

EAJLG

European-Asian Journal of
Law and Governance

Vol. 3, No. 2, 2013

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Table of Contents

Articles

- The Attempt to Adopt a Mixed-Member Proportional Election System in Thailand: The Near Miss of the Constitution Drafting Committee and Constitution Drafting Assembly in 2007**
Michael H. Nelson1
- Electoral Reforms and their Impact on Democracy in Southeast Asia**
Patrick Ziegenhain58
- The United Nations and the Efforts to Define Terrorism**
Daniela Gotzel75

Research report

- University Students Drop Out: Experience in a Thai University**
Ruthaychonnee Sittichai96

Research material

- Thai Constitutional Court Ruling No. 33/2555, 28th of March 2012**.....104
- Thai Constitutional Court Ruling No. 33/2555, 18th of May 2012**.....110

The Attempt to Adopt a Mixed-Member Proportional Election System in Thailand: The Near Miss of the Constitution Drafting Committee and Constitution Drafting Assembly in 2007

Michael H. Nelson*

Introduction

On September 19, 2006, after a long process of anti-government protests, a failed general election, and a series of speeches attacking the prime minister by the chief of King Bhumipol's Privy Council, the military ended Thaksin Shinawatra's time as head of Thailand's government. He had assumed this position first after the election of January 2001, and he convincingly defended it in the elections of February 2005. The coup plotters assigned experts in public law to draw up an "Interim Constitution."¹ Its articles 19 to 32 concern the

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1 "Constitution of the Kingdom of Thailand (Interim). Buddhist Era 2549 (2006)." Unofficial translation prepared by the Department of Treaties and Legal Affairs. รัฐธรรมนูญแห่งราชอาณาจักรไทย (ฉบับชั่วคราว) พุทธศักราช ๒๕๔๙. ราชกิจจานุเบกษา เล่ม ๑๒๓

establishment of a Constitution Drafting Assembly (CDA) as well as a Constitution Drafting Committee (CDC), the procedure of constitution drafting, and subjecting the constitution draft as approved by the CDA to a referendum. The CDC was tasked with preparing the draft constitution. This group of 35 people (25 selected by the CDA, ten by the coup plotters), comprised almost exclusively senior male members of the Bangkok-based bureaucratic and technocratic power elite (variously referred to as *aphichon* or, especially by the red-shirt movement, *ammart*). The CDC started its work on January 25, 2007 and held its decisive joint meeting with the CDA, in which the new constitution was decided upon point-by-point, on June 21, 2007. In its 62 meetings, the CDC debated a host of constitutional design issues. The word-by-word minutes of 47 of these meetings are accessible to the public, as are the word-by-word minutes of the CDC's three sub-committees.² This paper only describes the debates of the CDC, including the decision-making in its final meeting with the CDA. The thirteen meetings (comprising 637 pages of text) of the second sub-committee on political institutions, which are relevant to the topic of this paper, could not yet be included.

Amongst the host of constitutional design issues debated by the CDC, the election system was one of the most prominent and contentious. It remained highly contentious right until the CDC's decisive meeting with the CDA on July 21, 2007, when 45 members voted in favor of the mixed-member *majoritarian* election system introduced with the 1997 constitution, while 39 members supported the switch to a mixed-member *proportional* system (there were two abstentions and one no-vote). A number of important CDC members considered the redesign of the election system as one of the most important tasks of this round of constitution drafting. They perceived that the election system stipulated in the 1997 constitution had had strong undesirable effects, especially in creating a government unassailably backed by a parliamentary majority that was substantively bigger than the voter share of the main political party.

ตอนที่ ๑๐๒ ก ๑ ตุลาคม ๒๕๔๘. A "Certified Translation" was published by the Office of the Council of State's Welfare Fund. It prints the Thai version and the English translation side-by-side. The Thai version was officially published in the *Government Gazette*, Vol. 123, Part 102 Kor, dated October 1, 2006. For the Thai version, see also กองบรรณาธิการมติชน [2006].

2 Sub-committee 1 dealt with rights and liberties, people's participation, and decentralization; sub-committee 2 prepared input on political institutions; sub-committee 3 debated independent accountability organizations, and the courts.

Yet, this point was also expressly directed against the Thai Rak Thai Party of Thaksin Shinawatra, who stood accused of having established a “parliamentary dictatorship.”

However, this did not mean that the constitution drafting process, and even the decisions about the election system, was always of a deliberative nature where the participants clearly understood the issues, and merely acted based on pure reason, and complete information. Rather, an analysis of institutional development that pays “due attention to micro foundations” (communications of actors, such as those who served on the CDC and CDA) also includes paying attention to “the potential causal importance of political mistakes, misperceptions, and unintended consequences ... on both strategic behavior and institutional outcomes”.³ For example, the discussions and explanations on the CDC and in the CDA were not always helpful in clearly defining the alternative options, their respective strengths and weaknesses, and their potential political consequences. As one member of the CDA exclaimed with frustration when the decisive CDA vote on the election system had already been urged to be taken, “The more I listen [to the explanations], the more I am confused about how I should decide” (Chali Kangim, CDA 29:206). Another CDA member added, “I have listened, and I am still confused” (Akkharat Rattanachan, *ibid.*:207). After Winat Manmungsin had added that, “If you allow the vote to take place, I am afraid that it will not be based on our shared understanding” (*ibid.*:209), Sunthorn Chanrangsi cautioned, “I confirm that the majority of CDA members does not yet understand [the election system issue]. Since we do not yet understand it, how can you force us to make a decision?” (*ibid.*:210). Given the long, unsystematic, and confusing debate in this decisive CDA meeting, such statements were not surprising. Siva Saengmani suggested, “if there is somebody who really does not understand, he should abstain when voting” (*ibid.*). Sakchai Unchittikul was concerned about the image of the CDA saying, “Moreover, I think since there is still confusion, I do not want this confusion, and neither a decision based on a lack of understanding. This would make outsiders see us in a bad light” (*ibid.*:213). After some more (but not very enlightening) explanations regarding the election system design, the chairperson of the meeting, Seri Suwanphanon, noted,

3 Giovanni Capoccia and Daniel Ziblatt, “The Historical Turn in Democratization Studies: A New Re-search Agenda for Europe and Beyond”, in *Comparative Political Studies* Vol. 43, No. 8/9 (2010), pp. 937, 938.

See, there are still members who do not understand [the proposed election systems]. Therefore, it is difficult to vote on them, right? ... How can we decide when members do not yet understand [the issue]? (CDA 29:216)

Shortly afterwards, Seri followed up by asking, “Do you understand better now?” His own answer suggested that this was not the case: “Everybody makes a cloudy face” (ibid.:220). A short while later, Seri added, “Dear members, is there anybody who does not yet understand [the two alternative and competing election systems]? Is there anybody? If they are understood already, we will vote” (ibid.:224), and “The more explanations are given, the bigger is the confusion. Do not do this. I want explanations that settle [the issue]” (ibid.:231). This was an important issue that needed reason as a principle of decision-making (ibid.). Eventually, Montri Phetcharakham, became impatient,

Those who do not understand will understand afterwards. If they do not understand it now, they will understand it later. ... If I was a teacher teaching primary school students, everybody would fail. One hundred people have already explained, and there are still members who do not yet understand. Therefore, just vote. (CDA 29:235)

Given the situation briefly described here, one might well wonder what the final narrow vote of 45 to 39 in favor of the mixed-member *majoritarian* system, and against the mixed-member *proportional* system, meant in terms of the quality of this institutional “decision.”⁴ This question includes the reasons and other motivational factors that made members vote for one of the options rather than for another. On the occasion of drafting the 1997 constitution, the then-secretary general of the CDC, Borwornsak Uwanno, viewed the decision-making behavior of members in a rather critical light, when he referred to the “patronage system” and said,

You would expect them [well-educated and economically well-off middle-class elite members of the CDC/CDA] to be guided by principles, but they are not. If they are asked as a favor to vote a certain way, they will be guided by their personal relationships. And this is under the full attention of the press. It reflects the understanding that their relationships with those in power stand

4 There were two abstentions; one member did not vote. Five CDA members were listed as absent in the attendance list. Thus, eight of the 100 members are unaccounted for. The decision is documented on page 249 of the minutes referred to in this paragraph.

above all else. (*Bangkok Post*, July 21, 1997)

The actual communication process as reflected in the minutes of the CDC and CDA meetings made the supposedly clear-cut “intention of the constitution” about its election system look rather messy (and this includes neither the informal discussions and negotiations held outside the formal meetings nor the relationship issue raised in the Borwornsak quote). Nevertheless, subsequently, the Thais had to act out and bear the consequences of this institutional “choice” of the election system, be it as politicians, political parties, or voters.

Before I enter into an analysis of the CDC minutes, it might be useful first briefly to describe the election systems that were principally available for selection. This will make it easier to locate the system adopted in Thailand in the worldwide institutional context.

Electoral systems: a very brief overview

Electoral systems are normally divided into two main pure types, namely plurality/majority and proportional.⁵ In the first type, voters cast one single ballot for a candidate who runs in their local constituency. In plurality systems, the candidate with the highest number of votes wins, irrespective of whether he or she has gained an absolute majority or not. This system is also called “First past the

5 For a systematic treatment, see G. Bingham, *Elections as Instruments of Democracy: Majoritarian and Proportional Visions*, New Haven and London: Yale University Press, 2000. For overviews on the election systems outlined here, see André Blais and Louis Massicotte, “Electoral Systems”, in Lawrence LeDuc, Richard G. Niemi, and Pippa Norris (eds.), *Comparing Democracies: Elections and Voting in Global Perspective*, Thousand Oakes, California: Sage, 1996, pp. 49-81; André Blais and Louis Massicotte, “Electoral Systems”, in Lawrence LeDuc, Richard G. Niemi, and Pippa Norris (eds.), *Comparing Democracies 2: Elections and Voting in Global Perspective*, London: Sage, 2002, pp. 40-69. More details are to be found in Andrew Reynolds, Ben Reilly, and Andrew Ellis, *Electoral System Design: The New International IDEA Handbook*, Stockholm, Sweden: International Institute for Democracy and Electoral Assistance, 2005. A standard work on electoral systems in the author’s native German is Dieter Nohlen, *Wahlrecht und Parteiensystem: Zur Theorie und Empirie der Wahlsysteme*, 5., überarbeitete und erweiterte Auflage, Opladen and Farmington Hills: Verlag Barbara Budrich, 2007. For a systematic treatment of electoral change and system choice, comprising a systematic introduction and many country studies, see Josep Colomer (ed.), *Handbook of Electoral System Choice*, Houndsmills: Palgrave Macmillan, 2004. An assessment of the study of electoral reform is provided by Monique Leyenaar and Reuven J. Hazan, “Reconceptualising Electoral Reform”, in *West European Politics*, Vol. 34, No. 3 (2011), pp. 437-455.

post” (FPTP). A typical case of such a system – usually employed in single-member constituencies (SMC) – is the lower house in the United Kingdom. Some other countries require that the winning candidate achieves an absolute majority and thus perform a run-off election, in which only the two candidates with the highest number of votes can run (France), or they integrate such a run-off into the first round of voting, called “alternative vote” or “preferential voting” (Australia).

In proportional election systems, voters cast their single ballot for lists of candidates that were prepared by the political parties. Some countries feature national party lists (such as Israel, The Netherlands, and Slovakia), while the great majority employs some variant of regional or local lists (for example, Argentina, Finland, Spain, Denmark, or South Africa). Some countries combine these two pure election models into mixed systems, thereby creating a third major variant.⁶ This, in turn, takes two major forms, the mixed-member *majoritarian* (MMM) and the mixed-member *proportional* (MMP) systems. The MMM system emphasizes the majoritarian/plurality element by using the two different systems separately for different sets of MPs, and by setting the number of plurality constituency MPs considerably higher than that of the party-list MPs. It is therefore often described as a “segmented” or “parallel” system. Typical examples in Asia are Japan, South Korea, and Taiwan.

The MMP system, on the other hand, emphasizes the proportional component. Although there are also two kinds of MPs, the overall distribution of seats in parliament solely depends on how many votes the political parties received on their party lists. The MPs elected in local constituencies merely add a personalized element to this system. The total number of MPs a party can claim in parliament depends on its overall share of votes, making the number of a party’s seats proportional to its voter share. If a party’s number of constituency MPs does not reach its proportional claim, the number is filled up from the party list. Therefore, this system is also called “compensatory” or “corrective.” Typical examples are Germany and New Zealand (which essentially copied the German system and first applied it in 1996).

According to statistics presented in the IDEA’s handbook on *Electoral System Design*, of the 199 countries covered, 91 had a plurality/majority election system, 72 had a proportional election

6 Such mixed-member systems have gained increasing attention; see Matthew Shugart and Martin P. Wattenberg (eds.), *Mixed-Member Electoral Systems: The Best of Both Worlds?*, Oxford: Oxford University Press, 2001.

system, 30 countries had mixed systems, and six had other systems. Of the 30 countries with mixed systems, 21 featured parallel systems (MMM), while nine had adopted MMP.⁷ As for recent electoral change, the handbook notes,

As Table 1 shows, the trend is rather clear. Most countries [of 27] that have changed electoral systems have done so in the direction of more proportionality, either by adding a PR [proportional representation] element to a plurality system (making it a parallel or MMP system) or by completely replacing their old system with List PR. The most common switch has been from a plurality/majority system to a mixed system, and there is not one example of a change in the opposite direction.⁸

Locating Thailand in this overall scheme of electoral systems is now easy. “Table 1” mentioned in the quote lists Thailand as a country that had moved (since the adoption of the 1997 constitution) from a plurality/majority system (multi-member constituencies, or bloc vote) to a mixed “parallel” system (or MMM). Thailand had thus joined 20 other countries, among them, as mentioned above, Japan, South Korea, and Taiwan. The 1997 constitution had introduced a *segregated* or *parallel* election system (mixed-member *majoritarian*, or MMM) with 400 MPs elected in single-member constituencies (SMC), complemented by 100 MPs elected in nationwide closed and blocked party lists. This included a threshold of five percent. That is, only those political parties that received at least five percent of the total party-list vote received a proportional share of the 100 party-list MPs.

Thus, the constitution-drafting assembly and committee of 1997 succeeded in significantly reforming Thailand’s time-honored

7 For the figures, see the chart in Reynolds, Reilly, and Ellis, above fn. 18, p. 32. Pakorn Priyakorn presented these IDEA statistics in a CDC meeting, without, however, mentioning their source (CDC 26, 12). Just before Pakorn presented the IDEA statistics, Nakharin Mektrairat, in supporting a modified 1997 party-list system, had claimed, “Election systems with only constituencies [plurality/majority systems] ... have declined. Nobody uses them any longer. In the United Kingdom, it has been abolished already. Thus if we want only the constituency system, I think that this is not in harmony with the modern world. It is also not democratic” (ibid., p. 10). At the time he spoke these words, Nakharin was the dean of the faculty of political science of Thammasat University.

8 The quote is on page 23 of Reynolds, Reilly, and Ellis (2005), while the table follows on page 24.

plurality election system,⁹ while their successors in 2007 failed to push this reform substantially further by changing the emphasis of the mixed system from a majoritarian to a proportional approach, though this really was a near miss by merely six votes. The purpose of this paper is to describe how the idea of proportional representation developed, how it was discussed, and how it finally fell through.

The CDC proceedings regarding the election system

The overall process of drafting the 2007 constitution, including the election system, comprised the following major steps. First, the three thematic sub-committees mentioned above discussed constitutional design issues and provided the results of these discussions as input to the CDC, which performed its debates concurrently with the discussions separately taking place in the sub-committees. Second, a draft of the constitution as prepared by the CDC was disseminated to the public for feedback, and formally organized hearings were held.¹⁰ The draft was also presented to the CDA so that its members could form their views and possibly join groups that could initiate amendment motions (*prae yatti*). In order to get even more feedback, the draft was given to twelve organizations for providing comments from their perspectives.¹¹ Third, concerning the part on the election system, this was taken up again on June 1, 2007, following the public hearings, and after almost two and a half months had elapsed since the first round of decision-making. Fourth, the CDC held meetings with those members of the CDA who had initiated amendment motions to make changes to the CDC's draft constitution. The election-related debate took place in the 38th CDC meeting on June 6,

9 For an overview of electoral provisions in Thailand that includes the changes made by the 1997 constitution, see Michael H. Nelson, "Thailand", in Dieter Nohlen, Florian Grotz, and Christof Hartmann (eds.), *Elections in Asia and the Pacific: A Data Handbook. Volume II: South East Asia, East Asia and the South Pacific*, Oxford: Oxford University Press, 2001, pp. 261-320.

10 For observations on a set of such public hearings conducted in Chachoengsao province, see Michael H. Nelson, "Public Hearings on Thailand's Draft Constitution: Impressions from Chachoengsao Province", *KPI Thai Politics Update* No. 3 (August 14, 2007).

11 These twelve organizations were the National Security Council (the coup plotters), the National Assembly, the Cabinet, the Supreme Court, The Supreme Administrative Court, The Election Commission, the National Counter Corruption Commission, The Auditor-General of the State Audit Commission, The Ombudsmen, the National Economic and Social Advisory Council, and the institutions of higher education. This procedure was stipulated in the Interim Constitution.

2007. Fifth, in the following meeting on June 6, the CDC discussed which motions the members accepted, and which they rejected. Sixth, and finally, almost the entire CDA meeting on June 21 was spent to debate and decide on parliamentary system issues, in particular the election system (these issues cover 259 pages of the 279-page minutes of this meeting).

I will now provide a sequential narrative of what happened between the first and the last step of deciding about Thailand's election system.

The initial stage

Early on in the drafting of the constitution by the CDC, some members started pushing for abolishing the national-level party lists, which would have left the election system with only constituency MPs, as was the case before the 1997 constitution came into effect. In the ninth CDC meeting on February 15, 2007, Jaran Pakdithanakul¹² reported on the deliberations of the sub-committee on political institutions, of which he was the chairperson (CDC 9:14ff.). According to his report, the number of MPs was to be reduced from 500 to 400. Moreover, all of them were to be elected in multi-member constituencies or districts (MMD), while the party-list component of the election system would be abolished altogether. Many members of Jaran's sub-committee saw the party lists as giving too much power to the party leaders and their executive boards in selecting the candidates to be placed on the lists. It was thought that this would indebt those selected to their selectors, and thereby limit the MPs' freedom in making legislative decisions (the experience with Thaksin's TRT provided part of the background for this approach). Furthermore, rather than following the intentions of the 1997 constitution to put knowledgeable and capable people from various fields on the party lists, parties (mainly referring to TRT) had allegedly stacked them with their financiers. However, Jaran added, some sub-committee members had defended the party lists as useful.

¹² During his time on the CDC, Jaran was permanent secretary of the ministry of justice. Previously, he had served as a secretary to the Supreme Court President. He was an avowed enemy of Thaksin, and defender of the coup. In the crisis following the election of April 2006, stretching the constitution, he said, the "EC should resign for the sake of the country. Their resignation will allow the judicial authorities to supervise new election and recruit new EC members" (*The Nation*, May 9, 2006). After the coup period had ended, he was appointed to the Constitutional Court, thereby creating a conflict of interest.

Yet, these supporters wanted to replace the single national party lists by a number of regional lists covering a number of provinces.

Thus, at this early point in the drafting process there were two main proposals regarding the design of the election system. One represented a return to the pre-1997 system, while the other wanted a modified version of the 1997 model. Six weeks later, however, in the CDC's eighteenth meeting on March 28, 2007, Krirkkiat Phipatseritham¹³ suddenly (though there seemed to have been some talk on a proportional election system at the CDC's informal brainstorming sessions in the seaside resort town of Cha-am in Petchaburi province, from March 5-10, 2007)¹⁴ proposed the introduction of a proportional compensatory system. This proposal was expressly based on the German model. This would have meant a switch from a mixed-member *majoritarian* to a mixed-member *proportional* election system (CDC 18:49). Krirkkiat suggested what he henceforth would stick to, namely a House consisting of 400 MPs, with 200 elected in single-member constituencies and 200 elected from party lists. This proposal thus still reflected the original intention of most CDC members to reduce the number of MPs from 500 to 400. However, in Krirkkiat's model, the number of seats a political party could claim in the House would have been in direct proportion to the number of votes it had received on its party list alone. Krirkkiat clearly stated, "The number of MPs a political party receives is according to the number of votes cast for it. Every vote cast by the people counts [*mi khwammai*]." In more concrete terms, a political party that had received 40 percent of the vote could claim 160 seats in the 400-seat House of Representatives. If this party had won only 120 constituency MPs, the remaining 40 seats would be drawn from the party list. This is why the MMP system is called "compensatory."

Interestingly, Krirkkiat did not come up with the initial idea by himself, nor did he have any preceding knowledge about the proportional election system (according to his own statements).

13 Krirkkiat was a retired civil servant. He used to be a full professor of economics at Thammasat University, and a member of the first post-1997 National Counter Corruption Commission. He already participated in constitution drafting exercises in 1991 (after the coup by the so-called "National Peacekeeping Council," NPKC), and 1997. This indicates how well connected Krirkkiat was in the Bangkok establishment, and his degree of seniority. Moreover, he was a former rector of Thammasat University.

14 As far as I know, no minutes were prepared of these six days of deliberations. Judging from the minutes, the CDC's 13th meeting took place on March 1, while the subsequent 14th meeting only followed on March 13.

Rather, he had been approached and briefed by an interested party from outside of both the CDC and the CDA.¹⁵ The origin of his proposal, Krirkkiat said, went back to their meeting in Cha-am. An expert group of lecturers had come to see him and suggested the idea of proportional elections. “At that time, I did not yet know anything much [about it]. However, when I read the various documents, I became interested, and thus studied the issue further” (CDC 26:4). This “expert group of lecturers” (CDC 35:100) seemed to have comprised German-graduated professors of law from Thammasat University, amongst them Kittisak Prokati.¹⁶ Parinya Thewanarumitkul of the same faculty contributed a paper on the German election system with (flawed) recalculations of the 2005 election results.¹⁷

A few days later, in its twentieth meeting on April 3, 2007, the CDC worked on the preparation of the first draft constitution to be disseminated to the public for comments. There were two main models – 400 constituency MPs (without any party list element), and 480 MPs, comprising 400 constituency MPs and 80 party-list MPs. In addition, Krirkkiat provided a fuller explanation of his proportional model. He stated,

I would like to ask permission of the meeting to propose the idea to establish a completely new proportional election system. The 400 MPs would be divided into 200 constituency MPs and 200 MPs according to proportion. This system will completely change the face of the election system (CDC 20:64).

At this point, therefore, the number of models for the design of Thailand’s future electoral system had increased to three. In the same meeting, Pisit Leeahtam¹⁸ summarized this situation by pointing out

15 It would be interesting to draw up charts showing the networks of people from outside the CDC and CDA reaching into these two bodies, providing back up, information, and support services, and thereby exerting influence on the drafting of the 2007 constitution. However, this cannot be gleaned from the minutes of formal meetings.

16 In an informal talk with the author, Kittisak confirmed his participation.

17 See ปรสิญญา (2550a [2007]; see also ปรสิญญา 2007b).

18 Pisit was a former spokesperson of the National Bank of Thailand. He served as deputy finance minister in the second Chuan government (1997-2001). At the time of writing, he was the dean of the faculty of economics, Chiang Mai University, besides sitting on a number of academic committees. Pisit’s doctoral dissertation at Erasmus Universiteit Rotterdam was published as *From Crisis to Double Digit Growth: Thailand’s Economic Adjustment in the 1980s*, Bangkok: Dokya Publishing House, 1991. He was also the president of the Netherlands-

that, at the beginning, the *krop* (second sub-committee) had wanted only 400 MPs, without party lists. He pointed out that there had been little discussion in the sub-committee, simply because the decision to drop the party list had been made at the very beginning of the proceedings already. However, in their six-day retreat in a Cha-am hotel, about ten CDC members had insisted on keeping the party list MPs, which had led to the drafting of article 90/1 (an alternative version of the original article that excluded party-list MPs, presumably comprising 400 constituency MPs and 80 regional party list MPs). Finally, Krirkkiat had proposed a proportional system modeled after that of Germany (CDC 20:75).

Creating confusion about “proportionality” at the retreat in Bang Saen

The next step in this struggle about Thailand’s next electoral system came in a series of six meetings (nos. 22 to 27) held between April 6 and 11, 2007, at a hotel in the seaside resort town of Bang Saen, Chonburi province, in order finally to decide on the content of the hearing-version of the constitution. The decisive 26th meeting on April 10 started with Krirkkiat right away again describing the proportional system. Others, like Jaran, Vicha Mahakhun,¹⁹ Chuchai Suphawong,²⁰ and Komsan Pokhong²¹ also spoke in favor of this

Thai chamber of commerce, and chairperson of Jardines Matheson (Thailand) Ltd., and many other state and private enterprises. His socio-political circles included Prem Tinsulanonda, Surayud Chulanond, Anand Panyarachun, Sanoh Unakul, Borwornsak Uwanon, and Visanu Kruangarm. In sum, Pisit was a good example of the technocratic section of the *aphichon*.

19 Vicha was a former chief justice of the Supreme Court’s juvenile and family division. At the time of the CDC, he served on the National Anti-Corruption Commission (appointed by a decree issued by the coup plotters in September 2006). In 2006, he was a candidate to the ECT, but was not selected (reportedly because the Thaksin government considered him hostile, similar to Kaewsan Atipho and Nam Yimyaem, both of whom later served on the military-appointed anti-Thaksin Asset Scrutiny Committee). He was on the judiciary’s side in its post-April 2006 fight against the supposedly pro-Thaksin ECT arguing that, “The judges are trying to protect our democracy and our political system...” He was in class 41 at the National Defense College, a key institution for the social and ideological reproduction of the *aphichon* or *ammatt*. Vicha headed a number of charities, partly under royal patronage. When extremist right-winger Thanin Kraivichien was prime minister, after the massacre at Thammasat University in October 1976, Vicha was his personal secretary. He also co-authored a book on the interpretation of law with him.

