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Thailand: Constitutional Developments Since Amendment No. 5 of 10 February 1995 to the Constitution of 9 December 1991

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I. PRELIMINARY REMARKS

For constitutional developments of the Kingdom of Thailand in historical perspective, readers may review the introductory pages ix-xvii of Release 93-7: Preliminary Notes. For Amendments Nos. 4 and 5 to the Constitution of 9 December 1991, reference may be made to the Preliminary Observations, on pages ix-xxiii of Release 96-2, especially the Notes and Commentaries on the Fifth Amendment of 10 February 1995.

As observed at page ix of the Introductory Paragraphs, the application of the Fourth Amendment of Section 159, paragraph 2, of the Constitution requiring every Prime Minister of Thailand to be elected by the Thai people, was initially waived to enable the Government of Anand II to function without otherwise contravening a fundamental provision of the Constitution of the Kingdom. It was on the understanding that this exception was to be of a very limited duration, so as to permit the interim government to oversee a general election to ensure the birth of an elected Government with a popularly elected Prime Minister to serve the country in a democratic fashion, taking into account the loud outcry and costly sacrifices made by countless members of existing pressure groups, encompassing not only youths and students but also middle class families and the intelligentsia, many among whom gave their lives.
and shed their blood in the struggle to attain the acceptance and practice of this very basic democratic principle.

By popular demand, no subsequent Prime Minister of Thailand shall ever again be nominated or appointed who was not elected by the Thai people. Nevertheless, the Fourth Amendment was not promulgated until 12 September 1992, the day before the general election which led to the return of Mr. Chuan Leekbhai, leader of the Democratic Party, to resume his rightful place as the first Constitutional Prime Minister of Thailand duly elected by the Thai people under the amended Constitution of 1991.

II. DRAFTING A NEW CONSTITUTION FOR THE KINGDOM OF THAILAND

The Fifteenth Constitution of the Kingdom of Thailand as revised by Amendment No. 5 came into force on 10 February 1995 as an integrated text, incorporating all the amendments theretofore adopted. The Revised Constitution of 1991 was short-lived, considering the recent date of its entry into force after the Fifth Amendment.

A Constituent Assembly was established by the Sixth Amendment, B.E. 2539 (A.D. 1996) to draft a new Constitution to replace the Constitution of 1991. Under Section 211 quarto, as amended in 1996 the Constituent Assembly, otherwise known as the Constitution Drafting Assembly (C.D.A.) composed of 99 members, proceeded to appoint a Drafting Committee of twenty-nine to prepare the draft of a new Constitution, which was to be Thailand's Sixteenth Constitution, and to present it to the Assembly within 240 days for adoption.

A. THE DRAFTING PROCESS

The drafting process consisted of successive phases or stages of norms-formulation by monitoring, hearing, digesting and analyzing the views of the Thai people. Two fundamental tasks were
undertaken to permit the drafting process to achieve its goals. The first was to channel popular demands through the Constitution Drafting Assembly overseen by the Public Relations and Public Hearing Committee, and the second to translate those demands into legal terms performed by the Constitution Drafting Committee (C.D.C.).

The C.D.A.'s provincial representatives were responsible for highlighting the salient elements of the draft Constitution for public debate whenever appropriate. The people's views were then gathered, summarized and transmitted to the provincial C.D.A. representatives, who would in turn pass them on the C.D.A. in Bangkok for scrutiny. The opinion gathering process at the provincial level took place during March 1997, after which time the Provincial C.D.A. members were in Bangkok to thrash out the "Preliminary Draft" for a five-week period. Various interest groups from the provinces were given wide latitude to air their views through representatives at meetings organized by the provincial level Public Relations and Public Hearing Committee.

The first two weeks of May were devoted to a nation-wide public hearing process. Civic groups from each province gathered to debate the wide range of constitutional issues collected from the public relations meetings. This stage was intended to allow mass input and to ensure the draft truly reflected the "people's own version". Live radio broadcasts of the debate were made in the provinces by Radio Thailand. The C.D.A. scrutinized the results of the nation-wide public discussion. The meetings were broadcast and televised live. The draft was then submitted to the Legislative Assembly by August 1997 for approval or rejection. If rejected, the Draft Constitution would be submitted for referendum.

The duty of the Constitution Drafting Committee (C.D.C.) was to translate the people's needs and popular demands into a legal context. This involved construing what the people said, as received and monitored through the Public Relations and Public Hearing Committee in simplistic terms and ascertaining their underlying needs and demands. In the words of the Secretary-
General of the Drafting Committee, "So, it is all about decoding the people's needs before compiling them in the constitutional framework."

