisions of this Constitution." However, the respondents had clearly violated the right of privacy under section 34(1) and had not been absolved of the damage caused by their action in any way when the five litigants claimed damages of 50,000 Thai Baht (USD 1250) per person, which was not a large sum in view of the violation.

The judgment followed a similar decision of 24 June 2002 when the Central Administrative Court had ruled that AMLO had illegally investigated four journalists who had been critical of the then-government of Pol. Lt. Col. Thaksin Shinawatra. On that occasion, just prior to the court giving its verdict AMLO called off its investigation and lodged a petition for the case to be dismissed on the basis that since the inquiry had been closed there was no need for the ruling. However, Judge Wisanu Waranyu proceeded to give his judgment and found that AMLO had violated the rights of the four by investigating them on the basis of allegations contained in an anonymous leaflet. "Anonymous leaflets must be treated carefully with the fairest of minds because they could be... produced to justify the abuse of state power. This would be a danger to the rights and liberties of the people," Judge Wisanu ruled. He too stressed that the powers granted to the agency did not extend to launching blanket inquiries against anybody.

Villagers assault power plant employees

Red Case No. 2383/2548, Criminal Court (Bangkok)

Charoen Wat-aksorn and four others were accused of assaulting and confining a group of persons who on 13 October 2001 had come to do an environmental impact assessment of an area where the Gulf Power Generation Company had obtained a concession to build a 734-megawatt power plant in Bo Nok, Prachuap Kiri Khan. The five accused were all leaders of a local conservation group that had been fighting against the plant's construction for a number of years. Charoen was subsequently shot dead on 21 June 2004 after returning from testifying about land grabbing in the area to a senate inquiry.

Three of the accused—Charoen's wife, Korn-uma Pongnoi, Ladda Singlek and Chaiyos Kaenthong—were found guilty, but in passing sentence on 17 August 2005 Judges Suwit Thonphanit and Omruedee Phongsai took into consideration that their actions had been an expression of stewardship of natural resources and the environment, which everyone in the nation is obliged to help protect.


CHAROEN WAT-AKSORN

(Section 56[1] of the 1997 Constitution: "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.")

The court found that the group was acting in national interests but the methods used were disproportionate and in violation of the law. Thus there were extenuating circumstances in accordance with section 78 of the Penal Code, which provides that where such circumstances exist a sentence may be cut by

as much as half. The five were found guilty but the two-year jail term imposed was reduced to 18 months and then suspended for two years.

The two confessed killers of Charoen both died in prison. Prachub Hinkaew died on 21 March 2006, before the hearings to obtain witness testimonies were due to begin: reportedly from a bacterial infection. Then as the hearings were getting underway, on 3 August 2006 Saneh Lekluan also died in prison, this time reportedly due to blood circulation failure as a result of malaria. Both men are understood to have contracted HIV/AIDS. However, an August 9 report in the Bangkok Post newspaper cited the prison hospital director as saying that Saneh had not shown symptoms of malaria before he died. Although many persons questioned how both of the key witnesses could be allowed to die in the months just before the trial and the relatives of the two gunmen had reportedly earlier said that they did not expect that the men would get out of jail alive, no independent autopsies were known to have been conducted on the bodies of the two. The director of the Department of Special Investigation under the justice ministry reportedly assigned an officer to investigate the two deaths, but no information was made known publicly about any findings. The investigation into Charoen's killing remains unresolved.

THAILAND: Lower courts set important precedent on constitutional rights

(AHRC Statement AS-127-2006, 31 May 2006)

Last week two lower courts in southern Thailand made important decisions with wide implications for human rights and constitutional law in Thailand. On May 23 the southern Trang Provincial Court ruled that by destroying his April ballot paper in protest at the incumbent government, Tossaporn Kanchanapamornpat had not broken the election law. It said that as the higher courts had invalidated the vote, Tossaporn was exercising his right under article 65 of the 1997 Constitution "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". On the same day, the Songkhla Provincial Court gave the same ruling in a case against Dr Kriangsak Liewjanpatana and six others accused of the same offence. In so doing, the courts effectively concluded that this article under the constitution could be directly enforced, without any mediating law, over and above the provisions of an ordinary domestic law.

Although the Constitution of Thailand is the country's supreme law, the courts have been reluctant to invoke its provisions directly. Its article 6 holds that, "The provisions of any law, rule or regulation which are contrary to or inconsistent with this Constitution shall be unenforceable." However, in reality the courts have awaited the enactment and revision of domestic law in line with the constitution, and to some extent, guidance from the higher judiciary, before acting on its provisions. As a consequence, there are still many domestic laws being enforced in Thailand today that are contrary to constitutional law. There are also many constitutional provisions for which no equivalent legislation has been written, making it difficult for complainants to obtain redress for want of legal and institutional avenues.

In recent years, the Thai courts have sought to avoid the implications of the many contradictions and gaps found between the constitution and subordinate laws, as more and more defendants and litigants alike have invoked their constitutional rights in opposition to particular statutes and regulations, or the lack thereof. This has caused confusion and discomfort, as article 28 of the constitution clearly states that, "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."

In practice, the courts have been reluctant to recognise appeals direct to the constitution, and have rejected cases argued on constitutional grounds through narrow interpretations of existing law and criminal procedure. In February, for instance, the Angthong Provincial Court convicted Sathien Janthorn of setting up a community radio station illegally. The 1955 law under which he was convicted itself appears to violate articles 39 and 40 under the new constitution, and Sathien based his defence upon his constitutional rights to broadcast. However, the court decision had the effect of giving the 50-year-old statute precedence over the constitution.

In January, the Criminal Court in Bangkok sentenced one out of five police officers charged in connection with the abduction and forced disappearance of human rights lawyer Somchai Neelaphaijit to three years in prison for coercion. It has been established that the police abducted and probably murdered Somchai, and it is widely accepted that the five defendants in the original criminal case were all involved. Article 31 of the constitution protects "the right and liberty in... life and person", and stipulates that, "No arrest, detention or search of person or act affecting the right and liberty under paragraph one shall not be made except by virtue of the law." However, for want of a specific law on abduction and forced disappearance by state officers, the constitution could not be effected. Victims of torture defending themselves against fabricated charges have faced similar difficulties. Although article 31 also prohibits torture and cruel or inhumane punishment, again the absence of an enacting law places this constitutional right beyond the reach of the ordinary person.

The judiciary has long been the weakest leg of the Thai state. Historically, the role of the courts has been limited to enforcing legislation and cooperating with the executive with a view to obtaining a stable society. The interpretative role afforded the courts in other jurisdictions, and their importance in counterbalancing the authority of the executive and legislature, had not until recently been recognised in Thailand. As a consequence, powerful politicians and businesspeople together with elite military officers, corrupt police and bureaucrats for decades controlled national affairs uninterrupted. The end of military dictatorship in 1992 and progressive constitution in 1997 opened the door for the courts to play a new role in shaping the country's future, particularly with the introduction of two new superior courts. However, it has taken some years for the new possibilities to be recognised and seized.

...

The Asian Human Rights Commission calls upon all judges, lawyers, journalists and other concerned persons to study these cases closely and actively engage in the growing discussion on the role of all courts in building a body of constitutional jurisprudence in Thailand. The effects of the judgments in Trang and Songkhla should be felt not only in the remaining cases of ballot paper protests, but in all hearings and appeals pending before the courts where constitutional rights have been directly invoked. And in view of the growing number of cases before the courts where citizens are seeking remedies from—or defending themselves against—state agencies on constitutional grounds, the Asian Human Rights Commission renews its call for an avenue for direct complaints to the country's higher judiciary on this basis.

The debate on the authority of the Thai courts in enforcing constitutional rights is now on in earnest: if as a consequence the means to enforce these rights can be institutionalised, then a foundation will be laid for the judiciary to have an ongoing and active role in ensuring that they are found not only on paper but also in reality. In the meantime, the movement of the courts towards quickly taking up and addressing cases in the public interest is itself very welcome. It is in this way that a judiciary slowly emerges as a protector of basic rights, and as this trend continues in Thailand it can be expected to have positive effects for everyone in the country.

The search for order: Constitutions and human rights in Thai political history

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In 1997, parliament passed the new Constitution of the Kingdom of Thailand BE 2540 (1997). The new constitution reflected the crystallization of 67 years of Thai democracy. In this sense, the promulgation of the latest constitution was not simply another amendment to the previous constitutions, but it was a political reform that involved the majority of the people from the very beginning of its drafting. The whole process of constitution writing was also unprecedented in the history of modern Thai politics. Unlike most of the previous constitutions that came into being because those in power needed legitimacy, the constitution of 1997 was initiated and called for by the citizens who wanted a true and democratic regime transplanted on to Thai soil. This popular demand, fueled by the latest uprising in May 1992 against the military-controlled government, led to the election of the Constitution Drafting Assembly to rewrite the new constitution according to the wishes of the people. To make this constitution closer to the wishes and aspirations of the people, the assembly organized public hearings to enable concerned citizens and groups to air their opinions on a variety of topics and subjects crucial to the working and efficiency of the constitution. Finally the new and first popular constitution was submitted to parliament with strong support from people of all walks of life. Its submission was followed by long debates and objections from certain leading members of the house who feared it was overly liberal in its strong support of human rights and liberties of the people. The constitution of 1997 became the 16th constitution in the 67 years of Thai democracy.