20 A medical doctor by training, Chuchai was a former secretary general of the National Human Rights Commission, before a conflict with the NHRC’s then-

approach, though they differed in some detail. On the other hand, Nakharin Mektrairat,²² Phairote Phromsan,²³ and Woothisarn Tanchai²⁴ were critical of this proposed new system. All of these CDC members could be categorized as belonging to the administrative and academic

chairperson, Saneh Chamarik, cost him his job. During the CDC, Chuchai served as a high-ranking advisor to the office of the NHRC. He was later reappointed to his previous position, only to be dismissed again by the second set of human rights commissioners.

- 21 Komsan used to work for the Election Commission of Thailand immediately after it was established (at that time, I met him a number of times, because I collected data on the ECT). At the time of the CDC, he was a lecturer in the faculty of law at Sukhothai Thammathirat University. He was one of the more junior members on the CDC. Komsan was later described by the critical blog “Thai Political Prisoners” as an “ultra-royalist and yellow shirt” (Thai Political Prisoners, “Updated: For Ultra-Royalists, Nitirat is Very Scary”, 2012, at <http://thaipoliticalprisoners.wordpress.com/2012/01/24/for-ultra-royalists-nitirat-is-very-scary/> (last visited on March 28, 2013)). This assessment was based on his membership in a far-right political group, called “Sayam Prachaphiwat.” During the PAD protests in early 2006, he was amongst a group of 96 academics that petitioned the king on March 4 to replace Prime Minister Thaksin Shinawatra by an interim premier (*The Nation*, March 5, 2006).
- 22 At the time of the CDC, Nakharin was dean of the faculty of political science at Thammasat University. He was a key member of a closely-knit and long-standing academic-political *phuak* (informal clique), of which Somkit Lertpaithoon, the secretary of the CDC, was another key member, while Noranit Sethabutr (the group’s most senior member and leader, a former lecturer at the faculty of political science of Thammasat University, a former president of this university, a former secretary general of the King Prajadhipok Institute, and the current president of Thammasat University’s University Council), who was the chairperson of the CDA. This group had long helped the Democrat Party in various legislative processes.
- 23 Pairote was retired high-ranking civil servant. He used to be provincial governor, director general of the community development department and deputy permanent secretary of the Ministry of the Interior. Pairote was later appointed to the Political Development Council, which had been established based on the 2007 constitution that he helped to draft.
- 24 Woothisarn used to be a lecturer at the faculty of social administration of Thammasat University. At the time of the CDC, he was a deputy secretary general of the King Prajadhipok’s Institute (KPI), whose college of local government development he had previously directed. He had been a long-standing and instrumental member of the decentralization committee since its inception following the 1997 constitution. In 2007, he was the editor of the fourth KPI yearbook, entitled *Exploring the 2007 Constitution*. This book collects public-relations oriented articles by constitution drafters Somkit Lertpaithoon, Noranit Setabutr, Pakorn Priyakorn, Choochai Supawongse, Paiboon Varahapaitoon, Vicha Mahakun, and Woothisarn Tanchai himself (Woothisarn Tanchai (ed.), *Exploring the 2007 Constitution: KPI Yearbook 4*, Bangkok: King Prajadhipok’s Institute, 2007).

stratum of the *aphichon*. However, this did not mean that they always shared the same opinion. Thus, in the context of debating the election system, one could distinguish between “reformers” and “conservatives” within the same socio-political stratum.²⁵ Their relationship was not always without tension. The “reformers” insinuated that the “conservatives,” in rejecting the adoption of a mixed-member proportional system, somehow ignored the best interests of the country. The “conservatives,” on the other hand, accused the “reformers” that they did not properly understand Thai political culture and structures, and had therefore proposed an election system that was “inappropriate” for the country. In a later meeting (No. 35 of June 1, 2007), Pisit Leeahtam apparently felt the need to take up this issue saying that he had detected a problem of fairness regarding the criticism brought against those whom I have labeled “conservatives.” He pointed out that he was convinced that everyone on the CDC wanted the country to be better, and wanted to search for a system that was best for Thailand. Therefore, that a person proposed something, and others did not agree with it, did not mean that they did not love the country, or did not want the best for the country. That Vichit, Woothisarn, Nakharin, and Pairote – who were all political scientists²⁶ – did not agree with the proposals of the other side did not mean that they did not want to solve Thailand’s political crisis. Pisit added that he wanted to put this on record, because this tactic had already been used in the sub-committee, and he had talked about it there as well (CDC 35:89). Later in the same meeting, Woothisarn, a key defender of MMM, thanked Pisit for his intervention saying,

25 The secretary of the CDC, Somkit Lertpaithoon, also belonged to the conservative camp. However, as the secretary he did not participate in the debates. Relying on the analysis of the meeting records, his position became clear only in the CDA meeting that deliberated and decided the issue (CDA 29:passim). Somkit used to be dean of the faculty of law at Thammasat University, and a deputy rector. He was the deputy secretary of the CDC in 1997, and has long been involved in the legislative politics of the House of Representatives, mostly in the Democrats’ camp. He has also been a member of the decentralization committee from its inception (after he had helped drafting the decentralization act). At the time of the CDC, Somkit’s stated goal was to become rector of Thammasat University, a goal that he shortly afterwards achieved.

26 It is perhaps interesting to note that the main defenders of the MMM system had backgrounds in political science, while those who promoted the MMP system had backgrounds in accountancy, medicine, law, and economics.

I have to thank Khun Pisit who has spoken on my behalf that I also love the country. It is not that I do not look for an opportunity for change. But I want change that is moderate (*phodi*). (CDC 35:102)

A vocal proponent of the MMP side, Chuchai Suphawong, alluded to this issue when he claimed that not adopting MMP would be a serious loss of opportunity, and lead to trouble for the country. Yet, he added that his words were not intended negatively to affect anybody. He merely wanted to express his personal belief – though in doing so he could apparently not resist to blame the other side for a possible “blunder” in case they did not agree with the MMP system. In his own words:

Today, it is clear that we do not have the same understanding. If we blunder again in the design of the system, like in 1997, we will have trouble. Yet, that I say so does not mean that I scold Ajarn Woothisarn. (CDC 35:103)

In a later meeting, Chuchai again tried the act of massively attacking the MMM proponents while at the same time insisting that he did not scold them. “I want it to be recorded that I do not want to participate in writing this page of history that will take the country on the way to parliamentary dictatorship.” The majority proposal confirmed the 1997 (MMM) system, which had suffered from “party-list buying.” However, this did not mean that those who had spoken before him (against MMP) would take the country towards “parliamentary dictatorship.” His words did not mean that his view was only positive, while that of the others was negative (CDC 38:135).

Still, it was obvious that the competing camps in the CDC did not have “the same understanding.” Unexpectedly, however, this did not only concern the two main models of election systems – MMM and MMP – but also the question of what actually had been decided when they voted on the election system in their 26th meeting on April 10 in Bang Saen. This vote was of particular importance, because it determined the content of the draft constitution, and therefore the stipulations about which the views would be sought in the subsequent period of public hearings. That there was indeed a problem became apparent – and resulted in a debate of confused CDC members – only in their 35th meeting more than six weeks later, when the CDC returned to its debate of the election system after the public hearing phase of the draft constitution had been concluded.

Thus, the question arises how the options that the CDC members had to vote on at their retreat in Bang Saen were framed. In turn,

these options involved concepts that denoted their key characteristics. In meeting No. 26 of April 10, 2007, Nakharin Mektrairat (a proponent of MMM), recalled the CDC's informal retreat in Cha-am (March 5-10) saying that it had been clear at that time that his group "did not want the Party list [English in the original] system. We wanted the proportional system" (CDC 26:10). In Nakharin's view, the word "party list" denoted the national-level lists with a five-percent threshold that were introduced by the 1997 constitution, and used in the elections of 2001 and 2005. His use of "proportional system," on the other hand, denoted a number of regional party lists without any threshold. Just before the sentence quoted above, Nakharin had said, "I was in the minority that wanted to keep the proportional system in the election." What he meant was that his group had rejected the initial idea of sub-committee two to have an election system with only 400 constituency MPs, that is, without any party-list or proportional component. Rather, Nakharin's group wanted to keep the proportional element of the previous segmented MMM election system, in parallel with the constituency MP component, but in revised form. Looking at the German-style mixed-member proportional system as proposed by Krirkkiat, Nakharin pointed out,

Thais have not been used to this. If we really use this system, it would be too complicated. ... The mixed system means that we should have a number of constituency MPs, and a number of proportional MPs. (CDC 26:11)

To leave no doubts, he emphasized, "I believe that the details of the proportional system – I confirm, not the party-list system – should leave out the German system" (ibid.).

The meeting moved towards the decisive vote when the secretary of the CDC, Thammasat University law professor Somkhit Lertpaithoon (Nakharin's fellow key member in their informal academic-political clique), noted

I understand that the meeting agrees with having proportionality; we do not have to vote on it. ... Concerning the number [of MPs], I understand that we agree on 400, including both the proportional and the constituency. I understand that we agree on 320 plus 80, right?" (CDC 26:15)

By using the word "proportionality" in this way, Somkhit obscured the fundamental difference of the two opposing options of MMM or

MMP. Since there was deep disagreement on this issue, it seemed odd that he wanted to prevent a vote precisely on the most contentious point of the institutional design of the future election system. The way Somkhit phrased the relationship of the two kinds of MPs – that the 400 MPs would include a constituency and a proportional element – gave the impression that he referred to a segmented MMM system (of which he was a proponent). He then seemed to have looked around in the meeting room, because he added,

We do not yet agree about the number [of MPs]. If so, can we agree on the following? 1) We will have proportionality. 2) The total number is 400 ... I understand that the majority favors 320 plus 80. (CDC 26:16)

Somkhit mentioning the ratio of 320 constituency MPs to 80 proportional (or “list”) MPs prompted Komsan Pokhong from the MMP camp to note correctly,

If we adopt the 320 to 80 formula, we will eventually return to the old election system. ... we will immediately return to the election system of 1997 that we have been using. (CDC 26:16f.)

Therefore, he favored the ratio of 200 to 200. Krirkkiat added that, in the proportional system, the number of MPs needed to be equal, 200 to 200, or 300 to 300 (he did not say way, though) (CDC 26:17). Again, Somkhit tried to reduce the decision to the question of how many MPs should be in the two categories by claiming that there was agreement that there would be proportionality, meaning 400 MPs that included regional lists. Only the precise number of MPs was still open (*ibid.*). Woothisarn Tanjai, a leading member of the MMM group, followed this up by saying that he was in favor of proportionality (in the way this word was used by Nakharin and Somkhit, namely MMM, not MMP). Yet, the “behavior of the Thais must be changed gradually. Sudden and strong change will lead to confusion.” Therefore, he was in favor of the 320 to 80 formula, and the 80-MP element could be divided into four or five regional lists (*ibid.*).

Somkhit, who had for some time already been concerned that they were behind schedule in passing articles, again asked whether they could vote now (*ibid.*:18). Yet, Chuchai Suphawong of the MMP camp was still dissatisfied with the state of the debate. He did not believe that all the 35 CDC members had the same understanding (quite true). They needed more details before they could vote. If they

voted now already, there would be problems for sure (ibid.). At this point, the CDC's chairperson, Prasong Sunsiri,²⁷ intervened with the words, "As far as I have listened to everybody already, in principle, I think, the issue of *proportionality* is accepted by the meeting" (my italics). Only the number of MPs – 320 to 80, or 200 to 200 – was still open. "Therefore, since the majority thinks that the proportional system should be used in the next elections, only the numbers have not yet been agreed upon. Thus, I call the decision" (ibid.).

In fact, as has been pointed out already, the majority did not think in this clear way at all. Rather, one camp used the term "*proportional system*" by having in mind a revamped 1997 party-list system, thereby keeping the *segmented* system. The opposing camp also used the term "*proportional system*," but its members thought that it involved a fundamental restructuring of Thailand's election system along proportional lines by introducing a German-style *compensatory* MMP. Thus, Vithaya Nganthawi²⁸ was actually right when he responded on Prasong by saying, "Both the numbers and the method are not yet clear" (ibid.).

Nevertheless, Prasong returned to his decision-making mode saying,

I want the principle first. In principle, we all agree that we will have the *proportional election system instead of the Party list* [English in the original, my italics]. We do not want the Party list [English in the original]. We all agree with this. Only the numbers [of MPs] are still

27 At the time of the CDC, Prasong was 80 years old, and had been involved with anti-Thaksin activities, including coup preparations, for some time. He "has long been politically active and is widely perceived as a staunchly nationalistic, somewhat right-wing, influential figure. It is widely recognized that he has a privileged relationship with the palace, mainly through his strong ties with Chief Privy Councilor Prem Tinsulanonda. It is said by palace insiders that he is viewed favorably by King Bhumibol as a true nationalist and pro-monarchist" (Rodney Tasker, "Grumbles, Revelations of a Thai Coup Maker", *Asia Times Online*, December 22, 2006, at http://www.atimes.com/atimes/Southeast_Asia/HL22Ae01.html Tasker 2006). In meeting No. 27 of April 11, 2007 (p. 35f.), he stated, "As for the claim that I have been with the PAD [People's Alliance for Democracy, or "yellow shirts"], I confirm that I have been with them, because they have been a group without hidden benefits. Moreover, they fought for and demanded the right things, which I think are good and correct for the country. Therefore, I joined them. And if new problems occur, and the people think that they will have to fight again, I will join them in their struggle. I would like to inform [you] accordingly."

28 He was the president of the Rubber Tree Association of Thailand, and referred to himself as being from "up-country," meaning the southern province of Phuket.

open. (CDC 26:18)

He added that they did not need a vote on the proportionality issue, because the majority already was in favor of proportional voting. In the quote above, the phrase “instead of the Party list” suggested that, contrary to the fundamental system change that the proponents of MMP had in mind, proportionality would only apply to the previously 100 “party-list” MPs, and precisely not to the entire election system. What the CDC members voted for afterwards was indeed nothing more than a modified party-list system, which was merely re-labeled as “proportional voting.” At this point of the struggle about an election system change, the CDC’s decision kept intact the mixed-member *majoritarian* system (MMM) of the 1997 constitution, which substantially differed from Krirkkiat’s proposal of a mixed-member *proportional* system (MMP). Thus, contrary to what the CDC’s chairperson assumed, the decision was not simply about the number of MPs in the two categories – constituency, and list. Rather, the CDC members were called on to decide between two fundamentally different options for the country’s future election system. However, the way the discussion was conducted obscured the choices by the mixed-up usage of the term “proportional system.” In this way, the choice seemed to be merely whether the ratio of constituency and list MPs should be 320 to 80 or 200 to 200. Ironically, although Prasong stated that he wanted to decide about “the principle” first, this principle was indeed ignored by the way the vote was framed. One could perhaps have seen the two different ratios as indicating the alternative of MMM and MMP, as I did when I read the minutes. Yet, in the meeting itself, the choice situation was not framed in this straightforward way, and “the principle” merely referred to the re-labeling of the party list as “proportional voting.”

As it turned out, 21 CDC members voted for a 320 to 80 split of constituency and regional party-list MPs, denoting (not only in my view) an MMM system. Only nine members were in favor of Krirkkiat’s 200 to 200 model, which (not only in my view) stood for MMP. Chairperson Prasong summarized this decision with the words,

This means 320/80 has 21 votes, while 200/200 has nine votes. Therefore, the meeting resolves that there will be 320 [MPs] in the constituency elections and 80 in the proportional [election]. I think that we can talk about the details later. (CDC 26:19)

This summary sounded rather like the 1997-style segmented or parallel system, applying two different election principles separately

to two different sets of candidates, and not like the integrated proportional one proposed by Krirkkiat. Moreover, the basic decision between these two systems could certainly not be described as a “detail” to be dealt with at a later point, all the more since the proportional approach would have run into calculation problems (as Krirkkiat had pointed out just before the vote was called) if the number of MPs were fixed at 320 to 80. Thus, logically, there should have been a decision about the fundamental character of the election system first, with a search for the most appropriate relationship between constituency and proportional MPs coming afterwards.

As a consequence of this confused process of discussion and decision making by the members of the CDC, section 91 of the draft constitution published on April 26, 2007 for the public-hearing process provided for a House of Representatives comprising 400 MPs.

Article 92 divided these 400 MPs into 320 MPs elected in multi-member districts.²⁹ In principle, these MMD should comprise three MPs, representing a return to the pre-1997 system. In addition, there should be 80 MPs called “proportional” (*satsuan*, in Thai, “proportional” simply replacing the expression “party list” from the 1997 constitution) elected in four electoral zones with roughly the same population numbers. Each zone would thus have 20 MPs. They would be allocated proportionally to political parties according to the number of votes they had received in the respective zone.³⁰ The CDC offered a number of reasons for their changes to the 1997 constitution,

29 Shortly after the Thai-language draft constitution had been published, an English-language translation was circulated, though without attribution (Draft Constitution... 2007). The important parts of article 92 were translated as follows.

“Section 92: Election of members of the House of Representatives under Section 91 shall be carried out as follows:

(1) Three hundred and twenty members of the House of Representatives shall come from election held under constituency basis. ...

(2) Eighty members of the House of Representatives shall come through election held under proportional basis. There shall be four electoral zones, each of which shall have equal numbers of inhabitants and adjoining one another. Each electoral zone shall have 20 members of the House of Representatives by calculating the ratio [proportion] of the number of members of the House of Representatives from the vote ratio [proportion] of the political party list ...”

The final version of (now) article 93 says, “Section 93. The House of Representatives consists of four hundred and eighty members, four hundred of whom are from the election on a constituency basis and eighty of whom are from the election on a proportional representation basis” (Constitution of the Kingdom of Thailand, B.E. 2550 [2007]).

30 คณะกรรมการการชกการร่างรัฐธรรมนูญ (April 26, 2007, p. 58f).

as required by the interim charter. Unfortunately, almost all of them were invalid so that, in fact, they could not support the draft stipulations. Most certainly, these reasons for any changes made did not include any hint that the mixed-member *majoritarian* system of 1997 had been changed to a mixed-member *proportional* system in 2007.

*Trying to determine
which election system won the vote in Bang Saen*

This first draft of the 2007 constitution was only an interim product. A new round of discussions in the CDC followed after the hearing results had come in. In the minutes of the CDC's 35th meeting on June 1, 2007, fifty pages are about the election system. Interestingly, the CDC's confusing decision from about seven weeks earlier now returned to the meeting with a discursive search by the committee members for what they had actually decided about on April 10, 2007. On the one hand, Woothisarn Tanjai reiterated that he supported the 320 to 80 formula for two reasons. First, the system closely resembled the previous version (of 1997), and the people were familiar with it (after all, they had used it in the elections of 2001, 2005, and in the annulled 2006 elections). Second, the proposal in the draft constitution had gone through public hearings. While the newly proposed system (MMP) had been presented in some localities, it had not at all been put up for discussion countrywide. Therefore, Woothisarn saw it as difficult to justify if the CDC suddenly came up with a new election system that would change what they had written in their original draft constitution produced for the hearings. Moreover, the CDC was now already close to the time of its final decision-making (CDC 35:78). Some time later in the meeting, he warned that one should not interpret the existence of two ballot papers as meaning that the entire system had to be proportional (ibid.:94).

On the other hand, Jaran Phakdithanakun noted that they had come up with the 320 to 80 formula in the constitution draft, calling the latter component *banchi satsuan* (proportional list). However, they did not say at all what this proportional list meant. "Therefore, people have totally misunderstood it." He wanted to ask whether *phuak rao* (our group, meaning the CDC) agreed that, "The proportional list that we have proposed in the first draft is not like that in 1997. It is a proportional list according to the world model (*baep khong sakon*), only that our ratio is still 80 to 320" (ibid.:89). Thus, while

Woothisarn thought their decision on April 10 was for an election system like that in 1997, Jaran rejected this notion. His reference to the “world model” indicated an MMP system, only that their decision did not go as far as including the “world model’s” equal numbers of constituency and proportional MPs. Vicha Mahakhun added that, at the beginning, they had suggested such equal numbers of 200 to 200, because that would be the “complete system.” Yet, they had compromised and resolved for a ratio of 320 to 80. “There has not yet been much understanding of the proportional election system. Therefore, this understanding will probably have to be created amongst the people for some period of time” (ibid.:91). Krirkkiat had been the leader in this direction, and he had studied the issue seriously. Thus, he had pointed out that the 320 to 80 ratio “was not really proportional.” They had always tried to look for opportunities to explain the proportional system so that their fellow members on the CDC would “change their minds” (*plian chai*) in this matter. The *prae yatti* phase (in which motions for the change of the CDC’s constitution draft would be deliberated and decided upon by the CDA) would provide another opportunity. Moreover, the chairperson had asked them to study the issue well. Krirkkiat and his group had variously explained the issue, yet “there are many committee members who are still confused, and thus cannot decide” (ibid.).

Finally, the main advocate of a switch to the German-style mixed-member proportional election system, Krirkkiat Phipatseritham, also intervened. According to his recollection, the first question at Bang Saen had been whether they wanted the proportional system or not. And the meeting had confirmed that it wanted the proportional system. The second question, Krirkkiat continued, was whether they wanted the 200 to 200 formula, or the 320 to 80 formula. The result was that they wanted the latter (ibid.:95f). Indeed, Krirkkiat’s recollection regarding both points was correct. Yet, as shown above, the understanding of “proportional system” amongst the CDC members differed fundamentally, and with it differed the meaning that the members attached to the two formulas. While one side thought that the 320 to 80 formula represented a reformed 1997-style MMM system, the other side felt victorious, because they assumed that they had pushed through a substantial change of the Thai election system, namely the switch from a mainly *majoritarian* (MMM) to a mainly *proportional* (MMP) system. Krirkkiat, seemingly puzzled about how this renewed discussion could have occurred, said he still remembered that Jaran, after the vote had been taken in Bang Saen, had congratulated him that he had secured the CDC members’

support for the proportional election system that he had proposed. Krirkkiat further noted that he had responded to Jaran's congratulations by saying that the CDC's decision was good only at a certain level, because the 200 to 200 formula had been rejected (ibid.:96). At a later stage of drafting the 2007 constitution, when Krirkkiat explained his MMP model to those CDA members who had initiated motions for changing the draft (June 6, 2007), he mentioned that he had proposed his model first in Cha-am (March 5 to 9, 2007). In Bang Saen (April 6-11, 2007), he had lost the vote. However, he insisted, "I was happy to an extent because the meeting at Bang Saen accepted the proportional system, only that the numbers that I suggested lost" (this referred to the formulas of 200 to 200 and 320 to 80) (CDC 38:96).

One could well agree with Pisit Leeahtam who stated, on June 1, 2007, "In fact, this issue should long have been concluded already, because we have talked a lot about it" (CDC 35:99). One might also add that, at this point, every member of the CDC should have had enough time (two to three months) to attain a proper understanding of what the two basic and fundamentally different options concerning the election system were, in which key respects these options of MMM and MMP differed, and what effects a switch would have on election results. Thus, a clear and rational decision should have been possible. Pisit recalled that the CDC had two big meetings (multi-day retreats) at Cha-am and at Bang Saen. First, in Cha-am, sub-committee 2 had suggested that they should not have a "Party list" (English in the original), while the CDC thought that they should keep it, because members did not only want to have constituency MPs in the House. Rather, they had wanted a system that one might call "proportional," without calling it "Party list," simply "in order not to confuse it with the *national* list" (my italics) of the election system contained in the 1997 constitution (ibid.).

Thus, from Pisit's recollection, one can conclude that the terms "party list" and "proportional (MPs)" in fact referred to the same thing (MMM), though the 2007 version introduced a number of changes. The term "proportional" merely had been adopted in order to signal these changes to those who had rejected the 1997-style *national* party lists, and had strongly wanted to change this component of Thailand's election system. Unfortunately, though, this replacement of "party list" by "proportional" subsequently confused those members of the CDC who had wanted to adopt a genuinely proportional election system (MMP) for Thailand. One result was that both sides equally used the term "proportional system," while in

fact having fundamentally different election systems in mind. Thus, the process of designing Thailand's election system (as contained in the 2007 constitution) by the CDC and CDA suffered from unnecessary confusion right until the final vote was taken on June 21, 2007.

Pisit seemed to contribute to this confusion when he turned to summarizing the result of the discussions in Bang Saen. He correctly pointed out that they had voted against the 200 to 200 formula, and in favor of the 320 to 80 formula. However, then he added that it had not yet been clearly confirmed *which method* would be applied to the 80 seats, meaning whether the number of constituency MPs would be "subtracted" (ibid.). Pisit's last sentence sounded like MMP, because using the word "subtract" in relation to constituency MPs would only make sense if it referred to a political party's proportionally based overall seats claim. For example, if a party had an overall proportionally calculated seat claim of 230, while it had already won 200 constituency MPs, then this number of constituency MPs would be "subtracted," giving it an additional 30 seats from the "proportional list" of 80 MPs. If Pisit had a segmented system in mind, there would not have been any relationship between the 200 constituency MPs and the 80 "proportional" MPs. Both systems would have been applied entirely separately, making it impossible to establish a relationship between them via "subtraction." In that case, the reference to "which method" could only be applied to the eighty proportional seats with regard to the question of whether they would be allocated via national lists or a number of regional lists.