Seven stages were followed in the drafting process.

Stage one: the C.D.A. compiled three lists of problems and principles for the three Parts of the Draft Constitution, namely, Part I: The Rights, Freedoms and Duties of the People; Part II: Mechanisms to Prevent Abuses of Power by the State; and Part III: The Political Structure, the Legislative and the Executive.

Stage two: the Public Relations and Public Hearing Committee publicized problems and methods for gathering public opinion.

Stage three: the C.D.C. grouped the proposals of each Part, and prepared reports on organic laws to be submitted to Parliament.

Stage four: the Public Relations and Public Hearing Committee distributed the draft to the media, and conducted public hearings among various groups.

Stage five: the C.D.C. amended the Draft Constitution based on conclusions reached after the debate.

Stage six: Parliament voted on the draft which was approved.

If rejected, then Stage seven would be set entailing the conduct of a referendum by the Ministry of Interior within 90 to 120 days after rejection by Parliament. The final phase consisted in the submission of the draft to His Majesty the King for signature and promulgation in the Government Gazette. This was done on October 11, 1997.

Thus the drafting process consisted of a series of compilations of rules and monitoring, screening, sifting and incorporating the views of the public, which at times were patently inconsistent, contradictory, and at best incongruous if not disconcerting. The task facing the Public Relations and Public Hearing Committee was complex and difficult to fulfill within the
span of the time-frame allotted to it.

The translation or conversion of public demands and popular needs presented no apparent insurmountable difficulty. In the face of conflicting popular views, the Drafting Committee felt free to adopt any opinions that happened to suit the wishes or the particular interests of an important faction of the Drafting Committee. The pressure of time clearly rendered any delay excessively costly. The bottom line was abundantly apparent. Whatever was adopted in the ultimate analysis was bound to be better than the alternative of total failure or inability on the part of the C.D.C. to reach a decision.

The draft was considered a gift to the Thai people, although it was supposedly attributable to the will of the people, which was hard, if not impractical to ascertain.

Whatever the outcome, the fate of a Constitution must reflect the wishes to the people. Each people is entitled to have a Constitution it deserves. It is within its own sovereign political will and power to alter and modify whatever appears to oppose popular aspirations and destroy the object and purpose of democratic institutions established for the people of Thailand as free-thinking members of the national community. Between the Public Relations Committee and the Drafting Committee, the voices of the people may have been drowned by the vocal minorities whose sectarian interests were well preserved and represented.

B. THE ADOPTION PROCESS

Beyond the drafting stages lies the adoption process, which consists in its approval or rejection by Parliament. In case of parliamentary rejection, the draft could be reinstated by referendum conducted by the Ministry of Interior. This draft could in principle have been rejected by His Majesty the King. If it was not returned within 90 days, it would have been dropped. But as it happened, it received timely Royal assent and was signed and promulgated into law and published in the Government Gazette on 11
The adoption of the Draft Constitution was precipitated by a number of paramount considerations. Thailand of 1997, the year of the Ox, was characterized by a succession of events, mishaps and misfortunes, not far short of national calamity. Financial crises of gigantic proportion loomed large, due in part to the over-assessment and exaggerated expectations of Prime Minister Banharn Silpa-Archa of the Charti Thai party who was later succeeded by General Chavalit Yongchaiyuth of the New Aspirations Party in a slightly different coalition. Within a brief period of less than two years, the two Administrations had to appoint at least four consecutive Finance Ministers to cope with the deteriorating situation.

First, more than 50 trust and finance companies were suspended from providing services, later on, the total loss of foreign currencies reserve prompted the Finance Ministry and the Bank of Thailand to float the baht which slipped downward from Baht 25 to a US Dollar in May 1997. By the Chinese New Year, for the year of the Tiger, the Baht was sunk to its lowest at 59 Baht per 1 US Dollar. By 15 February 1998, the Baht has recovered but still fluctuated around 46 to 50 to the Dollar.

In October 1997, Prime Minister Chavalit still lingered on in his post despite repeated demonstrations and protests by several quarters and pressure groups. In more ways than one, the promulgation of a new Constitution served to accelerate and necessitate the exit of the Chavalit Administration.

The opposition led by Mr. Chuan Leekbhai of the Democratic Party was invited to form a coalition government and began the uphill task of restoring the confidence of the international community. In this way, the adoption of a new Constitution paved the way for a new Administration to stabilize the ailing economy and put the Kingdom back on the road to economic recovery and eventual prosperity.
C. THE MEETINGS OF THE SUBSTANTIVE SUB-COMMITTEES

In the report of the Constitution Drafting Committee (C.D.C.) dated 30 April 1997, three frames or frameworks were assigned to the three Sub-Committees as follows:

Frame I: The Rights, Freedoms and Participation of the People;
Frame II: The Checks and Balance of the Power of the State;
Frame III: Political Institutions and their Relations.