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The history of a constitution is necessarily interwoven with the history and development of democracy, and more specifically, with the emergence of the concept of rule by law. The ability to implement a constitution and to guarantee its integrity presupposes strong social and political institutions. Although constitutions were occasionally put in practice by ancient regimes, they are, for the most part, of recent invention. Their fates remain bound to those of the political history of a given country, particularly with regard to the aspirations for democratic rule. The Thai constitution is no exception. Thailand was catapulted into a democratic, or at least a democratizing, period following the coup of 1932. The leaders of this coup were immediately presented with the dilemma of having to adapt the ideals of western constitutionalism to the realities of Thai society and politics: namely a highly stratified society with a large number of undereducated people and the concentration of political and economic resources in the hands of a small percentage of the population. Additionally the presence of the military in their capacity as 'midwives' of Thai democracy, although not initially perceived as an obstruction to the advancement of democracy, became increasingly problematic as they gained in strength throughout the Cold War period and beyond.

In order to understand the Thai constitution, it is necessary to examine how it developed by drawing upon Thai ideas and adapting the western 'ideal' to Thai realities.

The importance of constitutions in Thai history

In the tradition and understanding of western constitutionalism, the constitution aims at the limitation and regulation of the government's powers and the protection of private rights and liberties. The significance of the constitution in Thai political history and government is that it is not simply the highest law. Thai constitutions served as histories of political development and conflicts, and in terms of the law, they were the sum total, not the source, of the lesser and organic laws that existed prior to the promulgation of the constitutions. Reflecting the temperament of the times, the Thai constitutions therefore represented the realities of power relations in the process of Thai social and political development.

The historic role of the constitution in Thai politics reflects its unique position in the continuity of the government. After the abolition of the absolute monarchy, the country had not been able to establish new institutions and customs to legitimize the transfer of power by force. In the old Thai government tradition, the palace coups and the use of force to overthrow or take over the king's power was justified and legitimized by the Buddhist concept of merit and power. According to traditional beliefs, the righteous behavior of the leaders was a precondition for their possession of power. That meant that those who had power were thought to be good and deserving of it. But the legitimacy of a modern regime stems not only from the elaborate process of

SOLDIERS DURING THE 1932 COUP

having constitutions, calling for new elections, appointing respectable figures in the governments, and declaring loyalty to the monarchy, but more so from the regime's ability to maintain authority and retain power.

"After World War II, the meaning of the constitution began to change according to new developments in political factions and conflicts"

Following the coup of 1932, the first constitutional monarchy regime was established with the aim of creating a democratic government in the kingdom. The coup group (known as the People's Party) saw this period as transitional and needed a special plan for the implementation of the new political system, resulting in the National Assembly, composed of a mixture of elected and appointed members. In the wake of the coup, however, government leaders and political elites attempted to adhere to the idea of constitutionalism. This idea persisted even in the face of many violent conflicts, which erupted from rivalry among elite groups. From 1932 to 1946, there were two unconstitutional changes of government. The first was the forced closure of parliament in 1933 by Phraya Mano, the first prime minister, as a result of disagreement in the cabinet over the proposed economic plan of Pridi Phanomyong. This led to a coup in the same year by the military wing of the People's Party. Later there were also two attempted rebellions against the government. One was the Bowaradet Rebellion in 1933; the other was the Songsuradet Rebellion in 1939. The use of force in resolving political conflicts among rival elite groups increasingly became part of the fledgling constitutional regime. The government under Phibun at that time resorted to the use of a special court and executions in order to suppress its political enemies.

After World War II, the meaning of the constitution began to change according to new developments in political factions and conflicts. Maintaining parliamentary politics and the stability of the government proved to be increasingly difficult. In order to cope with the new internal and external political and economic situation, the constitution of 1946 replaced a unicameral parliament with a bicameral one, calling the second house the House of Elders. From that time on the upper house, later referred to as the senate, would become another institution in the growth and development of parliamentary government in Thailand. The 1946 Constitution was terminated by the military coup of 1947.

From 1947-1958 there were seven attempts to overthrow the government by force, four of which succeeded: in 1947, 1951, 1957 and 1958. Two rebellions against the regime—the Grand Palace Coup of 1949 and the Manhattan Coup of 1951—failed, and one attempted coup by a group of junior army officers was suppressed before it took place. But these overthrows and instances of violent action against the regimes had not yet polarized into an antagonistic relationship between civilians and military rulers. In fact throughout the period of 1932–1957 governments consisted of supporters from both military and civilian groups, as did their opponents. As yet there was no strong division between military and civilians in government. Nor did the government leaders use the constitution as a political means

to protect and secure their powers. Of the four governments mentioned, only two wrote new constitutions, in 1948 and 1949. Otherwise they simply revised or amended the previous or existing constitutions.

The important point is that in the period of 1932–1957 government leaders still firmly believed in democracy as the most modern and viable form of government. Pridi Phanomyong, who was prime minister from March 24 to August 21 in 1946 and was the most important leader of the People's Party once said, "A democratic system means democracy with law and order and morality and honesty." Such a system clearly must be based on a constitution that is the highest law of the country. The problem facing the political elite at the time was how to make the new democratic government work in the context of Thai society rather than trying to redefine the meaning of democracy to fit with the desire of the government holders: a policy which would be anxiously initiated and pursued by government leaders from the late 1950s onwards.

"Once in power by extra-constitutional means, government leaders sought to legitimize their regimes mainly by the holding of elections; they first had to promulgate new constitutions, which also gave them the semblance of popular sanction"

Gradually, but more so after World War II, it became clear that the principles and customs of liberal democracy were inapplicable in the transfer of power and resolution of political conflicts among the elites, who resorted to force and extra-constitutional means to settle their conflicts. Once in power by extra-constitutional means, government leaders sought to legitimize their regimes mainly by the holding of elections. To achieve this they first had to promulgate new constitutions, which also gave them the semblance of popular sanction. Another reason for writing a new constitution was that after each major change of government institutional structures were modified to strengthen the new regimes. A new constitution thus served as a legal framework and guarantee of stable political structure for the regimes. Politically, the enactment of new constitutions allowed the government to declare its complete loyalty to the monarchy and to demonstrate the king's acceptance and support of the new rulers. The constitution thus retained its acquired symbolic meaning along the way.

In the period from 1957 to 1992 the Thai constitution underwent many redefinitions. With many ups and downs in the lives of the constitutions, the political elites during the Cold War era denounced the western liberal democratic regime as "alien institution" incompatible with the customs of Thai society. Paradoxically this stance was adopted even though the government had close ties with the United States government, but such were the mutual needs and interests of the Thai government and the US in their fight against communism during the Cold War. In order to create a more stable government, political leaders, mainly from the army, turned away from the western concept of constitutionalism and relied instead on traditional political ideas, namely paternalism and patron-client relations between government and the people.

"After Bloody May 1992, the public was again reminded that the mere existence of parliament and elections does not always benefit the people"

The growth of indigenous Thai democracy came about as a result of the failure in implementing a liberal form of democracy. First defined during Sarit Thanarat's regime (from 1959 to 1963) as "Thai-style democracy", the executive branch of government was emphasized at the expense of the legislature and judiciary. Sarit redefined the role and meaning of the constitution, appointing the Constituent Assembly to function both as the Constitutional Drafting Assembly and the legislature. The assembly drafted a new constitution while making laws for the government. Other democratic institutions were either curtailed or abolished. Political parties, labor unions, organizations, and freedom of the press and expression were prohibited or suppressed in the name of national peace and order. In place of modern democratic theory, Sarit introduced Thai paternalism invoking what he claimed were the practices and ideas of the ancient Thai kings, in which the government was like a benevolent father and the people were children. Claiming the power to guide and the responsibility to care for the well being of the people, the government had no need for Western frameworks of democracy. With full control of government power, Sarit's rule was known as despotic paternalism. Such political ideas and practices continued in the Thanom Kittikachorn regime until the people's uprising in October 1973, calling for full democratic government. The Constitution of 1974 was promulgated to serve as the fundamental basis for democratic development; however, it was nullified by the military coup of October 1976.

Later during the Prem Tinsulanond government in the 1980s, a similar idea of Thai style "half-fruit democracy" was also proposed, allowing for some relaxation of restrictions on political parties, the labor movement and the media.

The meaning of the constitution changed again after Bloody May 1992, when popular demonstrations were held against the military-led government of General Suchinda Kraprayoon. Advocates for reform and change of the "half-fruit democracy" called for the rewriting of the constitution. Finally, with the new constitution of 1997, the idea of constitutionalism was reintroduced into the political system again. The constitution was expected to bring about political reform through the application of liberal democratic government in the country. With these political goals, it contained extensive powers to regulate and control government and public agencies as well as to provide for and protect individual rights and liberties.

The new constitution of 1997

After Bloody May 1992, the public was again reminded that the mere existence of parliament and elections does not always work to the benefit of the people. The unexpected occurrence of the coup in 1991 made people more pessimistic about the progress and development of democracy in Thailand. Since the prevention of military intervention in national politics and government was almost impossible, the last hope was to rely on a sound and

efficient democratic system of government. But the general election in 1995, held after the restoration of a civilian government, almost dashed this hope because of vote buying all over the country together with other forms of electoral corruption. Electoral politics was becoming increasingly controlled by an alliance of so-called 'professional politicians', provincial mafia, unsavoury business interests, large companies, and third-rate ex-soldiers and bureaucrats.

"In drafting [the 1997 Constitution], the assembly paid special attention to the wishes of people all over the country. Public consultations took place nationwide"

In order to cope with the new trend of democratization under a globalized economy, a more responsive and accountable government and parliament was needed. This could be ensured through rigorous reform and improving the existing institutions—including the house of representatives, the senate, the judiciary, political parties and local government—so that they could become more responsible and accountable to the people. In the long run this political reform would build up the immunity of the political system, so that extra-constitutional interventions could not be justified. With hopes and fears, people began to call for true reform of the political system.