Pisit continued his statement by saying that this point of "subtraction" was still open for looking at the "details," and "what was appropriate or not appropriate." On the one hand, he said, many CDC members had explained that they wanted to "subtract." If they subtracted, there might be the problem that Komsan had mentioned, namely that a political party might have won too many constituency seats already (meaning overhang or surplus mandates – *Überhangmandate* in German – in excess of its overall proportional seat claim), "which is very difficult." On the other hand, many CDC members wanted to stick to the 1997 system. They preferred two ballots, whereby 20 seats would be allocated according to the proportional ballot (*bai khong satsuan*) in each region (at that time still thought to be four). In order not to increase the confusion, he had coordinated with the CDC's secretary about the "Wording" (English in the original) used in the hearing draft. The secretary's response had been that they had not written the respective articles in the draft in a

way that would finally stipulate the use of subtraction or exclude it (ibid.:99f.).

In a hairsplitting sense, this might have been true. As for myself, from reading the draft constitution with the 1997 system in mind, I always understood that the CDC had passed the 1997 system in a modified version. It never occurred to me that this would merely be a preliminary formulation, which did not yet determine the fundamental form of the country's election system as MMM. Nothing indicated, certainly not to most people who read the draft, that what was written in it could be turned into a proportional election system. In general, the comparison to 1997 was clear enough: the formula of 320 to 80 replaced that of 400 to 100, thereby reducing the total number of MPs by 100; the party-list component was changed from one national list to four regional lists; the threshold was abolished; and multi-member districts were reintroduced. Both the draft stipulations on the election system in article 92 and the reasons that the CDC had provided in its book distributed for the public hearings regarding the changes it had made over the 1997 constitution clearly confirmed the mixed-member majoritarian system of the 1997 constitution. Nowhere did the text indicate that all this, after the public hearing process had ended, could possibly be fundamentally changed into a mixed-member proportional system.³¹ This situation was the background for the argument of the MMM proponents, as in the case of Woothisarn Tanjai mentioned above, that what had been presented at the countrywide public hearings was the MMM system. Thus, it would be rather strange, and difficult to justify, if the CDC/CDA suddenly came up with an entirely new election system in the final constitution, which had never undergone any public consultation.

In fact, Pisit conceded as much saying that the CDC's published draft text said that people would vote for constituency candidates, and for proportional lists. Regarding the proportional element, no connection had been made in the sense that, "The calculation of the numbers [of proportional MPs] must be mixed with the constituency vote, which would have caused confusion" (CDC 35:100). Another CDC member, Atchaphon Jarujinda (ibid.:102),³² described their decision at Bang Saen, and the meaning of the respective stipulations in the draft constitution, very clearly by noting,

31 Ibid.

32 He was the secretary general of the Council of State, the government's legal advisory body.

The draft was written with the *understanding* that [the components] would be separate (*yaek kan*). That is, the system would be similar to the model of 1997, only that the national List [English in the original] would be divided into regions so that the votes would not be clustered. This is what is currently written in the draft. But *afterwards*, sub-committee 2 might have had additional considerations about the proportional system. (CDC 35:100; my italics)

Still, Jaran Phakdithanakun, the chairperson of sub-committee 2, could not agree with what seemed to be an accurate assessment by Atchaphon. He insisted that, as early as in Cha-am, their system was not the same as the 1997 model. Rather, they had come up with what was called a “Mixed Member Proportional Voting System” (English in the original). Moreover, he even asserted that the CDC members had been “o.k.” with it. This meant that they had progressed well beyond the 1997 system. Then, in Bang Saen, Jaran continued, they had rejected the 200 to 200 formula in favor of the 320 to 80 formula. Thus, the question arose whether, if they divided the proportional element into four or eight regions (or zones), they could still calculate according to the proportional model. The answer was yes, they could (*ibid.*:100f.). He provided an example and pointed out that if a party had already won more constituency MPs than its proportional seat claim allowed in the respective region, then it would not receive any more MPs from its respective regional list. This statement immediately prompted Atchaphon to ask Jaran whether, in this case, the constituency MPs also had to be included in the regions together with the proportional lists. Yes, this was correct, Jaran answered. This was the “Proportionality” (English in the original) that they proposed (*ibid.*:102). In other words, the mixed-member proportional system would not have been applied at the national level. Instead, the country would have been divided into four or eight electoral zones (the German model applied MMP at the state, or *Länder*, level), with each zone having twenty or ten proportional MPs, respectively. Since the zones had to have roughly the same number of inhabitants, they would also have had roughly the same number of constituency MPs. In the case of altogether 400 MPs (320/80) and eight zones, or “groups of provinces,” as they were also called, each zone would have had 50 MPs, divided into 40 constituency MPs and 10 list MPs. The calculation method of the MMP system would then be applied separately in each zone. Jaran also explicitly added a new element to the design of the regional zones. He pointed out that another

difference to the 1997 system would be that candidates on the party list could – at the same time – be candidates in the constituencies. This would not be obligatory; the political parties could decide this by themselves.³³

From the perspective of the MMM (1997 version) advocates, Woothisarn also tried to reconstruct the way their standpoint had developed. He thought that they had started from the idea to reduce the number of MPs to 400, without having any party list, only those from constituencies. Moreover, he remembered that he himself and Nakharin had said that the party list MPs also had good points, only that the national-level list was problematic. They had worried that party financiers could be fielded, and then become ministers. Yet, they had already solved this problem by also allowing constituency MPs to be appointed cabinet members (the 1997 constitution stipulated that ministers had to be drawn from the party lists only). “I understand that the issue of proportionality had not yet crystallized at that time [in Cha-am], and they [its proponents] had not yet talked about it.” Afterwards, many CDC members had agreed with keeping the party list, because there had been some debate about its good points. For example, it enabled capable people, who did not want to stand in the constituency contests, to become MPs. This would in turn also strengthen the legislature. “But it did not yet go as far as the regional proportional system.” In addition, he thought that the number of party list MPs only “crystallized” later at their meeting in Bang Saen CDC 35:94).

Woothisarn’s outline made clear again that the CDC’s starting point was indeed the 1997 version of the national-level party list. This list was seen as a key flaw of the 1997 election system, and the CDC merely set out to reform those points the members saw as problematic.³⁴ That is, at the beginning of the discussions, they had no idea whatsoever principally to change this election system. Members in the MMM camp later even positively contrasted their “gradual” and “moderate” revised 1997 version with the “sudden”

33 Ibid., p. 94. Komsan seemed to have indicated this design element on page 80 already. This corresponded to the German MMP system, in which important figures of political parties might run in a constituency, but also on the party list. The purpose was to make sure that important political personnel made it to the House. These politicians were “secured” (*abgesichert* in German) on the party list.

34 This could be done by abolishing the list altogether, by reducing the number of party-list MPs, by regionalizing the lists, by abolishing the threshold, or by allowing constituency MPs to become ministers.

and far-reaching change the MMP advocates were so proud of. Thus, when Woothisarn and others, in the meeting on April 10, voted for the 320 to 80 formula, they certainly understood this to mean the MMM system, and by no means the MMP approach. Consequently, when Chuchai Suphawong, an insistent proponent of MMP speaking after Woothisarn, opined that they had already accepted the proportional system, only that they still needed to choose between the 320 to 80 and the 200 to 200 formulas, and stated, “There is nothing else” (ibid.:103), he expressed counter-factual hope rather than being realistic. Pisit Leeaham immediately confronted Chuchai’s perception by a simple reference to the facts saying,

I think that the issue of 200 to 200 had been dropped since Bang Saen already. We have already raised our hands [in favor of the 320 to 80 formula] ... the issue of 200 to 200 should have ended at Bang Saen already. (CDC 35:104)

This statement made Krirkkiat unhappy. Regarding the question of whether the 200 to 200 issue was closed already, the chairperson had said that they could talk about these issues. (Prasong Sunsiri, had pointed out that Krirkkiat’s proposal had been made *after* the sub-committee and the CDC had made their decisions by coming up with a model, and *after* this model had gone through public hearings. However, he had added that it was nevertheless possible that they could turn around again and change the model, ibid.:88.) It was therefore not right to use the resolution reached in Bang Saen to “close our mouths” (*pit pak*) (ibid.:104). In other words, whatever the CDC had formally voted on in Bang Saen in producing their draft constitution for the public hearings, if the losing side on any issue was dissatisfied with the outcome of that vote, it could still promote their positions, try to recruit a majority in CDC and CDA, then have a new vote, and perhaps win.

In concluding this step of designing Thailand’s election system by the CDC and the CDA, the CDC’s chairperson, Prasong Sunsiri, stated that he had remembered their earlier resolution but wanted to give an opportunity to review their thinking and opinions. After all, they still had time. If he had violated the earlier resolution, he accepted [responsibility]. Yet, since he thought that various ideas might be useful, he had opened the discussion again. All resolutions could always be revised. If they had to vote again, they would do so. “I merely want to make the observation that all things, if they are new, and if the citizens and others do not yet understand them, will have many repercussions” (ibid.:105). To put it another way, Prasong

warned members to be careful with coming up and implementing innovations when they could not fully determine their practical consequences. Earlier in the meeting Prasong had already warned,

This [MMP] is something new. It has been proposed, and we have talked about it. I believe that many committee members do not yet understand what this is all about. Even the political parties and politicians [do not yet understand it]. It is true that we must think up new things that are better. At the same time, however, we must always consider whether something new and better is appropriate for the nature of our country's politics, its economy, and society. How much has the people's knowledge foundation developed regarding what we want them to use, or what we determine what they must use? (CDC 35:86f.)

Prasong added an easier version by saying, "If we cut a new dress for our people to wear, it must also be suitable for our conditions" (ibid.:88).

This was the state of affairs in the CDC before they went into the meeting with those members of the CDA that had submitted motions (*prae yatti*) for changes to the CDC's constitution draft, as published for the public hearings.

Listening to the amendment motions from the CDA

In the CDC's 38th meeting on June 6, 2007, seven groups of CDA members who intended to present motions for amending the CDC's constitution draft outlined their proposals. Chermesak Pinthong, who had been an important anti-Thaksin crusader,³⁵ was the first main speaker supporting the German-style mixed-member proportional election system. According to Chermesak, the proposal of his *prae yatti* group no. 5 was unlike the party list of the 1997 constitution, because "the people have much criticized that the party list system of 1997 enabled people who did not know the constituencies, who did not know the people, but had money, entered the party-list system" (CDC 38:74f.). Besides trying to derive justification for his group's

35 For his credentials as an arch-foe of Thaksin, see Chermesak's book series (เจิมศักดิ์ ปิ่นทอง, ขอคิดด้วยตน ทามกลางกระแส คิดใหม่ ทำใหม่, กรุงเทพฯ: สำนักพิมพ์ขอคิดด้วยตน, 2546; เจิมศักดิ์ ปิ่นทอง, แปลงทักษิณเป็นทุน, กรุงเทพฯ: สำนักพิมพ์ขอคิดด้วยตน, 2547; เจิมศักดิ์ ปิ่นทอง บรรณาธิการ, รู้ทันทักษิณ, กรุงเทพฯ: สำนักพิมพ์ขอคิดด้วยตน, 2547; เจิมศักดิ์ ปิ่นทอง บรรณาธิการ, รู้ทันทักษิณ 2, กรุงเทพฯ: สำนักพิมพ์ขอคิดด้วยตน, 2547; เจิมศักดิ์ ปิ่นทอง บรรณาธิการ, รู้ทันทักษิณ 4: ดนวงใน The Insiders, กรุงเทพฯ: สำนักพิมพ์ขอคิดด้วยตน, 2549; เจิมศักดิ์ ปิ่นทอง บรรณาธิการ, รู้ทันทักษิณ 5: สงครามการเมือง กรุงเทพฯ: สำนักพิมพ์ขอคิดด้วยตน, 2549; เจิมศักดิ์ ปิ่นทอง, รู้ทันประเทศไทย, กรุงเทพฯ: สำนักพิมพ์ขอคิดด้วยตน, 2551.

position on the electoral design from as nebulous an entity as “the people,” Chermesak also reproduced the preference for localized MPs, and the contra-factual cliché that candidates on the party lists were mostly financiers of their parties (this accusation was mostly directed against Thaksin’s Thai Rak Thai Party).

Leaning towards Krirkkiat’s key argument for the introduction of the MMP system (“all votes must have meaning”), Chermesak pointed out that, “The system that our group proposes is a system that prevents that votes of the people are being lost” (ibid.:76). However, his initial example looked more like one in support of run-off elections (like in France), or the alternative or preferential vote (such as in Australia). According to Chermesak, there might be the following constituency-level result in the election system then in use (MMM based on the 1997 constitution).

Candidate A received 50,000 votes. (winner)

Candidate B received 40,000 votes. (loser)

Candidate C received 30,000 votes. (loser)

Both losers together would thus have gained 70,000 votes, while the winner only achieved 50,000 votes. Consequently, the 70,000 votes cast for the two losers would be “lost.” In general, Chermesak’s example seemed to be a rather unusual result for a plurality system with single-member constituencies. Indeed, almost all constituency races in Thailand’s 2005 election were decided by clear advantages for one of two main candidates. This could also be seen from the shares of constituency level votes that the main parties gained. The Thai Rak Thai Party could hardly have achieved its countrywide vote share of 55.71 percent if Chermesak’s example, giving the winning candidate only 41.67 percent of the total vote, was correct. Moreover, the Democrats had only gained 24.96 percent of the total constituency vote, while Chart Thai received 10.52 and Mahachon 7.50 percent. Therefore, Chermesak example was rather unrealistic, as far as the 2005 election was concerned. Normally, an example such as Chermesak’s would lead to objections on the grounds that the winning candidate did not receive the absolute majority of the votes, and thus represented only a minority of the voters – thus the solutions in France or Australia. Indeed, he noted that the voters did not give candidate A more votes than candidate B and C combined. Chermesak continued saying that the result in his example was correct according to the rules – “But do the rules provide [electoral] justice?” (ibid.).

In order to make the election system more just, Chermesak then switched from a constituency or candidate-centered view to a national and political party perspective. In the model of his, the votes for “party A in the entire country would be summed up.” The same would be done for parties B and C. “When we have the number [of the parties’ national vote totals], they are allotted numbers of MPs that are equivalent to the proportion of MPs that we have determined, that is, 500 or 400 MPs.” For example, if party A had gained 50 percent of the votes, it would receive the “sure” number of 250 MPs, if the number of MPs in the House were 500. If party B received 25 percent of the total vote, it would receive 125 seats of the 500 MPs. Party C, which might have got 10 percent of the vote, would receive 50 seats. Chermesak concluded his example with the statement, “This is very clear.” Yet, the question remained who would then be the individual MPs (*tua khon*)? First, they would be those who had won in their respective constituencies. All winners in their constituencies were assured of their seats. Second, if seats remained [relative to the overall number of MPs that a political party could claim based on its proportion of the vote total], they would be drawn from the lists. Chermesak’s last sentence expressed the *compensatory* nature of mixed-member proportional election systems. Overall, what he had described looked very much like the German system of personalized proportional representation (*personalisiertes Verhältniswahlrecht*). Chermesak even added another component of the German system by saying that constituency candidates could also be on the party lists (this point had been mentioned a few days earlier by Jaran and Komsan in the CDC’s meeting on June 1). If they lost in their constituencies, but their parties recognized those persons’ political importance, then they could still become MPs by being taken from the party list, provided their parties’ number of compensatory seats reached those candidates’ position on their parties’ list.³⁶ Finally, the ratio of constituency MPs and proportional MPs suggested by

36 CDC 38:76, including the citations. Chermesak reiterated this element *ibid.*, p. 148. Later in the meeting, Krirkkiat added one more feature that was similar to the German system. He defended the five-percent threshold by saying that it was designed to prevent “too many small parties” from entering the House. However, their proposal said five percent *or* one constituency MP (as in Germany). For example, if a party received only two percent of the vote, but one constituency MP, then this party would also be included in the calculation of the proportional seat claim (*ibid.*, p. 120). In the 2005 elections, this would have benefited the Mahachon Party. Earlier, Krirkkiat seemed to have been in favor of a two-percent threshold.

Chermsak's *prae yatti* group also followed the German example in that the numbers of both kinds of MPs should be 250.

Following on Chermsak, Surachai Liangbunlertchai, speaking for *prae yatti* group no. 6, wanted the party list or proportional element of the election system abolished altogether. Public hearings, he claimed, had shown that the people did not understand the 80 regional MPs in the draft, because this element lacked clarity. Surachai also showed his adherence to a local conception of the representative by saying that the party-list MPs of the 1997 system were not directly connected to the people (though he did not say why such a direct connection was necessary for all MPs). Reproducing another well-known (but unproven) cliché from the preceding debate, he also accused the political parties of having used the party-list MPs for mobilizing funds. All of the political parties' party-list candidates were their financial supporters (one could wonder whether Surachai included Chuan Leekpai, Banyat Bantadtan, and Abhisit Vejjajiva, who occupied the first three positions on the Democrat's party list, in his statement). Moreover, those who had given much money to the respective party were also placed higher on the lists. Thus, their position on the party list reflected their financial contribution. This use of the party list component had prevented its goal from being realized, which was the development of the political party system (CDC 38:80).

Another speaker for group no. 6, Suraphon Phongthatsirikun, gave a particularly surprising reason for rejecting the party list by claiming, "The previous party-list MPs were not in harmony with our governmental culture." So, what could this "governmental culture" be that had supposedly been violated by the existence of 100 party list MPs in the 1997 constitution, and that would be violated by the proposed 80 regional party list MPs? Suraphon seemed to have thought about the existence of a king in the Thai political system. He explained that the total national number of votes accrued by the parties had led to talk like,

our party has gained 16 million votes, 14 million votes. This was like saying that they were already supreme in the country, although in reality we still have an institution that we have to respect, or that we have to admire and to praise. ... This [references to the total number of votes that a party had received on the party list ballot] was similar to the presidential system. (CDC 38:82)

In other words, Suraphon thought that a party that had received an overwhelming number of votes on the party list ballot, and which

referred to these votes in order to stress its degree of popular political support, and thereby legitimize the actions of its elected prime minister, would compete with King Bhumiphol for the admiration of the people. This situation then would make the prime minister of Thailand's parliamentary system look like a "president" (all this, of course, was a direct reflection of what certain political quarters thought about Thaksin Shinawatra and his Thai Rak Thai Party alone).

To understand the context of the above perception, it might be helpful to keep in mind that since the crackdown on the students in Thammasat University (October 1976), all prime ministers had been close to the king (Prem Tinsulanonda, subsequently the chairperson of the king's Privy Council, Anand Panyarachun)³⁷ or very weak (Chartchai Choonhavan, Suchinda Kraprayoon, Chuan Leekpai, Banharn Silapa-archa, and Chavalit Yongchaiyudh). As a result, the monarch, with his traditional sources of legitimacy and comprehensive means of public relations, could never be overshadowed by anybody in the political realm claiming popular support as his or her source of legitimacy. Only with Thaksin Shinawatra had a political leader appeared on the scene, who had the overwhelming electoral support of the Thai people. To make things worse from a royalist perspective, Thaksin was also a very strong prime minister, who implemented many policies that directly benefited the people (naturally, on a much larger scale and with a much greater degree of visibility than the royal projects could do). Moreover, he had equally strong public-relations support at a time when the king had been waning from public view due to his advanced age and fragile health. Thus, for people such as Suraphon, it might have seemed as if the loyalty of the Thais towards the king was endangered, and risked to be replaced by the loyalty of the voters towards Thaksin. In fact, such a conflict should never arise if one takes the Thai constitutional system seriously, because the king and the prime minister are supposed to rely on different kinds of admiration and different points of reference. The prime minister is located in the sphere of electoral democracy, in which he has to be responsive to the people's wishes. Consequently, he will reap the electoral benefits and popularity if he performs well. The king, on the other hand, being a remnant of an earlier social and political order in Thailand, who has nevertheless been retained to a certain extent, and for certain reasons, is designated as a national symbol above the

37 See Duncan McCargo, "Network Monarchy and Legitimacy Crisis in Thailand", in *The Pacific Review* Vol. 18, No. 4 (2005), pp. 499-519.

political system in the narrow sense, but under the constitution, meaning the political order understood more broadly. That Suraphon could see Thaksin as having threatened the supremacy of the king, in fact, only illustrated how much, in some quarters of the population, the ideological position of this particular king had developed far beyond the standing that one would “normally” expect from a constitutional monarch.

Suraphon also assumed that a division existed in the House between the party-list MPs and the constituency MPs.³⁸ The villagers, he asserted, did not know what the party list MPs were doing. He knew this, because he resided in *phuenthi* (locality). In sum,

And we saw that the ministers were rich businesspeople. Well, this is not a defect. But the truth is, how much do they care for and love the people? How much can we trust them that they would work for the nation (*chat banmueang*)? Therefore, regarding this point, I must ask permission to *prae yatti* to cut out [the party-list MPs]. (CDC 38:82)

After Chermesak had advocated the new mixed-member proportional system, and Suraphon had wanted the party list MPs abolished altogether, Siva Saengmani argued for the return to 400 constituency MPs and 100 “party list MPs, or the proportional system.” A brief moment earlier, he had already said that, “I think that both systems are actually not entirely different,” making one wonder whether he understood the fundamental difference between MMM and MMP. However, his main concern seemed to be the return to the number of 500 MPs. His following statement also contains a critical remark about the use of public hearing results in the deliberations.

We do not see why the number of MPs should be reduced. What is the flaw so that we must reduce their number from 500 to 400? Some say, we follow the voices of the people. Well, there are many issues that the people have said we should do. Then, we have said that we cannot quite listen to some people, or sometimes we cannot listen to them. It seems to depend on the mood. If the mood is good, we say that we listen to the voices of the people. If the mood is bad, it is said that sometimes it is hard to listen to the voices of the people.

38 This was quite possible, because the interests and working contexts of PL MPs and constituency MPs were often quite different. I add “often” here, because a number of PL MPs had previously been constituency MPs, and moved up to the list to make way for family members to become constituency MPs. As for so many other areas of the Thai political system, we lack empirical data about this element of the operations of parliament.

Therefore, we confirm that there should be 500 MPs as before. (CDC 38:84)³⁹

Siva called on former election commissioner Sawat Chotiphanit to add further explanations. Sawat pointed out that the Interim Constitution stipulated that they had to give reasons when they wanted to deviate from the 1997 constitution.⁴⁰ That is, the 1997 constitution had to be their starting point in drafting the 2007 version. Against this backdrop, he did not see any reason for changing the electoral system from the 400 to 100 formula used in the 1997 constitution. The MPs, after all, did not have any much part in creating the situation that had led to the coup (CDC 38:85).⁴¹ Thus,

39 Later in the meeting, Pairote Promsan nevertheless still argued that an important element in the drafting of this constitution had been that the drafters had listened to the people, and let them participate in the drafting. The people wanted a reduction of the number of MPs to about 400 (ibid., p. 117).

40 Section 26 of the Interim Constitution read, “Upon completion of the Draft Constitution, the Constitution Drafting Committee shall submit an explanatory note detailing to what extent the Draft Constitution differs from the Constitution of the Kingdom of Thailand B.E. 2540 (1997) as well as the reasons for the amendments...” (Constitution of the Kingdom of Thailand (Interim). Buddhist Era 2549 [2006]).

41 Some CDC and CDA members felt too restricted by Sawat’s insistence on using the 1997 charter as the model for their 2007 document. For example, Sriracha Charoenphanit stated that the new constitution had to be able to improve the country’s political system. The CDC had been hampered by the Interim Constitution, which said they had to compare the new draft with the 1997 constitution. This had led many members to assume that the new constitution must be similar to the 1997 version. However, all of them should gather ideas “to make this constitution open up new political dimensions. ... I want to see change. The proposal of *ajarn* Krirkkiat is one dimension of change. If we still stick to a model that is close to that of 1997, then I do not believe that it can affect change in the election system” (CDC 38:102). If they did not achieve change now, Sriracha stressed, there would not be any movement for positive constitutional changes during the next four to eight years. Currently, the climate was quite good, because four political parties had already been dissolved (this had happened just a few days before Sriracha’s statement, on May 30, 2007, by the military-appointed “Constitutional Tribunal,” and by using a special retroactively applied decree of the coup plotters; the most important dissolution concerned Thaksin’s Thai Rak Thai Party). Therefore, “a number of *nakkanmueang namnao* [foul water politicians] cannot return [to the House].” He only regretted that the Democrat Party had not also been dissolved, because that way, more “foul water politicians” would have been removed from the Thai political system (ibid.:103). Sriracha, one of the more extremist members on the CDC, was a retired lecturer of the faculty of law at Sukhothai Thammathirat University, and secretary general of the office of the Parliamentary Ombudsmen. In addition, he was a committee member at the Council of State and at the

there were three proposals by the *prae yatti* groups. One wanted to switch the election system to MMP, another wanted to abolish the party list leaving the election system with only constituency MP (a pure plurality system), and the final group wanted to keep the elections system of the 1997 constitution (MMM) intact.

After the *prae yatti* groups from the CDA had finished their presentations, Prasong Sunsiri, the chairperson of the meeting, asked the CDC members to comment on them. For the proponents of MMM, Woothisarn pointed out that the important principle for their 320 to 80 formula was that, “it makes the legislative system stronger, because the MPs from the party lists are perhaps another group of people who have different experiences” (CDC 38:87). Since their proposal was little different from the 1997 election system, it also had little effect on the knowledge and understanding of the people, and neither on the electoral administration, both of which was important, because elections were to be held quite soon (after the constitution would have been passed in a referendum) (ibid.:88). Pairote Promsan later in the meeting added that introducing something new, such as the 200 to 200 or the 250 to 250 formulas, was difficult to do and hard to explain. Moreover, this (MMP system) was really very new. “The country is not a tool for us to experiment with new things, while the time is so limited” (ibid.:119).