The first Sub-Committee undertook the finalization of the draft in Frame I as well as the Preambles to the Sixteenth Constitution. The sub-Committee of five were chaired by a practitioner, an attorney who had served as public prosecutor in the Attorney General's Office and also as Dean of the Faculty of Law of Thammasart University. Other members were drawn from professionals and academics.

The second Sub-Committee had six members, headed by a law professor and manned by practitioners and academics. This Sub-Committee dealt with Frame II.

The third Sub-Committee responsible for Frame III as well as Constitutional Amendments, was composed of academics and professionals.

The Sub-Committees of academics and bureaucrats met from 16 to 20 April 1997 to compile, organize and compose the provisions of the Constitution in time for submission to the Constituent Assembly on 2 May 1997. At these meetings, the views of the people were represented by four Regional People's Representatives from the Centre, the North, the Northeast and the South of Thailand. The main C.D.C. held meetings on 20-27 April 1997 to review the draft submitted by the Sub-Committees. Members of the Constitution Drafting Assembly (C.D.A.) were also invited to attend the Committee Meetings to better appreciate the intricacies of the basic laws and their normative formulation, including the underlying spirits and fundamental principles. Twenty-two meetings altogether were held by the C.D.A. at Committee's level.
Such was the way in which step by step the drafting of the latest Constitutional Charter was accomplished. Within less than a fortnight, the Sub-Committees and the Committee put their final touch to this historic document.

III. PROVISIONAL COMMENTS

A. TRANSITIONAL PROVISIONS

It is as yet premature to comment on the provisions of each section and each chapter of the latest Constitution, as its application in full has not taken place. The Transitional Clauses contain 22 Sections, from Section 314 to Section 336, envisaging transitional measures pending further adoption of relevant laws within 240 days to give effect to a number of innovations generated by the application of this Constitution.

Constitutional provisions are not all self-executing. Many provisions require subsequent implementing legislation. A series of steps will be taken and appointments made, for instance, the election of Members of the Constitutional Court under Section 255 and the Election Commissioners under Section 139 within thirty days after the promulgation of this Constitution.

Section 329 envisages the enactment of legislation to give effect to Constitutional Provisions within two years. Section 39 concerning allocation of radio frequencies would be implemented by legislation within three years without prejudice to pre-existing grants or concessions.

Section 336 designates the end of the five- year period after entry into force of the Constitution as the time for the Election Commission, the Constitutional Court and the National Anti-Corruption Committee to submit their reports to Parliament and the Cabinet regarding possible amendments to the Constitution and other organic laws.

Pending implementing legislation, new appointments and
elections, the pre-existing Privy Council continues to act as Privy Council with added responsibility during the termination of membership of the Senate en masse under Section 323. Pre-existing House of Representatives and Senate continue to function until expiration of their mandate. Pre-existing Council of Ministers also continues as before until new election under Section 324.

B. SUBSTANTIVE PROVISIONS OF THE NEW CONSTITUTION

Without commenting in any detail on each and every Chapter or Section of the new Constitution, a quick glance at the document in comparison to its predecessors may warrant a number of brief and inconclusive observations even at this early stage of its entry into force.

CHAPTER I : GENERAL PROVISIONS

In its first Chapter, two new Sections have been added to the previous Constitution, namely, Section 4 and Section 7.

Section 4 refers to the notion of Human Dignity along with the concept of human rights and liberties of the people to be protected by the Constitution.

Section 7 fills in the gap in the absence of relevant constitutional provisions by reference to the administration of the Kingdom according to democratic traditions, under Royal leadership.

CHAPTER II : THE KING

Sections 8 to 24 reiterate the corresponding provisions of the Constitution of 1991, confirming the respect owed to the King as Head of State and his status as an inviolable person. The King is a confirmed Buddhist and upholder of religion. He is the Commander in Chief of the Royal Thai Armed Forces. The King creates and
confers titles, and selects and appoints up to eighteen members of the Privy Council to render advice and counsel to the King on all matters pertaining to royal functions.

CHAPTER III : RIGHTS AND FREEDOMS OF THE THAI PEOPLE

Chapter III contains constitutional provisions drafted by the Sub-Committee for Frame I. Several provisions have been added to reinforce and give new meaning and effect to the rights, freedoms and dignity of the human person, protected by the Constitution.