Drafting the new constitution

The speaker of the house of representatives set up the Democratic Development Committee (DDC) on 9 June 1994 to study possibilities for political reform, following the hunger strike in front of parliament by Lt. Chalard Vorachat, a former member of parliament and political activist. Lt. Chalard started his protest on 25 May 1994 and ended it on July 31 after the government and opposition conceded to popular demands to revise the existing constitution, which was written in 1991 under the influence of the coup group, the National Peace Keeping Council. Consequently, parliament passed the fifth amendment to the Constitution of 1991 in February 1995, in an attempt to revise and amend some sections of the constitution which were regarded as undemocratic. But further effort to revise and amend the whole constitution according to the wishes of the people seemed to be deadlocked.

Then, under the new government led by Banharn Silpa-archa (from 13 July 1995 to 25 November 1996) the Political Reform Committee was appointed to look for solutions. One was found in the sixth amendment of the constitution, which was passed on 22 October 1996. This amendment stipulated the making of a whole new constitution by a special committee outside the National Assembly. The latter elected the Constitution Drafting Assembly, which consisted of 99 members. Seventy-six of them were representatives elected from all provinces and 23 were chosen from the ranks of academics and other qualified persons. This assembly's duty was to prepare a draft new constitution. In the drafting process, the assembly paid special attention to the wishes of people all over the country. Public consultations took place nationwide, coordinated by the public relations committee. Public hearings were held, and input solicited. The proposed ideas and principles to be discussed in the draft constitution had to do

promote and protect rights and liberties of the people. Equally important in achieving electoral reform was public participation in government and monitoring the exercise of state power. Finally the Constitution Drafting Assembly completed its work within 233 days and the constitution was promulgated on 11 October 1997.

"The 1997 Constitution is not only the embodiment of the aspirations of Thai people for a democratic system of government; it also reflects the struggle of the people to advance and achieve the democratic cause in Thai society"

Principles of government

The 1997 Constitution is not only the embodiment of the aspirations of Thai people for a democratic system of government, but it also reflects the struggle of the people to advance and achieve the democratic cause in Thai society. The constitution identifies the main principles of government: the form of the state, the structure of government, the separation of powers, the protection of individual rights and liberties, and the amendment of the constitution.

The significant change in the constitution regarding the political structure of the country is seen in the change from representative democracy to participatory democracy. This can be seen in many sections of the constitution that allow people to participate in the process of appointment of independent commissions, such as the Election Commission, the Administrative Court and the Ombudsman. Furthermore, it also allows people to recall certain members of parliament and ministers and to propose draft bills. The constitution makes clear that sovereign power belongs to the people and only the people can legitimately use this power.

The main objectives of the constitution are to uphold the principle of the democratic regime of government with the king as head of the state and to bring happiness, prosperity, and dignity to the people. The constitution also recognizes that sovereign power is derived from the Thai people.

The executive, legislature, and judiciary are independent in their respective functions and duties. The house of representatives exercises its check on the government by initiating motions on members of the cabinet and, in important policy matters, requesting a vote of confidence on the government. The council of ministers, or cabinet, has the duty to administer the country with the approval of the legislature. Finally, the courts perform their duties and responsibilities independently from the other two branches of government.

Another important principle introduced in the 1997 Constitution is the supervision and control of the use of power by the government and its agencies. There are rules and regulations regarding the wealth and behavior of politicians who are in office. Many new commissions and organizations independent from government and the bureaucracy have been created to monitor the running of the government and public services. The qualifications of members of the National Assembly and the cabinet have been raised to meet the popular demand for better public servants.

The bill of rights

The constitution of 1997, for the first time, stipulates that human dignity, not only the rights and liberties of an individual, must be protected. There are many new rights introduced in this constitution also. This is a reflection of the changes in the political and social environment in the country following the rapid expansion and growth of the economy in the 1990s. It also demonstrates the response of Thai people towards global trends and developments. Chief among these rights are individual rights, community rights, rights of children, the elderly, the handicapped and women. Freedom of information, the right to public health and education and consumer rights are also recognized. In all there are 40 sections on rights compared to only nine in the constitution of 1932.

"The constitution of 1997, for the first time, stipulates that human dignity, not only the rights and liberties of an individual, must be protected"

Regarding rights and liberties of the individual, the new constitution of 1997 states that a person shall enjoy the right and liberty in his or her own person to dignity, reputation and privacy, including family rights. A person has liberty of dwelling and travelling within Thailand. The rights to practice any religion, to hold private property and have inheritance, together with the rights of expression, of association, and of information are also recognized.

People have the right to vote, run in an election, form a political party and have access to government information. The airwaves are also a common resource and cannot be monopolized by the government. People have equal rights to utilize and make use of their frequencies. They are granted rights to sue the government and public agencies, and to lodge complaints with the National Human Rights Commission and the Ombudsman. In criminal cases and other cases, legal procedures must not violate the accused person's rights to a fair trial and investigation.

Another area of rights in the 1997 Constitution is the protection and promotion of individuals' self-development. Section 42 states that "a person shall enjoy an academic freedom" and that "education, training, learning, teaching, researching and disseminating such research according to academic principles shall be protected provided that it is not contrary to his or her civic duties or good morals". People have equal rights to public education for the duration of not less than twelve years without charge.

The new sections on communal rights and liberties deal with community rights, the preservation of natural resources and self-government. For example, section 46 states that persons assembling as a traditional community shall have the right to conserve or restore customs, local knowledge, arts or culture and participate in the management, maintenance, preservation and exploitation of natural resources and the environment.

Finally, for the first time, the constitution grants people "the right to resist peacefully any act committed for the acquisition of power to rule the country by a means which is not in accordance with the modes provided in this Constitution" (section 65).

The separation of powers

"The 1997 Constitution makes clear that sovereign power belongs to the people and only the people can legitimately use this power"

The principle of the separation of powers is mainly concerned with creating a stable government and protecting individual rights and freedoms from abuse by government powers. Underlying this is the distribution of power among the executive, legislative and judicial branches. The separation of powers is not the division of sovereign power but the separation of the exercise of that power. In practice there is no government that absolutely separates the three branches of powers from one another, because they are all related and dependent upon one another.

In fact, the efficiency of parliamentary government lies in the close union, nearly complete fusion, of the executive and legislative powers. This takes place in the cabinet. The house of representatives chooses the prime minister, who once elected exerts powers of administration by nominating ministers and selecting the cabinet, over which he presides. Then the cabinet exerts a special control over the house through its policies. The cabinet members cannot at the same time be members of the house, or government officials. In conducting government policies, the executive is accountable to the legislature, which can exercise a vote of no confidence to check the government. In return the government has the power to dissolve the parliament.

The right of dissolution that the government possesses makes it into an executive that can annihilate the legislature, as well as an executive that is the nominee of the legislature. The stability and efficiency of parliamentary government thus rests on the collective responsibility of the cabinet combined with the threat of dissolution of the parliament.

Elections

The 1997 Constitution makes it a duty for people to vote in a general election. Failure to do so is punishable by law. This requirement stems from people's wishes to construct a democratic government free from vote buying and selling, which have dominated elections in the past. Thus voting is now compulsory. For the first time, the people will directly elect the senate, which is being given more power in the National Assembly, including power to recall and investigate politicians. To guarantee the neutrality of the senate, senators are prohibited from affiliating with any political party, and no campaigning for election is allowed.

Members of parliament come from both direct popular election and from a party list, which accounts for one fifth of their total number. The reason for the introduction of party-list members is to allow certain professionals to be able to be elected into parliament without having to spend a huge amount of money in campaigning like ordinary members. This will open more avenues for some groups of people to be able to have their own representatives. Also this is a chance to see whether the direct election of executives will work or not, because only political

parties will nominate the party lists. Another new mechanism is the establishment of the Election Commission to oversee elections instead of the Ministry of Interior.

Conclusion

The significance of the constitution in Thai political history and government lies in its function to serve the interests of stability of the given regime. In this sense, Thai constitutions represented realities of power relations more than being the source of political legitimacy.

The 1997 Constitution, however, intends to introduce a change from representative democracy to participatory democracy. This can be seen in the establishment of the independent commissions and special courts, such as the Election Commission, the Administrative Court and the Ombudsman. Individual rights and liberties are expanded upon together with communal rights. Principles and practices of checks and balances and the separation of powers figure prominently. The 1997 Constitution therefore makes clear that sovereign power belongs to the people and only the people can legitimately use this power.

The draft 2007 Constitution of Thailand: A generals' charter in judges clothing

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Alexander Hamilton wrote in 1787 that where powers of government are properly separated the judiciary poses the least threat to constitutional rights:

> Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Consitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments. (*The Federalist*, no. 78)

The judiciary has no physical force of its own. Even for its judgments to be effected it relies upon police, corrections officers and bureaucrats. But although liberty has nothing to fear from the judiciary alone, Hamilton continued in the same passage, it has everything to fear from its union with other parts of government. A truly independent judiciary is a safeguard; a non-independent one is a grave threat:

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> This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the executive. For I agree that "there is no liberty if the power of judging be not separated from the legislative and executive powers" [Fn: Montesquieu, *The spirit of laws*, vol. 1, p. 181]. And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone [it] would have everything to fear from its union with either of the other departments...

"The courts in Thailand have never been obstacles to tyrants"

Some decades after Hamilton and his peers successfully advocated for their draft constitution, a French aristocrat observed that the great strength of America's political system lay in its courts. Alexis de Tocqueville marveled at how judges' authority was invoked at every turn, yet the constitution granted them no overt political powers:

> What a foreigner understands only with the greatest difficulty in the United States is the judicial organization. There is so to speak no political event in which he does not hear the authority of the judge invoked; and he naturally concludes that in the United States the judge is one of the prime political powers. When, next, he comes to examine the constitution of the courts, he discovers at first only judicial prerogatives and habits in them. In his eyes the magistrate never seems to be introduced into public affairs except by chance, but this same chance recurs every day. (*Democracy in America,* vol. 1, ch. 6)

Constitutional rights were guarded through strict interpretation of law and adherence to judicial practice. In this way, he concluded, the courts formed the strongest barrier against the rise of tyranny.