This remark came after Woothisarn’s counterpart, Krirkkiat Phipatseritham, had delivered a spirited defense of the MMP system. At the beginning, he pointed out that many elements of the MMP were similar to what Chermasak had said. Regarding the past two elections (2001 and 2005),

the election system that we have used created governments with absolute majorities in the House two times in a row. That we have had governments with absolute majorities subjected our political system to a dictatorial use of power. (CDC 38:88f.)

One might wonder whether Krirkkiat did not actually want to say that one single party, Thaksin’s Thai Rak Thai, had won absolute majorities “two times in a row” (though in 2001, it did not, but needed to form a coalition government). Besides, governments in a

National Research Council. This nicely reflected the *aphichon*’s network nature, as did the fact that, after having served on the CDC, Sriracha was selected to be an Ombudsman. Like Komsan Pokhong, Sriracha was amongst a group of 96 royalist academics that, during the PAD protests in early 2006, petitioned the king on March 4 to replace Prime Minister Thaksin Shinawatra by an interim premier (*The Nation*, March 5, 2006).

parliamentary system are normally thought to need absolute majorities in the House for being stable. Such absolute majorities are not usually equated with a “dictatorial use of power” (see also his quote on the next page) Krirkkiat added,

I think that the election system of 1997 was the reason that a government with dictatorial powers occurred. If we use the proportional system, we will get a government with a majority, but it would not dare using its power to deviate [from the right path]. (CDC 38:90)

Given these statements, it is not surprising that Krirkkiat could not agree with Woothisarn’s proposal to readopt the 1997 election system, though with small changes. He anticipated that this system would again lead to the “parliamentary dictatorship” that he and his group had been trying to exorcize from the Thai polity. “If we want to see political change in our country in a way that is better and constructive ..., then, I think, the election system is an essential element that must be changed [towards MMP]” (ibid.). According to Krirkkiat, there were two main reasons for supporting the introduction of an MMP system. First, it was more democratic.

If we use the proportional system, every vote will be included in the calculation of the number of MPs [for the political parties in the House]. The MPs in the House will be representatives according to the intentions of the voters [as expressed in the vote totals cast for the parties’ lists]. Therefore, regarding the principle of democracy, this proportional election system is the best system that reflects the intentions of the voters. This point is the highlight of this system. (CDC 38:92)

Second, a mixed-member proportional election system would prevent “parliamentary dictatorship.”

The proportional election system is a means to prevent political dictatorship. It creates a balance between the political powers, because with this election system, political parties will have hardly any opportunity to win majorities and absolutely control the House, and form a single-party government. ... We need a strong government to administer the country. But we do not need a dictatorial government. (CDC 38:92)⁴²

42 In a contribution to the debate, Watchara Hongpraphatson referred to a paper of twenty pages written by Krirkkiat about the election system. Unfortunately, I do not have this document (though I will try to acquire it). Given that he had read the paper, and considering the additional statements made by Krirkkiat in this

Similar to Woothisarn, Krirkkiat also argued that his system would not require much effort on the voters' side in terms of learning. As in previous elections (2001, 2005, and in the 2006 poll that was subsequently annulled by the Constitutional Court), the voters would have received two ballots, one for the constituency candidate, and another for the party list. Indeed, the electoral procedure would have remained the same with the adoption of MMP. However, voters would most certainly have had problems understanding the outcome of the elections, such as an increase in MPs by the Democrats, and a decrease of MPs by TRT. For example, in the chart on the next page, the outcome of the 2005 elections, as proportionally recalculated, looks quite different from the actual election result (the details depend on which proportional formula is used).

Given that even many members of CDC and the CDA had tremendous problems understanding the logic of MMP, one cannot help but wonder how the Election Commission of Thailand would have dealt with the task of explaining the new election system to the average voter. Certainly, this task would have been made more complicated by the fact that the constituency candidates would also have occupied the first positions on the party lists, "while those who do not stand as constituency MPs must come at the end of the list" (CDC 38:96). Many voters would probably have been confused to see that, in their constituency, a candidate was defeated, while he or she still made it to parliament through the party list. Though this phenomenon was familiar to the German voters, their Thai counterparts might well have been puzzled.

meeting, it was surprising to read Watchara's closing statement, "I would like to ask where is the difference between your proposal and the model in the 1997 constitution" (CDC 38:108). At this stage of the proceedings, the difference between a 1997-style MMM and Krirkkiat's MMP should certainly have been obvious.

Election result 2005: proportional recalculation
(results differ according to the formula used)

Thai Rak Thai Party

18,993,073 votes (61.17 %)

Actual number of MPs 377 (75.4 %)

Proportional recalculation 336/320/306

Democrat Party

7,210,742 votes (23.23 %)

Actual number of MPs 96 (19.2 %)

Proportional recalculation 128/122/116

Up to this point in the discussions, there were statements in favor of a revised 1997 system (Woothisarn), the elimination of party-list MPs (Suraphon), and the introduction of a mixed-member proportional system (Chermsak, Krirkkiat). Then the time had come for the lone crusader Karun Saingam (a former senator and avid follower of the People's Alliance for Democracy – PAD, or “yellow shirts”) to reject these three options. To him, the revised 1997 system and the one proposed by Chermsak and Krirkkiat were “little different.” Karun attacked the other *prae yatti* groups claiming, “You have nothing new that is worth trying. You change only a little bit... And if you do not have anything new, how will you solve the four big problems that you have determined?” (CDC 38:109). He then proceeded to dismantle the solutions for these four problems, as he interpreted them.

1. Vote buying and cheating in elections.” Will the three proposed election systems solve these problems? No. “They will be there just as before.
2. Will you be able to solve the problem of husband and wife assembly, or family assembly? If you have this kind of MPs and senators, your *prae yatti* will not solve anything. It will remain the same.
3. The legislature is too much under the power of the executive. It can order it around.” There were the powers of the party chairperson, those with *baramee* [a great degree of social recognition, and thus influence] in the parties, and those who provided money. They determined the direction of the party. These directions would become the directions of the party, and the executive. Your proposals would not solve any of these problems.

4. The balancing system has disappeared. The balance between the legislature and the executive has been damaged; it has become weak and has failed. Can the systems you proposed ameliorate a single problem? No, they cannot. (ibid.:109-111)

In conclusion, Karun somewhat immodestly suggested,

It is only my proposal that changes everything. Maybe, I am the only evil person, or the only smart person, or the only intelligent person—but it is only me [whose proposal can change Thai politics for the better]. (CDC 38:111)

Karun's solution was radical indeed. The Thai parliament as a representative body directly elected by the people should be abolished altogether. Instead, "a single assembly elected from occupations" should be created. Consequently, politics would completely change. The old politicians would have to run under the occupational categories of business, industry, or trade. These groups would not have more than about 10-20 members in the assembly, "according to their proportion in the population." It had been said, Karun complained, that his proposal had no representatives, and was not the voice of democracy. But why not? The election would concern representatives of occupational groups. "If you want politics to change, my proposal will change it 100 percent. ... Do you dare to really do it, do you dare to make a big change?" (ibid.). Karun claimed that he had conducted 21 hearings in Buriram province (his area of political influence, where he used to be an MP and elected senator), and some more in Korat. Everyone, he said, had supported his proposal. Yet, it seemed that few members in CDC and CDA supported it. Afterwards, however, the PAD would use its prolonged occupation of the Government House compound to impose a debate of a similar proposal on the public.⁴³

After the lengthy debate about the future election system between CDC and CDA members, one of the latter, Withaya Khotchakhuean, concluded with some resignation that they were trying to change politics, and to eliminate vote buying. Nevertheless, he felt that they sometimes went into a dead end. From the "rural perspective," he wanted to say that, "we can accept all systems, but we must

43 Michael H. Nelson, "Thailand's People's Alliance for Democracy: From 'New Politics' to a 'Real' Political Party?", in Marc Askew (ed.), *Legitimacy Crisis and Political Conflict in Thailand*, Chiang Mai: Silkworm Books, 2010, pp. 119-159.

understand them first. ... At the same time, I think that many CDC members themselves do not yet understand the [MMP] system” (CDC 38:151). He asked Krirkkiat and Komsan for more information. In particular, since this system was taken from abroad, he wanted to know what its effects would be in Thailand (ibid.:152). As will be briefly described below, this problem of understanding even persisted in the decisive vote-taking meeting of the CDA two weeks later, on June 21, 2007.

The CDC’s electoral design decisions

One day after the above meeting with the *prae yatti* groups from the CDA, the CDC met for its 39th meeting briefly to discuss the issues again in order finally to determine its position ahead of the debate of the draft in the CDA. When its deliberations had reached the issue of the election system, the CDC’s secretary, Somkhit Lertpaithoon, put the alternative this way.

I understand that we confirm 400 members, right? We have two groups with different views. The first group is 320 to 80, as in our draft, while the second group [wants] 200 to 200, the German system. (CDC 39:87)

Of course, the two different views Somkhit tried to characterize had actually been about MMM versus MMP. What he called the “German system,” after all, was not merely about equal numbers of constituency and list MPs (versus the CDC’s original 320 to 80 formula), but denoted a mixed-member *proportional* election system (versus the CDC’s decision for a mixed-member *majoritarian* system).

Krirkkiat Phipatseritham said that had talked with Phairote Phromsan about a compromise. The idea was to have a transitory provision according to which they would use the 320 to 80 formula in the first election after the constitution had been approved, while they would use the 200 to 200 formula in the subsequent election. They could also talk about it in the CDA, because he did not want the CDC to waste time (CDC 39:88). It seemed that, somehow, Krirkkiat still assumed that the 320 to 80 formula was to be applied with an MMP system. Otherwise, it would have made little sense to have a “compromise” by applying MMM in the 2007 election, and then switch to MMP in the following one. Jaran seemed to think in a similar direction saying that the 320 to 80 formula was “our first

step” (*kao raek*). It was not a party list like in 1997, but “a proportional model,” the details of which still needed to be debated.

Can we write the 200 to 200 formula in the transitory provisions? We can write in the transitory provisions that after having used this model for five years already, the proportion will be changed from 320 to 80 to 200 to 200. If the CDA does not want this, they can delete this transitory provision. (CDC 39:89)

Jaran saw this procedure as implying a move to the “complete” (*temrup*) 200 to 200 model at that later point. He seemed to look at the 320 to 80 model as a diminished MMP formula, the complete form of which would be 200 to 200 (or 250 to 250). In fact, however, and certainly to the majority in the meeting, the 320 to 80 formula had precisely the meaning that Jaran rejected – a modified 1997-style party list model. Thus, Somkhit Lertpaithoon, in his capacity as the CDC secretary, bluntly countered, “I understand that the majority does not want 200 to 200, neither in the main text nor in the transitory provisions” (*ibid.*). However, Somkhit also added to the conceptual confusion by saying that he understood that in the seven *prae yatti* groups of the CDA, the majority wanted to have party lists,

meaning the proportional system, never mind what word they might use. I use proportional, proportional system. We agree already that we should have a proportional system. Therefore, there are only two remaining points, namely 320 to 80 and 200 to 200. (CDC 39:91)

This quote illustrated again the fundamental misunderstanding in much of this discussion. Of course, one could make the proportional element of the mainly majoritarian system (the party list) comprise 80 or 200 MPs – in the same way that the number of 80 party list MPs in the 2007 constitution was increased, by a constitutional amendment passed during the Abhisit government, to 125 for the 2011 election.⁴⁴ Yet, Krirkkiat and his group did not fight so hard merely to have a greater number of party list MPs in the MMM system. Rather, they wanted to apply proportional voting as the founding principle of the election system altogether, that is, they advocated a switch from MMM to MMP. Again, as so often already, the point was about the

44 Michael H. Nelson, “Thailand’s Election of July 3, 2011: An Overview”, A research report submitted to the King Prajadhipok’s Institute (KPI), Nakorn Si Thammarat: Regional Research Unit, Southeast Asian Studies Program, School of Liberal Arts, Walailak University, October 12, 2012 (expanded version), pp. 8-16.

difference between a mixed-member *majoritarian* and the mixed-member *proportional* system. Yet, for some reason, and despite all the preceding discussions, this supposedly simple, but fundamentally important, design difference did not seem to have reached the CDC debate, even at this late point in the constitution drafting process, with sufficient clarity, leading to much redundant and confusing debate.

Pisit Leeahtam added an objection to the MMP system that resulted from its envisaged application by using the 320 to 80 formula. In this version of the proportional system, he pointed out, if a party had already received as many constituency MPs as it could claim according to its proportional vote share, then nobody from the party list would become MP. In other words, those candidates who stood on the party list part of the election system would be eliminated.

This contradicts our intention for having the proportional system, because we want people with different characteristics, who have mainly national orientations and not mainly provincial or constituency orientations, to do political work. We want people of this kind to get into [the political system]. Therefore, we think that we should have a proportional system or the Party list [English in the original]. (CDC 39:96)

In fact, the 80 MPs mentioned in the formula could not disappear, but would be given to those parties that had gained fewer constituency MPs than their proportional seat claim would suggest.⁴⁵ In any case, Krirkkiat could not go along with the direction the discussion was taking, making the accurate observation that,

What had just been said entirely returns to the year 1997. This is for sure, irrespective of what you might think. It is the same as before. You do not think [in terms of] proportionality. (CDC 39:97)

Before Krirkkiat made this statement, he had reiterated that, in Bang Saen, they already had adopted a proportional voting system, only that they still needed to decide about the formula (320 to 80, or 200 to 200). Therefore, he must have perceived that the direction the CDC

45 With a 400 to 100 formula in the election of 2005, TRT would have gained 10 PL MPs, and the Democrats 26. In 2007, with a 400 to 80 formula, the People's Power Party would have gained 6 PL MPs, while the Democrats could claim 70. Finally, with the 375 to 125 formula applied in the 2011 election, Phuea Thai could have claimed 58 more PL MPs, while the Democrats would have gained 75 PL MPs.

discussion was taking represented a regression behind what he mistakenly assumed had already been achieved in Bang Saen. From the other end of the spectrum, Nakharin actually confirmed Krirkkiat's impression by saying that what both Pisit and Phairote had talked about differed very little from the 1997 system. In addition, he contrasted their position with that of Jaran, stating,

But if we use the entire country as a constituency, and only mark one number, that will be another system. We can perhaps call it proportional system. It will be a compensatory system. What Jaran has proposed is such a system. (CDC 39:99)

Nakharin's own position had been clear for a long time. He reiterated, also reproducing the conservative vocabulary, "If I should choose, I think moderate change would be better." He was in favor of 320 single-member constituencies, combined with 80 proportional MPs. "I think that supporting this is better. It is a change that can be understood easily" (ibid.:99f.).

In order to deal with the persisting differences regarding the election system design, Phairote Phromsan suggested establishing a working group with Jaran, Pisit, Krirkkiat, and himself. Somkhit's response was clear: "There is no time" (ibid.:104). Phairote tried again, prompting Somkhit to ask him, "It is the same, right? That is, the system of 1997, right?" Yes, Phairote responded, it was the same, only that their model did not have the national party lists any longer but regional lists (ibid.:105). Jaran followed by framing the alternative from his perspective,

We must chose which model we want. If we want to have a strong government, and have the opportunity for a party to gain a huge majority, then I think we should use the model that Phairote has proposed. [This would make us] think like the model of 1997, of which *Ajarn* Nakharin had said that it was supported by academic principles. However, if we say that we do not want a political party of this kind become a parliamentary dictatorship again, we must distribute the votes on the party list to medium and small parties. We would need the model that I have proposed. The broad lines of thinking that we have to decide about are like this, I think. (CDC 39:107)

Krirkkiat then withdrew from further debate in order to save the CDC's time. Instead, he wanted to use the CDA debate, which would lead to the final decision, as another occasion to speak about the models. Somkhit followed straight away by calling the vote about the two models. This point finally arrived after Praphan Naikowit had

briefly distracted the meeting with an intervention about the regional zones and the threshold, Chuchai Suphawong had remarked that an election system that could lead to a “parliamentary dictatorship” “would move in an entirely wrong direction” (ibid.:110), and after Phairote had made another attempt to get support for establishing a working group.

CDC secretary Somkhit Lertpaitoon said that he understood that there were two models:

1. 1997, adjusted to have four or more regions, and using a lower threshold than the previous 5%. This model had been proposed by Phairote, Pisit, Nakharin, Woothisarn, “*arai phuak ni.*”
2. A new proportional system. This was supported by Jaran, Chuchai, Wicha, Khomsan, Krirkkiat, and many others.

“Those who agree with Khun Nakharin, please raise your hands.”

- 15 votes

“Those who agree with Jaran, please raise your hands.”

- 12 votes.

Somkhit: “15 to 12 *na khrap*” (ibid.:110f., result on p. 111).

Therefore, the proposal to introduce a mixed-member *proportional* election system was defeated, at this CDC level, by the proposal for a mixed-member *majoritarian* system by only three votes. Thus, the proponents of the MMP had made considerable progress since the CDC’s retreat in Bang Saen two month earlier, where their proposal had been more clearly defeated when they lost by 21 to 9 votes. After this vote had been lost, they had two weeks time for lobbying CDC and, especially, CDA members until the final and decisive vote would take place in the CDA, to which the CDC had to submit its completed constitution draft.

The CDA’s final decision for a mixed-member majoritarian system

The final step in deciding about the country’s election system arrived on June 21, 2007 with the “special” (*phiset*) 29th meeting of the CDA, in which the assembly deliberated the remaining contentious issues jointly with the CDC. If differences could not be solved amicably,

votes had to be taken. In the minutes of this meeting (CDA 29), the discussions on the election system start on page 58, while the final vote on the MMM/MMP issue is recorded on page 249. The pages in between are filled with serious deliberations, misunderstandings, quarrels, struggles amongst the contending groups and individuals, and votes. The procedure started with Pakorn Priyakorn outlining the CDC's election system proposal. It included a reduction of the number of MPs from 500 (as in the 1997 constitution) to 400. They should comprise 320 MPs elected in single-member constituencies (this was a reaction on the public hearings; the CDC had originally wanted multi-member constituencies), and 80 "proportional MPs" elected in eight (up from the originally envisaged four) "groups of provinces" with ten MPs each (CDA 29:58). Later in the meeting, Praphan Naikowit added to this CDC model saying, "In fact, the principle is similar to the previous [1997] list MPs, only that we [the CDC] spread them according to groups of provinces" (CDA 29:158). He rejected the proposed mixed-member proportional system with the words, "If we adopt it at this time, there will be considerable confusion." Even the members of CDA and CDC had still problems understanding this system, and he added,

We are drafting a new constitution in a time of crisis. If we change the [election] system to one that is very complicated, then the first issue would be that it is difficult to explain. The people might not understand it, and the various works [connected to elections] might encounter problems. (CDA 29:158)

From the same camp as Praphan, Woothisarn Tanjai sounded very similar when he pointed out that the considerations of his group were based on the fact that,

in political development, it is very necessary to use time. Therefore, if in the development of politics changes are made frequently while the people are still familiar with an existing system, then this might lead to problems and to confusion about Thailand's political system. [For this reason, the CDC had adopted an] election system that is similar to the election system in the 1997 constitution. (CDA 29:161)

Moreover, according to Woothisarn, the CDC's proposal,

is the most appropriate answer for the current Thai political system. There will not be much change, and it will not cause too much confusion in politics. Moreover, it takes into account the culture and reality of our country. (ibid.:166)

After Pakorn had spoken for the CDC, every CDA and CDC member who wanted to debate issues had ten minutes time to make his or her points. For the proponents of a mixed-member proportional election system, the discussions started badly when its major advocate, Krirkkiat Phipatseritham (expressly speaking in his capacity as CDA member, not as a member of the CDC), started talking without proper focus prompting the chairperson, Seri Suwanphanon, to remind him what the purpose of this meeting was. After some more babbling by Krirkkiat, the chairperson interrupted him again with the words, “Your ten minutes are up, *Ajarn* [teacher, lecturer, professor]” (CDA 29:63). Krikkiat responded by saying, “Oh, let me talk just a little bit more.” While another CDA member protested against Krirkkiat, the chairperson asked for how much longer Krirkkiat wanted to talk. His answer of “15 minutes” led to some more exchanges of words, and a baffled Seri asking how he could administer the meeting under these circumstances. Anyway, he offered five minutes. Krirkkiat said that this would not be enough, and somebody else should talk first.

After this rather bizarre episode had passed, other CDA members made their proposals that mostly concerned support for a 400 to 100 formula. Uthit Chuchuyay was a leader in this group (though his group originally wanted only 400 constituency MPs, they also accepted to have party list MPs, as long as the number of constituency MPs was not reduced below the number of 400). He argued against MMP saying,

We do not have time any longer to take examples from this or that country, and then try to use it in our country. I respect the CDC members who have tried to propose a proportional system with 200 and 200 MPs, 200 constituency and 200 proportional MPs, or 250 and 250 MPs. I understand, sympathize, and respect the views of these members. However, these things are not in harmony with our society, our country. Our country does not have minorities, or federal states. We are a unitary state with 76 provinces. ... I believe that we should continue developing our politics. That we have stumbled in the latest phase was not due to the system. Rather, it was due to that special person [this was a reference to Thaksin Shinawatra]. What can we do to prevent this [from happening again]? (CDA 29:72)⁴⁶

46 Uthit used to be the mayor of Songkhla municipality (thereby placing him firmly in the Democrat and Prem Tinsulanonda networks), and then moved up to become the directly elected executive chairperson of Songkhla’s Provincial Administrative Organization (PAO). In late 2012, he made headlines for an alleged involvement in the murder of his successor as Nakorn Songkhla municipal mayor (Santiparp Ramasutra, “Murder Probe Focuses on Songkhla Lake Project”, *The Nation*, November 20, 2012.

Seri Nimayu later supported an important aspect against the introduction of MMP in Thailand from Uthit's quote pointing out, "Do not adopt too much foreign culture and values. Sometimes, they are not in harmony with the people who live in our present up-country Thailand" (CDA 29:85). Montri Petcharakhum added to this line of reasoning saying that he did not want to refer to any foreign countries in arguing for an election system.

I think that the Thais must have Thai identity. Why do they have to copy things from other countries? Those other countries should also emulate Thailand. ... [Thailand should] proceed according to the customs of the Thai people. ... Do not think about other countries. Do not at all use examples from other countries. (CDA 29:139)

Directly following on Montri, Phairote Phromsan added that, for the future development of Thai politics, it was necessary and most important to have a constitution that was "appropriate" (*mosom*) to the conditions in Thailand—it should be "*baep thai thai*" (Thai style). Thus, it was not necessary to design the constitution according to models from this or that country (CDA 29:141). Obviously, one could wonder whether Phairote intended to suggest that people such as Krirkkiat, Khomsan, Chermesak, Somchai, Jaran, or Chuchai were somehow less Thai than Phairote considered himself to be, or that they simply did not adequately understand what "*baep thai thai*" implied, leading them to propose and push for an "inappropriate" election system, namely MMP.

Proposals for 400 constituency MPs without party lists were also made. Surachai Liangbunloetchai stated that the "party list had not created any benefit for the development of politics and government of the country. ... [Therefore] Get rid of the party list" (CDA 29:77). At the other end of the spectrum, however, Chermesak, Somchai Ruchuphan, and Khomsan lengthily defended the mixed-member proportional election system. With their system, Chermesak stressed, "not even one single vote of the people would be wasted" (CDA 29:89) in allocating MPs to the political parties. With some understatement, he claimed that their proposal differed only "a little" (*nittiew*) from that of the CDC. Chermesak urged the audience, "Please, listen carefully" (to his explanation) (CDA 29:91). Indeed, he made the alternative very clear. Both the CDC and his group envisaged two ballot papers, one for the constituency MPs, and another for the MPs on the party lists. But the CDC would use the party-list ballot only to calculate how many of the 80 seats would

proportionally be distributed to the parties (meaning in proportion to their votes on the party-list ballot). In the model proposed by his group, however, the party-list vote would be used to calculate the entire number of MPs that the political parties could claim in the House. Thus, their model would concern all 400 MPs, and not merely the 80 standing on the party lists (ibid.). Chermesak concluded by saying, “Let’s take the principle first. Do we want the proportion applied only to the party lists, or to the proportion of MPs altogether?” (ibid.:92).

At one point, Winat Manmungsin proposed what the CDA finally would adopt as Thailand’s new election system: 400 constituency MPs, and 80 regional party-list MPs, elected in eight regions with ten MPs each (only that he still wanted a small threshold, and did not mention the single/multi-member constituency issue) (CDA 29:129f.). Wichai Rueankroengkunlakrit proposed a similar model, namely 400 constituency MPs elected in multi-member districts, and 80 party list MPs (CDA 29:146). Earlier, Karun had insisted on his model of representation in the form of “occupational groups according to their proportional share of the population” (CDA 29:118). This would have led to a dramatic change in the occupational backgrounds of MPs, because the dominance of businesspeople in the House would have been broken.

After the members of CDA and CDC had finished a one-hour dinner break, the proceedings resumed at 18:40. The chairperson of the CDA, Noranit Setabutr, noted that they had had a wide debate already. Therefore, the CDC should provide its summary (in preparation for taking votes on contentious issues). Atchaphon Charuchinda posed the seven issues as follows (CDA 29:167f.):

1. There should be two systems, namely constituency and proportional (he combined “proportional” and “party list” by referring to *rabop satsuan baep banchi raichue*, approximately “the proportional system of the party-list kind”).
2. The original proposal of the CDC regarding the number of constituency MPs was 320. However, the committee had no objections against increasing this number to 400, as advocated by many speakers.
3. There should be single-member districts.
4. There should be 80 “list” MPs.
5. There should be eight provincial groups with 10 list MPs each.