Sections 26, 27, 28, 29 and 30 provide the rights and unfettered freedoms of persons under the Constitution, guarantee equality and non-discrimination before the law.

Sections 31 to 33 provide procedural safeguards for the rights of the accused and freedom from arbitrary arrest, search and detention.

Section 34 provides for the right to privacy and Section 35, freedom within a place of abode.

Section 36 guarantees freedom of movement and choice of residence within the realm. Section 37, guarantees freedom of communication, Sections 38 and 39, freedom of opinion, thought and religion as well as speech and information, including broadcast and other mass media.

The right to education is protected under Sections 42 and 43. Freedom of association and the right to quiet enjoyment of peaceful gathering are protected by Sections 44 and 45.

The right to found political parties is protected by Section 47, and the right to property by Sections 48 and 49. Freedom to engage in business or profession is provided for in Section 50. Social securities and public welfare are also guaranteed.

Section 57 provides for consumer's protection and Sections 58 and 59 ensure the right to obtain information and public news from Government agencies. The right to petition and civil disobedience are protected by Sections 61, 62, 63 and 64.
CHAPTER IV : CIVIC DUTIES OF THE THAI PEOPLE

Corresponding civic duties have been incorporated into Sections 66 to 70 of Chapter IV of the Constitution, confirming positive duties and obligations of the Thai people to uphold the nation, the religion and the King as well as constitutional and democratic form of Government with the King as Head of State. The duty to obey the law, to exercise the right to elect representatives, to perform national services, to pay taxes and to assist the Government in the protection of cultural heritage and conservation of natural resources are prescribed in this Chapter.

CHAPTER V : STATE POLICIES, PRINCIPLES AND DIRECTIVES

State policies, principles and directives are contained in Sections 71-89 of Chapter V of the Constitution, announcing in advance the functions and policies of the State to uphold the institution of monarchy, and the political independence and territorial integrity of the Kingdom; to organize and maintain armed forces to assure the defence of the realm; to patronize and protect Buddhism and other religions; and to promote friendly relations with other countries.

The State is committed to allocate budgets for the independent administration of a system of justice to protect the rights and freedom of the human person, the Election Commission, the Ombudsmen, the National Human Rights Commission, the Constitutional Court, the Courts of Justice, the Administrative Court, the National Anti-Corruption Commission, and the State Audit Commission.

Free market economy is to be encouraged with free and fair competition in trade. To this end, a National Economic and Social Council will be established to give advice and recommendations to the Council of Ministers on economic and social problems.
CHAPTER VI : THE NATIONAL ASSEMBLY

There will be a bicameral system of parliament, the National Assembly consisting of a House of Representatives and a Senate with joint and separate sessions to be held in accordance with constitutional provisions.

A. THE HOUSE OF REPRESENTATIVES

Section 98 envisages two distinct categories of membership of the House of Representatives of five hundred members, of whom one hundred shall be drawn from the election on a party-list basis under Section 99 and four hundred from the election on a constituency basis under Section 102.

Political Parties shall each prepare a party-list of no more than one hundred candidates and have it submitted to the Election Commission before the date an application for candidacy in an election on the constituency basis commences. For this purpose, the whole territory of Thailand is one entire constituency. Persons named on the list shall not be repeated in another list submitted by another Party and shall be placed in numerical order, so as to assist in the determination of the proportion of votes received by the party-list of each political Party. This shall be in accordance with rules, procedures and conditions provided by the organic law on the election of members of the House of Representatives and Senators.

There has as yet been no general election under the new Constitution which awaits further implementation through enactment of pertinent organic law to give effect to Constitutional Provisions.

Thus the two categories of House of Representatives will work side by side. While those on the party-list in numerical order will be eligible for appointment as Prime Minister and Ministers in accordance with the proportion of the number of the Party members
elected on the basis of constituency.
This sophistication is a novelty in Thai politics and is likely to cause some confusion in the early elections. It is predicted that this dual method of election: party-list and constituencies, will serve to eliminate smaller political parties. There would appear to be little point in furnishing a list of one hundred candidates as the bottom part of the list is not going to be exhausted unless those on the top part are appointed ministers and the ones lower on the list move up the ladder.

It would be interesting to be able to observe at closer range how this double-tiered membership operates to provide a built-in ready-made composition of a coalition of the Council of Ministers after a general election. Meanwhile, the subsisting members of the House of Representatives continue to hold office until expiration of the term of the House or dissolution or otherwise terminated under Section 323, as the case may be.