The courts in Thailand, by contrast, have never been obstacles to tyrants. The notion of judicial review of government actions, which briefly captured public attention before the 2006 coup, has never caught hold in Thailand. Nor has its senior judiciary ever ruled against a military takeover. On the contrary, it has at each instance affirmed that might is right and has rewritten the law accordingly, even where, in the words of Professor Worachet Pakeerut of Thammasat University, this has been "against morality and people's common sense."

Therefore, the fact that the new draft constitution, written under the army's watch, is being described as a "judges' charter" suggests that people are getting confused. There is justified alarm at its contents, which include many new judicial powers relating to the appointment of senators (they won't be elected anymore) and representatives of independent bodies, as well as expanded authority over electoral affairs and administration.

The chief drafter, a former air force squadron commander, Prasong Soonsiri, said that his committee had deliberately sought to enlarge the role of the courts to prevent the sort of

political problems that had arisen in the last couple of years. But judges have worried that this will push them into an overtly political role and undermine their fragile and limited integrity. So have they held too little power, or are they going to get too much?

"The separation of powers, which only exists in Thailand notionally anyway, does not exist at all in the minds of the people who have prepared the mock constitution"

The cause for this confusion is in the failure to differentiate, as Hamilton did two centuries ago, between an independent judiciary and a compromised one. Thailand's senior judges have proven themselves unwilling and incapable of resisting the authority of other parts of government. There is no reason to believe that under a new constitution with expanded powers they would be any different. And that's what this constitution is really all about: not expanding the power of the judiciary, but expanding the power of others through it.

Perhaps the clearest indication of the deeply regressive ideology behind the draft constitution, and everything of which it is a part, can be found in its section 68: that in times of "national crisis" a council comprising the prime minister, the chairpersons of upper and lower houses, the leader of the opposition, and the chairpersons of the Constitution Court, Supreme Court, Administrative Court and independent organizations be established to sort things out—the whys and wherefores being left to the imagination. At least one drafter, Sodsri Sattayatham, who also happens to be a member of the election commission that will oversee the proposed referendum on the draft, kept insisting that the council should have included representatives of the army and police, so that they could help find a solution and not feel the urge to grab their guns and head on down to parliament quite so often.

The drafting group subsequently agreed, under withering criticism from all quarters, to tentatively withdraw section 68. Nonetheless, the provision remains important because it exposes the extremely primitive thinking that has gone into the whole charter: not that the judiciary is a check on the power of the parliament or military at all, but rather, that the best it can do—especially at times of greatest urgency—is just to help other parts of government out somehow. The separation of powers, which only exists in Thailand notionally anyway, does not exist at all in the minds of the people who have prepared the mock constitution.

A properly-formulated charter defining, expanding and protecting the power of courts in Thailand could only be a good thing. The draft constitution of 2007 is no such document. It was never intended to be, and nor shall it be. On the contrary, it is a hurried attempt at devising ways and means for the old order to persist in exercising its prerogatives through a judiciary whose responsibilities have for over a century been configured with reference to a national figurehead, rather than its citizenry. This is no judges' charter; it is a generals' charter dressed in judges' clothing. Thailand's judiciary is not on the rise; as usual, it is just on for the ride.

There is one obvious way out of this whole mess, one that was available from the start and which has obtained currency in recent days. Bring back the 1997 constitution. Bring it all back. Abandon the pretence that has been carried along since last September. Don't waste any more time and money on a fraudulent constitution. After a new government is elected, appropriate persons can be appointed to study and propose constitutional amendments, and a sensible, open and coherent debate can be held on matters of national importance. None of this can or will happen right now, amid the retarded political and social conditions that are part and parcel of military dictatorship. If Thailand has to go forward to the past, then it had best be 1997; the draft charter and people behind it aim to drag the country back much further than that.

> "Any government can use a referendum for any purpose: they are not a special characteristic of democratic countries; on the contrary, dictators like them too"

Dictators use referendums too

By September 2007 the draft constitution, Thailand's eighteenth, will go to the country's first-ever referendum. If passed by simple majority, the military government that took over last year will declare its mission accomplished and ostensibly transfer power back to civilian hands.

Amid more and more questions about the coming vote, one writer in the Bangkok Post newspaper assured readers that "constitutional referendums are commonly held in democratic countries around the world" (Tunya Sukpanich, 'Referendum could be tipping point', 25 March 2007). But this is only half the story. As the regime in Thailand intends to demonstrate, any government can use a referendum for any purpose. They are not a special characteristic of democratic countries. On the contrary, dictators like them too.

Louis Napoleon was the first modern autocrat to call referendums. In 1851 he used one to justify his overthrow of the French republic. The citizenry was offered a simple choice: Napoleon or chaos. Officials were warned that their jobs depended upon ensuring that the people didn't opt for chaos. The opposition was harassed; the result was predictable. Napoleon made himself the second emperor of France, after his better-known uncle, and established a system of government that was a precursor to fascism: Adolf Hitler employed many of Napoleon's methods, including referendum, to obtain his objectives.

Authoritarian rulers the world over have since made bogus appeals to popular opinion. General Augusto Pinochet used a plebiscite to pass the 1980 Constitution upon which the armed forces consolidated control over the government in Chile. Closer to home, Ferdinand Marcos called three—the last in 1976 amended the Constitution to keep him on as president, granted him special powers to declare an emergency, and gave him immunity from prosecution once out of office. In Sri Lanka, J R Jayawardene held one to extend Parliament by six years and propel his country into bloody madness that persists until today.

LOUIS NAPOLEON

So the generals in Thailand are among friends. But what happens if their draft doesn't get approved? That's the clincher. Under section 32 of the interim Constitution, then the junta "shall hold a joint meeting with the Council of Ministers to consider and revise one of the previously promulgated constitutions." Put simply, the choice for people in Thailand will be between a fraudulent draft charter and leaving the army to decide everything itself: not democracy, but blackmail.

"Apart from its legalized coercion of the electorate, the regime has been trying hard to make sure that other conditions are right for the vote"

Apart from its legalized coercion of the electorate, the regime has been trying hard to make sure that other conditions are right for the vote. All political party activity remained banned across the country up until the tribunal set up in place of the dissolved Constitution Court disbanded the former ruling Thai Rak Thai party and barred all its senior officers from their electoral rights for five years. Martial law has remained in force across half of the provinces, and military propaganda efforts have been in full swing. Persons speaking out against the draft have been accused of being against the country's development and not wanting a return to electoral process, no matter how flawed.

Polls have tipped that at least 60 per cent of the population will vote yes for the new constitution. If this happens, it won't be out of trust in the charter or government, but just to get the stupid thing over and done with. The generals are banking on this. As in France over 150 years ago, their referendum has nothing in common with those "held in democratic countries around the world" because Thailand is not a democratic country. Rather, the vote is intended to sanction traditional elite groups as the final arbiters of social and political conflict, over and above the general public. It is about the endorsement of fraud, just as it was for Louis Napoleon, Augusto Pinochet and Ferdinand Marcos. And like them and theirs, neither this regime nor its constitution will last.

Thailand's real enemy is insincerity

Beware of news editors who write about "stakeholders". The word may be popular among the staff of international development agencies, producing clouded reports about projects that they have never seen, but it is usually avoided by journalists, who are expected to be more straightforward.

The fact that "stakeholders" appeared no less than four times in a single Bangkok Post feature should set alarm bells ringing about the condition of journalism in Thailand. The unidentified writer praised the special tribunal that had just dissolved the overthrown Thai Rak Thai party and advised everyone that its verdict should be universally accepted and that they should all just move on (and on, and together, and on, and forward, and on):

> The rulings should be accepted by all parties concerned, especially hardline loyalists of Thai Rak Thai (TRT). The verdicts serve as a lesson for unscrupulous politicians that they must play by the rules, or face the consequences... Democrat leader Abhisit Vejjajiva could not be more correct when he said the tribunal verdicts should put an end to all the

> uncertainties and worries which have gripped the nation for months. The country, he said, must move on, with all stakeholders moving together... The verdict should not be seen as the end of the world for the majority of TRT members, who can still participate in politics. With millions of supporters, they should move on... Of all the underlying problems facing the country, mutual distrust among the political stakeholders, which has resulted in the worst political divide ever seen in modern Thai history, seems to be the biggest challenge... For the country to move forward and avoid the kind of crisis which confronted it last year during the Thaksin regime, this atmosphere of mutual distrust must be cleared. Mr Abhisit recently floated the idea of bringing together five major political stakeholders... The country needs to look beyond the tribunal's verdicts and move on. And for this to happen requires the cooperation of all stakeholders... ('Now it is time to move on', 31 May 2007)

"Few newspapers in Thailand nowadays report or comment with any sincerity"

The same person could have written the editorial in the country's second English daily, The Nation. Although the stakeholders were gone, in a few hundred words the author managed to cram in reconciliation, good governance, public accountability, and, in a final mind-numbing paragraph political ideology, socio-economic status, effective citizenship, genuine democracy based on the rule of law, and "a conducive environment for sustainable economic and social development."

Such writing is offensive because it denies readers the opportunity to think and react. It has the opposite effect of real journalism, anaesthetizing rather than awakening society. "The great enemy of clear language," George Orwell said in his seminal essay on politics and English usage, "is insincerity." Insincere prose is unpleasant to read because while the truth may not be obvious, the struggle to obscure it with nonsense is all too apparent.