6. As for the counting of the PL votes, it should be done only for candidates on the party lists, without taking into consideration the constituency results.
7. There should be two ballot papers, as in 1997.

These were the seven points for which decisions would have to be made.

The first question that arose was whether, in fact, everybody agreed with having two kinds of MPs. Atchaphon therefore noted that some groups still wanted only constituency MPs. In a comment that indicated the hidden dynamics of this exercise in Thai constitution drafting, Somkiat Rotcharoen remarked that there were not so many people present in the chamber at this point, because negotiations for compromise solutions were going on outside of the meeting room. They were looking for ways out (of the disagreements). They were in the process of agreeing. Could they perhaps wait for ten more minutes? They would then return to the chamber. Noranit asked Suraphon Phongthatsirikun, whom he addressed as “[provincial] governor,” whether his group would withdraw their proposal of only having constituency MPs. After all, the trend was clearly for having two kinds of MPs. His group had not yet withdrawn its proposal, Suraphon answered (CDA 29:171). Noranit wondered aloud what they should do now, which prompted some more deliberations about the voting procedure. At this point, Uthit declared that his group withdrew their proposal of having only 400 constituency MPs. Thus, only Suraphon’s group still insisted on having only 400 constituency MPs. Had they changed their minds, Noranit asked him. No, not yet. Could Noranit wait a minute? His group was still deliberating what it wanted. Could he wait for two minutes? Yes, yes, Noranit responded.

While the groups were still negotiating, Jaran expressed his dissatisfaction with the trend of increasing the number of MPs beyond the originally envisaged number of 400, that is, a reduction of 100 over what the 1997 constitution had stipulated. All their surveys and hearings had shown that the people wanted this reduction. If they could achieve this by omitting the party list altogether, he would not object. If there were only 400 constituency MPs, all right. “But do not make the [number of] MPs betray the people by making them 480 or 500 again, just like in the past” (CDA 29:173).

One remaining obstacle was eliminated when Surachai declared that his group had wanted to *prae yatti* for only 400 constituency MPs; they did not want the proportional system. However, since they had listened to the debate, his group had decided that, “we are

pleased to have a proportional system” (here certainly denoting MMM; CDA 29:175). This left only Karun Saingam with his proposal of occupational representation as the lone obstacle to agreement on this issue. Eventually, he also conceded. The chairperson, Karun said, had twice been kind to him by allowing him to explain his position. “Therefore, I agree. I withdraw as well” (CDA 29:176). With Karun’s withdrawal, there was no *prae yatti* group left that still wanted to have only one kind of MPs. Thus, the CDA was left with only one option, namely an election system that comprised both constituency and party-list MPs. With this, the first point on Atchaphon’s list quoted above was finished.

After this issue had been resolved, the CDC’s secretary, Somkhit Lertpaithoon, noted that they now had to deal with the question of how many constituency MPs they should have. The CDC, he said, was undecided between 320 and 400, although their draft envisaged 320. Yet, the CDA wanted 400. Therefore, this issue needed a decision (CDA 29:176f.). Similar to the statement of Jaran above, Chali Kangim referred to the public hearings favoring 400 MPs altogether: “We must not cheat the people. This is an important point” (ibid.). This warning was followed by Wichai, who repeated his earlier proposal of having 400 constituency MPs, and 80 party list MPs. Uthit reiterated his insistence on 400 constituency MPs (this was probably not surprising since his background was in constituency-level politics). Afterwards, they could vote on the number of MPs on the party lists (ibid.). Surachai then suggested that they should decide first whether they would adopt single or multi-member districts (because this would influence his group’s decision on 320 to 80 versus 400 to 80), which was no. 3 on Atchaphon’s list above. After a brief discussion about the procedure, they took the vote about SMD or MMD. This vote turned the CDC’s proposed SMD into MMD by 48 to 28 votes (CDA 29:183). It should be noted here that the number of votes only reached 76, although the meeting was supposed to be attended by 95 members, according to the attendance list printed on pages one to four of the minutes. Since no abstentions were recorded, one might thus wonder what had happened to the remaining 19 members.

Shortly after this vote had been taken, the meeting opted, with no further debate, in a 50 to 32 vote, for 400 constituency MPs and 80 party-list MPs (the majority position in the CDC was 320 to 80). Chairperson Noranit summarized the result by saying, “Therefore, it is 480” (CDA 29:186). There was no vote on the increase from the originally envisaged four electoral zones for party-list MPs to eight

zones, because there were no dissenting voices. Thus, Somkhit called on the next point, which was about the method of calculating the proportional groups of MPs. The CDC had suggested calculating them separately from the constituency MPs (MMM), while Chermesak and others of the CDC minority wanted to calculate them together (MMP) (CDA 29:187). Thus, this was the point where the choice between a mixed-member majoritarian versus a mixed-member proportional election system re-entered the debate. The meeting, therefore, did not deliberate the proportional system as such, but rather treated it as a variant of the question of how the 80 proportional MPs should be calculated. Consequently, the meeting also did not arrive at the question of whether, for the MMP to work, they could ever use a formula such as 400 to 80. In terms of the electoral design logic, a decision should first have been made about the preference for MMM or MMP. If CDA and CDC had opted for MMP, the next design issue would have been what ratio of constituency and proportional MPs this system needed to work in (Thai) practice. Praphan seemed to have sensed this problem when he wondered how the proponents, given the preceding decision in favor of 400/80, could calculate the votes. After all, their proposal from the beginning had been to have half the number of MPs standing in constituencies, while the other half would be drawn from the party lists. In this context, Praphan also pointed to the texts of the motions (*prae yatti*) of the MMP supporters. “You will see that both of them have the half/half system. ... These are totally different concepts” (CDA 29:200). It seemed that the *prae yatti* included the 50/50 split of kinds of MPs, according to Krirkkiat’s original proposal, based on the situation in Germany. Yet, the way the vote was organized in the present meeting, participants had to vote for the kinds of MPs first, and arrived at 400/80. Nevertheless, the two *prae yatti* groups in favor of MMP did not want to concede defeat that easily, and thus still insisted on trying to push through their proportional approach, which would have meant to adopt MMP based on the existence of 400 constituency MPs and 80 party list MPs, and one question is whether this could have ever worked.

Nevertheless, Chermesak Pinthong went ahead with explaining their system once again, saying,

The system that my group proposes is a system that, when the calculation is being done, uses the proportion of all 480 [MPs], while your system calculates only from the 80 [MPs]. We want to use only the party ballot paper to calculate the entire country. The parties’ votes are summed up for the entire country. Then, it [their

proportional seat claim] is calculated from the 480 seats. They will get the grand total (*yotruam*) from that. (CDA 29:188)

Thus, if a party won 50 percent of the vote, it would get 240 of the 480 MPs (CDA 29:190; this approach led to some more confusion, because, in Chermesak's model, constituency MPs could also stand on the party lists). Similarly, Chuchai Suphawong noted that, "The calculation method of *ajarn* Krirkkiat and *ajarn* Somchai uses the party preferences [for determining] the entire number of MPs." For example, if the Thai Rak Thai party got 40 percent of the vote, it would receive 200 MPs if the House comprised 500 MPs altogether (CDA 29:198). Chuchai thought that this approach would lead to stable governments, without getting "parliamentary dictatorships" again (supposed to have existed under Thaksin Shinawatra). He added, "We are lucky that we still have something that can save the country from crisis" (CDA 29:199). With this "something," Chuchai referred to the military and its coup of September 2006.

Noranit then accepted the call by some members, who had asked the proponents to explain their models once again. For the CDC position, Woothisarn provided a brief and precise explanation, emphasizing that their model was similar to the one stipulated in the 1997 constitution (CDA 29:192f.). Jaran Phakdithanakul's explanation of the MMP stance was not as clear. In a subsequent explanation Woothisarn also reacted on Chermesak's model when he pointed out that, "It would be very difficult for us to explain to the people why this candidate who did not win in his constituency nevertheless became Member of Parliament" (CDA 29:197). Eventually, chairperson Noranit tried his luck again. He stated that they had two models, one from the CDC, and another from Krirkkiat, Chermesak, and Somchai. "Therefore, if we cannot agree, then we will have to vote" (CDA 29:201). However, Chuchai still felt he needed to explain some aspects of MMP, as did Jaran. The latter expressly confirmed that Krirkkiat's calculation method could be applied, although they had resolved for a 400 to 80 ratio of MPs. From the opposing camp, the CDC's secretary, Somkhit Lertpaithoon, countered by saying that their version of the MMM system already resulted "in considerable political reform," while the newly proposed system was difficult to understand, and they still debated how the MP numbers in it could be calculated (CDC 29:205f).

Given that a number of CDA members did not yet understand the differences of the two systems, the proceedings went back and forth for a while, followed by Khomsan and Jaran trying again to explain

their election system model. Somkhit and Woothisarn tried the same for their model. The former could not resist the temptation to dig at Jaran remarking, “Listening to *Ajarn* Jaran, things are still very complicated” (CDA 29:221). Some time later, Somkhit added, “The minority on the CDC has not yet been able to define their own [MMP proposal] at all” (CDA 29:247). Pisit Leeahtam criticized the advocates of MMP on the ground that this model was used in some rich countries. He added,

Germany uses this system, because the characteristics of MPs in the constituency and party-list systems are hardly any different. ... In fact, they should not have any constituency system at all. They should only have the proportional system. (CDA 29:226)

Eventually, the signal was sounded calling the CDA members into the assembly hall to take the vote. Seri Suwanphanon, now acting as the chairperson of the meeting, said that he thought that there had been enough debate, and all sides understood already. Still, this did not prevent members from further questions. Chuchai confirmed one contentious issue saying,

Party leaders can stand both in the constituency and on the party list. If they cannot make it in the constituency, they can make it on the list. Therefore, in this system, the party leaders are very secure, and it is difficult for them to fail in an election. (CDA 29:239)

The chairperson clearly had been impatient for a while. Now, he uttered, “Dear members, please decide for yourselves” (CDA 29:240), which was directly followed by Sawet Thinakun saying, “I do not understand. I really do not understand. Since I have little knowledge, I just want to ask a little bit” (ibid.). Seri then gave the word to Komsan (for MMP) and Praphan (for MMP), adding that their statements would conclude the debate. In his statement, Praphan noted that the proponents of MMP had continuously added more elements to their proposal, for example, that candidates could stand both on the constituency and on the party list ballot (which had also surprised me when reading the minutes). “With all due respect, but what had been debated about is not at all included in the frame of the *kham prae yatti* [the formal motion necessary to initiate an amendment of the constitution draft];” their *kham prae yatti* spoke only of the 250 to 250 ratio (CDA 29:243f.). Atchaporn Charuchinda also noted that the *kham prae yatti* of both Chermesak’s group and the minority on the CDC figured one national constituency, both for the

constituency MPs and the party list MPs. Moreover, they used equal numbers of 200 for both. After the meeting had decided to have 400 constituency MPs and 80 party list MPs, and after they had divided the latter into eight provincial groups, the MMP proponents' *kham prae yatti* had not been adjusted (CDA 29:246).

Indeed, it seemed that the various groups advocating MMP were not well coordinated, and lacked a clear strategy, except for trying to delay the final decision by “explaining” their models repeatedly, thereby only adding to the confusion. They might have changed their tactics after the meeting had voted for the 400 to 80 ratio, thereby rejecting the 250 to 250 or 200 to 200 options originally seen as necessary for adopting a mixed-member proportional election system. Besides, the idea of national party lists had given way to lists in eight provincial groups. Following this double rejection, the advocates of MMP seemed to have tried to save their proposal by reintroducing it in the vote about how the 80 party list MPs would be calculated. This included their attempt to draw the constituency seats into the provincial zones (like in the German federal states, or *Länder*), moving from a national-level 200 to 200 or 250 to 250 ratio to a regional-level 50 (constituency MPs) to 10 (party list MPs) ratio. Yet, the 400 to 80 formula approved in the earlier vote did not connect the two kinds of seats at all – after all, that model was designed as a “parallel” or “segmented” system, with no relation between the 400 constituency MPs and the 80 regional party list MPs.

Finally, the decisive moment had arrived when Seri repeated that the members should decide by themselves, and they should do it now. He thought that everything was understood already. Again, he sounded the signal announcing the taking of a vote. If you agreed with the CDC (majority), then press “agree” (*hen duay*). If you agree with the *prae yatti* group, press “disagree” (*mai hen duay*). Now, please vote. The result was as follows.

- Agree: 45 votes.
- Disagree: 39 votes.
- Abstentions: 2 votes.
- Did not vote: 1 vote.

Seri: Therefore, it is according to the CDC (majority) (CDA 29:249).

Thus, the attempt to introduce a mixed-member proportional election system in Thailand had failed – by six votes, with eight votes missing, given the attendance list according to which 95 members participated

in the meeting.

Conclusion

The unplanned and non-teleological construction of representative structures in Thailand's political system – replacing the strictly top-town and exclusionary character of the previous monarchical system started in any practically significant sense only with the elitist revolution of 1932. It combined indigenous ideas of political participation with the adoption of foreign models of a constitutional political order. Ever since, there has been an interplay of remnants of the old system (monarchy, military, civil bureaucracy), newly-introduced political positions and structures (politicians, political parties, voters, elections, parliament), political events and processes (be they military coups or popular protests), political culture (in the sense of sets of political ideas or themes), changes in the environment of the political system (such as an increased popular interest in politics, and the role of the mass media) that translate into the development within the political system of an audience that actively observes those in political positions,⁴⁷ and legal codifications (mainly the constitution, including organic laws). The present paper has tried to illuminate one instance of legal codifications, concentrating on the CDC and CDA of 2007, and here specifically on the decision-making process concerning the election system (election system design issues raised during the proceedings of CDC and CDA will be dealt with in a separate paper). More precisely, the task was to show how the CDC and CDA, during the course of their deliberations between January and June 2007, opted for a revised version of the mixed-member *majoritarian* election system, which had been introduced with the 1997 Constitution, rather than follow the proposal of and persistent push for the introduction of a mixed-member *proportional* election system.

In analyzing the decision-making process, the author has relied on the word-by-word minutes of the meetings, mainly those of the key

47 Some readers might prefer the word “public” to “audience.” The use of “audience” in the present context refers to Luhmann's earlier distinction of three subsystems of the political system, namely administration, politics, and audience (Niklas Luhmann, *Political Theory in the Welfare State*, transl. and introduced by John Bednarz, Berlin: De Gruyter, 1990 (originally published in 1981, *Politische Theorie im Wohlfahrtsstaat*, München: Olzog); see also his posthumously published *Die Politik der Gesellschaft (The Politics of Society)*, Frankfurt am Main: Suhrkamp, 2000.

drafting body, the CDC. Informal discussions and negotiations as well as documents distributed in the meetings have not been used since they have not been accessible, while additional interviews have so far not been conducted because of time limitations, and the fact that such interviews will be useful only after the available written sources have been exhausted. Relying on the formal records had the advantage of having a large body of text about what the participants really said in the meetings, rather than what they thought they remembered years after the events when asked specific questions. Moreover, these texts were generated unobtrusively. In making their statements, the participants neither reacted on question incentives posed by an interviewer nor did they seem overly to speak to an imagined external audience (such as in meetings of the House), although most deliberations were broadcast on closed-circuit TV to a reporters' room, and although the committee members were well-aware that every word uttered in the meetings was recorded by the staff of the stenographic services section of the House of Representatives.

Therefore, a reasonably accurate description could be constructed of what happened during the deliberations aimed at determining the 2007 Constitution's election system (participants might well see this claim differently). It is clear that two main groups existed that advocated a revised mixed-member majoritarian and a mixed-member proportional election system, respectively. This includes the identification of the main advocates in each of these two groups, and the perspectives they adopted in arguing for their respective cases. Nevertheless, these declared advocates comprised only about nine people, and only they left traces in the meeting records. It cannot be determined what the remaining 26 CDC members thought about the two main options for the future election system, and what reasons led them to decide one way rather than the other. This point became even more problematic when the decision-making process moved up to the CDA, especially in their decisive meeting with the CDC on June 21, 2007. A number of assembly members, as demonstrated in the introduction of this paper, did not really seem to grasp what was at issue in casting their votes for one of the two main options. Moreover, these were only those members among the 95 people listed in the attendance list of that meeting who dared speaking out. What their silent colleagues thought, we cannot tell. We can certainly say, though, that the constitution-related deliberations on the CDA were considerably less intensive compared to those on the CDC. This, in turn, might have accounted for a lower level of understanding

complex constitutional issues, and their political consequences, on the part of the CDA members. Thus, looking at the “micro foundations” of the Thai constitution drafting in 2007, “mistakes” and “misperceptions” might have had an important role in determining “institutional outcomes”.⁴⁸ In the important case of the election system, this outcome, as it turned out, could have almost gone either way – MMM or MMP –, given the final vote of 45 in favor of MMM and 39 in favor of MMP. For this reason, there remains some dissatisfaction that we could not get any closer to the complex dynamics of the decision-making process than has been presented in this paper. Electoral Reforms and their Impact on Democracy in Southeast Asia

48 Capoccia and Ziblatt, above fn. 3.

Electoral Reforms and their Impact on Democracy in Southeast Asia

Patrick Ziegenhain*

Introduction

Competitive elections are generally regarded as one of the main traits of modern representative democracy. Only free and fair elections provide the essential legitimacy of any democratic government. Additionally, elections are the usual tool of determining the configuration of the main political institutions such as parliament. The strength and power of competing political forces in democracies is determined by elections.

In this paper, I will focus on electoral systems in the three current major democracies of Southeast Asia: Indonesia, Thailand, and the Philippines. In recent years, important electoral reforms took place in all of three of these democracies that altered the political system, at least to some extent. This particularly refers to the type of democracy, which according to Arend Lijphart tends to be a majoritarian or a consensus-oriented form of government.¹

Indonesia, Thailand, and the Philippines were chosen since they can be considered as the most democratic countries in the region.² Elections are generally regarded as free and fair in these three countries. This does not apply to neighboring countries such as Singapore, Malaysia, Cambodia, and Myanmar, where elections have been orchestrated in favor of the ruling party or coalition.

Generally, there are two major types of electoral systems, the majority or plurality voting system and the proportional voting system. In reality, there are many more sub-types and mixed forms than just these two electoral forms, however in effect, they are all variations of the two main types. In a plurality system, voters elect candidates and not parties. The winner of an election is the candidate who receives the largest number of votes. It is thus not important if a certain party receives, say 2 or 30 percent of the national votes, but in

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1 See Arend Lijphart, *Patterns of Democracy*, New Haven: Yale University Press, 1999.

2 See for instance the BTI Transformation Index 2012 at: <http://www.bti-project.org> or Freedom House Index 2012 at: http://www.freedomhouse.org/sites/default/files/inline_images/FIW%202012%20Booklet--Final.pdf.

how many electoral districts the party has a relative majority. This very transparent and comprehensible election system is applied in such places as Canada, India, the United Kingdom, and the United States of America. A frequent variation of the plurality voting system is the run-off (or two round) election mode. If no candidate receives an absolute majority, the two best performing candidates compete again in a second ballot, such as in France.

Somewhat more complicated, but maybe more fair-minded than the previously described winner-take-all approach is the proportional election system. Here, the number of parliamentary seats won by a party is proportionate to the number of votes it received. If a party, for instance, receives 10 percent of the votes, it will get about 10 percent of the mandates. Proportional election systems, sometimes modified with electoral thresholds³, are applied in Germany and most states of the European Union.

In this paper, I will take a closer look into the following two questions: How did the reform of the electoral systems in Thailand, Indonesia, and the Philippines influence the character of their respective political systems? How did the latter change in regard to the continuum between a pure majoritarian and a consensus democracy according to the Lijphart's approach? Finally, in a broader perspective, did the electoral reforms contribute to the deepening of democracy?

Elections and Power-Sharing

Electoral systems determine the rules of how the representation of the people – the sovereign in democratic political orders – takes place. They define the mode of transforming voter preferences in parliamentary mandates and the circumstances of a direct presidential vote respectively. Therefore, the mode of election is one of the most important ways to shape the voter's will within the government institutions. Not without reason, Giovanni Sartori described electoral systems as “the most manipulative instrument of politics.”⁴

The design of the electoral system is a crucial part of constitutional engineering since it is a decisive variable for the access

3 An electoral threshold means that parties that receive less than a certain previously defined percentage will get no mandate at all. The introduction of threshold tries to reduce the fragmentation of parliaments and to promote more efficient parliamentary work.

4 Giovanni Sartori, *Comparative Constitutional Engineering*, New York: New York University Press, 1994, p. IX.

to power, the configuration of the party system and the possibilities of civil participation as well. The type of electoral system determines the inclusiveness of the main state institutions as well. With a proportional election mode for the parliamentary elections, the legislature will possibly be more representative and fragmented than with a plurality election system. The relative advantage of being more in accordance with people's political stances and representing social, political, ethnic and other minorities is counterweighed by its more difficult decision-making process. Plurality systems, on the other hand, usually give more priority to the efficiency and effectiveness of the government.

Voting systems are a central part of Arend Lijphart's dichotomy of democracies.⁵ He distinguishes between two types of democracies, the majoritarian system of government which is closely associated with the plurality voting system and the consensus or, in Lijphart's terms, consociational system of government with a proportional election system. In a majoritarian democracy, the main aim is to create an arrangement of institutions to provide for a stable and accountable government. Opposition forces have little influence on political decision-making, but the winner-take-all voting mechanism gives them a reasonable chance to become the government themselves in the next elections.

The main goal of a consensus democracy is to include as many political forces as possible in the political decision-making process. Consequently, there are often more compromises and a relatively slower pace of policy-making, but minorities are included and smaller social groups and parties have a certain influence on government policies. Coalitions and power-sharing mechanisms prevent power abuse by the head of government and radical policy change.

The choice for a certain voting system is thus, willingly or not, directly connected with a choice for a rather majoritarian or consensus type of political system. Reforms of election systems always move the whole political system closer to one of the two types. Due to their influence, Dieter Nohlen pointed out that that electoral system reforms are the key to reforming political systems.⁶

The choice for a certain voting system is directly connected with a

5 See Lijphart, above fn. 1.

6 See Dieter Nohlen, "Electoral systems and electoral reform in Latin America", in . Arend. Lijphart and Carlos H. Waisman (eds.), *Institutional Design in New Democracies: Eastern Europe and Latin America*, Boulder, Colo.: Westview Press, 1996, p. 44.

choice for a rather majoritarian or consociational type of political system. If one wants to reduce distortions in the process of transforming votes into mandates and as well let minorities an adequate representation, certain elements of a proportional election system are necessary and other plurality elements must be diminished. If the target is creating more system stability and reducing party fragmentation and polarization, plurality voting elements are a usual means. Due to its impact on the party system, plurality voting systems tend to prevent anti-system parties from entering into parliaments and thus increase system stability.

In this regard, it is important to note that in practice, the choice of electoral systems is usually not between pure proportional representation and undiluted majoritarianism. As many examples from Eastern Europe and Latin America show, the electoral systems have often mixed elements of both majoritarian and proportional rules. The states under research chose among a range of options that include a combination of majoritarian and proportional elements.

The type of electoral system also has an impact on the circumstances of presidential elections. Run-off elections with an absolute majority give the winner a higher legitimacy and also lead to depolarization, since mavericks and political extremists are prevented from access to power. Without a second round and without the necessity of an absolute majority, the latter could possibly be able to win with 20 or 30 percent of the vote.

Constitutional limitations concerning the tenure of office for presidents are meant to prevent potential power abuse, but on the other hand, they limit the president's or prime minister's power in the final term, since he or she cannot count on re-election. This co-called lame duck phenomenon⁷ leads to a substantial loss of political power, as other elected officials are less inclined to cooperate with the incumbent government leader.

Presidentialism as well as a plurality voting system for parliament strengthen the role of individual persons and decrease the role of political parties, particularly their recruitment function. The connection between voters and elected officials is closer than in other voting mechanisms. However, the intermediary function of political parties as instruments of regulation and coherence is deeply

7 The lame duck phenomenon refers to experiences made with US-American presidents, who do not run for re-election. In such cases, the president has no incentives to be politically active anymore and presidential power declines since other political players already either fight for the succession or see better political opportunities with potential successors.

undermined in such systems.

The decision for a certain mode of election for the vice-president is dependent from the following considerations. If president and vice-president are elected on the same ticket, they will presumably cooperate well and work as a team. If the vice-president is elected independently from the president, this would strengthen his legitimacy and independence vis-à-vis the president, but may lead to a loss of efficiency in the daily work of the government.

In young democracies, the electoral systems are not only part of the initial constitutional engineering, but are also frequently discussed as a variable in order to support the consolidation of democracy. As we will see in the following cases of Indonesia, Thailand, and the Philippines, the reform of electoral systems was an attempt to strengthen certain aspects of the political system with regards to majoritarian versus consensus democracy. Still, it is important to bear in mind that electoral reform attempts are often a mixture of deliberate actions to change the majoritarian-consensus dimension and the selfish power interests of ruling elites.