B. THE SENATE

The Senate constitutes the Upper House. Two hundred Senators will be elected on the basis of constituencies in accordance with Section 102 (2), (3) and (4) of the election of members of the House of Representatives. Pending such election, pre-existing Senators appointed under the Constitution of 1991 as amended in 1996 will continue to serve as Senators until four years shall have elapsed since his or her appointment (Section 315 of the Constitution), or until the date set for election of Senators, as the case may be.

C. THE ELECTION COMMISSION

Section 136 establishes an Election Commission of five members, one of whom shall be its Chairperson, appointed by the King upon the recommendation of the Senate from those who are politically impartial and with transparent integrity. The search
for Election Commissioners will be in accordance with the procedure prescribed in Section 138 with the assistance of a Search Committee. The Election Commission has wide power of oversight in respect of elections of members of the House of Representatives.

D. THE OMBUDSMEN

No more than three Ombudsmen shall be appointed by the King with the advice of the Senate from the persons of reputable character with apparent integrity. The Ombudsmen have the power to consider and conduct an enquiry into the complaint for fact-finding for failure of a governmental official or an official or employee of a government or State agency, enterprise or local administration to perform his function or omission or excess of authority given by the law. Questions relating constitutionality will be submitted to the Constitutional Court or the Administrative Court, as the case may be.

E. THE NATIONAL COMMISSION OF HUMAN RIGHTS

A National Commission will be set up under Sections 199 and 200, consisting of a President and ten other members, appointed by the King with the advice of the Senate from persons of high qualifications and experience in the protection of human rights and fundamental freedoms. The Commission will examine and report any violation of human rights or treaty obligations protecting human rights to which Thailand is a party. The report is submitted to the National Assembly for further action and proceeding. The Human Rights Commission is also responsible for proposing policies and recommendations with regard to revision of laws, rules and regulations pertaining to the promotion of human rights. The Commission also has the power to subpoena relevant documents or summon witnesses to make statements or give evidence on questions of fact.
foresee at this point how the multiple judicial functions will be distributed. Constitutional guidance is far from clear in the absence of an established set of case law or jurisprudence.

An independent administrative justice system, closer to that prevailing in France and other former French colonies, appears to have been envisaged in the new Constitution. Pending the establishment of administrative cadres as in the French administrative system with the *Ecole Nationale d’Administration*, it is not easy to predict with reasonable certainty what type of administrative justice can be expected. It is too early to see how the Judicial Commission of the Administrative Courts will be appointed pending subsequent legislation on the subject.

It should not be forgotten that the existence of Military Courts are also endorsed by the Constitution under Section 281 which refers the appointment and removal of military judges to a special law.

No special constitutional safeguards exist to regulate the operation of Military Courts, nor indeed are Constitutional Provisions adopted to define the jurisdiction of Military Courts or the minimum standard of military justice.

CHAPTER IX : CONTROL OF STATE POWER

Mechanisms exist under the Constitution, Sections 291-302, to check and curb the exercise of State authority by politicians and those holding political positions, such as the need to declare assets and liabilities and the establishment of National Anti-Corruption Commission for the Prime Minister, Ministers, Members of the House of Representatives, Senators and other political officials as well as local administrators and local assembly men as provided by law.

It is too early to comment on how effective the mechanisms devised would work in the up-coming election within the foreseeable future.
CHAPTER X : STATE AUDIT

Constitutional Provisions exist to support the work of the State Audit Commission and the Auditor-General who is independent and impartial. While impartiality refers to absence of political bias, independence is harder to secure. A benefit of the doubt must be given to the assurance of independence through recommendations by the Senate for appointment. There is an apparent independence from interference by the Executive, but the Senate itself must be subject to auditing and control under Chapter IX as well as Chapter X.

CHAPTER XI : AMENDMENT

Section 313 provides for possibilities and procedures for amending the Constitution, subject to certain constraints.

TENTATIVE CONCLUSION

In this brief commentary, it seems premature to comment on a number of fundamental constitutional issues. Yet it is the firm belief of this Commentator that there is sufficient room for growth and further evolution. The Thai people have suffered long enough and deserve a well-balanced Constitution, which is not unattainable nor easily within reach. In view of their rich experience in constitutional reforms, revisions and amendments, it is never too late to learn and the process of self-adjustment and improvement appears to come naturally to the instinctive resilience of the Thai nation and people. The best and sincerest wishes of this Commentator accompanying this tentative concluding remark should dispel any misgivings that readers and reviewers may entertain in their perusal of the sections of the latest Constitution of
Thailand, given the record time within which it was improvised and systematically composed.

One thought lingers in the mind of observers. Surely, half a loaf is better than none. Think of a country that struggles for thousands of years to write a constitution without thus far a concrete product to demonstrate its ability as a nation to unite for the adoption of an agreed basic law.

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