Few newspapers in Thailand nowadays report or comment with any sincerity. Whereas the previous decade saw a dramatic rise in their assertiveness, the bullying and goading tactics of the Thaksin Shinawatra government encouraged renewed self-censorship. Among those writers and publishers that resisted Thaksin, many have since been shameless cheerleaders for the junta that pushed him out last September. Alternative opinions, occasionally entertained, give the illusion of continued debate; they are greatly outnumbered by narrow reporting and uncritical commentary. Yet even against this backdrop, the response to the May 30 ruling was a new low.

No doubt the former prime minister and his people manipulated laws and institutions to their commercial and political advantage. They intimidated opponents, precipitated killings and encouraged police excesses. But the superior courts were already examining and proceeding on suits lodged against him and his party prior to the military coup last year. Had they been left alone to rule on the government at that time in accordance with the 1997 Constitution then there may indeed have been a great day for justice in Thailand of the sort that was pronounced last week.

THE CONSTITUTIONAL TRIBUNAL PULLS JUSTICE OUT OF THE FIRE... OR DROPS IT IN?
(SOURCE: MATICHON)

Instead, what happened was that a tribunal appointed by the military regime under its interim constitution was given the role of pretending to decide on something that was already settled from the moment that the army took power, applying a law established under the abrogated constitution together with an order from the coup leader. The cynical use of senior judges to do a dirty job for which the generals did not want to be directly responsible was no triumph of justice: it was a travesty that will almost certainly cause lasting damage to public confidence in the country's entire judiciary.

"Whereas in Pakistan judges and lawyers have played a heroic role in challenging the authority of the army, in Thailand they have done nothing to come between it and its objectives"

But there was no room for doubt about the tribunal's findings in most newspaper editorials and reports the morning after. Blinded by euphoria at the apparent end to Thaksin's political vehicle, and corrupted by the moral and legal pollution of dictatorship, editors and writers feigning objectivity sought refuge in humbug. Only here and there were cautious questions raised about the validity of the judgment and jurisdiction of the tribunal, again greatly outnumbered by those reassuring readers that from now on everything will be okay, so long as everyone just plays by the rules. Never mind whose rules.

Whatever else happens in Thailand during the weeks and months ahead, the newspapers won't quickly or easily regain the voice and credibility that they have lost in the last nine months. Readers interested in getting an honest opinion about events there should instead turn to the Internet, if they have not done so already. In addition to news available via the international media, there are a number of useful regional and national Web sites, such as Asia Sentinel and Prachatai. There are also many good blogs, like Bangkok Pundit and New Mandala. If enough people turn away from conventional sources, perhaps editors will realize that by persistently insulting the intelligence of their readers they risk much more than just their integrity.

Pakistan's judiciary sets an example for Thailand

Dramatic events in both Pakistan and Thailand during the past year have brought their respective judiciaries to the centre of national politics. But whereas in Pakistan judges and lawyers have played a heroic role in challenging the authority of the army, in Thailand they have done nothing to come between it and its objectives.

On May 29 Pakistan's top judge lodged an unprecedented complaint about his attempted dismissal, before his own court. In the historic affidavit, Chief Justice Iftikhar Muhammad Chaudhry described how on March 9 he was called to meet General Pervez Musharaff. In the presence of other army officers and officials, the general-cum-president asked him to resign over some unsubstantiated allegations. When he refused, he was detained for five hours while another judge was appointed in his stead. After he attempted to go to the court, his car was stopped.

THAILAND: AHRC welcomes new independent online news page

(AHRC Press Release, AHRC-PL-019-2007)

(Hong Kong, June 6, 2007) The Asian Human Rights Commission (AHRC) on Wednesday welcomed the launch of a new English-language independent online news page from Thailand.

The Prachatai online news group launched its English version on May 24 to complement its established Thai-language website.

Launching the page, columnist Pitch Pongsawat said that democracy could only be promoted in Thailand by people taking matters into their own hands, not asking for people in power to share it.

“The launch of this new page is a very good development for English-language users interested to know what is really going on in Thailand,” Basil Fernando, executive director of the Hong Kong-based AHRC said.

“Prachatai has built a reputation as a reliable and well-regarded independent news source for Thai-language users,” Fernando said.

“Its move into English is particularly welcome at this time when the conventional media in Thailand has been severely psychologically disabled by the military dictatorship,” he said.

“Readers can expect to find many news items and commentary on the site that they cannot find elsewhere,” Fernando added.

Prachatai was founded in 2004 by a group of senior journalists, senators, academics and other persons concerned about growing attempts to curtail media freedoms under the government of former the prime minister, Thaksin Shinawatra.

In contrast to mainstream newspapers and magazines, it has maintained its editorial independence since the September 2006 military coup up to the present.

The first English articles on the new Prachatai webpage include reports on television and Internet censorship by the military regime and analyses of last Wednesday's tribunal decision to dissolve the former ruling political party, Thai Rak Thai.

The group has sought assistance from volunteers to translate and edit material into English.

The page can be accessed at:http://www.prachatai.com/english.

Meanwhile, Freedom Against Censorship Thailand (FACT) on Friday warned that nearly 18,000 websites are now being blocked in Thailand, with some 90 politically-related sites blocked in April alone.

"Anti-coup websites, pro-Thaksin websites, newly-uncovered anonymous proxies, plus all the usual suspects from past blocklists were censored," the Bangkok-based freedom of information advocacy group said in a press statement.

FACT noted that the Ministry of Communications Technology, which is responsible for blocking the majority of the sites, continues to refuse to release its criteria for ordering a site blocked.

The report follows the banning of You Tube in Thailand due to its refusal to withdraw videos mocking the country's king, a move which attracted international attention.

Arriving back at his residence he saw police and other authorities cutting the telephone, television and Internet connections. His official vehicles were trucked off.

"It is important to understand that for the most part the judiciary in Pakistan has, like that in Thailand, gone along with the wishes of its military"

In subsequent days Chief Justice Chaudhry found that his chambers had been entered and files removed, his office and house staff detained and questioned, his colleagues and peers prevented from meeting with him, and his home apparently bugged. However, he refused to succumb and was able to mount a defence against his removal. He was not alone: most of the country's senior judges and thousands of lawyers came out in protest at the way he was treated and to demand his reappointment. His petition against the president has been accepted, and a full court case is now set to ensue in which many other details of the military's attempts to dominate the judiciary are likely to be revealed.

Meanwhile, at risk of their lives, Pakistan's judges and lawyers have stimulated a huge outpouring of discontent against the military. The chief justice and his advocates have been attacked and threatened with death. Their houses have been fired upon; at least one court official was killed after refusing to support the government. Travelling to Lahore, they were met by tens of thousands of cheering villagers along the entire distance. The next trip had to be aborted when the army and its political allies initiated mob violence in Karachi, preventing the chief justice from leaving the airport and besieging the city's courts. Still the judges and lawyers have not been deterred.

Compare this with what has happened in Thailand since last September, when the armed forces again took control of government. No need for the generals there to threaten the judges. They turned up for work like usual and did as they were told: no questions were asked about the legality of the coup; no objections were uttered when the Constitutional Court was shut down along with the constitution itself. And when a new tribunal was needed to dispense victors' justice and abolish the former ruling party, the judges were again obliging. The president of the Supreme Court in Thailand has so far raised a finger against the army only once, in refusing to join the majority verdict of the tribunal to strip the former prime minister and his party executives of their electoral rights for five years, under an order from the junta, retrospectively applied.

It is important to understand that for the most part the judiciary in Pakistan has, like that in Thailand, gone along with the wishes of its military. Since 1954, when the then-chief justice endorsed the forcible removal of the prime minister from power, it has sacrificed legal principle for political expediency. Chief Justice Chaudhry too was no radical, but he did serve with integrity and in recent times had issued notices on cases of public interest, established a human rights cell within the court, and challenged government and military officials over writs concerning alleged abductions and killings by the security forces.

So then why have Pakistan's judges and lawyers now resisted whereas Thailand's have not? Maybe it is that some notion of constitutionalism and judicial independence is still cherished in Islamabad, one that remains foreign to Bangkok. Prior to the 1997 constitution there was never any concept of a constitutional order in Thailand other than whatever was imposed by the ruling elite. Its senior judges now seem only too eager to revert to that earlier model, perhaps thinking that it will not do them any harm personally. They are wrong: by failing to take a stand and by going along with the army, they have caused a self-inflicted wound. With the eyes of the world upon them, they have succeeded only in joining with the generals to mock themselves.

"What does a prime minister installed through a military coup mean when he talks about the rule of law?"

Given the chance, what might the judges and lawyers of Pakistan say to their counterparts in Thailand right now? We have a clue from the president of the Supreme Court Bar Association of Pakistan, who remarked on May 26 that

> The great American jurist Benjamin N. Cardozo said, 'The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.' We are all caught in that same tide today, and only our own actions now will determine whether we sink or swim. Those that do not learn from the past are condemned to relive it.

Thailand's judiciary too should pay heed.

Ransacking and reining in the 'rule of law'

Since October 2006 the new interim prime minister of Thailand, General Surayud Chulanont, has stressed his strong interest in the "rule of law". What does a prime minister installed through a military coup mean when he talks about the rule of law? What interest does the army have in this notion? Recent history gives a clue about their real intentions.

In 1975 thousands of striking police joined protesters demanding that the "rule of law" be restored to Thailand, after a court ordered the release of nine alleged communists in the northern city of Chiang Mai. The protests culminated in around one hundred armed and uniformed police ransacking the house of the civilian prime minister, Kukrit Pramoj. They were never punished. The prime minister declined to take legal action; 14 months later police led a massacre that preempted renewed military dictatorship. Rhetorical commitments to the law were backed with lawlessness, and ultimately, the justification of order by force, with or without law.