Electoral Systems in Indonesia, the Philippines, and Thailand

Presidential Elections Indonesia

After the end of the authoritarian New Order of President Suharto in May 1998, Indonesia initially kept its constitution and thus also the presidential form of government. The first democratic presidential elections in 1999 formally took place practically in the same manner as those in the authoritarian era. The president was not elected directly by the people but from the People's Consultative Assembly (Majelis Permusyawaratan Rakyat, MPR). This institution consisted of 1000 people of which 500 were the previously elected members of parliament (Dewan Perwakilan Rakyat, DPR) and 500 were representatives from the various regions and important social groups.⁸ Together with the fact that the president was responsible to the MPR, the whole system of government had some resemblance to a parliamentary system. According to the criteria of Steffani⁹, the latter

8 See Leo Suryadinata, *Elections and Politics in Indonesia*, Singapore: Seng Lee Press, 2002, p. 140.

9 See Winfried Steffani, "Zur Unterscheidung parlamentarischer und präsidentieller Regierungssysteme", in *Zeitschrift für Parlamentsfragen*, Vol. 14, No. 3 (1983), pp. 390-401.

system of government is defined by the appointment and dismissal of the head of government by the parliament. Such a development took place in 2001, when Abdurrahman Wahid lost the support of a large majority in the DPR and was toppled by an “impeachment”, which was actually a political vote of no-confidence.¹⁰

These political events influenced the ongoing negotiations concerning the restructuring of the constitution. The mode of the election of the president was changed. Instead of the MPR, the people could vote for the president directly for the first time in 2004. Therefore, the president was no longer directly dependent on the political parties in the parliament and the position of president was strengthened vis-à-vis the parliament.¹¹ However, to counterbalance this gain of power, the presidential candidates can only be proposed from political parties participating in the parliamentary elections. Additionally, the previously unlimited re-election possibilities¹² were scrapped and only one re-election chance for another 5 years term was allowed. According to the newly introduced article 6A of the Indonesian Constitution, the president and the vice-president have to be elected on the same ticket and need at least 50 percent of the votes and additionally more than twenty percent of the votes in at least half of the provinces.

The constitution also provided that if no pair of candidates is able to get an absolute majority, a second round between the two pairs with the most votes has to be held.¹³ In the first direct presidential elections in 2004, Susilo Bambang Yudhoyono defeated then-incumbent president Megawati Soekarnoputri in the second round after no candidate was able to win an absolute majority in the first round. In order to keep the number of presidential candidates low and to maintain their influence, the political parties represented in the parliament introduced relatively high threshold for all possible presidential nominations. In the new election law for the 2009 presidential elections, the parliamentarians decided that all presidential candidates needed the support of parties representing at least 20 percent of the parliamentary mandates or 25 percent of the

10 See Patrick. Ziegenhain, *The Indonesian Parliament and Democratization*, Singapore: Institute of Southeast Asian Studies, 2008, pp. 142 ff.

11 See Harold Crouch, *Political Reform in Indonesia after Soeharto*, Singapore: Institute of Southeast Asian Studies, 2010, pp. 56 ff.

12 Authoritarian President Soeharto was re-elected 6 times for another 5 year term between 1966 and 1997.

13 This regulation can be found in Article 6A, Paragraph 4 of the current Indonesian Constitution.

votes.¹⁴ In the 2009 presidential elections, incumbent president Susilo Bambang Yudhoyono was re-elected with more than 60 percent in the first round.

Parliamentary Elections Indonesia

The 1999 and 2004 elections were based on a similar election law. Both were held with a nearly pure proportional election system. No effective threshold for small political parties was provided. Consequently, 21 and 17 parties respectively were able to gain seats in the national parliament, several of them with only one or two seats. The threshold, which provided that political parties with less than 2.5 percent were not allowed to participate in the forthcoming elections, proved to be ineffective. For instance, the Justice Party (*Partai Keadilan*) received only 1.4 percent and 7 mandates, but then newly registered as Justice and Welfare Party (*Partai Keadilan Sejahtera*) and participated with more success in the 2004 elections. Many small parties agreed to work in combined factions but the extreme fragmentation of the national parliament led to an inefficient and time-consuming negotiation processes.¹⁵ Additionally, the proportional election system resulted in no clear majorities for individual parties. In 1999, the strongest party, the Democratic Party of Indonesia-Struggle (Partai Demokrasi Indonesia-Perjuangan, PDI-P) had 30.6 percent of the mandates, in 2004 the Party of the Functional Groups (*Partai Golongan Karya*, Golkar) with 23.3 percent of the seats and in 2009, the Democratic Party (*Partai Demokrat*) was strongest with 26.4 percent of the mandates. Thus, there were no clear majorities for or against the president in parliament and he had to form coalitions with many of the various factions in order to reach a stable majority in parliament.

For the 2009 elections, the new election law¹⁶ changed several provisions in order to stabilize the work of parliament. An effective 2.5 percent threshold was introduced, reducing the number of

14 See Crouch, above fn. 11, p. 74

15 See Stephen Sherlock, "The Parliament in Indonesia's Decade of Democracy: People's Forum or Chamber of Cronies?", in Edward Aspinall and Marcus Mietzner (eds.), *Problems of Democratisation in Indonesia*, Singapore: Institute of Southeast Asian Studies, 2010, pp. 164 ff.

16 See Law No. 10/2008 on general elections of the national parliament DPR, the Regional Council DPD, and the local parliaments DPRD, in Indonesian: Undang-Undang Republik Indonesia No. 10/2008 Tentang Pemilihan Umum Anggota Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, dan Dewan Perwakilan Rakyat daerah

political parties in the DPR from 17 to 9. This is in international comparison still a high number of parties in a national parliament, but the work efficiency could be improved without losing the inclusiveness ideal of the proportional election system. In the first elections with the effective 2.5 percent threshold in 2009, nearly 18 percent of the votes were used for parties that later did not get a single seat. This distortion, however, could be counterbalanced with the positive effect of a concentration of the party system.

Another change concerning election system was the introduction of open party lists in 2004.¹⁷ The voters were now allowed to choose a certain candidate from the party list and could thus change the order of the party list. However, this system did not function in practice and the political parties still determined whom they preferred to get a parliamentary seat. The power of the political parties was more damaged by a decision of the Constitutional Court (*Mahkamah Konstitusi*) in March 2009.¹⁸ The court annulled Article 214 of Law No. 10/2008 and decided that those candidates on party lists get a seat in the DPR which receive the highest number of votes in their electoral districts and not those which are on the top of the party list. Consequently, the voters and not the party leadership determine who will represent them in the national parliament.

Presidential Elections in the Philippines

After the ouster of authoritarian ruler Ferdinand Marcos in 1986, the new constitution¹⁹ followed the tradition of presidential systems of government, which were prevalent from independence until the declaration of martial law by Marcos in 1972. However, some provisions²⁰ were introduced in order to decrease the possibilities of a president to become too powerful which in turn could endanger the democratic order. The historic experience of Marcos, who was a democratically elected president but then turned into a authoritarian ruler, led to the provision that a president cannot be re-elected but is granted a significantly longer term than an US-American president (six versus four years).²¹ However, in analogy to the US presidential

17 See Crouch, above note 11, pp. 63 ff.

18 See Michael Buehler, “Islam and Democracy in Indonesia”, in *Insight Turkey* Vol. 11, No.4 (2009), p. 58

19 The Constitution of the Philippines (Filipino: Saligang Batas ng Pilipinas) was enacted in 1987 and is popularly known as the “1987 Constitution”.

20 See Article VII, Section 4 of the Constitution of the Philippines.

21 See *ibid.*

election system, no absolute majority of the votes is necessary in a single round of presidential elections. The candidate who receives the relative majority (plurality) of the votes becomes president. Thus, the president does not necessarily need to have the support of a high number of voters. In 1992, Fidel Ramos became president with just 23.5 percent of the votes. Accordingly, the legitimacy of a Philippine president can be lower than that of presidents in countries where an absolute majority is needed to become president.

The missing possibility of re-election for a president can be seen from two perspectives. On one hand, it provides the president with a higher independence from outside interference. Six years is enough time to pursue his or her policies, to start reforms and to sometimes make unpopular but necessary decisions. The disadvantage, on the other hand, is that the whole presidency is threatened by the “lame duck phenomenon” from the first day in office.

Different from the US American model of presidentialism, the Philippine vice president is elected not together with the president but in a separate vote. The drafters of the 1987 Constitution did this out of various considerations. They wanted to let the people have their own direct choice and additionally guarantee a relatively independent vice-president in order to balance the power of the presidency. However, such a model has some weaknesses as the recent history of democratization shows. If the president and vice-president come from two different political camps, conflicts between the two are highly probable. The more ambitious and powerful the vice-president is, the more he or she will undermine presidential policies. Even as central part of the executive branch of government, such vice-presidents can regard themselves as opposition toward the head of government. A vice-president may even try to contribute to the downfall of a president. In 2001, for instance, Vice President Gloria Macapagal-Arroyo actively and successfully supported efforts to impeach then-President Joseph Estrada in order to replace him.²²

Parliamentary Elections in the Philippines

The Congress of the Philippines is divided into two chambers: the House of Representatives and the Senate. The House of

22 Yuko Kasuya, “Weak Institutions and Strong Movements: The Case of President Estrada’s Impeachment and Removal in the Philippines”, in Jody C. Baumgartner and Naoko Kada (eds.), *Checking Executive Power – Presidential Impeachment in Comparative Perspective*, Westport, Connecticut: Praeger, 2003, pp. 45-64.

Representatives is currently composed of 212 members, which are elected in as many electoral districts by a first-past-the-post election system. This election system reduces the influence of political parties, since the voters decide on personalities rather than on party platforms. In the Philippines, the plurality voting system favors affluent local elites, which are the only ones who can afford the high expenses for campaigning with little party support.²³ The House of Representatives in the Philippines is thus often described as a “club of millionaires”.²⁴

In order to counterbalance this upper class bias, the Philippine Constitution of 1987 provided in article VI, paragraph 5 (2) the requirement to also include socially disadvantaged groups in the House of Representatives. A maximum of twenty percent of the mandates was provided for such groups, which compete for these seats in so-called party list elections. It took until the year 1999 that this constitutional provision was eventually realized and the first party list representatives entered the House of Representatives. Until 2010, however, due to a questionable party list election system, no more than 26 representatives of minorities were granted seats in the House.²⁵ Additionally, a maximum of three mandates for each group was allowed – irrespective of their election result. Even if a party list group would get 50 percent of the votes, it would receive the same three seats as a party list group with only 5 percent. If one takes a closer look at the party list representatives, it is questionable if they really represent the disadvantaged classes of society, particularly the huge masses of the poor. Sons and daughters of rich businessmen and politicians quite often found such party groups in order to strengthen their power. Mikey Arroyo, son of former President Gloria Macapagal-Arroyo, for instance, had to give up his safe district seat in Pampanga’s 2nd district to be succeeded by his mother before the 2010 elections. In order to keep his parliamentary seat, he decided to create Ang Galing Pinoy, a party list group supposedly representing the interests of security guards and entered the House of

23 See Jürgen Rüländ, Clemens Jürgenmeyer, Michael H. Nelson and Patrick Ziegenhain, *Parliaments and Political Change in Asia*, Singapore: Institute of Southeast Asian Studies, 2005, pp. 170 ff.

24 See Sheila S. Coronel, Yvonne T. Chua, Luz Rimban and Booma B. Cruz, *The Rulemakers. How the Wealthy and Well-Born Dominate Congress*, Quezon City: Philippine Center for Investigative Journalism, 2007, pp. 22 ff.

25 See Edna C. A. Co, Jorge V. Tigno, Lao, Maria Elissa Jayme and Margarita A. Sayo, *Philippine Democracy Assessments. Free and Fair Elections and the Democratic Role of Political Parties*, Manila: Ateneo de Manila University Press, 2005, pp. 89 ff.

Representatives in this way. NGO activist Renato M. Reyes, Jr commented that Mikey Arroyo "does not come from the ranks of the marginalized. He is the incumbent congressman of his district, a member of the dominant political party Lakas-Kampi, and the son of the [then] incumbent president. By no stretch of the imagination can he be considered marginalized or fit to represent the marginalized for which the party-list system was meant to serve."²⁶

The Senate of the Philippines is composed of 24 senators, which are elected with a relative majority for a six-year term. Every three years half of the senatorial seats are contested. The election district is the whole country. Therefore, different to the US Senate, its members do not represent different areas, but only represent their own agenda. Additionally, the federal component of the US model is not practiced in the Philippines leading to a huge bias toward the capital region of Metro Manila, where at least 20 of the 24 senators came from in recent years. The national election district also results in social exclusion. Only very rich persons can afford to run election campaigns on a national level.²⁷ Thus it is no wonder that the Senate is often seen as the "club of billionaires." Only well-known personalities, most of them from established dynasties or show business, have chances to become senator.

Parliamentary Elections in Thailand

Since the introduction of the constitutional monarchy in Thailand in 1932, a parliamentary system of government was always officially maintained. Therefore, different than in the Philippines and Indonesia, the elections for the House of Representatives are always decisive for the election of the head of government, the prime minister. Since the House majority elects and supports the prime minister, Thai people can only vote the head of government indirectly.

The House of Representatives is (and was most of the time) elected with a plurality voting system. Therefore, similar to the Philippines, only wealthy candidates with extended patron-client relations have realistic chances to garner a parliamentary seat.²⁸ The

26 See Ina Reformina, RG Cruz, "Mikey seeks to be voice of security guards in Congress", in *ABS-CBN News Online*, 23 March 2010, <http://www.abs-cbnnews.com/nation/03/23/10/mikey-seeks-be-voice-security-guards-congress> (accessed 19 July 2011).

27 See Rüländ et al., above fn. 23, pp. 170 f.

28 See Allan Hicken "The Market for Votes in Thailand", 2002, p. 14, at <http://web.mit.edu/cis/pdf/Hicken.pdf> (accessed 3 April 2012).

role of the parties is nevertheless more important for the political system than elsewhere. They need to be more coherent in order to maintain a majority in parliament, which is necessary for the survival of the government in power. Several electoral reforms took place in the years 2001, 2005, and 2007, when proportional elements were introduced. Currently 400 seats are elected with a plurality election system, and 80 with a proportional election system. The reason for these reforms was the expected increase of inclusiveness through the proportional elements and, at the same time, the further strengthening of the electoral winning party by the plurality election elements.

The Thai Senate, which has only a subordinated function compared to the House of Representatives was composed of 200 senators elected with a plurality voting system between 1997 and 2007. In the Constitution of 2007, which was passed by the military government after the 2006 coup d'état the number of the senators was downsized to 150 and only 76 senatorial posts are now elected directly. The remaining 74 seats are appointments from the Senate Selection Committee, which is dominated by high-ranking persons from the judiciary. This step represents a set-back for democracy in terms of representation and accountability.²⁹

The Electoral Systems in Comparative Perspective

Presidential Elections

In the two presidential systems of government, the Philippines and Indonesia, the mode of election for the presidency was only altered in the latter. There, the reforms which led to a comprehensive direct presidential election with an absolute majority have proven successful so far. The Indonesian president enjoys a much higher legitimacy as a result of the electoral process than his Philippine counterpart. The absolute majority of the votes, which is required in Indonesia, guarantees that at least half of the voters supported this candidate. In the Philippines, however, the relative majority can result in a low legitimacy, if the winner reaches far less than 50 percent of the votes. Since the re-introduction of democracy in 1986, no presidential candidate has ever been able to reach an absolute majority. Therefore, the relatively low legitimacy of the Philippine president is a result of the electoral system. An absolute majority

29 See Allan Hicken, "The 2007 Thai Constitution: A Return to Politics Past", in *Crossroads: An Interdisciplinary Journal of Southeast Asian Studies*, Vol. 19, No. 1 (2007), p. 156.

requires moderate and centrist candidates. The Philippine electoral system for presidential elections gives controversial and polarizing candidates a much higher chance to win. Additionally, any person can announce his presidential candidacy independently. The Indonesian election law, which prescribes that the presidential candidates must be nominated by the largest political parties represented in the House of Representatives³⁰ on the other hand, make it more likely that senior party politicians will be presidential candidates.

The Indonesian presidential electoral system is also more consensus-oriented than the Philippine's version in regard to the provisions on the vice-presidency. Since the president and vice-president are elected jointly in Indonesia, the presidential candidates usually choose top politicians from other parties as running mates in order to increase their chances. Coalitions must be built between several political parties and before every election round. In the Philippines, on the contrary, the different elections for the president and the vice president result in higher competition and rivalry – often leading to election-related violence³¹ – because coalition-building is not necessary. The “winner-take-all” principle,³² typical for majoritarian democracies, leads to an ultimate winner and many angry losers in the Philippines. The Indonesian presidential election is much more consensus-oriented since an absolute majority is required for the winner and the most important political parties determine the candidates. This led in practice to the formation of coalitions. Additionally, parties whose candidate lost the presidential race soon afterwards were able to join the presidential coalition. The powerful Party of the Functional Groups (*Partai Golongan Karya*, Golkar), for instance, did this twice, both in 2004 and 2009.

The possibility for a single re-election in Indonesia, gives the president a chance to stand the judgment of the general public for its first term. If the performance is well – according to the electorate – he or she can hope for another 5-year term. This scenario, which happened to President Susilo Bambang Yudhoyono in 2009, is not possible in the Philippines. Here, the president does not have the chance to run for re-election and faces possible resistance from the first day in office. Former president Gloria Macapagal-Arroyo, for

30 See Rizal Sukma, “Indonesia’s 2009 Elections: Defective System, Resilient Democracy”, in Edward Aspinall and Marcus Mietzner (eds.), above fn. 15, p. 61.

31 See Co et al., above fn. 25, pp. 25 f.

32 See Lijphart, above fn. 1.

example, was always in stalemate with a Senate majority in her term between 2004 and 2010. Many senators tried to boost their presidential ambitions by opposing the incumbent president.³³

Being aware of the end of her term in May 2010, President Gloria Macapagal-Arroyo started the ambitious project of amending the constitution and converting the system of government from a presidential to a parliamentary one. Many persons, most prominently the senators, were opposed to this so-called “Charter Change” or “Cha-Cha” and doubted the sincerity of the proposal.³⁴ Instead of improving the efficiency of the political process, she was suspected of acting on personal ambitions only. A change to a parliamentary system of government would have allowed her to continue as head of government. Gloria Macapagal-Arroyo’s opponents argued that facing her presidential term limit, she was solely looking for ways to remain at the top executive position.³⁵ In the end, the proposed charter change remained an unsuccessful idea.

Parliamentary Elections

The proportional election, which among the three countries under research is only adopted in Indonesia, is responsible for a more inclusive parliament and strengthens the role of political parties therein. In comparison with the two other countries, the composition of the Indonesian parliament is less dominated by wealthy local elites. Particularly in the Philippines, but also to some extent in Thailand, members of the House of Representatives care much more for the transfer of state money to their constituencies than for national political affairs.³⁶ Though there were also some tendencies in this direction in Indonesia, the work of a parliamentarian in Indonesia is generally more focused on committee work.

In Indonesia, the relative strength of political parties in relation to individual candidates is also only explicable with the specific proportional election system. Andreas Ufen argues that Indonesia has much stronger parties compared to Thailand and the Philippines, since Indonesian parties have a mass base and are embedded in

33 See Paul D. Hutchcroft, “The Arroyo Imbrolio in the Philippines”, in *Journal of Democracy*, Vol. 19, No. 1 (2008), p. 144.

34 See Sheila S. Coronel, “The Philippines in 2006: Democracy and Its Discontents”, in *Asian Survey*, Vol. 47, No. 1 (2007), pp. 177 f.

35 See *ibid.*

36 See Yvonne T. Chua, “The Perks of Lawmaking”, in above fn. 24, pp.118 ff.

specific milieus (*aliran*).³⁷ If Indonesia would adopt a plurality system, the relative strengths of the political parties would be soon drastically diminished. It is only the electoral system that underlines the importance of political parties for the nomination process of parliamentary as well as presidential candidates.

The assumed advantages of a majoritarian system of government, i.e. stability, effectiveness and efficiency, have not been realized in Thailand and the Philippines in the last decade. The governments in Thailand, be it under prime minister Thaksin Shinawatra or Abhisit Vejjajiva, had latent legitimacy problems³⁸ stemming from the electoral system. The opposition felt excluded and turned to violent street protests. The complex political turmoil in Thailand cannot be traced back only to the plurality election system for the House of Representatives. However, the plurality bias of the electoral system led to a majoritarian type of democracy in which the ruling party made no concessions let alone coalition offers to the opposition. In the Philippines under Gloria Macapagal-Arroyo (2001-2010), the majoritarian features of government, among them major parts of the electoral system, led to a high degree of confrontation between the government and the most powerful opposition leaders assembled in Senate. Thus, neither the Thai nor the Philippine majoritarian type of democracy led to stability, effectiveness and efficiency but rather to instability, gridlock and long-lasting confrontation inside and outside of the political institutions.

Thus, the choice of the electoral system had a direct impact on the quality of democracy in the three countries under research. While in Thailand and the Philippines there is a high degree of confrontation between government and opposition, Indonesia's more inclusive election system leads to substantial cooperation between all political actors. This consensus-oriented type of democracy in Indonesia produced the expected negative consequences, i.e. slow pace of decision-making and many compromises instead of far-reaching political reforms. However, the higher inclusiveness of political decision-making led to a more stable and efficient government compared to Thailand and the Philippines.

37 See Andreas Ufen "Political Party and Party System Institutionalization in Southeast Asia: Lessons for Democratic Consolidation in Indonesia, the Philippines and Thailand", in *The Pacific Review*, Vol. 21, No. 3 (2008), pp. 327-350.

38 See Björn Dressel, "When Notions of Legitimacy Conflict: The Case of Thailand", in *Politics & Policy*, Vol. 38, No. 3 (2010), pp. 445-469.

Electoral Reforms and Conclusion

Electoral reforms have “played and will continue to play a preeminent role in the discussion of political-institutional reform.”³⁹

The reforms are an important means of counterattacking the reduction of democratic quality and thus the regression of democracy. Additionally, electoral reforms, which took place in all three countries, are a vital tool for the adjustment of the majoritarian or consensus orientation of the whole political system. In the Philippines and Thailand, pure plurality systems were transformed in order to make the legislatures more inclusive. In the Philippines, the so-called party list system led to the appearance of new and often unconventional members of Congress. However, the *trapos* (traditional politicians) coming from wealthy dynasties, which dominate their constituencies for generations, are still in a large majority.

In Thailand, the 2007 electoral reforms were intended to reduce the majoritarian elements of the previous voting system. More multi-member electoral districts were created instead of the previous 400 single-seat constituencies. The percentage of districts seats was continuously reduced in relation to proportional seats. While under the 1997 Constitution the relation was 4:1 (400 to 100), the 2011 Electoral Laws reduced it to 3: 1 (375 to 125). The 5-% threshold for mandates from party lists was abolished in 2007.⁴⁰ However, as political scientist Michael Nelson pointed out the party list seats were “not aimed at providing access to underrepresented political forces. Rather, the intention was to enable supposedly better qualified personnel to govern the country and strengthen the hand of the prime minister over them.”⁴¹

In Thailand and the Philippines, the trend of the electoral reforms appears to move from relatively strong majoritarian systems towards more consensual and proportional elements. In Indonesia however, the introduction of an effective threshold and the decision that those candidates on party lists get a seat in the DPR which receive the highest number of votes in their electoral districts and not those which are on the top of the party list, limits the inclusiveness in order

39 See Nohlen, above fn. 6, p. 44.

40 See Michael H. Nelson, “Looking Back Before the Elections of 2011: Thailand’s Constitutional Referendum and the Election of 2007”, in *European-Asian Journal of Law and Governance*, Vol. 1, No. 1 (2011), p. 50.

41 See Michael H. Nelson, “A proportional election system for Thailand?” in *KPI Thai Politics Update*, No. 2 (2007), p. 11.

to rationalize the effects of the proportional election system. The introduction of an effective 2.5 percent threshold for seats in the national parliament led to the exclusion of a high number of small parties. In 2011, legislators from the large parties of the Democratic Party of Indonesia-Struggle (*Partai Demokrasi Indonesia-Perjuangan*, PDI-P), and the Party of the Functional Groups (*Partai Golongan Karya*, Golkar) even demanded that the threshold should be lifted up to 5 percent in order to make parliament work more efficiently.⁴²

The Philippines and Thailand initiated electoral reforms in order to smooth the negative effects of their plurality election systems such as vote distortions and social mismatch. Indonesia tried to mitigate the less desirable results of the proportional elections system such as extreme fragmentation and party dominance over voters. All three reforms are undertaken in order to further stabilize democracy. However, the reforms in Thailand, and particularly the Philippines, did not produce the favorable impact on the political system as a whole.

This paper has shown that well-designed electoral systems are an important factor for the quality of democracy. Due to their influence on the majoritarian versus consensus orientation of a political system, electoral systems shape the political landscape and political competition to a great extent. There may be no optimal election system fitting all the three democracies of Southeast Asia. However, the political decision-makers in Indonesia, Thailand and the Philippines should be aware of the strengths and weaknesses of their respective election systems. By carefully reforming their electoral system, they would also improve the overall quality of the democracy in their country.

42 See R. M. Sijabat, "Golkar, PDI-P insist on 5% threshold as debate heats up", in *The Jakarta Post Online*, 28 May 2011, <http://www.thejakartapost.com/news/2011/05/28/golkar-pdi-p-insist-5-threshold-debate-heats.html> (accessed 4 April 2012), and R. M. Sijabat, "Parties still at odds over election system", in *The Jakarta Post Online*, 29 March 2012, <http://www.thejakartapost.com/news/2012/03/29/parties-still-odds-over-election-system.html> (accessed 4 April 2012).

The United Nations and the Efforts to Define Terrorism

Daniela Gotzel*

“Terrorists are defined by their hatreds: they hate democracy and tolerance and free expression and women and Jews and Christians and all Muslims who disagree with them. Others killed in the name of racial purity or the class struggle.”¹

What sounds like a reverberation from an ancient era is still part of today’s political reality: the word terrorism is a political label that is easily attached to justify a military intervention or a new piece of legislation. It is used to legitimize political actions. Real commitment to the rule of law looks different. One sign of a commitment to the rule of law would be an endorsement of a clear definition of terrorism. After the Security Council of the United Nations has passed a lot of resolutions concerning terrorism during “the war on terror,” one might assume that an international definition of terrorism is already in existence, but that is not the case. One of the controversial points is the idea that “One man’s terrorist is another man’s freedom fighter.” Because of this unsolved discussion only individual acts of terrorism were banned by the different UN-conventions. They were mostly a reaction towards a terrorist attack that had already taken place, (e.g. Lockerbie).

These conventions² will be outlined in the first part of this article. Part two identifies the corresponding elements in the conventions. In the end, it may be that a general UN-definition of the term “terrorism” already exists.

The Existing UN-Conventions

Convention on Offences and Certain Other Acts Committed On Board Aircraft (Aircraft Convention 1963)

The Aircraft Convention covers all actions aimed against air security. The aircraft commander is authorized to impose reasonable measures,

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1 Former US-President George W. Bush in the German Bundestag on 23 May 2002, <http://webarchiv.bundestag.de/cgi/show.php?fileToLoad=840&id=1074>.

2 See <http://www.un.org/terrorism/instruments.shtml>.

including restraint, on any person he or she has reason to believe has committed or is about to commit such an act. The contracting states have to take custody of offenders and to return control of the aircraft to the lawful commander. The Convention was adopted by the International Civil Aviation Organization (ICAO) and entered into force on 4 December 1969. Today 185 nations have ratified the Convention.³ Article 1 paragraph 1 of the Convention says:

This Convention shall apply in respect of:

- (a) offences against penal law;
- (b) acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board.

*Convention for the Suppression of Unlawful Seizure of Aircraft
(Unlawful Seizure Convention 1970)*

The next convention also deals with aircraft security, specifically the unlawful seizure of aircraft. The convention makes it an offence for any person on board of an aircraft in flight to "unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of that aircraft, or attempts to perform any such act." The contracting states have to take custody of the offenders, extradite them or submit the case for prosecution. Additionally the parties to the Convention have to make hijacking punishable by severe penalties. In connection with criminal proceedings to the convention the parties are required to assist each other. The ICAO adopted the 1970 Convention which entered into force on 14 October 1971. 184 have states ratified the Convention.⁴ Unlawful seizure of aircraft as an aspect of terrorism is defined the following way:

Article 1. Any person who on board an aircraft in flight:

- (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or

3 See <http://www.icao.int/icao/en/leb/Tokyo.pdf>.

4 See <http://www.icao.int/icao/en/leb/Hague.pdf>.

- (b) is an accomplice of a person who performs or attempts to perform any such act.

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention 1971) and its Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988)

This Convention makes it an offence for any person on board an aircraft in flight to “unlawfully, by force or threat thereof, or any other form of intimidation, seize or exercise control of that aircraft” or attempt to do so. The ICAO adopted the Convention 1971 in Montreal and the Convention entered into force on 26 January 1973, comprising 186 contracting states.⁵

The Protocol enlarges the articles of the Convention on international airports. It entered into force on 6 August 1989 and has 168 contracting states.⁶ The definition of terrorism in the Convention is listed as:

Article 1.

1. Any person commits an offence if he unlawfully and intentionally:
 - (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
 - (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
 - (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight;or

5 See <http://www.icao.int/icao/en/leb/mtl71.pdf>.

6 See <http://www.icao.int/icao/en/leb/Via.pdf>.

- (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
- (e) communicates information, which he knows to be false, thereby endangering the safety of an aircraft in flight.

2. Any person also commits an offence if he:

- (a) attempts to commit any of the offences mentioned in paragraph 1 of this Article; or
- (b) is an accomplice of a person who commits or attempts to commit any such offence.

*Convention on the Prevention and Punishment of Crimes
Against Internationally Protected Persons (1973)*

Heads of States, Ministers for Foreign Affairs, representatives or officials of a State or international organization who are entitled to special protection in a foreign State are especially protected by the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons. The Convention prohibits the intentional murder, kidnapping or other attack upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodations, or the means of transport of such person. The General Assembly of the UN adopted the Convention. It entered into force on 20 February 1977 and has 172 member states.⁷ Terrorism is defined in the Convention as:

Article 2

1. The intentional commission of:

- (a) a murder, kidnapping or other attack upon the person or liberty of an internationally protected person;
- (b) a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty;
- (c) a threat to commit any such attack;

⁷ See http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-7&chapter=18&lang=en.

- (d) an attempt to commit any such attack; and
- (e) an act constituting participation as an accomplice in any such attack shall be made by each State Party a crime under its internal law.

International Convention against the Taking of Hostages
(1979)

According to this Convention taking hostages has to be severely punished by the contracting states. Furthermore they have to exchange information and extradite the offenders or bring them to justice. On 3 June 1983 the convention entered into force.⁸ The relevant paragraphs for this analysis are:

Article 1

1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereafter referred to as the “hostage”) in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking hostages (“hostage-taking”) within the meaning of this Convention.
2. Any person who:
 - (a) Attempts to commit an act of hostage-taking, or
 - (b) Participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence for the purposes of this Convention.

Convention on the Physical Protection of Nuclear Material (1980)

This convention was not the follow-up to a terrorist attack, but based on the fear that nuclear material could become a weapon for terrorist

⁸ See http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-5&chapter=18&lang=en.

groups.⁹ For this reason the contracting states are obliged to protect nuclear facilities and material in peaceful domestic use, storage as well as transport. In 1980 the Convention was adopted by the International Atomic Energy Organization (IAEO) and entered into force 8 February 1987. 141 states ratified the convention.¹⁰ The relevant definitions are:

Article 7

1. The intentional commission of:

- (a) An act without lawful authority which constitutes the receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property;
- (b) A theft or robbery of nuclear material;
- (c) An embezzlement or fraudulent obtaining of nuclear material;
- (d) An act constituting a demand for nuclear meta-materials by threat or use of force or by any other form of intimidation;
- (e) A threat:
 - (i) To use nuclear material to cause death or serious injury to any person or substantial property damage, or
 - (ii) To commit an offence described in sub-paragraph (b) in order to compel a natural or legal person, international organization or State to do or to refrain from doing any act;
- (f) An attempt to commit any offence described in paragraphs (a), (b) or (c); and
- (g) An act which constitutes participation in any offence described in paragraphs (a) to (f) shall be made a punishable offence by each State Party under its national law.

9 See Jörn Thielmann, *Die UNO und der Terrorismus*, Mainz: Landeszentrale für Politische Bildung, 2004, p. 89.

10 See http://www.iaeo.org/Publications/Documents/Conventions/cppnm_status.pdf.

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988) and its Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (Fixed Platform Protocol 1988)

The convention associates the rules of the Civic Aviation Convention to the Safety of Maritime Navigation. The Protocol enlarges the protection to the Safety of Fixed Platforms Located on the Continental Shelf. The Convention and the Protocol entered into force on 1 March 1992, the convention has 141 and the protocol 124 contracting states.¹¹ The relevant articles are:

Article 3

1. Any person commits an offence if that person unlawfully and intentionally:
 - (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
 - (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
 - (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
 - (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
 - (e) destroys or seriously damages maritime navigational facilities or seriously interferences with their operation, if any such act is likely to endanger the safe navigation of a ship, or
 - (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
 - (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

¹¹ See http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml&menu=MTDSG.

Protocol:

Article 2

1. Any person commits an offence if that person unlawfully and intentionally:
 - (a) seizes or exercises control over a fixed platform by force or threat thereof or any other form of intimidation; or
 - (b) performs an act of violence against a person on board a fixed platform if that act is likely to endanger its safety; or
 - (c) destroys a fixed platform or causes damage to it which is likely to endanger its safety; or
 - (d) places or causes to be placed on a fixed platform, by any means whatsoever, a device or substance which is likely to destroy that fixed platform or likely to endanger its safety; or
 - (e) injures or kills any person in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (d).

2. Any person also commits an offence if that person:
 - (a) attempts to commit any of the offences set forth in paragraph 1; or
 - (b) abets the commission of any such the offences perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or
 - (c) threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b) and (c), if that threat is likely to endanger the safety of the fixed platform.

Convention on the Marking of Plastic Explosives for the Purpose of Detection (Plastic Explosives Convention 1991)

The Lockerbie attack to the Pan Am Flight 103 in 1988 directed the attention of the international community to the problem of undetectable plastic explosives.¹² For this reason the Convention on

¹² See Thielmann, above fn. 9, p. 89.

the Marking of Plastic Explosives for the Purpose of Detection obligates the contracting states to mark explosive devices and control effectively the “unmarked” plastic devices. The Convention entered into force on 21 June 1998 and has 141 contracting states.¹³ No definition of terrorist acts is given in the convention, just an obligation:

Article 2

Each State Party shall take the necessary and effective measures to prohibit and prevent the manufacture in its territory of unmarked explosives.

International Convention for the Suppression of Terrorist Bombings (Terrorist Bombing Convention 1997)

The convention creates a regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place. The intention of the convention is to reduce “safe havens” for terrorists.¹⁴ The Convention was adopted by the General Assembly of the UN on 15 December 1997 and entered into force 23 May 2001. 162 signed the Convention.¹⁵ For the first time there seems to be the real attempt to define terrorism in a general way:

Article 2

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:

- (a) With the intent to cause death or serious bodily injury; or

13 See <http://www.icao.int/icao/en/leb/MEX.pdf>.

14 See Thielmann, above fn. 9, p. 90.

15 See http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-9&chapter=18&lang=en.

- (b) With the intent to cause extensive destruction of such place, facility or system, where such destruction results in or is likely to result in major economic loss.
2. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1.
3. Any person also commits an offence if that person:
 - (a) Participates as an accomplice in an offence as set forth in paragraph 1 or 2; or
 - (b) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

After this attempt to approach terrorism in a general way, the discussion in the United Nations was renewed to outlaw terrorism with a general definition. Therefore India proposed the concept of an “International Convention on the Suppression of Terrorism,”¹⁶ but the idea could gain no traction in UN-negotiations.¹⁷

*International Convention for the Suppression of the Financing of
Terrorism (Terrorist Financing Convention 1999)*

The signing states have to take steps to prevent and counteract the financing of terrorists, whether direct or indirect, through groups claiming to have charitable, social or cultural goals or which also engage in illicit activities such as drug trafficking or gun running. Bank secrecy is no longer adequate justification for refusing to cooperate. The convention entered into force 10 April 2002 and has

16 General Assembly A/C.6/55/1, at <http://daccessdds.un.org/doc/UNDOC/GEN/N00/622/60/PDF/N0062260.pdf?OpenElement>.

17 See Stefan Oeter, “Terrorismus – ein völkerrechtliches Verbrechen?”, in Hans-Joachim Koch (ed.), *Terrorismus – Rechtsfragen der äußeren und inneren Sicherheit*, Baden-Baden: Nomos, 2002, pp. 29-50.

169 contracting states.¹⁸ Limited to the financing of terrorism, terrorism is outlawed for the first time in a broad sense.¹⁹

Article 2

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:
 - (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
 - (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

International Convention for the Suppression of Acts of Nuclear Terrorism (2005)

The convention covers a broad range of acts and possible targets, including nuclear power plants and nuclear reactors and encourages states to cooperate in preventing terrorist attacks by sharing information and assisting each other in connection with criminal investigations and extradition proceedings. The General Assembly of the United Nations adopted the convention on 14 September 2006. The convention has 115 contracting states.²⁰ The central articles are:

Article 2

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:

18 See http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&lang=en.

19 See Oeter, above fn. 17, p. 29-50.

20 See http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-15&chapter=18&Temp=mtsdg3&lang=en.

- (a) Possesses radioactive material or makes or possesses a device:
 - (i) With the intent to cause death or serious bodily injury; or
 - (ii) With the intent to cause substantial damage to property or to the environment;
- (b) Uses in any way radioactive material or a device, or uses or damages a nuclear facility in a manner which releases or risks the release of radioactive material:
 - (i) With the intent to cause death or serious bodily injury; or
 - (ii) With the intent to cause substantial damage to property or to the environment; or
 - (iii) With the intent to compel a natural or legal person, an international organization or a State to do or refrain from doing an act.

2. Any person also commits an offence if that person:

- (a) Threatens, under circumstances which indicate the credibility of the threat, to commit an offence as set forth in paragraph 1 (b) of the present article; or
- (b) Demands unlawfully and intentionally radioactive material, a device or a nuclear facility by threat, under circumstances which indicate the credibility of the threat, or by use of force.

Convention the Suppression of Unlawful Acts Relating to International Civil Aviation (Beijing Convention 2010)

In reaction to the attacks of 9/11 the Montreal Convention of 1971 was revised and in Art. 1 the following lines were added:

- (f) uses an aircraft in service for the purpose of causing death, serious bodily injury, or serious damage to property or the environment; or
- (g) releases or discharges from an aircraft in service any BCN weapon or explosive, radioactive, or similar substances in a manner that causes or is likely to cause death, serious bodily injury or serious damage to property or the environment; or
- (h) uses against or on board an aircraft in service any BCN weapon or explosive, radioactive, or similar substances in a

- manner that causes or is likely to cause death, serious bodily injury or serious damage to property or the environment; or
- (i) transports, causes to be transported, or facilitates the transport of, on board an aircraft:
- (1) any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; or
 - (2) any BCN weapon, knowing it to be a BCN weapon as defined in Article 2; or
 - (3) any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to a safeguards agreement with the International Atomic Energy Agency; or
 - (4) any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon without lawful authorization and with the intention that it will be used for such purpose; provided that for activities involving a State Party, including those undertaken by a person or legal entity authorized by a State Party, it shall not be an offence under subparagraphs (3) and (4) if the transport of such items or materials is consistent with oris for a use or activity that is consistent with its rights, responsibilities and obligations under the applicable multilateral non-proliferation treaty to which it is a party including those referred to in Article 7.

The new elements of the Convention are the use of an aircraft for the purpose of causing death and the use of BCN weapons.²¹ This new convention supplants the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23

21 See Damien van der Toorn, "September 11 Inspired Aviation Counter-Terrorism Convention and Protocol Adopted", in *American Society of International Law* Vol. 15, No. 3 (2011).

September 1971 and its supplement Protocol from 1973.

Comprehensive Convention on International Terrorism

The Ad Hoc Committee established by the General Assembly Resolution 41/210 of 17 December 1996 is still working on a Comprehensive Convention on International Terrorism. The last session in April 2011 ended without reaching an agreement. The convention should complement the existing conventions follow their principles.²²

Analysis of the conventions

The question to be examined now must be, is there a minimal consensus about a general definition of terrorism between the different conventions? The following chart²³ helps to get a better understanding. In the center column the definition of terrorism of each convention will be repeated and in the right column the meaning of each definition for a general definition will be examined.

Convention	Definition of terrorism	Impact for a general definition of terrorism
Aircraft Convention 1963	acts which jeopardize the safety	With this general formulation even the crossing of a street could be a terrorist act.
Unlawful Seizure Convention 1970	force or threat thereof, or by any other form of intimidation	Obviously “force” is an element of terrorism. One should distinguish between direct force (=traditional terrorism) and indirect force (e.g. cyber terrorism).

22 See <http://www.un.org/terrorism/instruments.shtml>.

23 See for the original chart Daniela Gotzel, *Terrorismus und Völkerstrafrecht*, München: Herbert Utz Verlag GmbH, 2010, pp. 124.

Convention	Definition of terrorism	Impact for a general definition of terrorism
Montreal Convention 1971	endangers the safety; destroying; a device or substance which is likely to destroy or to cause damage and which is likely to endanger the safety; destroys or damages; communicates information, which one knows to be false, there-by endangering the safety	The phrase „endanger security” repeats the abstract element of terrorism.
Supplementary Protocol 1988 to the Montreal Convention	Adds the necessity of a weapon to commit terrorism.	A definition of terrorism should not include the element „weapon“, otherwise a discussion could easily arise about the question „What is a weapon?“. This element should be covered in an abstract way.
<u>Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons</u> 1973	- murder, - kidnapping or - other attack upon the person or liberty of an internationally protected person; - a violent attack upon the official premises, the private accommodation or the means of	These elements concerning terrorism are only applied to a specified group of persons, diplomats. A general definition could include these elements. On the other hand: not every case of kidnapping is a terrorist act.

	transport of an internationally protected person	
Convention	Definition of terrorism	Impact for a general definition of terrorism
International Convention against the Taking of Hostages 1979	Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person in order to compel a third party.	The same problem: not every hostage taking is terrorism.
Convention on the Physical Protection of Nuclear Material 1980	An act which causes or is likely to cause death or serious injury to any person or substantial damage to property	The question here is, if a comprehensive definition should comprise all possible varieties of nuclear material or if it should be phrased in a more abstract way.
<u>Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation</u> 1988	<ul style="list-style-type: none"> - to seize or exercise control by force or threat thereof or any other form of intimidation - to perform an act of violence that is likely to endanger the safety - to destroy or cause damage - to place or cause to be placed a device or substance which is likely to 	<p>The requirements are similar to the Montreal Convention.</p> <p>It is becoming apparent that force against persons and property is an element that is frequently repeated in the definitions of the UN.</p>

	<p>destroy or cause damage which endangers or is likely to endanger the safety</p> <ul style="list-style-type: none"> - to communicate information which he knows to be false, thereby endangering the safe - to injure or kill any person 	
Convention	Definition of terrorism	Impact for a general definition of terrorism
Fixed Platform Protocol 1988	The Protocol repeats the definition of the convention.	
Plastic Explosives Convention 1991	No definition of terrorism included.	
Terrorist Bombing Convention 1997	A person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an	The recurring elements are again "causing death", "serious injuries" and "damage to property."

	<p>infrastructure facility: a) With the intent to cause death or serious bodily injury; or b) With the intent to cause extensive destruction of such place, facility or system, where such destruction results in or is likely to result in major economic loss.</p>	
<p>Terrorist Financing Convention 1999</p>	<p>The definition of terrorism in Art. 2 Para. 1: (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such</p>	<p>The recurring elements are again "causing death", "serious injuries" and "damage to property."</p>

	act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.	
Convention	Definition of terrorism	Impact for a general definition of terrorism
<u>International Convention for the Suppression of Acts of Nuclear Terrorism</u> 2005	<ul style="list-style-type: none"> - With the intent to cause death or serious bodily injury; or - With the intent to cause substantial damage to property or to the environment; - With the intent to compel a natural or legal person, an international organization or a State to do or refrain from doing an act. 	As in the Convention against the Financing of Terrorism targets of intimidation are persons, international organizations or a state.
Convention the Suppression of Unlawful Acts Relating to International Civil Aviation (Beijing Convention 2010)	Adds to the old Aircraft Convention the following aspects: (f) uses an aircraft in service for the purpose of causing death,	As mentioned above the new aircraft convention is a reaction to the 9/11 attacks. For this reason the misuse of an aircraft as weapon is added as a tool to commit a terrorist act.

	serious bodily injury, or serious damage to property; or (g) releases or dis-charges from an aircraft in service any BCN weapon or explosive, radioactive, or similar substances (...) or (h) uses against or on board an aircraft in service any BCN weapon or explosive, radioactive, or similar substances (...)	
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From the chart above, one can conclude that within the United Nations exists a consensus that terrorism contains all of or some of the following:

- force
- is used against persons and/or property
- endangers security
- intention of intimidation
-

If one refrains from the urge to include every possible variety of a terrorist attack into a single definition and allows a general perspective, which is already supported by the majority of the UN-member states, the following definition has to be concluded:

Terrorist acts consist of the use of force against persons and/or property to endanger security and with the intention to intimidate a natural or legal person, an international organization or a state. Such an act should not be allowed by international law.

By means of the last sentence the discussion about actions in an international conflict or the actions of freedom fighters could be solved in terms of international law. Within the framework of the UN a definition of terrorism already exists. It is simply waiting for adoption.

Research report

University Students Drop Out: Experience in a Thai University

Ruthaychonnee Sittichai*

This report summarises three studies investigating premature discontinuation of university studies at Prince of Songkla University, Pattani campus in southern Thailand and tries to locate them in a governance-orientated context to ask for further research questions. Two quantitative studies examined the dropout rate by year of admission (1999 to 2006), faculty, and religion-gender group; of 11,408 students, 2,311 (20.3%) discontinued. To gain additional insights into reasons for dropping out, sixteen dropouts participated in semi-structured in-depth interviews. Five primary causes of dropping out were: concerns about being enrolled in a non-preferred field of study, security, lifestyle, problems with time management, and problems caused by a break or change in an intimate relationship. Ceasing university studies prematurely (“dropping-out”) is a common and well known problem. Beyond its impact on society in general and the labour market for the affected students in the three southernmost provinces of Thailand, this problem also touches upon a governance dimension. The general consequences of the drop-out are well known: Failure to complete a degree means that a student has largely wasted a period of time, from one semester to two years or more. The impact of dropping out can damage the student economically and psychologically. There is also a negative impact on the broader society by reducing the pool of skills needed for further development. The specific governance aspect results from the security context in what is called the ‘Deep South’ – the three provinces of Pattani, Yala, and Narathiwat.

Almost all of the population in Thailand are Thai nationals (96%); the remaining 4% are Burmese, Laotian, Cambodian or Chinese, etc. Most of the population are Buddhist (93%), followed by Muslim

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(5%), Christian (1%), Hindu (0.06%), Confucian (0.03%), Sikh (0.02%), other or atheist (0.07%). The sound of gunfire and bombs erupting in a sub-district of Narathiwat in early January 2004 marked the beginning of a new wave of violence by Islamic separatists in the southern Thailand. These violent events now happen almost on a daily basis, and because this is widely known by the public through coverage in the media, the Deep South is often seen by outsiders as of 'no-visit' area.

The biggest university in southern Thailand is the Prince of Songkla University, a medium-size university, which was founded in 1967. It is the only state university in the predominantly Muslim southern region of Thailand running a multi-campus system, with main campuses located in Pattani and Hat Yai and smaller campuses in Surat Thani, Trang and Phuket. The study reported here is from Pattani Campus (PSUP).

Before the recent violence, PSUP had a student body from diverse backgrounds. Unfortunately, after the public's perception towards the Deep South changed in a negative way, parents of students and even student themselves from other parts of the country became more reluctant to choose PSUP and to spend their university life there due to the insecure feelings and instability in the area.

In this context the phenomenon of the university drop out can assume a particular importance. The security situation and its various implications not only deliver explanations for drop out phenomena, but the drop out phenomena also contain in turn value for the analysis of the security situation, although they insofar constitute marginal aspects. In this respect, the drop out is worth to be considered as indicator for theoretical expectations towards middle-term stabilization and as subject of corresponding practical stabilizing governance policies. If universities can be considered as institutions important for the socialization of young people who in turn can be considered as endangered by violent Islamic groups, the drop out can be reflected on in three security-related dimensions of integration and desintegration.

1. First, universities can play an important integration function with regards to the socio-psychological development of students. In this respect, the drop-out phenomenon is to be discussed as negative development. Though not the only one, a sense of sustained lack of prospects is factor of the political radicalization of young people. This lack of prospects in turn can correspond differently with drop out phenomena which might. Otherwise, it

might be the drop out which decisively and critically reinforces the impression of the lack of prospects. Both can be the case, and both can come together cumulatively.

The relationship between lack of prospects which can be caused by the drop out, but which can also reinforce the drop out, and approaching violent extremists is described by Sageman as follows: “People who are satisfied with life are unlikely to join a religious revivalist terrorist movement.”¹

2. Universities, which like the PSU possess a regional importance – if not even a island position –, can furthermore develop a potential of regional integration which both prevents young people following radical groups and help to build up constructive webs of regional identity in the long term. To be stressed is the contradiction between local identity and integration of youths on the one hand and the risk stemming from the phenomenon of globalization, if Appadurai is right in saying: “Terror is thus the nightmarish side of globalization [...]”²

3. Finally, universities like the PSU – as mentioned above the only public university in the Deep South – can execute an integration function at the interface between local and national level by trying to integrate by education the – in various aspects – less integrated Malay-Muslim population of this region into the national value community. This accords quite to the general functions of higher education institutions in Thailand and applies in particular to a university under conditions of the PSU. In this respect, it is to be pointed out, how crucial the so called “dialogue democracy”, the establishment of an integrative communication platform, is for the fight against violent fundamentalism.³ In this regard, the university is particularly suitable due to its institutional claim and those actors which the university calls on for the discursive encounter. According to the integrative function of university like the PSU student – drop out obviously is at least more than just a minor point of consideration in terms of a stabilizing governance strategy for the South of Thailand.

1 Marc Sageman, *Understanding Terror Networks*, Philadelphia: University of Pennsylvania Press, 2004, p. 95.

2 Arjun Appadurai, *Fear of Small Numbers: An Essay on the Geography of Anger*, Durham: Duke University Press, 2006, p. 33.

3 See Anthony Giddens, *Beyond Left and Right: The Future of Radical Polity*, Cambridge: Polity Press, 1994, p. 243.

What are, now, the reasons for the drop out?