In 2006 thousands took to the streets to demand the ouster of Thaksin Shinawatra, who was accused of manipulating laws and financial institutions to serve personal objectives. His party began organizing counter protests, and allegedly arranged for physical attacks on critics. As in previous years, the pretext for the army takeover on September 19 was to protect the country from growing lawlessness and incipient bloody confrontation. The interim government has iterated that it will work hard to correct the wrongs of its predecessor by restoring the law to its rightful place.


the nation
POLICE PROTESTERS STORM PM'S HOME
Shots fired in looting spree
'TAKE ME HOME, THEY CAN SHOOT 'EE'—PM

VOICE OF THE NATION, 20 AUGUST 1975

Like the police in 1975, the concern of the generals in 2006 was not with the rule of law, but with the control of law.

"Justice institutions in Thailand, like the former prime minister's house, have been ransacked and brought back under control"

In Thailand, the judiciary remains in essence an institution to protect elite interests. By contrast, the rule of law requires a strong and independent judiciary, free from control and able to enforce its decisions against all persons equally. Control of law means impunity, the rule of law means liability.

What offended the police in 1975 was not that the law itself was in danger, but that their control of the law and its institutions was in danger.

What worried the military in 2006 was not that the courts were unable to address the country's problems, but on the contrary, that they might be able to do so. It was the rule of law, not lawlessness, which had to be averted at all costs. But in preventing the rule of law, its meaning has been perverted, as in 1975, to correspond with control of law. The wreckers of law can then claim to be its saviors.

Since the September 2006 coup, the army has ransacked institutions for the rule of law in Thailand and reasserted its prerogative to control. A senior court has been closed, reconstituted and pushed about without a whimper of protest. The interim constitution has given all orders by the coup leader the effect of law: they will require parliamentary acts to be revoked. Talk of judicial review of executive actions has been forgotten. Investigative bodies have been coordinated by a revamped counter-insurgency agency under army command. Anybody connected to the former government has been removed and replaced by somebody connected to the coup group. Political activity has been banned, and half of the country kept for an extended period under martial law.

Still this is not enough; generals need guarantees. Like earlier army-sponsored constitutions, the interim charter of 2006 contains a clause exempting them from prosecution. The provision is likely to be retained, albeit more vaguely worded, in the new draft permanent constitution (section 299). This would be unprecedented. The chairman of the drafting committee, Prasong Soonsiri, has expressed concern that otherwise ill-intentioned persons might later have the audacity to take legal action against the coup leaders, which "would not be just". Thus it is implicitly accepted that a category of persons exists that is entitled to remain outside of the law. This is not the rule of law but its antithesis.

Justice institutions in Thailand, like the former prime minister's house, have been ransacked and brought back under control. Anybody expecting this to have the effect of restoring stability, democracy and respect for human rights to Thailand is fooling himself.

Appendix I: Constitution of the Kingdom of Thailand BE 2540 (1997) (extracts)

Chapter I: General Provisions

1. Thailand is one and indivisible Kingdom.

2. Thailand adopts a democratic regime of government with the King as Head of the State.

3. The sovereign power belongs to the Thai people. The King as Head of the State shall exercise such power through the National Assembly, the Council of Ministers and the Courts in accordance with the provisions of this Constitution.

4. The human dignity, right and liberty of the people shall be protected.

5. The Thai people, irrespective of their origins, sexes or religions, shall enjoy equal protection under this Constitution.

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.

7. Whenever no provision under this Constitution is applicable to any case, it shall be decided in accordance with the constitutional practice in the democratic regime of government with the King as Head of the State.

Chapter III: Rights and Liberties of the Thai People

Regard to human dignity

26. In exercising powers of all State authorities, regard shall be had to human dignity, rights and liberties in accordance with the provisions of this Constitution.

Constitutional rights binding

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.

Constitutional rights justicable

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.

Restriction of rights only in accordance with law and to extent necessary

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.

Equality before law

30. All persons are equal before the law and shall enjoy equal protection under the law.

Men and women shall enjoy equal rights.

Unjust discrimination against a person on the grounds of the difference in origin, race, language, sex, age, physical or health condition, personal status, economic or social standing, religious belief, education or constitutionally political view, shall not be permitted.

Measures determined by the State in order to eliminate obstacle to or to promote persons' ability to exercise their rights and liberties as other persons shall not be deemed as unjust discrimination under paragraph three.

Right to life

31. A person shall enjoy the right and liberty in his or her life and person.

A torture, brutal act, or punishment by a cruel or inhumane means shall not be permitted; provided, however, that punishment by death penalty as provided by law shall not be deemed the punishment by a cruel or inhumane means under this paragraph.

No arrest, detention or search of person or act affecting the right and liberty under paragraph one shall not be made except by virtue of the law.

Prohibition of retroactivity

32. No person shall be inflicted with a criminal punishment unless he or she has committed an act which the law in force at the time of commission provides to be an offence and imposes a punishment therefor, and the punishment to be inflicted on such person shall not be heavier than that provided by the law in force at the time of the commission of the offence.

Presumption of innocence

33. The suspect or the accused in a criminal case shall be presumed innocent.

Before the passing of a final judgement convicting a person of having committed an offence, such person shall not be treated as a convict.

Right to privacy

34. A person's family rights, dignity, reputation or the right of privacy shall be protected.

The assertion or circulation of a statement or picture in any manner whatsoever to the public, which violates or affects a person's family rights, dignity, reputation or the right of privacy, shall not be made except for the case which is beneficial to the public.

Freedom of residence

35. A person shall enjoy the liberty of dwelling.

A person is protected for his or her peaceful habitation in and for possession of his or her dwelling place. The entry into a dwelling place without consent of its possessor or the search thereof shall not be made except by virtue of the law.

Freedom of movement

36. A person shall enjoy the liberty of travelling and the liberty of making the choice of his or her residence within the Kingdom.

The restriction on such liberties under paragraph one shall not be imposed except by virtue of the law specifically enacted for maintaining the security of the State, public order, public welfare, town and country planing or welfare of the youth.

No person of Thai nationality shall be deported or prohibited from entering the Kingdom.

Freedom of communication

37. A person shall enjoy the liberty of communication by lawful means.

The censorship, detention or disclosure of communication between persons including any other act disclosing a statement in the communication between persons shall not be made except by virtue of the provisions of the law specifically enacted for security of the State or maintaining public order or good morals.

Freedom of religion

38. A person shall enjoy full liberty to profess a religion, a religious sect or creed, and observe religious precepts or exercise a form of worship in accordance with his or her belief; provided that it is not contrary to his or her civic duties, public order or good morals.

In exercising the liberty referred to in paragraph one, a person is protected from any act of the State, which is derogatory to his or her rights or detrimental to his or her due benefits on the grounds of professing a religion, a religious sect or creed or observing religious precepts or exercising a form of worship in accordance with his or her different belief from that of others.

Freedom of opinion & speech

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.

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 State as subsidies to private newspapers or other mass media.

Broadcast frequencies national resources for public interest

40. Transmission 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 businesses 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 interests including fair and free competition.

Media freedom

41. Officials or employees in a private sector undertaking newspaper or radio or television broadcasting businesses shall enjoy their liberties to present news and express their opinions under the constitutional restrictions without the mandate of any State agency, State enterprise or the owner of such businesses; provided that it is not contrary to their professional ethics.

Government officials, officials or employees of a State agency or State enterprise engaging in the radio or television broadcasting business enjoy the same liberties as those enjoyed by officials or employees under paragraph one.

Academic freedom

42. A person shall enjoy an academic freedom.

Education, training, learning, teaching, researching and disseminating such research according to academic principles shall be protected; provided that it is not contrary to his or her civic duties or good morals.

Right to education

43. A person shall enjoy an equal right to receive the fundamental education for the duration of not less than twelve years which shall be provided by the State thoroughly, up to the quality, and without charge.

In providing education by the State, regard shall be had to participation of local government organisations and the private sector as provided by law.

The provision of education by professional organisations and the private sector under the supervision of the State shall be protected as provided by law.

Right to assembly

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.

Right to association

45. A person shall enjoy the liberty to unite and form an association, a union, league, co-operative, farmer group, private organisation or any other group.

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.

Right to protect traditional culture & community resources

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.

Right to form political party

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.

Right to hold property

48. The property right of a person is protected. The extent and the restriction of such right shall be in accordance with the provisions of the law.

The succession is protected. The right of succession of a person shall be in accordance with the provisions of the law.

Limits on expropriation of immovable property

49. The expropriation of immovable property shall not be made except by virtue of the law specifically enacted for the purpose of public utilities, necessary national defence, exploitation of national resources, town and country planning, promotion and preservation of the quality of the environment, agricultural or industrial development, land reform, or other public interests, and fair compensation shall be paid in due time to the owner thereof as well as to all persons having the rights thereto, who suffer loss by such expropriation, as provided by law.

The amount of compensation under paragraph one shall be fairly assessed with due regard to the normal purchase price, mode of acquisition, nature and situation of the immovable property, and loss of the person whose property or right thereto is expropriated.

The law on expropriation of immovable property shall specify the purpose of the expropriation and shall clearly determine the period of time to fulfil that purpose. If the immovable property is not used to fulfil such purpose within such period of time, it shall be returned to the original owner or his or her heir.

The return of immovable property to the original owner or his or her heir under paragraph three and the claim of compensation paid shall be in accordance with the provisions of the law.

Freedom of livelihood

50. A person shall enjoy the liberties to engage in an enterprise or an occupation and to undertake a fair and free competition.