On a general level there are many reasons for university students to drop out being reported. Johnes and Taylor compared non-completion rates in UK universities and concluded that the main determinants were the scholastic ability of new entrants, the subject mix of each university, and the number of students accommodated in the a hall of residence.⁴ Two other UK studies found that main causes of dropping out were the extent of prior academic preparedness and confidence, and social integration (or lack thereof) at university.⁵ In Germany, Griessbach, Lewin, Heublein and Sommer claimed that 13% of dropout students aimed to start studying other subjects later, 13% dropped out for financial reasons, 9% dropped out for family reasons and 6% after failing examinations.⁶ In Italy, Cingano and Cipollone reported that the most important determinants of a decision to drop out were a student's family and educational background.⁷

In a review, Tinto highlighted three factors as being important in influencing the individual's goals and institutional commitment in higher education contexts: individual attributes, precollege experiences, and family background.⁸ Individual attributes include race, gender and academic ability. Precollege experiences include school grade point average as well as academic and social attainments. Family background includes social status, value climates, and expectation climates. Tinto (1975) especially asserted the effect of an individual's educational expectations on attrition; how long the student intended to attend the educational institution and the

4 See Jill Johnes and Jim Taylor, "Undergraduate Noncompletion Rates: Differences between UK Universities", in *Higher Education*, Vol. 18, No. 2 (1989), pp. 209-225.

5 See Jeremy P. Smith and Robin A. Naylor, "Dropping out of university: a statistical analysis of the probability of withdrawal for UK university students", in *Journal of the Royal Statistical Society (A)*, Vol. 164, No. 2 (2001), pp. 389-405; Patrick Lockhart "An investigation into the causes of student drop out behavi-our", retrieved December 30, 2008, from <http://www.psy.gla.ac.uk/~steve/loaled/docs/lockhart.pdf>.

6 See Heinz Griessbach, Karl Lewin, Ulrich Heublein and Dieter Sommer, *Students dropouts – typology and possible ways of determining the dropout quota*, Hannover: Hochschul-Infofrms-System GmbH, 1998.

7 See Frederico Cingano and Piero Cipollone, "Determinants of univeristy drop-out probability in Italy", retrieved June 20, 2008, from http://www.econ.upf.es/~cingano/papers/dropout_EALE.pdf.

8 See Vincent Tinto, "Dropout from Higher Education: A theoretical synthesis of recent Research", in *Review of Educational Research*, Vol. 45, No. 1 (1975), pp. 89-125.

importance that the student placed upon this specific institution. In a later model and review, Tinto highlighted individual-level variables affecting students' commitment to institutions, arguing that personal characteristics and socioeconomic background significantly influence individual's departure decisions by modifying their interactions with institutions.⁹ The work of Tinto has been important in establishing the role of the institution of higher education facilities in promoting an environment for student persistence and integration.

As Tinto's concept and most studies to date have focused merely on western institutions it is worth to ask in how far such findings can be generalized for Thailand, especially in the Deep South.

Here, I summarize findings from three studies investigating premature discontinuation of university studies at Prince of Songkla University (PSU), Pattani campus in southern Thailand; two of them have been quantitative, and one a qualitative assessment.

An initial quantitative study used a statistical model to examine discontinuation rates at PSU.¹⁰ University records for 6,610 bachelor degree students enrolled between 1999 and 2003 served as data base. The effects of the faculty and religion-gender group on discontinuation rates were analyzed by odds ratios, while a logistic regression model was used to determine the joint effects of faculty, year of admission and religion-gender group on discontinuation. The overall discontinuation rate over the five year period was 15%, with the Faculty of Science and Technology having a higher discontinuation rate than the other faculties. Discontinuation rates were higher for students entering after 2001, dramatically rising to 7%, 12%, and 15%. Muslim students had lower dropout rates than other students, with no difference between Muslim students entering university from Islamic high schools or from public high schools. Between the academic years 1999 and 2003 the highest number of discontinuation accounts for non Muslim female (3224 students) followed by Muslim female (1602 students), non Muslim male (1153 students) and Muslim male (631 students). Among non-Muslim students only, men had higher discontinuation rates than women, but these rates converged by the end of the period.

A further quantitative study I, 2009) examined the pattern of

9 See Vincent Tinto, "Stages of student departure: Reflections on the longitudinal character of student leaving", in *Journal of Higher Education*, Vol. 59, No. 4 (1988), pp. 438-455.

10 See Ruthaychonnee Sittichai, Phattrawan Tongkumchum, and Nittaya McNeil, "Discontinuation among university students in Pattani", in *Journal of Songklanakarin*, Vol. 14, No. 3 (2008), pp. 400-408.

discontinuation between 1999 and 2006, using records for 11,408 bachelor degree students.¹¹ The annual average discontinuation rate over the eight year period was 5.3%, with an overall discontinuation rate of 20.3%. This period saw a rapid increase in the proportion of Muslim students (especially female) entering university, from 23% in 1999 to 77% in 2006. Discontinuation rates were highest for students in their first or second year of study. They were also substantially higher for students entering university after 2003, possibly due to demographic changes in the intake. Again, non-Muslim males from the Faculty of Science and Technology had the highest dropout rates. Both admission year/study year combination and the faculty-gender-religion combination were strongly associated with dropout.

A further qualitative study yielded to elaborate useful insights into the reasons for dropping out from PSU, which had not been ascertained by the quantitative studies. A sample of sixteen students was interviewed, of varied gender and religion, who had prematurely discontinued their studies between 1999 and 2003. Questions asked have been related to demographic and general information including from which province the students came from and how, when and why the dropped out as well as to a range of aspects of university, academic and social life potentially relevant to dropping out. Content analysis was employed for classification, summarization and tabulation of interview information.

The comments from the senior staff were helpful but somewhat different from those of the dropout students. The Rector of PSUP added some aspects about financial support for security equipment and buildings. The Vice-Dean, Faculty of Science and Technology blamed the size of the schools. If the students came from the big high schools (1500 students up), they were not likely to drop-out. Because they studied like other government schools, on the other hand, the students who came from the small schools they had to study religion half day.

In common with the dropout students interviewed, the senior staff (academic staff including the Deans of the Faculty of Education, the Faculty of Humanities and Social Sciences and the Vice Dean of Science and Technology) recognised that the security situation was an important factor stemming from the political unrest:

11 See Ruthaychonnee Sittichai, Phattrawan Tongkumchum, and Nittaya McNeil, "Discontinuation among university students in Southern Thailand", in *International Education Studies*, Vol. 2, No. 2 (2009), pp. 17-21.

“The political unrest discourages the students from other parts of Thailand from coming here to study”. (Vice-Dean, Faculty of Science and Technology)

“The political unrest means that PSUP has only local students.” (Dean, Faculty of Humanities and Social Sciences)

“The political unrest effects the assignments - when the students need to conduct qualitative research they could not go to some risky political areas”. (Dean, Faculty of Education)

“Because of the political unrest, the government gives more funds to support our security. CCTV and other facilities such as network, fiber optics systems are provided. However, we still have a low percentage of students from other parts of Thailand.” (Rector of PSUP)

Five primary causes of dropping out were suggested by the above-mentioned senior staff members. The first reason was that respective students have been enrolled in a field of study that they did not prefer; for example, some interviewees had wished to change their field of study to nursing, another had preferred to be studying engineering, and others stated that they had not liked the subjects they had studied; this appeared to affect academic results. Second, the security situation in Pattani proved to be another factor due to an environment with thousands of victims in a few years within the region. Third, some interviewees mentioned that the lifestyle in Pattani and the lack of any night life being away from a big city was a major concern. Fourth, difficulties in managing time affected the academic results of many interviewees; these were related to later learning problems, and the influence of distracting activities such as internet computer games were also mentioned. Fifth, experiencing a break or significant change in intimate relationships was sufficient to cause a small number of students to drop out, such as one who had discontinued when her older boyfriend left the university to live in another city. In contrast, neither financial factors, nor aspects such as learning environment or dormitory life, appeared as major factors.

However, in other respects their opinions differed from those of the students. On the one hand, they put more emphasis on lack of academic achievement in the first year of study, which they blamed on academic weakness and/or on large class size. These were not aspects strongly brought up by student dropouts. On the other hand, senior staff did not bring up three factors mentioned by the students:

non-preferred field of study; significant changes in intimate relationships; and difficulties in time management. This might mean that they do not sufficiently value consulting or counselling services for students (on subject choice, personal difficulties, time management), which, if the student dropout perceptions are correct, might be most instrumental in reducing dropout rates.

These studies suggest some commonalities to previous work, in that academic and social integration tended to influence decisions to drop out. But there are also some distinctive aspects from this research. Financial aspects were not important, as most students in Thailand receive support from parents for university study. However religion was a major factor; this may be because Muslim students (with a lower dropout rate) are less concerned about night life and computer games, distractions that caused some dropping out. Security was another factor, probably more relevant for some developing countries. In sum, these findings suggest some expansion of the range and weighting of factors influencing university dropout in models such as Tinto's, when considering the situation in developing countries such as Thailand.

**Research material: CPG Translation of the Thai
Constitutional Court Ruling No.
33/2555, 28th of March 2012**

Ruling No. 33/2555

Case No. 33/2553

The Constitutional Court

Dated 28th March B.E. 2555 (2012)

Re: Whether or not section 54 of the Direct Sales and Marketing Act B.E. 2545 (2002) is contrary to or inconsistent with section 39 paragraph two, section 40 (5) in conjunction with section 30 of the Constitution?

The Supreme Court referred the objection of the second defendant (Mr. Pithan Cheohatapong) to the Constitutional Court for a ruling under section 211 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The facts in the application and supporting documents can be summarised as follows.

The Provincial Public Prosecutor for Buriram Province prosecuted Asian Gems Company Limited, first defendant, and Mr. Pithan Cheohatapong, second defendant, on charges of offences under the Direct Sales and Marketing Act B.E. 2545 (2002). The second defendant was a direct sales operator who had persuaded others to subscribe as a member in a network of independent distributors and to purchase goods from the first defendant, upon a promise of financial returns if the said members could enlist more independent distributors to purchase goods. The financial returns were to increase incrementally when the number of new subscriptions achieved by the independent distributor reached certain levels. The agreement constituted a promise of a benefit in return for the acquisition of new subscriptions to the network, determined by the number of increase in network membership, which was a violation of the law. The prosecution sought penalties for the both defendants under section 3, section 19, section 46 and section 54 of the Direct Sales and Marketing Act B.E. 2545 (2002).

Buriram Provincial Court held that both defendants had

committed offences under section 19, section 46 and section 54 of the Direct Sales and Marketing Act B.E. 2545 (2002). The first defendant was fined in the amount of 500,000 baht. The second defendant was sentenced to 5 years of imprisonment. Both defendants appealed. The Court of Appeals Region 3 affirmed the judgment. Both defendants filed objections against the judgment of the Court of Appeals Region 3. The case is pending consideration in the Supreme Court.

The second defendant subsequently filed a motion to the Supreme Court, raising an objection that section 54 of the Direct Sales and Marketing Act B.E. 2545 (2002), which provided that in the case where an offender liable to a penalty under this Act was a juristic person, the managing director, manager or any person responsible for the juristic person's operations must also be liable to the penalties provided for such an offence, unless it was proven that he/she did not have an involvement in the offence committed by the juristic person, was contrary to or inconsistent with section 39 paragraph two and section 40(5) in conjunction with section 30 of the Constitution. In other words, where the prosecution proved that a juristic person, the first defendant, had committed an offence under the law and the court had sentenced the juristic person, the managing director, manager or other person responsible for the juristic person's operations must also be liable to penalties provided by law for such an offence. The prosecution was not required to prove that the second defendant, as managing director, had participated in the commission of the offence. The law imposed an automatic liability on the managing director or manager, shifting the burden of proof to the second defendant to show that he/she did not have any involvement in the commission of offence by the juristic person. This provision of law denied or deprived the court of the competence to hear evidence presented by the prosecution that would be beneficial to the managing director and manager. Moreover, whilst the juristic person enjoyed the right to a presumption of innocence under such provision, the managing director or manager, as the second defendant, did not enjoy the same right. On the contrary, the managing director or manager had to bear the same liability as the juristic person unless there was proof that he/she did not have any involvement in the commission of such an offence. Such provision did not protect the second defendant, the managing director, under the principle that "in a criminal case, there shall be a presumption of the defendant's innocence."

The Supreme Court ordered the referral of the second

defendant's opinion and objections through official channels to the Constitutional Court for a ruling.

The preliminary issue considered by the Constitutional Court was whether or not the Constitutional Court had the competence to admit this application for a ruling under section 211 paragraph one of the Constitution. It was held that the question raised in the application was an objection on whether or not section 54 of the Direct Sales and Marketing Act B.E. 2545 (2002) was contrary to or inconsistent with section 39 paragraph two and section 40(5) in conjunction with section 30 of the Constitution. As the Supreme Court was going to apply such provision of law to the case and there had not yet been a ruling of the Constitutional Court in relation to such provision, the case was therefore in accordance with section 211 paragraph one of the Constitution in conjunction with clause 17(13) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). The Constitutional Court thus ordered the admittance of the application for consideration.

The issue considered by the Constitutional Court was whether or not section 54 of the Direct Sales and Marketing Act B.E. 2545 (2002) was contrary to or inconsistent with section 39 paragraph two and section 40(5) in conjunction with section 30 of the Constitutional Court.

After deliberations, the Constitutional Court found as follows. Section 39 paragraph two and section 40(5) of the Constitution were provisions in Chapter 3 on Rights and Liberties of the Thai People, Part 4 Rights in the Judicial Process. Section 39 paragraph two provided that in criminal proceedings, there must be a presumption that a suspect or defendant had done no wrong. The provision aimed to protect the rights of a suspect or defendant in criminal proceedings by presuming that the suspect or defendant had done no wrong until a final conviction. This presumption of innocence provided in section 39 paragraph two of the Constitution was derived from the human rights principle under article 11 of the Universal Declaration of Human Rights, i.e. "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence." This principle, that no person shall be presumed guilty, was deemed as a fundamental principle in the international criminal justice system. The principle provided a safeguard for the rights and liberties of a person in relation to criminal liability granted by the state to all persons to prevent the imposition of a criminal sanction until there was evidence proving the commission of an offence. This

principle also formed a significant basis for the “Rule of Law” recognised by civilised nations and internationally, namely, the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights, under which Thailand had obligations as a party state.

Section 40(5) of the Constitution was a provision which recognised the rights of a victim, suspect, defendant and witness in criminal proceedings. Such persons enjoyed protection as well as necessary and appropriate assistance from the state. Remunerations, indemnifications and necessary expenses would be as provided by law.

Section 30 of the Constitution was a provision in Chapter 3 on Rights and Liberties of the Thai People, Part 3 Equality. All persons were recognised as equal under the law and enjoyed equal legal protection. Men and women enjoyed equal rights. Unjust discrimination against a person for the causes provided by the Constitution was prohibited.

The Direct Sales and Marketing Act B.E. 2545 (2002) was a law enacted with the purpose of protecting consumers from direct offers for sale of goods or services by an independent distributor or direct sales agent to consumers at the residences or workplaces of the consumers or others, or at other places which were not regular places of business. As a consequence, the consumer would not be in a position to make an independent and prudent decision on the purchase of goods or services. There were also businesses which distributed goods or services by communicating the offer for sale of goods or services directly to consumers, whilst such goods or services might not match the qualities claimed in the advertisements. Moreover, current direct sales and marketing practices employed persuasive tactics for the general public to subscribe to the business network by promising benefits in return for acquiring additional subscribers to the network, determined on the basis of the number of additional subscribers to the network. This method was deceptive to the public and caused the general public, as consumers, to be at a disadvantage and caused injustice and social disorder. A penalty was thus provided in section 54, that in the event an offender liable to a penalty under this act was a juristic person, the managing director, manager or any person responsible for the juristic person’s operations should also be liable for the penalty provided by law for such an offence unless it could be proven that the person was not involved in the commission of offence by the juristic person.

The Constitutional Court found that section 54 of the Direct

Sales and Marketing Act B.E. 2545 (2002) provided for a legal presumption leading to a presumption of the defendant's guilt. The prosecution was not required to show prior proof of any act or intent of the defendant. The commission of offence of another person was applied as a condition for presuming the defendant's guilt and criminal liability. This presumption applied when an offence was committed by a juristic person, in which case the managing director, manager or other person responsible for the juristic person's operations would also be jointly liable with the guilty juristic person, unless there was proof of non-connivance of the juristic person's commission of offence. The prosecution did not have to prove the act or intent of the managing director, manager or other person responsible for the juristic person's operations, in regard to any form of participation in the juristic person's commission of offence. The prosecution only had to prove the juristic person's offence under this Act and that the defendant was a managing director, manager or person responsible for the juristic person's operations. Hence, there was a presumption from the outset that the managing director, manager or person responsible for the juristic person's operations had also committed the offence, shifting the burden of proving innocence to the managing director, manager and all person responsible for the juristic person's operations. The provision of law was therefore a presumption of guilt of a suspect and defendant in criminal proceedings on the basis of a person's status, not a presumption of a fact comprising certain elements of an offence after the prosecution was able to prove a certain act relating to the defendant's alleged offence. The provision of law was also inconsistent with the Rule of Law, i.e. that the prosecution in criminal proceedings should bear the burden of proving all elements of a defendant's wrongful act. In addition, the provision in such section brought a person into criminal proceedings as a suspect and defendant, thereby potentially restricting the rights and liberties of the person, e.g. by arrest or detention without reasonable preliminary evidence that the person had acted or intended in any way in relation to the alleged offence. The provision in this section, as regards the presumption of criminal guilt of a suspect and defendant without any evidence that the suspect or defendant had committed an act or had any intent relating to the offence, was therefore inconsistent with the Rule of Law, and contrary to or inconsistent with section 39 paragraph two of the Constitution.

The Constitutional Court, by five Constitutional Court Justices, namely Mr. Wasan Soipisut, Mr. Charum Pukditanakul, Mr.

Chalermopol Ake-uru, Mr. Chat Chonlavorn and Mr. Boonsong Kulbupar, finds that section 54 of the Direct Sales and Marketing Act, only as regards the presumption that the managing director, manager or persons responsible for the juristic person's operations should be criminally liable along with the juristic person without evidence of any involvement in the commission of offence of the juristic person, is contrary to or inconsistent is contrary to or inconsistent with section 39 paragraph two of the Constitution.

Four Constitutional Court Justices, namely Mr. Jaroon Inthajarn, Mr. Nurak Mapraneet, Mr. Supoj Kaimook and Mr. Udomsak Nitimontree, finds that section 54 of the Direct Sales and Marketing Act B.E. 2545 (2002) is neither contrary to not inconsistent with section 39 paragraph two, section 40(5) and section 30 of the Constitution.

By virtue of the foregoing reasons, it is held that section 54 of the Direct Sales and Marketing Act B.E. 2545 (2002), only as regards the presumption that the managing director, manager or persons responsible for the juristic person's operations should be criminally liable along with the juristic person without evidence of any involvement in the commission of offence of the juristic person, is contrary to or inconsistent is contrary to or inconsistent with section 39 paragraph two of the Constitution. The provision is deemed unenforceable pursuant to section 6 of the Constitution. A further decision on whether such provision of law is contrary to or inconsistent with other sections of the Constitution is therefore no longer required.

Mr. Wasan Soipisut	President of the Constitutional Court
Mr. Charun Pukditanakul	Justice of the Constitutional Court
Mr. Jaroon Inthajarn	Justice of the Constitutional Court
Mr. Chalermopol Ake-uru	Justice of the Constitutional Court
Mr. Chat Chonlavorn	Justice of the Constitutional Court
Mr. Nurak Mapraneet	Justice of the Constitutional Court
Mr. Boonsong Kulbupar	Justice of the Constitutional Court
Mr. Supoj Kaimook	Justice of the Constitutional Court
Mr. Udomsak Nitimontree	Justice of the Constitutional Court

**Research material: CPG Translation of the Thai
Constitutional Court Ruling N0.
13/2555, 18th of May 2012**

Ruling No. 13/2555

Case No. 33/2553

In the Name of His Majesty the King

The Constitutional Court

Dated 18th May B.E. 2555 (2012)

President of the House of Representatives Applicant

v.

**Jatuporn Prompan, Member of the
House of Representatives Respondent**

Re: The President of the House of Representatives referred the Election Commission's determination to the Constitutional Court for a ruling on whether or not Mr. Jatuporn Prompan's membership of the House of Representatives terminated under section 106(4) in conjunction with section 101(3) of the Constitution.

The President of the House of Representatives, the applicant, referred a determination of the Election Commission under section 91 paragraph three of the Constitution to the Constitutional Court for a ruling on whether or not Mr. Jatuporn Prompan's membership of the House of Representatives terminated under section 106(4) in conjunction with section 101(3) of the Constitution.

The facts in the application and supporting documents could be summarised as follows. The Election Commission held a general election of members of the House of Representatives pursuant to the Royal Decree on Dissolution of the House of Representatives B.E. 2554 (2011) on 3rd July B.E. 2554 (2011). The respondent was the P Pheu Thai Party number 9 candidate in the election of party-list members of the House of Representatives. After the election, Mr.

Tul Sitisomwong submitted a complaint dated 5th July B.E. 2554 (2011), and Mr. Mongkolkit Suksintaranont, Mr. Chatchai Saengsuk and Mr. Wiwatchai Kulamat submitted a complaint dated 6th June B.E. 2554 (2011), the submissions being made on 6th July B.E. 2554 (2011) to the Chairman of the Election Commission, alleging that the respondent, who was a candidate in the election of party-list members of the House of Representatives, had been removed from membership of Pheu Thai Party due to the respondent's detention pursuant to a court order prior to the candidacy application. As a consequence, the respondent was banned from exercising election rights on the day of the election pursuant to section 100(3) of the Constitution, which also resulted in the termination of his membership of Pheu Thai Party under section 20 in conjunction with section 19 and section 8 of the Organic Act on Political Parties B.E. 2550 (2007) and article 10 of the Pheu Thai Party Rules B.E. 2551 (2008). Hence, the respondent was disqualified from confirmation as a member of the House of Representatives.

The Election Commission appointed a commission of inquiry to investigate both applications and passed a majority resolution to endorse the election of the respondent as a party-list member of the House of Representatives for Pheu Thai Party pursuant to Announcement of the Election Commission dated 1st August B.E. 2554 (2011). The Election Commission also passed a resolution to task the Office of the Election Commission to consider whether the respondent's case had grounds for further proceedings under section 91 of the Constitution.

The Election Commission subsequently considered the outcome of proceedings undertaken by the Office of the Election Commission pursuant to the Election Commission's resolution in meeting number 11/2554 on 29th November B.E. 2554 (2011). The Election Commission then passed a resolution by a majority vote that since the respondent was detained by a court order, the respondent was thus banned from exercising the right to elect members of the House of Representatives under section 100(3) of the Constitution. This was analogous to the ban on a person from membership of a political party under section 19 in conjunction with section 8 paragraph one of the Organic Act on Political Parties B.E. 2550 (2007) and the consequent termination of the respondent's membership of Pheu Thai Party under section 20(3) of the same Organic Act on 3rd July B.E. 2554 (2011). As a result, the respondent's membership of the House of Representatives terminated under section 106(4) in conjunction with section 101(3) of the

Constitution due to the lapse of political party membership on the election day. The matter was therefore referred to the applicant for submission to the Constitutional Court pursuant to section 91 paragraph three of the Constitution for a ruling that the respondent's membership of the House of Representatives terminated under the Constitution, as stated in Election Commission Ruling No. 476/2554, dated 29th November B.E. 2554 (2011).

The preliminary issue considered by the Constitutional Court was whether or not the Constitutional Court had the power to accept this application for a ruling under section 91 of the Constitution.

After deliberations, the Constitutional Court found as follows. Section 106 of the Constitution provided that the membership of a member of the House of Representatives terminated upon... (4) lack of qualification under section 101. Section 101 provided that a person having the following qualifications was a person eligible for candidacy in an election of a member of the House of Representatives... (3) being a member of any one political party for a consecutive period of not less than ninety days up to the election day, except for a general election due to a parliamentary dissolution, in which case such person had to be a member of any one political party for a consecutive period of not less than thirty days up to the election day. Section 91 paragraph one provided that members of the House of Representatives or senators in a number not less than one-tenths of the total number of existing members of each respective House had the right to participate in a petition to the President of the House of membership that the membership of any member of such House terminated under section 106(3), (4), (5), (6), (7), (8), (10) or (11) or section 119(3), (4), (5), (7) or (8) of the Constitution, as the case may be. The President of the House receiving such a petition should forward the petition to the Constitutional Court for a ruling on whether or not such person's membership terminated. Section 91 paragraph three stated further that in the case where the Election Commission found that the membership of any member of the House of Representatives or senator terminated for a cause under paragraph one, the matter shall be submitted to the President of the House of such person's membership and such President of the House should forward the matter to the Constitutional Court for a ruling under paragraph one and paragraph two. Therefore, upon the Election Commission finding that the respondent lacked the qualifications of a member of the House of Representatives, resulting in the respondent's membership of the House of Representatives terminating under section 106(4) in conjunction with section 101(3)

of the Constitution, and subsequently submitting the matter to the President of the House of Representatives, and upon the President of the House of Representatives referring the matter to the Constitutional Court for ruling, the case was in accordance with section 91 paragraph three of the Constitution in conjunction with article 17(3) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). The Constitutional Court thus ordered the acceptance of this application for trial and adjudication.

Mr. Wasan Soipisut	President of the Constitutional Court
Mr. Charun Pukditanakul	Justice of the Constitutional Court
Mr. Jaroon Inthajarn	Justice of the Constitutional Court
Mr. Chalernpol Ake-uru	Justice of the Constitutional Court
Mr. Chat Chonlavorn	Justice of the Constitutional Court
Mr. Nurak Mapraneet	Justice of the Constitutional Court
Mr. Boonsong Kulbupar	Justice of the Constitutional Court
Mr. Supoj Kaimook	Justice of the Constitutional Court
Mr. Udomsak Nitimontree	Justice of the Constitutional Court