The restriction on such liberties under paragraph one shall not be imposed except by virtue of the law specifically enacted for maintaining the security and safety of the State or economy of the country, protecting the public in regard to public utilities, maintaining public order and good morals, regulating the engagement in an occupation, consumer protection, town and country planning, preserving natural resources or the environment, public welfare, preventing monopoly, or eliminating unfair competition.

Prohibition of forced labour

51. Forced labour shall not be imposed except by virtue of the law specifically enacted for the purpose of averting imminent public calamity or by virtue of the law which provides for its imposition during the time when the country is in a state of war or armed conflict, or when a state of emergency or martial law is declared.

Right to health

52. A person shall enjoy an equal right to receive standard public health service, and the indigent shall have the right to receive free medical treatment from public health centres of the State, as provided by law.

The public health service by the State shall be provided thoroughly and efficiently and, for this purpose, participation by local government organisations and the private sector shall also be promoted insofar as it is possible.

The State shall prevent and eradicate harmful contagious diseases for the public without charge, as provided by law.

Child rights

53. Children, youth and family members shall have the right to be protected by the State against violence and unfair treatment.

Children and youth with no guardian shall have the right to receive care and education from the State, as provided by law.

Rights of the elderly

54. A person who is over sixty years of age and has insufficient income shall have the right to receive aids from the State, as provided by law.

Rights of the disabled

55. The disabled or handicapped shall have the right to receive public conveniences and other aids from the State, as provided by law.

Right to protect natural resources

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 education 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 organisation or other State authority to perform the duties as provided by law under paragraph one and paragraph two shall be protected.

Consumer rights

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 issuance of law, rules and regulations and on the determination of various measures for consumer protection.

Right to information

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.

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.

Right to be informed prior to any project that may affect quality of life

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.

Right to involvement in decision making

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.

Right to petition the State

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.

Right to sue the State

63. No person shall exercise the rights and liberties prescribed in the Constitution to overthrow the democratic regime of government with the King as Head of the State under this Constitution or to acquire the power to rule the country by any means which is not in accordance with the modes provided in this Constitution.

Change of government only via means as provided by Constitution

In the case where a person or a political party has committed the act under paragraph one, the person knowing of such act shall have the right to request the Prosecutor General to investigate its facts and submit a motion to the Constitutional Court for ordering cessation of such act without, however, prejudice to the institution of a criminal action against such person.

In the case where the Constitutional Court makes a decision compelling the political party to cease to commit the act under paragraph two, the Constitutional Court may order the dissolution of such political party.

64. Members of the armed forces or the police force, Government officials, officials or employees of State agencies, State enterprises or local government organisations shall enjoy the same rights and liberties under the Constitution as those enjoyed by other persons, unless such enjoyment is restricted by law, by-law or regulation issued by virtue of the law specifically enacted in regard to politics, efficiency, disciplines or ethics.

Members of services and bureaucracy enjoy same rights

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.

Right to peacefully resist illegal acquisition of power

Chapter V: Directive Principles of Fundamental State Policies

...

75. The State shall ensure the compliance with the law, protect the rights and liberties of a person, provide efficient administration of justice and serve justice to the people expediently and equally and organise an efficient system of public administration and other State affairs to meet people's demand.

Efficient administration of government & justice

The State shall allocate adequate budgets for the independent administration of the Election Commission, the Ombudsmen, the National Human Rights Commission, the Constitutional Court, the Courts of Justice, the Administrative Courts, the National Counter Corruption Commission and the State Audit Commission.

Public participation in policymaking

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.

Prevention of corruption

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.

Decentralisation

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.

Public participation in protection of natural resources

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

Social development

80. The State shall protect and develop children and the youth, promote the equality between women and men, and create, reinforce and develop family integrity and the strength of communities.

The State shall provide aids to the elderly, the indigent, the disabled or handicapped and the underprivileged for their good quality of life and ability to depend on themselves.

Education

81. The State shall provide and promote the private sector to provide education to achieve knowledge alongside morality, provide law relating to national education, improve education in harmony with economic and social change, create and strengthen knowledge and instil right awareness with regard to politics and a democratic regime of government with the King as Head of the State, support researches in various sciences, accelerate the development of science and technology for national development, develop the teaching profession, and promote local knowledge and national arts and culture.

Public health service

82. The State shall thoroughly provide and promote standard and efficient public health service.

Income distribution

83. The State shall implement fair distribution of incomes.

Land holdings

84. The State shall organise the appropriate system of the holding and use of land, provide sufficient water resources for farmers and protect the interests of farmers in the production and marketing of agricultural products to achieve maximum benefits, and promote the assembling of farmers with a view to laying down agricultural plans and protecting their mutual interests.

85. The State shall promote, encourage and protect the co-operatives system.

Cooperatives

86. The State shall promote people of working age to obtain employment, protect labour, especially child and woman labour, and provide for the system of labour relations, social security and fair wages.

Labour protection

...

Chapter VIII: The Courts

Part 1 General Provisions

233. The trial and adjudication of cases are the powers of the Courts, which must proceed in accordance with the Constitution and the law and in the name of the King.

Court trial in accordance with Constitution

234. All Courts may be established only by Acts.

Courts established only by Acts

A new Court for the trial and adjudication of any particular case or a case of any particular charge in place of an ordinary Court existing under the law and having jurisdiction over such case shall not be established.

235. A law having an effect of changing or amending the law on the organisation of Courts or on judicial procedure for the purpose of its application to a particular case shall not be enacted.

Prohibition on laws applied to individual cases

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 judgement or a decision of such case, except for the case of *force majeure* or any other unavoidable necessity as provided by law.

Quorum of judges

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, 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:

Warrants

(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.

238. 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.

Searches

Bail

239. An application for a bail of the suspect or the accused in a criminal case must be accepted for consideration without delay, and an excessive bail shall not be demanded. The refusal of a bail must be based upon the grounds specifically provided by law, and the suspect or the accused must be informed of such grounds without delay.

The right to appeal against the refusal of a bail is protected as provided by law.

A person being kept in custody, detained or imprisoned has the right to see and consult his or her advocate in private and receive a visit as may be appropriate.

Unlawful detetion

240. In the case of the detention of a person in a criminal case or any other case, the detainee, the public prosecutor or other person acting in the interest of the detainee has the right to lodge with the Court having criminal jurisdiction a plaint that the detention is unlawful. Upon receipt of such plaint, the Court shall forthwith proceed with an ex parte examination. If, in the opinion of the Court, the plaint presents a prima facie case, the court shall have the power to order the person responsible for the detention to produce the detainee promptly before the Court, and if the person responsible for the detention can not satisfy the Court that the detention is lawful, the Court shall order an immediate release of the detainee.

Right to a speedy, continuous & fair inquiry & trial

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.

Legal aid

242. In a criminal case, the suspect or the accused has the right to receive an aid from the State by providing an advocate as provided by law. In the case where a person being kept in custody or detained cannot find an advocate, the State shall render assistance by providing an advocate without delay.

In a civil case, a person has the right to receive a legal aid from the State, as provided by law.

Right to remain silent

243. A person has the right not to make a statement incriminating himself or herself which may result in criminal prosecution being taken against him or her.

Any statement of a person obtained from inducement, a promise, threat, deceit, torture, physical force, or any other unlawful act shall be inadmissible in evidence.

Witness protection

244. In a criminal case, a witness has the right to protection, proper treatment, necessary and appropriate remuneration from the State as provided by law.

Rights of injured party

245. In a criminal case, an injured person has the right to protection, proper treatment and necessary and appropriate remuneration from the State, as provided by law.

In the case where any person suffers an injury to the life, body or mind on account of the commission of a criminal offence by other person without the injured person participating in such commission and the injury cannot be remedied by other means, such person or his or her heir has the right to receive an aid from the State, upon the conditions and in the manner provided by law.

Wrongly accused & detained entitled to compensation

246. Any person who has become the accused in a criminal case and has been detained during the trial shall, if it appears from the final judgement 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.

Right to appeal

247. In the case where any person was inflicted with a criminal punishment by a final judgment, such person, an interested person, or the public prosecutor may submit a motion for a review of the case. If it appears in the judgment of the Court reviewing the case that he or she did not commit the offence, such person or his or her heir shall be entitled to appropriate compensation, expenses and the recovery of any right lost by virtue of the judgment upon the conditions and in the manner provided by law.

Resolution of disputes among superior courts

248. In the case where there is a dispute on the competent jurisdiction among the Court of Justice, the Administrative Court, the Military Court or any other Court, it shall be decided by a committee consisting of the President of the Supreme Court of Justice as Chairman, the President of the Supreme Administrative Court, the President of such other Court and not more than four qualified persons as provided by law as members.

The rules for the submission of the dispute under paragraph one shall be as provided by law.

Judges independent

249. Judges are independent in the trial and adjudication of cases in accordance with the Constitution and the law.

The trial and adjudication by judges shall not be subject to hierarchical supervision.

The distribution of case files to judges shall be in accordance with the rules prescribed by law.

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.

The transfer of a judge without his or her 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.

...

Appendix II: Transcript of conversation between Supreme Court Judge Pairote Navanuch, Supreme Court Secretary Virat Chinvinijkul and a senior government official on the eve of the 2006 Election Commission dismissal

This is an edited transcript adapted the full text of the conversation in Thai , available on the "Hi Thaksin" website, which has been blocked to users in Thailand. The Bangkok Pundit webblog contains a longer edited version in Thai and English together with the original recording. Although the authenticity of the recording had not been confirmed at time of going to print, it has not been denied. The conversation pertains to attempts by the courts and bureaucrats to force the members of the national Election Commission to resign prior to the holding of a new general election after the results of the 2 April 2006 vote were nullified. The speakers are Supreme Court Secretary Virat Chinvinijkul, Supreme Court Judge Pairote Navanuch and an unidentified top-echelon government bureaucrat referred to as "Phi Phed". Ultimately the commissioners refused to resign and the court was forced to act on the complaints against them.

Unidentified senior government official: Hello, I'm calling for Mr Jiap [Supreme Court Judge Pairote Navanuch].

Supreme Court Secretary Virat Chinvinijkul: Hello.

Official: [Apparently recognising the voice] Hello sir, how are you? Well?

Virat: I'm well, thank you.

Official: Today I saw the TV news. Oh boy. It... what's going to happen to our nation? I'm really puzzled. Please help to get me on the right wavelength.

Virat: We're not yet at the stage of a ruling [on the Election Commission (EC)], but there's a discussion among our three courts [the Supreme Court, Supreme Administrative Court and Constitutional Court]... [and] we are not happy for the EC to continue. If this EC membership stays on things will go full circle. It'll all come up again. We're worried about this. The president of the Supreme Court has asked me, [Secretary to the President of the Supreme

Court] Jaran [Phakdeethanakun] and Mr Jiap to see if there's a way for the EC to resign and then we'll choose [new commissioners] from the Supreme Court.

Official: Is it possible to do this?

Virat: We can do it as per section 138 subsection 3 [of the 1997 Constitution]. It can be done. Since we have the chance, it's asked why the Supreme Court doesn't do so. We shouldn't go fighting with others. We're a court, we're not children. But now the country's situation has changed. It's forcing the Supreme Court to act.

Official: To follow the Royal Address(es) [to senior judges on 25 April 2006 on the role of the courts in solving national crises].

Virat: Yes... and at this time some of us wondered why His Majesty directly praised the Supreme Court all the time. It's because he sees ahead that [this matter] must end up in the Supreme Court. In fact now there's no other way for it to go other than for the Supreme Court to choose the EC. You understand? It's a deadlock. There's no way out. It's up to the EC to sacrifice itself, otherwise the country can't go on.

Official: It can't be like that, because His Majesty has seen that however it's done the country must be able to go forward.

Virat: Yes... therefore His Majesty looks on the Supreme Court even more highly than we do ourselves. On that initial day [of the king's address to the judges] I left with the president [of the court] stupefied that he had thrown the Supreme Court a heavy burden. We couldn't come up with any ideas about what we could do to solve the country's problems. But today the answer is clear that he saw that only we could solve the country's problems.

Official: So it's the key to assist in doing something.

Virat: Yes...

Official: Today Mr. Jaran was interviewed while leaving [the court]. It was as if he was worried or...

Virat: At our court it's like this... We can't give a ruling [yet]. We can't hoist the flag beforehand [give away our position].

Official: Oh, yes.

Virat: If we didn't do like that then we wouldn't be a court. But the point that everyone raises is if so then what will be next? We cannot allow an election under the current EC. The people probably wouldn't accept it.

Official: Yeah...

Virat: We must speak the truth.

Official: Yes, yes. We are at the stage that we have to speak the truth; have to show the cards.

Virat: It's the time to speak the truth. I myself cannot say what I know against whom, right? But we are discussing how to get the country's situation up.

Official: Now we have to proceed according to the Royal Address of His Majesty because His Majesty is the one whom everyone depends upon.

Virat: Yes, but we ourselves when making announcements don't dare to mention the Royal Address because it would be like we just followed what he instructed. The foreigners won't accept it.

Official: Yes, yes, as per our constitution. But was there agreement in today's meeting or not?

Virat: This morning Mr Jiap [Supreme Court Judge Pairote Navanuch] had an urgent appointment, made yesterday. You can ask him to give a clue about what.

Official: So I want to ask you supposing that, okay, here's one option that's troubling [me]: the court's observation that's not a ruling; in this case if the EC says that, "To be clear [of blame] I'll invite representatives of the Supreme Court, Constitutional Court, Administrative Court and representatives of all the political parties to meet in order to work out the next election process," can it be done?

Virat: Well now we need to look at the state of the EC, right? At this time it's not that society just wants a short cut. It can't be about timing now. We're talking about doing something unprecedented.

Official: Have you talked about it yet?

Virat: We've talked... One way is for us to join with the EC. [But] from the start everyone saw that it isn't doable. It can't be done. The people wouldn't accept it.

Official: Yeah.

Virat: We've thought that way; it's not that we haven't thought of it. Therefore the only thing to be done is that there must be a new EC.

Official: So... to sum up, it's the view of the court, from discussions, that there must be a new EC?

Virat: Yes, yes.

Official: Then please advise, how can I forewarn the government? (Laughing)

Virat: If you forewarn you must suggest to them to make sacrifices for the country. Then the court, we'll send our people to be the EC, though I believe that the result of the next election won't be different from the previous.

Official: Probably not.

Virat: Not different from the previous, but just so that everyone accepts it. I should say that whatever happens, to speak directly, [the] Thai Rak Thai [party of the then-prime minister, Thaksin Shinawatra] won't lose but maybe won't get as much, that's all.

Official: How much they get depends on their behaviour, on top of campaigning, [and other] activities.

Virat: But if they are stubborn I keep seeing that there will be bad consequences. We've closed the opening for the opposition and the people and... and...

Official: Hold fast to what we believe in or our ideas.

Virat: Yes, yes...

Official: I have to thank you a lot for helping me understand.

Virat: Fine.

Official: There's one other matter... under the circumstances of the many particulars [of charges against the EC], the Administrative Court has accepted the case that has been lodged concerning the previous election; two, the [section] 157 charge [under the Penal Code] in the Criminal Court [for abuse of office]; three, then there's the pending matter of... land inspectors. I'm not sure if there were any or not. Under the circumstances, I think that it's another point for worry, [and] whether or not it is the EC itself or related persons [who are prosecuted]...

Virat: This thing... we discussed it too. I can say that the EC resigning would have a good effect on the cases being prosecuted. Certainly I can almost promise that it would have a good effect on what's being dragged along. We have spoken and thought about it too.

Official: So they do something... give something...

Virat: Yeah... that's it. They'll be the sacrifice. Then everybody will have the feeling that, yeah, it's finished. We Thais know that it's like this.

Official: Easily forgotten, easily forgiven. (Laughing)

Virat: Yes... what's done is done. But if it's dragged out, I have the feeling that, if so, you know the three courts, we'll be united in the course of action. Therefore, there won't be any way out. You understand what I'm saying?

Official: Yes, yes, I understand.

Virat: There's no way to have the Criminal Court do anything else.

Official: We have to choose a legal way.

...

Virat: We can't seek an audience [with the king]. We listen to what comes out. Whatever the court proceeds to do, it can't be said that it's following orders. We're not doing so. [But] you know there's a "link", Mr Jiap.

Official: (Laughs) I know it's Mr Jiap. He's become the [movie/play] director.

Virat: Do you know? "He" knows everything, because the link from Mr Jiap goes to the Sisao house [of Privy Council president General Prem Tinsulanonda]... because the Sisao house must report every morning at nine.

Official: Oh... every morning?

Virat: Yes. He has to go and come back every morning. In the morning before going into the meeting [of Supreme Court judges] "father" calls the president [of the court]. In short, His Majesty knows every step that we take. He has said that it should be faster than this. I feel like I can speak directly: I am worried. If they don't resign, it's worrying.... it's worrying... We'll have to follow what the Constitutional Court has decided...

Official: Constitutional law is intact because every institution follows it accordingly.

Virat: We have to follow it. What else can we do? But if they resign it's over. It'll all be over. You give it a try: take what I have said and see what you can do [to convince the EC to resign].

Official: I'll forewarn the government that they should speak with the EC. I think that the government will be able to do it.

Virat: You have to speak. And I believe that the government will surely prevail. Believe me.

Official: And I see that no matter what, Thai Rak Thai is still popular.

Virat: ... Don't be afraid. It's better to go out in a dignified manner. Nobody can go against a Royal Address.

Official: No one opposes.

Virat: Talking, hanging around, people will look upon it badly. People see the government clearly. At some level inside people know [what is really going on], right?

Official: Let me speak to Mr Jiap a bit. Thank you very much. If there's anything I can do to be of assistance, call me alright?

[Preliminary greetings]

There's information from an army spy, a spy of Big Jiew [General Chavalit Yongchaiyudh], who said that on May 6 the President of the Supreme Court had a Royal Audience in the late night. Is it true or not?

Supreme Court Judge Pairote Navanuch: No, it's not.

Official: If you say that then it must be so.

Pairote: It's not true [information].

Official: The army spy who released that information...

Pairote: It's not true.

Official: It's not true, huh?

Pairote: Now, the way out [of the problem with the EC] that I suggest, it's the same as what the court secretary suggests?

Official: It's the most correct way.

Pairote: The most correct, huh?

Official: It's like this: I must speak directly, I know [Pol. Gen.] Vassana [Puernlarp, the then-head of the EC]. I can go talk him into it.

Pairote: You must tell him. Otherwise it won't be safe for him.

Official: Before discussing with you I talked with Vassana that if he quits all the damn annoying cases being prosecuted will be cleared up. [But if] guilt is determined [through a court verdict] then there is nothing he'll be able to do.

Pairote: Yes, it's better to advise like this. It's guaranteed. You can be sure of it.

Official: No... If I speak I don't know if he will listen or not to the words of a junior. He has a lot of experience.

Pairote: A lot of experience can land someone in jail.

Official: No, my meaning was that I'm a small person, going to speak to him.

Pairote: He's not a man. He doesn't know all the facts. Now who's big? No one is big now. Only the Criminal Court is the highest.

Official: Okay. Thank you very much. Good luck. If there is anything, call.

Pairote: Yes, goodbye.

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